

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4358

Appeal PA20-00139

Fanshawe College of Applied Arts and Technology

February 28, 2023

Summary: Fanshawe College of Applied Arts and Technology (the college), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for various records related to the Canadian Centre for Product Validation, a testing facility of the college. In response to the request, the college identified numerous records, many of which it disclosed in full or in part. This order resolves an appeal from the college's decision to claim the exclusions at sections 65(6)3 (labour or employment matters), 65(8.1)(a) (research exclusion), the mandatory exemption at section 17(1) (third party information), and the discretionary exemptions at sections 15(a) and (c) (relations with other governments), 18(1)(c) (economic and other interests), and 19 (solicitor-client privilege). The adjudicator upholds the college's access decision, in part, and orders disclosure of the non-exempt information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 15(a), 15(b), 17(1)(b), 17(3), 18(1)(c), 19(a), 21(1), 65(6)3, 65(7), and 65(8.1)(a).

Orders Considered: Orders P-1236, PO-3540-F, PO-3893-I and PO-4076.

OVERVIEW:

[1] The Canadian Centre for Product Validation at Fanshawe College is a prototyping and test facility. Fanshawe College of Applied Arts and Technology (the college), received the following request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*, or the *Act*):

1. Minutes of all CCPV [Canadian Centre for Product Validation] board meetings
2. All CCPV financial reports and any other documentation or presentations concerning CCPV or the Canadian Centre for Product Validation to the Fanshawe College Board of Governors since January 2014
3. All email communications since July 1, 2017 between [named individual] and [named individual] Vice-President, Corporate Strategy and Business Development which refers to CCPV or the Canadian Centre for Product Validation.
4. All email communications since July 1, 2017 between [named individual] and [named individual] Vice-President, Corporate Strategy and Business Development which refers to CCPV or the Canadian Centre for Product Validation

[2] In response to the request, the college issued a decision granting partial access to the records responsive to the request. The college withheld information under a number of discretionary exemptions.¹

[3] The requester (now the appellant) appealed the college's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. During the course of mediation, the college issued a revised decision granting further access to some of the previously withheld information. The college withheld information under previously claimed discretionary exemptions, as well as the mandatory exemption at section 21(1) (personal privacy) and the exclusion at section 65(6) (labour relations and employment) of the *Act*. The appellant advised the mediator that they wish to pursue access to some of the remaining withheld information.²

[5] Since no further mediation was possible, this appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] The adjudicator initially assigned to this appeal began a written inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the college. After providing written representations in response, the college issued a revised access decision, and subsequently provided the adjudicator with further representations. The following issues were claimed and addressed in the various sets of representations from the college:

- the exclusions at sections 65(6) (employment or labour relations) and 65(8.1)(a) (research exclusion) of the *Act*;

¹ Some of the exemptions initially claimed are no longer issue.

² During mediation, the appellant also raised the issue of reasonable search in relation to a number of attachments to emails, but this issue was later resolved when the college later disclosed them. The college advised that the attachments had been inadvertently omitted from disclosure before.

- the mandatory exemptions at sections 17(1) (third party information) and 21(1) (personal privacy); and
- the discretionary exemptions at sections 15 (relations with other governments), 18(1)(c) (economic or other interests), and 19 (solicitor-client privilege).³

[7] The appellant did not provide representations in response to any of the college's representations.

[8] Several affected parties were notified of the appeal, and were asked for representations about disclosure of records in which they may have an interest. One affected party advised had no objection to disclosure, another responded with written representations opposing disclosure, and the remaining advised that they took no position and/or they would not provide representations, or did not respond. The adjudicator subsequently invited a response from the appellant, but did not receive representations.⁴

[9] The appeal was transferred to me to continue its adjudication. On my review of the file, I determined that I did not need to hear from the parties further before making my decision.

[10] For the reasons that follow, I uphold the college's decisions, in part. I order the college to disclose the records (or partial records) that I have found not to be exempt under the *Act*.

RECORDS:

[11] Based on the indices of records provided to the appellant, and the college's representations, the records at issue are letters or emails (some with attachments), totalling hundreds of pages, withheld in full or in part. They are set out in the appendix to this order. The college is encouraged, in future, to do as thorough research as possible at the outset in response to an access request, and to carefully consider any claimed exclusions and exemptions. Discovering additional records and claiming additional exclusions or exemptions during the adjudication stage, as occurred here, adds unnecessary delay and complexity to the appeal.

³ The college also claimed in passing that some information in certain records was not responsive to the request, but did not identify those portions. Given my findings in this order, it is not necessary to address this. Similarly, I do not discuss section 18(1)(e), given other findings in this order.

⁴ During mediation, the appellant provided their views about the remaining records at issue (at the time) and the college's claim in writing to the mediator, in an unredacted document on file. During the inquiry, the appellant was provided with a full copy of the college's initial representations, and a copy of the non-confidential portions of the college's subsequent representations and the non-confidential portions of an affected party's representations. Portions of the representations were withheld under *Practice Direction 7* of the IPC's *Code of Procedure*, which deals with the sharing of representations.

