

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-4150

Appeal PA19-00185

Northern College of Applied Arts and Technology

May 28, 2021

**Summary:** An access request was made to the college by one of its unions for reports prepared for the college by a research company and the costs associated with those reports. In this order, the adjudicator partially upholds the college's decision to withhold some of the information on the basis that it is commercial information that belongs to the college that has a monetary value (section 18(1)(a) of the *Act*). However, the adjudicator orders the college to disclose the invoices and the parts of the reports that do not qualify for the section 18(1) exemption.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.1, sections 17(1), 18(1)(a), and 18(1)(c).

**Orders Considered:** Orders PO-1791, M-602, P-1190, M-67 and PO-1901.

### OVERVIEW:

[1] The Northern College of Applied Arts and Technology (the college) provides educational services in four locations in Northern Ontario. It retained a research company (the affected party) to provide custom research and analytics to assist the college to design its programming.

[2] The president of OPSEU Local 653 Northern College Academic Faculty Union made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the college for "a copy of all completed [named research company]

reports and the cost of each or all of the reports.”

[3] The college denied access to the reports and invoices in full, citing sections 17(1) 18(1) of the *Act*, which protect certain economic interests of third parties and institutions, respectively.

[4] The union, now the appellant, appealed the college’s decision. Although efforts were made, no resolution was possible at the mediation stage of the appeal and it was therefore transferred to the adjudication stage of the appeal.

[5] A written inquiry occurred. Representations were sought and received from the college, the appellant and the affected party. The non-confidential portions of the college’s representations were shared with the appellant in accordance with this office’s *Code of Procedure* and *Practice Direction 7*. The appellant’s representations were shared with the college.

[6] In this appeal, the appellant union argues in part that the college has a duty to disclose the records because of the terms of the collective agreement between the college and the union; the college has a different view. As I explain below, the duties that may be set out in the collective agreement are not relevant to determining whether sections 17(1) or 18(1) of the *Act* apply and they are therefore not addressed in this order. The IPC does not have jurisdiction to adjudicate a difference between the parties under a collective agreement.

[7] In this order I uphold the college’s decision to withhold three of the reports in their entirety and parts of the remaining reports on the basis of section 18(1). I do not uphold the college’s decision to withhold the invoices and parts of two of the reports.

## **RECORDS:**

[8] The records at issue are three invoices and five reports.

[9] The reports are about discrete topics of study or analysis and were prepared by the affected party. I have numbered the reports from 1 to 5 and refer to them by number in this order. I will provide the college with an index to correlate the numbers that I have assigned with the reports by title.

## **ISSUES:**

- A. Does the mandatory exemption for third party information at section 17(1) of the *Act* apply to the records?
- B. Does the discretionary exemption for economic and other interests at section 18(1) of the *Act* apply to the records?

- C. Did the college exercise its discretion to disclose the records under section 18(1)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **Issue A: Does the mandatory exemption for third party information at section 17(1) of the *Act* apply to the records?**

[10] The college claims that sections 17(1)(a) and (c) apply to the reports and the invoices. In brief representations, the affected party agrees that the reports and invoices should be withheld and makes general arguments why without reference to section 17(1) or the *Act*. The appellant argues that the college has not established that section 17(1) applies.

[11] Sections 17(1)(a) and (c) state:

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;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[12] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>1</sup> 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.<sup>2</sup>

[13] For section 17(1) to apply, the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

---

<sup>1</sup> *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.*).

<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), or (c) of section 17(1) will occur.

***Part one – does the information consist of trade secrets, commercial information or financial information?***

[14] I will first consider whether the information at issue is the type of information that is protected by section 17(1).

*Representations*

[15] The affected party did not refer to section 17(1) or the test stated above. However, it characterizes the reports as “custom market research” and also describes their value *to the college*. The affected party did not make any arguments to suggest that disclosure of the records would reveal its own trade secrets, commercial information or financial information. However, the affected party states that disclosure of the custom reports would be viewed negatively by its other clients.

