

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3805

Appeal PA16-190

Northern College of Applied Arts and Technology

January 16, 2018

Summary: The appellant, a local union, made a request to the college for access to all agreements with another named college, including the dollar amount of any payments made under the agreement. The college located one agreement responsive to the request, and created a record showing the dollar amount of any payments made under the agreement during a specified time period. After receiving partial consent from the named college, the affected party, the college granted access, in part, and relied on sections 17(1) (third party information) and 18(1) (economic and other interests) of the *Act* to withhold the remainder of the records. In this order, the adjudicator upholds the college's decision, in part.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(1), and 65(6)3.

Orders and Investigation Reports Considered: Orders PO-3620, PO-2599, MO-3537, and PO-2248.

BACKGROUND:

[1] The appellant, a local union, made a request to Northern College of Applied Arts and Technology (the college), under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to all agreements and contracts with another named college (the affected party), including the dollar amount of any payments made under each contract.

[2] The college located one agreement responsive to the request. It also created a record showing the dollar amount of any payments made under the contract during a specified time period and issued a decision denying access, in full, to the responsive records pursuant to the mandatory exemption at section 17(1) (third party information), and the discretionary exemption at section 18(1) (economic and other interests) of the *Act*.

[3] The appellant appealed the college's decision to this office.

[4] During mediation, the college notified the affected party in accordance with section 28(1) of the *Act* and provided it with an opportunity to make representations concerning disclosure of the records at issue.

[5] Upon receiving consent for partial disclosure of the agreement from the affected party, the college issued a revised decision to the appellant granting access to a portion of this record and withheld the remainder of the information in accordance with sections 17(1) and 18(1) of the *Act*.

[6] As no further mediation was possible, the appeal was moved to the next stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The appellant confirmed that he is pursuing access to both records at issue.

[7] I sought and received representations, reply representations and sur-reply representations from the college and the appellant. The affected party confirmed that it will not be providing any representations. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the parties' representations were shared.

[8] In this order, I uphold the college's decision, in part.

RECORDS:

[9] The records at issue are the withheld portions contained in an agreement and a one-page document (specifying the dollar amount of payments under the contract during a specified time period).

ISSUES:

- A. Does the discretionary exemption at section 18(1) apply to the records?
- B. Does the mandatory exemption at section 17(1) apply to the records?
- C. Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Preliminary Issues

[10] In its representations, the college raises two additional issues, besides the three issues listed under the above heading "Issues." As these two issues go to the IPC's jurisdiction, I have decided to address them first.

Does section 65(6)3 exclude the records from the Act?

[11] For section 65(6)3 to apply, it must be established that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[12] In this appeal, I find that the agreement at issue was "collected, prepared, maintained, or used" by the college, in relation to "meetings, consultations, discussions or communications" about the college's arrangement in which it licenses its courses and programs to the affected party for delivery to international students. I find, therefore, that the first two parts of the test are met.

[13] I now turn to part 3.

[14] The college asserts that the agreement at issue was used for the purpose of addressing the requester's labour relations concerns in a November 2015 meeting and that the request has been made in a labour relations context. It also asserts that it has adduced evidence that the agreement at issue was used to address the union inquiry and an allegation about "bypassing the collective agreement" that was made at a Union-College meeting constituted under a collective agreement. The college states that the appellant sought access to the agreement at that meeting and, when denied, filed an access request "on behalf of" an identified union.

[15] Although the appellant provided representations and sur-reply representations, these representations did not address this issue.

[16] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships.

[17] In this case, the agreement at issue is between the college and the affected

party, a private college, about licensing its courses and programs for delivery to international students. It is evident that this arrangement between the college and the affected party is not part of a collective bargaining arrangement or an analogous relationship. As such, the meetings, consultations, discussions and communications that took place were not about "labour relations" matters. The mere fact that a labour union is seeking access to the records or believes its contents affect it does not establish that the exclusion applies.

[18] I acknowledge that the one-page document (specifying the dollar amount of payments under the agreement for the time period of April 1, 2015 to March 31, 2016) was created by the college to the union. However, the mere fact that the record was created in response to a request by a labour union does not establish that the exclusion applies. The creation of a record in the context of an access request does not affect the underlying nature of the records. In orders MO-3537 and PO-2248, conversely, information contained in the records which were excluded from the scope of the *Act* continued to be excluded even though the record at issue was created to respond to an access request (and not for labour relations purposes.)

[19] Accordingly, I find that the records at issue are not excluded from the *Act* under section 65(6)3.

