

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER PO-3087-I

Appeal PA11-78

Ministry of Training, Colleges and Universities

June 13, 2012

Summary: The ministry received a request for records related to a particular private career college. The ministry denied access citing the law enforcement exemptions in section 14(1)(b) and 14(2)(a). This order upholds the application of section 14 to the records and orders the ministry to re-exercise its discretion. This order also upholds the ministry's search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 14(1)(b), 14(2)(a), 24.

Orders and Investigation Reports Considered: Order PO-2729.

OVERVIEW:

[1] The Ministry of Training, Colleges and Universities (the ministry or the MTCU) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following records dated between January 1, 2009 and December 31, 2010:

All correspondence, communications, emails, records, memorandums, notes and material relating to or between any of the following: The Superintendent of Private Career Colleges [two named individuals] or any

of his designates, and [two other named individuals] relating to the Second Career Funding Program or [a named College (the College)].

As well as all correspondence, communications, emails, records, memorandums, notes and materials relating to or between [the two other named individuals] relating to the Second Career Funding Program or [the College].

As well as all correspondence, communications, emails, records, memorandums, notes and materials relating to or between [the two other named individuals] and the Second Career Funding Program or [the College].

[2] The ministry located four responsive records and issued a decision in which it provided Record 3 to the requester but withheld Records 1, 2 and 4 citing section 14 (law enforcement) and section 21 (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed this decision.

[4] During mediation, the appellant advised the mediator that he believes there should be more records that are responsive to the request. The ministry explained that there would be additional records subsequent to the timeframe specified in this request, but the appellant was not satisfied with this explanation, and accordingly, reasonable search is also an issue in this appeal.

[5] As mediation did not resolve the issues in this appeal, the file was referred to adjudication where an adjudicator conducts an inquiry. During the adjudication stage of the appeal, I sought and received representations from both the ministry and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] In addition, during adjudication the ministry disclosed most of the information from Record 1, the cover email from Record 2 and all but one sentence from Record 4. The appellant also agreed to the redaction of the student names and educational and financial history in Record 1 and the name of the confidential source in Record 2. As such, Record 1 and the cover email and the name of the confidential source in Record 2 are no longer at issue. Further, the actual complaint letter is no longer at issue as the entire letter, except for the name of the source) is contained in the memo in Record 2. Therefore, the personal privacy exemption in section 21 is no longer at issue.

[7] In this order, I uphold the application of section 14(2)(a) to the memo in Record 2 and section 14(1)(b) to portions of this memo and all of the information at issue in Record 4. Lastly, I also uphold the ministry's search as reasonable.

RECORDS:

[8] The records at issue are listed in the following chart:

Ministry's Record No.	Description of Record	Exemption claimed
2	2010-11-25 Memo from Inspector, Private Career Colleges Branch, Post-Secondary Division to Manager, Registration Unit and Manager, Compliance and Enforcement	14(1)(b)
4	One sentence from a handwritten note of legal counsel	14(1)(b), 14(2)(a)

ISSUES:

- A. Does the discretionary exemption at section 14 apply to the records?
- B. Did the institution exercise its discretion under section 14? If so, should this office uphold the exercise of discretion?
- C. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Does the discretionary exemption at section 14 apply to the records?

[9] The ministry relies on sections 14(1)(b) and 14(2)(a). These sections read:

- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
 - (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (2) A head may refuse to disclose a record,
 - (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[10] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[11] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings [Orders M-16, MO-1245].
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085].
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings [Order MO-1416].

[12] The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*(1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)].
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions [Order P-1117].

[13] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

[14] Except in the case of section 14(1)(e), where section 14 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[15] It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Representations

[16] The ministry relies on Order PO-2729 where Adjudicator Steve Faughnan found that the term “law enforcement” applies to an investigation under the *Private Career Colleges Act* given that a college may, as a result of an investigation, have its licence revoked and may also be subject to proceedings under the *Provincial Offences Act*.

[17] The ministry states that it administers and regulates private career colleges (PCC)’s under the *Private Career Colleges Act (PCCA)*, through its Private Career Colleges Branch. The ministry states that when a career college is not in compliance with the *PCCA*, the ministry may give notice that it has decided to refuse to register or renew a registration of a private career college or can suspend or revoke a private career college’s registration. Upon receipt of such a notice an applicant or registrant may request a hearing before the Licence Appeal Tribunal (LAT). The ministry states that failure to comply with an order under the *PCCA* can lead to proceedings under the *Provincial Offences Act*.