[16] The college submits that the reports reveal trade secrets, commercial and financial information and that the invoices reveal financial information. The college refers to and relies on the following descriptions of the type of information protected by section 17(1) that have been well established by prior orders of this office:

*Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which: (i) is, or may be used in a trade or business; (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>3</sup>

*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.<sup>4</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>5</sup>

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

---

<sup>3</sup> Order PO-2010.

<sup>4</sup> Order PO-2010.

<sup>5</sup> Order P-1621.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>6</sup>

[17] The college argues that the reports reveal trade secrets because they contain strategic particularized analyses of *the college's* strengths, weaknesses and opportunities regarding the process for attracting new students and managing enrollment. The college says that the reports contain commercial information because they identify and outline the college's current and recommended practices relating to its educational programming, which is its commercial offerings. It says that the reports contain unique client information and profiles, marketing strategies and proposals.

[18] As can be seen, these arguments focus on how the information relates to the college, not the affected party, and they will be considered in more detail at Issue B, regarding section 18(1).

[19] The college also argues that disclosure would reveal the approach taken by the affected party to prepare the reports and that this approach is both a trade secret and commercial information.

[20] Lastly, the college says that the costs detailed in the reports and the costs of the reports set out in the invoices reveal financial information.

[21] The appellant disputes that the records contain trade secrets, commercial information or financial information. The main thrust of the appellant's arguments is that that there would be no harm in disclosure.

### *Finding*

[22] Based on my review of them, the records do not contain the affected party's trade secrets. While disclosure of the records would arguably enable someone to deduce the methods used by the affected party to develop the reports, I have been provided no evidence to suggest that these methods are not generally known and used by others involved in similar work. (I also find under Issue B that the reports do not contain the college's trade secrets.)

[23] After reviewing the reports, I conclude that they contain the affected party's financial or commercial information to the extent that the reports identify that the affected party provided services to the college for payment. As I will discuss in more detail at Issue B, the reports also contain the college's commercial and financial information.

[24] I also find that the invoices contain the affected party's commercial and financial information as it pertains the sale of its services to the college.

---

<sup>6</sup> Order PO-2010

[25] Having concluded that the records contain commercial and financial information, I therefore find that the first part of the section 17(1) test has been met in relation to the records and it is necessary to consider part two of the test.

***Part two – were the records supplied in confidence by the affected party?***

[26] The requirement that the information was “supplied” to the institution reflects the purpose of section 17(1) to protect the informational assets of third parties.<sup>7</sup> Information may qualify as “supplied” if it was directly supplied to an institution by a third party<sup>8</sup> – the affected party in this case.

[27] 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 the information was provided. This expectation must have an objective basis.<sup>9</sup>

[28] For the reasons that follow, I find that although the records were supplied by the affected party to the college, they were not supplied in confidence.

*Representations*

[29] Regarding the reports, the college submits that they were supplied in confidence by the affected party to the college. In support of this position, it submits that the information contained in the reports includes “internal confidentially-held” information *of the college* that is not available in the public domain. The college submits that it has limited access to the reports and that the affected party treated the information as confidential.

[30] The affected party does not address this part of the test, but it states that *the college* would be disadvantaged if the reports are publicly disclosed and that other of the affected party’s client’s may reconsider working with it if they “saw custom reports shared publicly.” Giving the affected party’s representations a broad reading, I acknowledge that the affected party understands that the college wishes for the reports to be confidential.

[31] In response to the college’s representations, the appellant counters by stating that it (the union) would not disclose the records publicly, an argument which I will address more under Issue B. The appellant also states that the college disclosed some of the information contained in one of the reports at a faculty meeting.

[32] In reply, the college concedes that it did share “selected portions of the records at issue to internal staff.” However, it maintains its position that the reports are

---

<sup>7</sup> Order MO-1706.