Should the IPC decline to conduct an inquiry because of the parties' settlement discussion?

[20] The college takes the position that this office should decline to hear this appeal because the appellant resiled from a settlement agreement made in the summer of 2016. It asserts that there was an agreement between one of its named college executives and the appellant, by which the college would provide the appellant with an opportunity to view the agreement at issue in a confidential forum (without making copies) and ask questions in exchange for the withdrawal of the access request. The college points out that the meeting occurred but the appellant refused to withdraw its request. It further asserts that "fairness demands that the IPC enforce the parties' agreement."

[21] In other words, the college is asking this office to decline to proceed with this appeal based on the referenced settlement agreement entered between the college and the appellant.

[22] It is a well-established principle that one may not contract out of the provisions of the *Act*. In Order PO-2520, Senior Adjudicator John Higgins had to determine as a preliminary issue whether an institution had, as it submitted, "contracted out" of the *Act* by having previously entered into an agreement with the requester. In rejecting the institution's argument, Senior Adjudicator Higgins stated the following:

Section 10(1) creates an express and unambiguous right of access to records “in the custody or under the control” of an institution such as the College, subject to exceptions that do not include the provision of a contract. In my view, therefore, the *Act* applies in the circumstances of this appeal regardless of the contents of any agreement to the contrary, and the right of access in section 10(1) must be decided within the four corners of the statute. The Commissioner’s authority is unaffected. If the Minutes of Settlement ending the grievance in this case in fact include an express provision contracting out of the right of access created by the *Act* (and I expressly decline to find that they do), any violation of that provision would be a matter of contract law, employment law or labour law, and enforceable in that context. ...

[23] I agree with this approach and adopt it, and will continue with my inquiry under the *Act*. I will now turn to discuss the main issues raised in this appeal.

A. Does the discretionary exemption at section 18(1)(c) apply to the records?

[24] Section 18(1)(c) states:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[25] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹

[26] For section 18(1)(c) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²

[27] The failure to provide detailed and convincing evidence will not necessarily defeat the institution’s claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of

¹ Toronto: Queen’s Printer, 1980.

² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

harms in the *Act*.³

[28] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.⁴

Section 18(1)(c): prejudice to economic interests

[29] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁵

[30] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.⁶

Parties' representations

[31] The college submits that disclosure of the records at issue could reasonably be expected to give rise to the harms in section 18(1)(c). The college identified two ways in which harms covered by this section could arise: through the use of this information by competitors in the international education field, and by private provider affiliates or potential affiliates with which the college negotiates. The college provides an affidavit of its vice-president of finances, administrations and Aboriginal services in support of its claims.

[32] The vice-president reports that it is difficult to draw international students to northeastern Ontario, where the college's four campuses are located. He points out that part of their strategy for dealing with this challenge is to expand their reach and generate international student revenue through partnerships, such as its partnership with the affected party. He also reports that in 2015-2016 their domestic base was approximately 1,300 students while the international base (delivered by the affected party) was approximately 850 students. The vice-president also points out that the

³ Order MO-2363.

⁴ See Orders MO-2363 and PO-2758.

⁵ Orders P-1190 and MO-2233.

⁶ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

revenue generated by this activity is of substantial benefit to the college and its northern community.

[33] The college competes for international student revenues with all schools that offer post-secondary education to international students, but competes most closely with those that offer post-secondary education to international students who seek to study in Canada or to obtain a Canadian credential. The college's direct competitors in this endeavor are all publicly-funded Ontario colleges and universities that also enroll international students directly, or provide courses and programming through relationships with Canadian affiliates. The vice-president provides several examples of competing domestic affiliations.

[34] As the essential offering from all competitors – namely, quality courses and programs and respected academic credentials – is the same, the vice-president explains that the college competes for the strongest affiliates based not only on the quality of the college's courses and programs, but also on other measures. Some of these measures include the other services the college offers to affiliates, the administrative costs the college imposes on affiliates to meet its quality control and risk management objectives, the allocation of risk between the college and affiliates, and the price the college charges for its affiliation and for use of its courses and programs.

[35] The college also competes for the attention of international education sales agents, who direct international students to international courses and programs for a commission. The vice-president explains that the college competes for agents on the basis of the educational opportunities it provides to students and the commission rates it offers to agents.

[36] The college notes that it treats the agreement as confidential. It also expects, based on the confidentiality clause in its agreement with affiliates, and the nature of these relationships, that affiliates will also maintain the confidentiality of the agreement's terms. The college submits that disclosure of the information contained in the records could reasonably be expected to give rise to the kinds of harms contemplated by section 18(1)(c). The vice-president elaborates on the college's two main concerns about disclosure.