[18] The ministry further states that the information at issue in the records relates to an ongoing investigation by it under the *PCCA* of a specific private career college. The file on the College remains with the Compliance and Enforcement Unit. As such the ministry relies on section 14(1)(b) to exempt the information remaining at issue in the records.

[19] The memo in Record 2 was sent by a staff member in the Private Career Colleges Branch to other staff in that branch. The ministry states that it also relies on section 14(2)(a) to exempt this memo, which according to the ministry, is a report on the compliance history of the College in response to a complaint, containing recommendations as to further investigation into the College.

[20] The appellant provided both confidential and non-confidential representations in this appeal. In his non-confidential representations, the appellant states that section 14(1)(b) does not apply as there is not an ongoing law enforcement investigation,¹ as the matter has been completed. Concerning the order relied on by the ministry, Order PO-2729, the appellant states that in that order the records were ordered to be disclosed.

[21] The appellant states that section 14(2)(a) does not apply to the memo in Record 2 as it is not a report but only includes mere observations and recordings of fact.

[22] The appellant also submits that the ministry has failed to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" in the event that the records are disclosed, as it relies only on bald, unsupported allegations.

[23] In reply, the ministry states that the file on the College is still with the Enforcement Unit of the Private Career Colleges Branch, and it is still being monitored by the Unit to ensure that they are meeting the Conditions of Registration issued to them by the Superintendent. It states that it did not disclose one sentence in Record 4 as this sentence reveals the nature of the complaint against the College, which has not been previously shared with the College. The ministry is withholding the nature of the complaint from the College as the file is still with the Enforcement Unit and the College continues to be actively monitored.

[24] The ministry maintains that the memo contained in Record 2 is rightfully withheld under section 14(2)(a), as it is a report prepared in the course of investigations by the Private Career Colleges Branch and not a report prepared in the course of routine inspections by the ministry, as outlined in section 14(4) of the *Act*. Further, it states that the memo contains information that has not previously been shared with the College, and was not contained in the Compliance Order to the College.

[25] In sur-reply, the appellant states that the College's conditions of registration will continue to exist until they are reviewed (and extended or removed) at the time of the Colleges' registration renewal. He states that the MTCU's position that it is monitoring the conditions of registration as part of a law enforcement investigation would effectively mean that a private career college subject to conditions of registration (likely in the hundreds in Ontario) would be under a law enforcement investigation. The appellant states that the MTCU regulates all private career colleges and is responsible for "monitoring" all private career colleges, whether they have conditions of registration or not, to ensure conformity with the *PCCA*.

[26] In response, the ministry provided both confidential and non-confidential representations. In its non-confidential representations, it states that while all private

¹ Order PO-2657.

career colleges are routinely inspected and monitored to ensure conformity with the *PCCA* only a very small number are inspected, investigated, and monitored for compliance with additional conditions on registration. It states that:

Out of approximately 600 private career colleges, only about 10 are being monitored using a compliance monitor as a condition of registration for special compliance reasons. A further 5 registered private career colleges are monitored or have special reporting requirements due to the nature of the compliance issues. The college in question in this appeal is thus part of a very limited number of colleges that the ministry is monitoring for serious concerns.

[27] The appellant then submitted two additional documents that he submits support his position that the College's file is not with the ministry's enforcement unit and, therefore, section 14(1)(b) should not apply.

[28] In response, the ministry provided confidential representations which it claims support its position that section 14(1)(b) should still apply to the information at issue in the records.

Analysis/Findings re: section 14(1)(b)

[29] The ministry administers and regulates private career colleges under the *PCCA*. When a college is not in compliance with the *PCCA*, the ministry can provide a notice of refusal to register or renew a registration and/or suspend or revoke it. Upon receipt of such a notice an applicant/registrant may request a hearing before the Licence Appeal Tribunal (LAT). Failure to comply with an order under the *PCCA* can lead to proceedings under the *Provincial Offences Act*. As such, I find that an investigation under the *PCCA* meets the definition of "law enforcement" because it leads or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed in those proceedings as required by paragraph (b) of the law enforcement definition.