<sup>8</sup> Orders PO-2020 and PO-2043.

<sup>9</sup> Order PO-2020.

confidential and not intended for public consumption.

[33] Neither the college nor the affected party made specific representations pertaining to part two of the test in relation to the invoices.

*Finding – the invoices*

[34] It is clear that the affected party supplied the invoices to the college as they are invoices issued by the affected party and transmitted to the college for payment.

[35] However, I am unable to conclude that they were supplied in confidence. I have been provided no basis to conclude that there was any expectation of confidentiality over the invoices. There is nothing on the face of the invoices that suggests that they are confidential, nor do the college or affected parties' representations indicate how the affected party could reasonably conclude that the invoices would be kept confidential.

[36] If I am incorrect about this finding, I have considered the third part of the test pertaining to the invoices, below.

*Finding – the reports*

[37] I also conclude that the reports were supplied to the college by the affected party but that they were not supplied "in confidence."

[38] The focus of the analysis under the second part of the test is whether *supplier of the information* had a reasonable expectation of confidentiality, determined on an objective basis.<sup>10</sup> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential *and that it was to be kept confidential*;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and,
- prepared for a purpose that would not entail disclosure.<sup>11</sup>

[39] Although I readily accept that *the college* would like to maintain the confidentiality of the reports and that the affected party understands this, I am not

---

<sup>10</sup> Order PO-2020.

<sup>11</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

satisfied that the affected party had any actual or objective expectation that the reports would be kept confidential by the college.

[40] I have been provided with no authority or reasonable basis to conclude that if the college decided to disclose the reports publicly, the affected party could take the position that the college was not entitled to do so or had any reasonable basis to argue that the college was not permitted to do so. The reports are the college's to use as the college wishes, including its wish to maintain them confidentially or to share with select faculty as it has done.

[41] I am unable to conclude that the reports were supplied "in confidence" as that concept is understood in the context of section 17(1).

[42] If I am incorrect about this finding, I have considered the third part of the test pertaining to the reports, below.

***Part 3 – are the section 17(1)(a) or (c) harms present?***

[43] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.<sup>12</sup>

*Representations*

[44] The college suggests that the affected party will suffer the harms in sections 17(1)(a) and (c), meaning that disclosure could reasonably be expected to: prejudice significantly the affected party's competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; or, result in undue loss or gain to the affected party.

[45] The college states that the affected party is in the best position to state any harms that it may face if the records are disclosed. However, it suggests that disclosure could harm the affected party's competitive position by revealing analysis and insights that it may provide to similar clients. It suggests, too, that the affected party's competitors may unduly benefit because the work product of the affected party would be available to be used. To illustrate, the college states that if one of the affected party's competitors used the information and analysis prepared by the affected party and was therefore able to offer the college the same service at a lower rate, the college would "strongly consider" using the competitor.

[46] The college refers to Orders PO-1761 and M-602 in support of the proposition that prejudice to economic position has been found in situations where pricing is at

---

<sup>12</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.



issue where the records would enable a competitor to gain an advantage by adjusting its bid on similar work.

[47] Regarding harms that it may experience, the affected party states that it works with many institutions and that "if our other members saw custom reports shared publicly, they may consider working with our company." This is the totality of the evidence provided by the affected party regarding possible harms that it may face.

[48] The appellant does not address whether the affected party will suffer any harms, focusing only on the harms that may be suffered by the college.

### *Finding*

[49] There is insufficient evidence before me to conclude that the harms in sections 17(1)(a) or (c) could reasonably be expected to occur if the records are disclosed. Taken together and given a broad reading, the college and the affected party's representations present speculative risks, without any particulars about the nature of the competitive market in which the affected party operates or any particular contracts that could be impacted by disclosure, for example. Although it is not necessary to prove with certainty the harms that may arise, there must be more than speculation about the possibility of harm.