[37] The first is the use of this information by competing universities and colleges to optimize their own position, by replicating or otherwise responding to the college's confidential approach to dealing with its affiliates. This might include competitors adjusting their own dealings with current and potential affiliates, adjusting their agent commission rates, and making investments based on a location analysis that considers the precise boundaries of the college's affiliation with the affected party. The vice-president submits that the terms and information at issue are key to the college's competitive endeavour, are confidential, and are very difficult to discern from publicly available information. As this type of information is not shared or known between competitors in this line of business, disclosure of the college's terms and conditions for

its affiliates would put the college at a competitive disadvantage. On this point, the college draws an analogy between the information at issue in this appeal and that found exempt in Order PO-2569. In that order, information about the government's relationship with a private company was found to be exempt on the basis that its disclosure would provide competitors with an insight into the government's business strategy and the tools it is prepared to use to attract business.

[38] The vice-president also raises concerns about the use of this information by affiliates and potential affiliates, which will affect the college's ability to obtain the best possible outcome in future negotiations. He explains that the college actively seeks new affiliates, and frequently renegotiates terms with its affiliates. Future negotiations are likely to be prejudiced by disclosure of the confidential pricing information in the records, revealing what the college is prepared to give in negotiations and discouraging third parties from making concessions. The college notes that both these potential harms have been recognized by this office as legitimate bases for restricting public access to confidential pricing and analogous information. Similarly, disclosure could reasonably be expected to harm the college's ability to attract international agents, which it does in part based on the commission rates it offers. These rates are confidential and are competitively sensitive for the same reasons.

[39] The appellant only peripherally addresses the application of 18(1)(c) to the records. On the matter of harm, the appellant argues that the college will not face harm from disclosure of the records as other colleges are using the same contract language template(s). It points out that to carry out one of its functions as a labour union, which is to safeguard the employment stability of its members, the appellant needs to have factual data – data such as the requested affected party's enterprise with the college. The appellant also argues that non-disclosure could potentially imperil the functional ability of the union in serving its members.

Analysis and findings

[40] For the reasons that follow, I find that some of the withheld portions of the agreement and the one-page document at issue are exempt under section 18(1)(c). I find that the other withheld portions of the agreement are not exempt.

[41] In Order PO-3620, Adjudicator Jenny Ryu grappled with a similar scenario as the one present. In that order, the requester, a union local, requested access to all agreements between Lambton College of Applied Arts and Technology (Lambton college) and a private career college that delivers Lambton college's programs to international students.

[42] Adjudicator Ryu found that discrete portions of the licence agreement and its subsequent amendments were exempt under section 18(1)(c). In coming to this conclusion, she made the following findings:

These terms are key elements of the consideration negotiated between the parties for the licensing of college programs, which I accept are maintained in confidence by the parties to these agreements...

I accept that disclosure of this information could reasonably be expected to prejudice the college's competitive position in future negotiations with other private providers and recruitment agents. I am satisfied that revealing the position the college has taken in past negotiations, including specific details of what the college was willing to give and to accept, would give counterparties to future negotiations for international program licences an advantage in dealing with the college. I am also persuaded by the college's evidence that other colleges and universities in the international education field could use this information to adjust their own offerings to compete with the college for private affiliates. These outcomes could reasonably be expected to arise from disclosure of this confidential information, and to have a detrimental effect on the college's ability to negotiate the best possible deal for its international student programming, with a concomitant negative effect on the college's economic interests.

[43] I agree with and adopt the reasoning set out above. I find that the below withheld portions deal with concessions or incentives for the two parties, the college and the affected party, to enter into such an agreement. If revealed, such concessions or incentives would prejudice the college's competitive position in future negotiations. As such, I find the following withheld portions of the agreement to be exempt under section 18(1)(c):

- the amount of licensing fees paid by the affiliates to the college
- the commission rates paid to international agents (including the terms of payment of those commissions)
- the amount of security deposit
- the terms of negotiation of the security deposit
- compensation for student transfers
- sharing of losses for student withdrawals
- marketing in certain regions of the world
- geographic location covered by the agreement
- the amount of student fees

[44] I also find that the one-page document (specifying the dollar amount of payments under the contract during a specified time period) is exempt under section 18(1)(c) as I am satisfied that the disclosure of that number, along with other known information (i.e. international student tuition fee), would allow third parties to determine the licensing fees paid by the affected party to the college.

