

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-3106-F

Appeal PA11-78

Ministry of Training, Colleges and Universities

August 24, 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). In Interim Order PO-3087-I, the ministry was ordered to re-exercise its discretion. This order upholds the ministry's re-exercise of discretion.

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

Orders and Investigation Reports Considered: Order PO-3087-I.

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] As mediation did not resolve the issues in this appeal, the file was referred to adjudication where an adjudicator conducts an inquiry. 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*.

[5] 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, only the memo from Record 2 and one sentence from Record 4 remained at issue.

[6] The memo in Record 2 is an internal ministry memorandum written by its Inspector, Private Career Colleges Branch, Post-Secondary Division. Record 4 is a handwritten note written by the ministry's legal counsel.

[7] I issued Interim Order PO-3087-I in which I found that section 14(1)(b) applied to some of the information at issue in the memo in Record 2 and all of the information at issue in Record 4. I also found that section 14(2)(a) applied to the memo in Record 2. Order provision 1 states:

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.

[8] On June 27, 2012, following the issuance of Interim Order PO-3087-I, the ministry re-exercised its discretion and disclosed the entire memo in Record 2, except for five portions which it withheld. In its letter to the appellant, it stated that it had re-exercised 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.

[9] The appellant did not respond to the ministry's explanation for exercising its discretion to withhold the information from the memo in Record 2 pursuant to sections 14(1)(b) and 14(2)(a). When contacted by this office, the appellant stated that it was not providing a response, but that it was still interested in receiving a final order in this appeal.

[10] In this order, I find that the ministry exercised its discretion in a proper manner in accordance with order provision 1 of Interim Order PO-3087-I. Therefore, I uphold the ministry's re-exercise of discretion.

DISCUSSION:

The sole issue to be determined is whether the ministry exercised its discretion with respect to the memo in Record 2 under section 14 in accordance with the terms of Interim Order PO-3087-I.

[11] The ministry relied on sections 14(1)(b) and 14(2)(a) to exempt the memo in Record 2. 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;

[12] In Interim Order PO-3087-I, I found that disclosure of some of the information at issue in the memo in Record 2 could reasonably be expected to interfere with a specific, ongoing law enforcement investigation and was subject to section 14(1)(b). Certain information in the memo in Record 2 was not subject to section 14(1)(b) as it consisted of background, general, or other information whose disclosure 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.

[13] I also found in Interim Order PO-3087-I that the memo in Record 2 is a report prepared in the course of a law enforcement investigation and, therefore, was subject to section 14(2)(a).

[14] 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.

[15] 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.

[16] 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)].

[17] In its representations in response to the Notice of Inquiry, the ministry stated 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, 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 stated that disclosure of the information withheld from the records would reveal to the appellant the ministry's reasons for initiating the investigation of the College, as well as the nature of the complaint.

[18] I found in Interim Order PO-3087-I that the ministry's submissions supporting its exercise of discretion did not relate to the withholding of information that did not reveal the reason it initiated the investigation of the College, as well as the nature of the complaint.

[19] As such, I ordered the ministry to re-exercise its discretion with respect to the information in the memo in Record 2 that did not reveal the nature of the complaint against the College nor the reason why the ministry initiated the investigation against the College.¹

[20] Based on my review of the information remaining at issue in the memo in Record 2 following the ministry's re-exercise of discretion, I find that the ministry has disclosed to the appellant all of the information in the memo, except for the information that reveals the nature of the complaint against the College and the reason why the ministry initiated the investigation against the College.

[21] I find that the ministry re-exercised its discretion in a proper manner taking into consideration the fact that information that would not reveal the complaint against the College or the reason why the ministry initiated the investigation against the College should be available to the public. The information withheld is significant information gathered in the course of a law enforcement investigation. I found in Interim Order PO-3087-I that disclosure of this particular information could reasonably be expected to interfere with a specific, ongoing law enforcement investigation under section 14(1)(b). Accordingly, I am upholding the ministry's re-exercise of discretion and I am dismissing the appeal.

ORDER:

I uphold the ministry's re-exercise of discretion and I dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ August 24, 2012

¹ In Interim Order PO-3087-I, I also found 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.