[50] I considered Order PO-1791 but find that it does not assist the section 17(1) argument. Although the adjudicator in Order PO-1791 refers to instances in which the IPC has found section 17(1) to apply, he also found that it did not apply in the case before him. Like the present appeal, the adjudicator in Order PO-1761 was unable to conclude that the section 17(1) harms were present due to lack of sufficient evidence.

[51] In Order M-602, the adjudicator found that the equivalent to section 17(1) in the *Municipal Freedom of Information and Protection of Privacy Act* applied to prohibit disclosure of unit prices contained in a tender package having been satisfied that disclosure would prejudice the bidder's competitive position. (The adjudicator also found that the exemption did not apply to the identifies of the other bidders due to lack of sufficient evidence.)

[52] In my view, the circumstances in Order M-602 are distinct from the appeal at hand. While I accept that there is a market for the services provided by the affected party, I am not satisfied that the services or the prices paid by the college are analogous to unit prices or the procurement process that was at issue in Order M-602. Rather, the services provided by the affected party appear to be more customized and tailored to the individual client. And, as noted, I do not have any information about the nature of the competitive market in which the affected party operates.

[53] On the basis of the evidence before me, I find that the third part of the test has not been met and that therefore section 17(1) does not apply to the records.

[54] I will consider the college's alternative claim that the discretionary exemption for economic and other interests in section 18(1) applies to the records.

**Issue B: Does the discretionary exemption for economic and other interests at section 18(1) of the Act apply to the records?**

[55] The college relies on sections 18(1)(a) and (c) to withhold the records in their entirety. In contrast to section 17(1), which protects the economic interests of third parties, the purpose of section 18 is to protect certain economic interests of institutions.<sup>13</sup>

***Preliminary issues – the collective agreement and the union's assurances of confidentiality***

[56] In addition to disputing that section 18(1) applies, the appellant union also argues that the college should provide it with the records because it shares the interests and concerns of the college and would protect the confidentiality of the information against other third parties. The union also suggests that the college has a duty under the collective agreement between it and the college that require the college to provide it with the records.

[57] The college disagrees with the union and says that it has no duty to provide the records to the union under the collective agreement. It also argues that any assurances provided by the union to keep the information confidential are not relevant to my decision under the *Act* because disclosure under the *Act* is effectively disclosure to the public at large.

[58] This order does not address the parties' arguments about their respective duties under the collective agreement because the IPC does not have jurisdiction to resolve these types of differences. This appeal is about whether the *Act* permits the college to withhold the information at issue in response to an access request.

[59] In determining the applicability of the section 18(1) exemption, I have not considered the appellant union's assurance of good faith dealing with the records. This is because it is well established that disclosure under the *Act* is effectively disclosure to the world.<sup>14</sup> There is no authority under the *Act* for conditional disclosure of information, with one small exception that is not relevant to the circumstances of this appeal. The union's assurances are therefore not relevant to a determination about the applicability of the section 18(1) exemption.

---

<sup>13</sup> *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.

<sup>14</sup> See for example Orders MO-3730-R (referring to PO-2018), MO-3657 and PO-3140.

***Section 18(1)(a): information that belongs to the college***

[60] Section 18(1)(a) states:

A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

[61] Section 18(1)(a) protects similar types of informational assets protected by section 17(1). For section 18(1)(a) to apply, the college must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,
2. belongs to the college, and
3. has monetary value or potential monetary value.

*Part one – are the records the college’s trade secrets, commercial or financial information?*

[62] The types of information listed in section 18(1)(a) are the same as those protected by section 17(1). As it did in relation to section 17(1), the college relies on the following definitions of the types of information, which have been well-established in several prior orders of this office (and repeated here for ease of reference):

*Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which: (i) is, or may be used in a trade or business; (ii) is not generally known in that trade or business; (iii) has economic value from not being generally known; and, (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>15</sup>

*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.<sup>16</sup>

*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

---

<sup>15</sup> Order PO-2010.