[30] In Order PO-2729, which was relied upon by the ministry, Adjudicator Faughan found that the ministry has a law enforcement mandate as defined in paragraph (b) of the definition of law enforcement in section 2(1) of the *Act*. He stated that:

In my view, the structure and content of the *PCCA*, the fact that the LAT has the power to direct the Superintendent to enforce, refrain from carrying out or amend a proposal refusing to renew a registration or suspending or revoking it, and that a failure to comply with an order, direction or other requirement under that legislation may lead to proceedings under the *Provincial Offences Act* leads me to conclude that the process of enforcing the provisions of the *PCCA* involves investigations or inspections which could lead to proceedings before a tribunal (either

before the LAT or in a Provincial Offences proceeding) where a penalty or sanction could be imposed.

[31] In order for records to be found to be subject to section 14(1)(b) of the *Act*, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations [Order PO-2085]. The investigation in question must be ongoing or in existence [Order PO-2657].

[32] The institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply [Order PO-2085].

[33] In this case, I find that based on my review of the confidential portions of the ministry's representations that section 14(1)(b) applies. The records concern a law enforcement investigation. I find that disclosure of some of the information at issue in the memo in Record 2 and all of the information at issue in Record 4 could reasonably be expected to interfere with a specific, ongoing law enforcement investigation. I find that certain information in the memo in Record 2 is not subject to section 14(1)(b). This information consists of background or general or other information disclosure of which could not reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

[34] Accordingly, subject to my review of the ministry's exercise of discretion, the information at issue in Record 4 and some of the information at issue in the memo in Record 2 is exempt by reason of section 14(1)(b). I will now consider whether the remaining information at issue in the memo in Record 2 is subject to section 14(2)(a).

Analysis/Findings re: section 14(2)(a)

[35] The ministry has also claimed the application of section 14(2)(a) to the memo in Record 2 as it submits that this memo is a report within the meaning of that section. In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

[36] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

[37] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Orders MO-1238, MO-1337-I].

[38] Section 14(2)(a) exempts "a report prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law" rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption [Order PO-2751].

[39] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous [Order MO-1238].

[40] As I found above, in my analysis for section 14(1)(b), I find that the ministry is an agency which has the function of enforcing and regulating compliance with a law.

[41] The memo in Record 2 was written by ministry staff as a result of a complaint received by it concerning the College. This memo contains background information about the College, information about the complaint against the College, details about the ministry's investigation into the College, as well as recommendations about what action the ministry should take.

[42] I agree with the ministry that the memo in Record 2 is a formal statement or account of the results of the collation and consideration of information. Therefore, I find that the memo in Record 2 is a report prepared in the course of a law enforcement investigation. The memo in Record 2 is not a report prepared in the course of routine inspections by the ministry, as outlined in section 14(4) of the *Act*.

[43] Accordingly, I find that subject to my review of the ministry's exercise of discretion, I find that the memo in Record 2 is exempt by reason of section 14(2)(a).

D. Did the institution exercise its discretion under section 14? If so, should this office uphold the exercise of discretion?

[44] The section 14 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[45] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[46] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[47] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the Act, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[48] The ministry submits that in exercising its discretion under section 14, it considered a number of factors, including the reasonableness of its decision, the effect of the disclosure of the records and fairness and the expectation of harm. The ministry's primary consideration was given to balancing openness and accountability against reasonable expectations that the information could reveal investigative techniques and procedures. Specifically, it states that the information at issue would reveal to the appellant the ministry's reasons for initiating the investigation of the College, as well as the nature of the complaint. This information has not previously been disclosed.

[49] The appellant states that the ministry has exercised its discretion in bad faith and for an improper purpose and has failed to consider the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right to access should be limited and specific.

Analysis/Findings

[50] The ministry in exercising its discretion to withhold the information at issue states that it specifically took into consideration that disclosure would reveal the reason it initiated the investigation of the College, as well as the nature of the complaint. One of the purposes of the *Act* is that exemptions from the right of access should be limited and specific. Section 10(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

[51] As stated above, the memo in Record 2 contains information that does not reveal the nature of the complaint against the College nor the reason why the ministry initiated the investigation against the College. As such, I have decided to order the ministry to re-exercise its discretion with respect to the information in the memo in Record 2 that does not reveal the nature of the complaint against the College nor the reason why the ministry initiated the investigation against the College.

[52] The information at issue in Record 4 does reveal the nature of the complaint against the College. I find that the ministry exercised its discretion in a proper manner with respect to the information at issue in Record 4, as well as with respect to the

information at issue in the memo in Record 2 that reveals the nature of the complaint against the College and the reason why the ministry initiated the investigation against the College.