[45] However, I do not find that the remaining withheld portions of the agreement are exempt. These remaining portions are generic clauses and, in my view, does not result in harms to the college's economic interest or competitive position. This includes information such as the college's right to make changes to the programs offered or to add additional programs and student tuition fees for the business marketing, accounting and computer engineering technician programs. The risks of harms from disclosure of these withheld portions are not evident on their face, and the college has not provided evidence to support a different finding.

[46] In summary, I find that some of the withheld portions of the agreement and the one-page document are exempt under section 18(1)(c).

[47] I will now turn to discuss whether the remaining withheld portions of the agreement, which are not exempt under section 18(1)(c), are exempt under section 17.

B. Does the mandatory exemption at section 17 apply to the remaining withheld portions of the agreement?

[48] Section 17(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[49] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁷ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.⁸

[50] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[51] Past orders of this office have defined financial and commercial information as follows:

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁹

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.¹⁰ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹¹

[52] Adopting these definitions, from my review of the withheld portions at issue, I find that they contain information that qualifies as financial and commercial information for the purposes of section 17(1) of the *Act*. As stated above, the withheld portions is

⁷ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

⁸ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁹ Order PO-2010.

¹⁰ Order PO-2010.

¹¹ Order P-1621.

contained in an agreement. The agreement is for the licensing of college programs to an affiliate provider in exchange for licensing fees and other consideration, and therefore relate to the buying, selling or exchange of merchandise or services.

[53] Accordingly, the first part of the test for the application of section 17(1) has been met.

Part 2: supplied in confidence

[54] Part two of the test requires the information to have been “supplied” to the institution. The requirement that the information be “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.¹² In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time of the information was provided. This expectation must have an objective basis.¹³

[55] The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.¹⁴

[56] I note that this office’s approach to the second part of the test for the application of section 17(1) to executed contracts has been upheld by the Divisional Court on a number of occasions.¹⁵

[57] There are two exceptions to this general rule, which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.¹⁶ The immutability exception

¹² Order MO-1706.

¹³ Order PO-2020.

¹⁴ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

¹⁵ In addition to *Boeing Co.* and *Miller Transit*, cited above, see also: *Grant Forest Products Inc. v. Caddigan*, 2008 CanLII 27474; *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005; *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario*, 2012 ONSC 3496 (CanLII); *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (Can LII); and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392 (CanLII).

¹⁶ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples include financial statements, underlying fixed costs, and product samples or designs.¹⁷

[58] I note that none of the parties have provided any submissions or evidence that either or both these exceptions apply. Moreover, based on my review of the agreement, I find that they do not apply in this case. Accordingly, I find that the agreement was mutually generated, rather than "supplied" by the affected party to the college.

[59] As all parts of the three-part test must be met for section 17(1) to apply, I find that it is unnecessary to consider whether the third part of the test is satisfied. Accordingly, I find that the withheld portions at issue are not exempt under section 17(1).

C. Did the institution exercise its discretion under section 18? If so, should this office uphold the exercise of discretion?

[60] The section 18 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.

[61] The college submits that it exercised its discretion properly. It considered the following in issuing its supplementary decision:

- the public's entitlement to access in general and the purpose of that entitlement;
- the nature of the college's relationship with the affected party;
- the nature of the specific information at issue;
- the potential economic impact of disclosing the specific information at issue; and
- how the IPC had treated similar information in Order PO-3620 (involving Lambton college).

[62] Although the appellant provided representations and sur-reply representations, they do not address this issue.

[63] I find that the college exercised its discretion under section 18(1)(c), and did so appropriately. In deciding to withhold information under this section, the college states that it considered Order PO-3620, along with a number of other factors. In the circumstances, therefore, I am satisfied that the college properly exercised its discretion under section 18(1)(c).

¹⁷ *Miller Transit*, above, at para. 34.

ORDER:

1. I uphold, in part, the college's decision to withhold portions of the agreement and the one-page document at issue under section 18(1)(c).
2. I do not uphold the exemption claims made for the remainder of the withheld portions of the agreement. I order the college to disclose the non-exempt withheld portions of the agreement to the appellant by **February 21, 2018** but not before **February 14, 2018**.

To assist the college, I enclose with the copy of this order sent to the college a copy of the agreement, with the non-exempt portions highlighted in yellow. To be clear, the highlighted portions are to be disclosed to the appellant by the date set out above.

Original Signed by: _____

Lan An
Adjudicator

January 16, 2018