<sup>16</sup> Order PO-2010.

application to both large and small enterprises.<sup>17</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>18</sup>

### Representations

[63] As noted above, the college argues that the reports contain its trade secrets, financial and commercial information. It says that the reports contain unique client information and profiles, marketing strategies and proposals.

[64] Generally, the college submits that it is a relatively small school that competes with larger institutions to provide similar programming. The college explains that the reports provide unique and detailed information about its programming and strategic enrollment management. It submits that the reports consist of trade secrets because they are strategic particularized analyses of strengths, weaknesses and opportunities for attracting prospective students and managing enrollment.

[65] The college submits that the reports contain commercial information because they identify and outline its current and recommended practices for its programming, which is its commercial offerings.

[66] Lastly, the college says that the costs detailed in the reports and the costs reflected in the invoices reveal sensitive financial information.

[67] The appellant disputes that the records consist of trade secrets, commercial or financial information. Generally, the appellant denies that the market in which the college operates is as competitive as stated by the college. The appellant submits that the college's competitors are in close collaboration with it and operate "within an environment in which there is little room for product variation because the substance of the product is defined by the province."

[68] The appellant specifically rejects that the reports contain trade secrets or financial information on the basis that the college does not compete as the college suggests and he disputes that any harm will come to the college if the information is disclosed or the information "gets out." Lastly, the appellant disputes that the reports consist of commercial information merely because the reports were paid for.

### Finding – the records consist of the college's financial and commercial information

[69] I have reviewed each of the records and considered the arguments of the parties.

[70] I find that the invoices consist of financial information as they contain the costs

---

<sup>17</sup> Order PO-2010.

<sup>18</sup> Order P-1621.

to the college of the services provided by the affected party.

[71] I also find that the reports contain commercial information pertaining to the college's provision of educational programming, which is the college's commercial offerings.

[72] In my view, the reports do not contain trade secrets. The college submits that the strategic particularized analyses of strengths, weaknesses and opportunities for attracting prospective students and managing enrollment consist of trade secrets.

[73] Considering the four criteria necessary to establish a trade secret, I accept that the information contained in the reports may be used in the college's business and that the college has made efforts to keep this information confidential. However, I have no information or evidence to determine whether the information is generally known among other colleges or whether the information has any economic value from not being generally known information. In sum, I am unable to conclude that any of the records consist of trade secrets.

[74] Having found that the invoices and the reports are either financial information or commercial information, I will now move to the second part of the section 18(1)(a) analysis.

*Part two: does the information "belong to" the college?*

[75] To find that the information "belongs to" the college, the college must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[76] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,<sup>19</sup> customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.<sup>20</sup>

---

<sup>19</sup> Order P-636.

<sup>20</sup> Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

## Representations

[77] Regarding the invoices, the college makes no specific argument that they "belong to" it within the meaning of section 18(1)(a).

[78] Regarding the reports, the college submits that they "belong to" it as they were commissioned for the benefit and use of the college and that all proprietary interests in them lie with the college. The college says that it has maintained control over the reports and treated them in a manner consistent with proprietary informational assets with strategic value. The college submits that I need not find that disclosure would depreciate the value of the reports to find that they belong to it.

[79] The appellant does not specifically address this part of the section 18(1)(a) test. However, he submits that the college has disclosed the contents of some of the reports in meetings at the college. In reply on this issue, the college concedes that it "opted to disclose select portions of the records at issue to select internal staff," but that they have not been otherwise disclosed to the public.

## Finding – reports 1, 3 and 4 and part of reports 2 and 5 "belong to" the college

[80] Having reviewed the reports, I find that three of the reports in their entirety (reports 1, 3 and 4) and one page within each of reports 2 and 5 contain information that belongs to the college within the meaning of section 18(1)(a). I am satisfied that this information was developed using information owned by the college that is similar to customer lists, or in some cases, I am satisfied that the information is sufficiently specific and unique to the college and its place and position in the competitive market that the law would recognize a substantial proprietary interest in that information.