E. Did the institution conduct a reasonable search for records?

[53] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[54] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

[55] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

[56] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

[57] The ministry submits that searches of files, email accounts and personal notes in the Private Career Colleges Branch were conducted by:

- the Manager, Registration Unit,
- the Inspector, Registration Unit,
- the Investigator, Compliance and Enforcement Unit,
- the Director and Superintendent, and
- the former Superintendent, Legal Counsel.

[58] The ministry states that all staff members searched their records according to the Ministry's "Guideline for Searching for Records" document, which outlines to staff how to search email, electronic files and drives, and paper and other hard copy files.

[59] The timeframe for this search was during the month of January, 2011. Anticipating that the requester might question the relatively few records that the search revealed, the ministry states that the Manager of the Registration Unit undertook a second search for any possible additional records that might have existed. None were

found. The ministry explains that the investigation was, at that time, in the early stages and no additional records were created during that time period. The ministry also states that the request in this appeal was specific and limited to records within the Private Career Colleges Branch and staff within that Branch.

[60] The appellant submits that:

It is simply unreasonable for MTCU to take the position that there are not additional notes, emails, documents, records, etc. that are responsive to the request. Further, at no point in time did the MTCU contact the requester under this request for additional clarification of the request. Instead, the MTCU opted to unilaterally define the scope of the request

[61] In reply, the Ministry submits that the request was very clear and specific and that the request related to a file that ministry staff was working on at the time the request was made. As a result, the ministry states that these staff were familiar with the records in question and interpretation of the request was not needed. The ministry states that:

Nonetheless, the ministry took additional steps in its search for responsive records. First, the ministry made a special effort to go beyond a strict interpretation of the request by having staff members not specifically named in the request, including [name] an Investigator with the Private Career Colleges Branch, and [name] Legal Counsel, search for responsive records. Second, the ministry undertook an additional search for records, not because the ministry "was incredulous as to the number of documents it yielded", as the appellant stated in his responding representations, but because the ministry correctly assumed the appellant would question the search.

The ministry maintains that there are no further records that respond to this request. The Private Career Colleges Branch is a small and busy Branch, numbering 26 employees, responsible for in excess of 450 private career colleges and over 600 campuses. Staff members of this Branch are located on the same floor, side-by-side in an L shape floor plan. Many informal conversations occur as a matter of routine, without extemporaneous notes, in the interest of time and efficiency. As stated in the Ministry's representations of October 6, 2011, and in an affidavit sworn by [name], Manager of the Registration Unit of the Private Career Colleges Branch, Ministry staff did have conversations about the College in question, but the investigation of the College was in its early stages and no further written records were created during the time period of the request.

Analysis/Findings

[62] Based upon my review of the ministry's representations, including the detailed supporting affidavit of its Manager of the Registration Unit of the Private Career Colleges Branch, I find that the ministry has conducted a reasonable search for responsive records. I find that the ministry has provided sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[63] The appellant submits that additional notes, emails, documents and other records responsive to the request exist. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.² The appellant has not provided me with a reasonable basis for concluding that additional records exist. Nor has the appellant indicated why he believes that his request in this appeal required clarification or how the ministry has unilaterally defined the scope of the request.

[64] Therefore, I uphold the ministry's search for records.

ORDER:

1. I order the ministry to re-exercise its discretion with respect to the information in the memo in Record 2 that does not reveal the nature of the complaint against the College nor the reason why the ministry initiated the investigation against the College and to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If the ministry continues to withhold all or part of the information at issue in this record, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The ministry is required to send the results of its re-exercise of discretion, and its explanation to the appellant, with the copy to this office, by no later than **July 5, 2012**. If the appellant wishes to respond to the ministry's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, it must do so within 21 days of the date of the ministry's correspondence by providing me with written representations.
2. I uphold the ministry's decision to withhold the information in the memo in Record 2 that reveals the nature of the complaint against the College and the reason why the ministry initiated the investigation against the College.

² Order MO-2246.

3. I uphold the ministry's decision to withhold the information remaining at issue in Record 4.
4. I uphold the ministry's search for records responsive to the request.
5. I remain seized of this matter pending the resolution of the issue outlined in order provision 1.

Original signed by: _____
Diane Smith
Adjudicator

_____ June 13, 2012