[81] I have reached the opposite conclusion with respect to remaining pages in reports 2 and 5. Without divulging the specific nature of the information, it is information that is primarily derived from external, publicly-available sources. These pages do not contain information that belongs to the college in the proprietary sense necessary to meet this part of the test. While there is no doubt that the college purchased the reports, and it derived a value from them, I am not persuaded that the information contained in them consists of information to which the can claim a substantial proprietary interest.

[82] Without any argument before me about why the invoices belong to the college, I find that it has not established this part of the test as it relates to the invoices.

[83] As a result of these findings, I have determined that section 18(1)(a) does not apply to the invoices and parts of reports two and five. I will therefore consider the college's alternative section 18(1)(c) arguments for this information below.

[84] First, I will conclude my analysis about whether section 18(1)(a) applies to reports 1, 3, 4 (in their entirety) and one page within each of reports 2 and 5.

*Part three – do reports 1, 3, 4 and parts of reports 2 and 5 have monetary value?*

[85] To have “monetary value,” the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.<sup>21</sup>

[86] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.<sup>22</sup> Nor does the fact, on its own, that the information has been kept confidential.<sup>23</sup>

### Representations

[87] The college submits that all of the reports have monetary value. It says that this is inherent about the reports and that the value of the reports has been affixed through its negotiations with the affected party to prepare them. The college relies on Order PO-3710, in which the adjudicator stated of the records at issue, “There is a monetary value in the information resulting from the application of skill and effort to develop it where the information has consistently been treated in a confidential manner and it derives its value to the institution from not being generally known.”

[88] The appellant does not address this part of the test directly; however, as noted above, the appellant disputes that the college participates in as competitive of a market as it claims and, he submits that the college has not maintained the reports confidentially as stated.

[89] As noted above, one of the appellant’s main arguments is that the union he represents will treat the information carefully and properly and that it would not deal with the information in a manner that would harm the college. Although this is not relevant to whether an exemption applied, the colleges points to this line of argument as a concession on the part of the appellant that there is value in maintaining confidentiality over the reports. I acknowledge this argument but I do not give it weight in my analysis below. The appellant has not seen the reports and is not able to make the kind of concession attributed to it by the college.

### Finding – the information at issue has a monetary value to the college

[90] I have carefully reviewed reports 1, 3 and 4 and the pages of reports 2 and 5 that I concluded were commercial information that belongs to the college. I have also taken into account the arguments of the parties, including the confidential representations of the college.

---

<sup>21</sup> Orders M-654 and PO-2226.

<sup>22</sup> Orders P-1281 and PO-2166.

<sup>23</sup> Order PO-2724.

[91] I am persuaded that the information at issue has a monetary value within the meaning of section 18(1)(a). In reaching this conclusion, I accept that the college operates in a competitive marketplace and that it has an ability to design its offerings in response to market forces and that the information in these reports is sufficiently proprietary and particular to the college's situation that I find that it has a monetary value necessary to establish the third part of the section 18(1)(a) test.

[92] Although I considered that the appellant disputes the degree of competitiveness of the market in which the college operates, I am satisfied based on my review of the records themselves that the college operates in a competitive environment and that disclosure of the records under the *Act*, which is disclosure to the public at large, would diminish any competitive advantage developed by the college through its engagement of the affected party.

[93] As a result, I find that the college has established that section 18(1)(a) applies to reports 1, 3 and 4 in their entirety and a page within each of reports 2 and 5. I must still review the college's exercise of discretion to withhold this information, which I will do at Issue C, below.

[94] I will now consider the college's alternative section 18(1)(c) claims for the invoices and the remaining information in reports 2 and 5.

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

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

A head may refuse to disclose a record that contains,

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

[96] For section 18(1)(c) to apply, the college must provide detailed evidence about the potential prejudice its economic interests or competitive position. 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.<sup>24</sup> The failure to provide detailed evidence will not necessarily defeat the college's claim for exemption where harm can be inferred from the surrounding circumstances.

[97] 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

---

<sup>24</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.



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.<sup>25</sup>

[98] 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.<sup>26</sup>

### *Representations*

[99] The college has not made any argument about how disclosure of the invoices could prejudice its economic interests.

[100] Regarding the reports, the college explains that it is a small college that competes for market share of prospective students in Northern Ontario, citing four other schools that it competes with.

[101] The college says that it competes by tailoring its programming to students needs. It retained the affected party to provide custom research and analytics to audit and conduct tailored research about the college's programming and the desires and needs of prospective students. The reports contain unique analysis and recommendations tailored to the college that are "embedded with, and built upon, internal quantitative and qualitative information from the college," as well as information produced by the affected part.

[102] The college argues that if the reports are disclosed it could lose revenue. It explains that if the reports are disclosed, it would mean that its competitors have access to the college's confidential strategic plans to compete for enrollment. The college says that this is a "clear and undeniable prejudice" to its ability to compete for market share of a finite number of prospective students. It says that disclosure would harm the very purpose for which the college commissioned the reports at issue.

[103] The college provides brief additional confidential representations to illustrate how its economic interests are addressed in the reports. In support of its position, the college relies on Orders P-1190, M-67 and PO-1901.

[104] Although the college has not expressly specified, some of these arguments are relevant mainly to reports 1, 3 and 4, that I have found to be exempt pursuant to section 18(1)(a).

---

<sup>25</sup> Orders P-1190 and MO-2233.

<sup>26</sup> Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

[105] As noted, the appellant disputes that the market in which the college operates is as competitive as stated by the college. He says that the named competitors and the college are in fact collaborators and that there is "little room for product variation because the substance of the product is defined by the province."

[106] The appellant also states that the college has disclosed the contents of one of the reports at a specified department meeting and so therefore, the college's claims that disclosure would cause harm are undermined.

[107] In reply, the college states that it "opted to disclose select portions of the records at issue to select internal staff," but that they have not been otherwise disclosed to the public.

[108] The college provided brief confidential representations to elaborate on how some of the information could be of "tremendous value to a competitor" or to "an individual who could leverage this information into a position with a competitor."

*Findings – the harms in section 18(1)(c) have not been established*

[109] To begin, I have no argument before me about how disclosure of the invoices qualifies for exemption under section 18(1)(c). Based on my review of them, I find that section 18(1)(c) does not apply and I will order them to be disclosed.

[110] For the reasons that follow, I am not persuaded that disclosure of the remaining portions of reports 2 and 5 could reasonably be expected to cause the harms in section 18(1)(c).

[111] I have considered the orders referred to by the college but find that the nature of the records at issue in those appeals is distinct from the reports at issue. Order P-1190 dealt with peer reports conducted by or for Ontario Hydro. The adjudicator accepted evidence provided by the institution that disclosure of these reports would harm an ongoing negotiation. There is no similar evidence before me.

[112] Order M-67 dealt with mailing lists and the adjudicator accepted that these lists had an intrinsic value to the institution and qualified for the equivalent exemption in the *Municipal Freedom of Information and Protection of Privacy Act*. The information at issue in the reports remaining to issue is not analogous to this type of information. If it was, I would have found so in the section above pertaining to section 18(1)(a).

[113] Lastly, Order PO-1901 dealt with appraisal reports for properties that remained unsold. The adjudicator had sufficient evidence to conclude that that because of the status of the properties – that they remained unsold and on the market – disclosure of the reports could prejudice the economic interests of the institution. The information remaining at issue is different in kind.

[114] The remaining withheld information in reports 2 and 5 consists of information

based in sources external to the college and that is otherwise publicly available. Certainly, the compilation of the information by the affected party added value to the information; however, I am unable to conclude that disclosure of this information could prejudice the economic interests of the college.

[115] I accept that the college may perceive an unfairness if another school is able to access the information and use it to its benefit because it was the college that paid for the information to be compiled. However, I do not have sufficiently detailed evidence before me to conclude that disclosure of the information in reports two and three would prejudice its economic interests.

[116] Having concluded that the remaining information in reports 2 and 5 are not eligible for an exemption under section 18(1), either (a) or (c), I will order that these pages be disclosed.

**Issue C: Did the college exercise its discretion when it decided not to disclose the records eligible for exemption under section 18(1)? If so, should this office uphold the exercise of discretion?**

[117] Although I have found that the section 18(1) exemption applies to some of the information, the exemption is discretionary, and this office has jurisdiction to review the college's exercise of discretion.

[118] The IPC's jurisdiction to review an institution's exercise of discretion emphasizes that even if a record is eligible for a discretionary exemption, the institution may nevertheless decide to disclose it. Review of the institution's exercise of discretion is separate from the IPC's jurisdiction to review whether a record is eligible for an exemption.

[119] An institution must exercise its discretion. This means that in addition to determining whether a discretionary exemption applies, it must also ask whether the record should nevertheless be disclosed.

[120] Also, an institution must not err when exercising its discretion. An institution may be found to have erred where, for example,

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

[121] If an institution fails to exercise its discretion or it does so improperly, this office may send the matter back to the institution for an exercise of discretion based on

proper considerations.<sup>27</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>28</sup>

[122] Relevant to the present appeal, this office has found in previous orders that following considerations are relevant:<sup>29</sup>

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

### ***Representations***

[123] The college submits that it considered the purpose of the *Act* and that exemptions should be limited and specific. The college also submits that it considered that the appellant is the president of a union representing faculty at the college. However, as I understand the arguments the college submits that it has weighed the interests protected by the *Act* over any interest that the union may have in the information. The college also explains that the records remain current. In sum, the college submits that it has exercised its discretion appropriately.

[124] The appellant submits that the request was in good faith and that by making the request, it is acting in accordance with its duty to hold the employer accountable pursuant to the collective agreement. As explained above, the appellant believes that the college should place greater weight on the fact that the requester is its own union and that it has provided assurances that it will not act in a manner that is contrary to

---

<sup>27</sup> Order MO-1573

<sup>28</sup> Section 54(2).

<sup>29</sup> Not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant: Orders P-344 and MO-1573.

the college's interests.

***Finding***

[125] For the following reasons, I find that the college exercised its discretion in accordance with the *Act* and I uphold it.

[126] The college took into account relevant considerations and there is no evidence before me that suggests any bad faith or that it took into account improper considerations.

[127] I have considered carefully whether the college ought to have or did in fact consider the fact that the appellant is its own union. Having reviewed the representations exchanged in this appeal, I am satisfied that the college has considered and weighed this factor. Although it was not relevant to the issues under the *Act*, the college responded to the appellant's position about how it interprets its own obligations under the collective agreement. Although not summarized in this order, these positions were shared with the appellant.

[128] As is clear, the college and the appellant union disagree with each other about the college's disclosure obligations under the collective agreement. Although I am not empowered to adjudicate these differences, I am satisfied that the college considered the issues and the considerations urged by the union.

**ORDER:**

1. Except for the information referred to in order provision 2, I uphold the college's decision to deny access to the records on the basis of section 18(1) of the *Act*.
2. I order the college to disclose to the appellant: the invoices; all but page 5 of Report 2; and, all but page 3 of Report 5 by **July 5, 2021** and not before **June 28, 2021**.
3. In order to verify compliance with order provision 2, I reserve the right to require the college to provide the IPC with a copy of the records sent to the appellant.

Original signed by: \_\_\_\_\_

Valerie Jepson  
Adjudicator

\_\_\_\_\_ May 28, 2021