ISSUES:

- A. Does section 65(6)3 of the *Act* (labour and employment matters) apply to exclude certain records from the *Act*?
- B. Does the section 65(8.1)(a) of the *Act* (research) apply to exclude portions of a CCPV proposal from the *Act*?
- C. Does the discretionary exemption at section 18(1)(c) for economic and other interests of the institution apply to the records?
- D. Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply?
- E. Does the mandatory exemption at section 17(1) for third party information apply to the records?
- F. Does the discretionary exemption at section 15 for information received from other governments apply to the records?
- G. Did the college exercise its discretion under sections 15, 18, and 19? If so, should the IPC uphold the exercise of discretion?
- H. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

DISCUSSION:

Background information

[12] The college provided an affidavit from its Vice President of Corporate Strategy and Business Development (the VP), which includes background information that I will summarize below, taken from this affidavit, to assist with better understanding the context of the records at issue.

The CCPV and its relationship to the college

[13] The college is a publicly funded post-secondary educational institution. It operates based on government funding with respect to domestic student programs.

[14] The Canadian Centre for Product Validation (the CCPV) is not funded by student tuition. Through the CCPV, the college competes with other private and public sector organizations in the product testing business. The CCPV's purpose is to create economic value and provide economic and non-economic returns to the college. As a result, the college sees CCPV's ability to offer a competitive service to the marketplace is essential,

and its ability to guarantee the confidentiality of client and business information is critical to CCPV's survival.⁵

[15] Product testing is described as a process that provides independent validation of product qualities and attributes for clients. In some circumstances, independent product testing can be used to determine if a product satisfies a regulatory requirement.

[16] There has been a change in governance that was the result of business conditions and CCPV's lack of profitability. In 2020, the CCPV was officially wound down as an arms' length subsidiary of the college, and it is now a direct operating unit within the college's Advance Business and Industry Solutions Office. As part of the change in the CCPV's structure and governance, the college engaged in confidential discussions with various levels of government.

The CCPV's shared interest in confidentiality with its clients

[17] According to the college, the CCPV is engaged in a highly competitive business where confidentiality of client and business information is critically important if it is going to be successful. The CCPV and its clients are described as having a shared interest in ensuring that client information is held in the strictest of confidence. The affidavit notes that this has not changed with the change in governance because reputable independent product testing facilities rely on their reputation in the marketplace as a valuable corporate asset.

[18] Confidentiality is described as a critical part of the CCPV's ability to compete and survive in the marketplace: clients provide the CCPV with confidential information about their products, and the CCPV may also provide new and confidential information to clients about their products, as a result of testing. Some clients test their products as part of patent applications or, in the case of start-ups, for financing and going to market. Many products being tested are in the developmental stage, and are not available in the marketplace, so rival companies cannot access the product for study or comparison. Any information which competitors could obtain through the product testing process would provide an unfair competitive advantage to the CCPV's client's competitors. Based on the CCPV's confidentiality obligations to its clients and the inherent confidential nature of its business, the VP states that the CCPV's sponsors, clients, and potential clients expect the CCPV to maintain the confidentiality of these records.

[19] Furthermore, the CCPV values the confidentiality of other types of commercial information to attract business to the CCPV, including: its price offerings, discounting business strategies, sales and sales development strategies, potential clients and

⁵ The affidavit also explains that CCPV started operations in 2015, as an arms' length company under the *Ontario Business Corporations Act* company, as an arms' length subsidiary of the college. According to the affidavit, CCPV received grants, sponsorship and other forms of consideration from various levels of government.

strategies to secure business from new clients, joint venture possibilities, technical developments, client needs' analysis and profit/loss information. The VP explains that he does not want CCPV's competitors to have this information because it would allow them to optimize their competitive position (through, for example, price and discount adjustments), but the CCPV would not have access to similar information of its commercial competitors to do the same.

[20] The VP notes that the CCPV treats all of the records at issue as confidential, keeping them secure and accessible only to the responsible CCPV employees; these records are not accessible to the college's senior executive team, or a wider group of the college's employees.

[21] In this context, non-disclosure agreements are a common feature of CCPV's business relationships with its client.

[22] Since the CCPV is a federally approved controlled goods facility, it can test products in highly sensitive and confidential sectors, like the defence industry. The CCPV performs a significant amount of testing on products for the military, providing about half of its revenue. As a result, the CCPV's ability to guarantee of confidentiality is said to be critically important to being able to ability to test products for the military.

[23] The affidavit also indicates that disclosure will affect the CCPV's ability to obtain the best possible outcome in future negotiations, as the information in the records at issue is relevant to negotiations with clients and potential clients.

[24] To one extent or another, these types of concerns are repeated in the college's representations about sections 15, 17(1), and 18, so I will only briefly set them out in the discussion of those issues below.

Issue A: Does section 65(6)3 of the *Act* (labour and employment matters) apply to exclude certain records from the *Act*?

[25] The college claims the exclusion at section 65(6)3 over two attachments to record EM-244. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.⁶ Here, the college withheld an attachment named "Fanshawe-CCPV final report 070918" in full, and disclosed portions of an attachment named "Ideal State Governance Model."⁷ For the reasons that follow, I uphold the college's decision that the information withheld is excluded from the scope of the *Act*.

[26] Section 65(6) of the *Act* excludes certain records held by an institution that relate

⁶ Order PO-2639.

⁷ Determining whether section 65(6)3 applies involves considering the record as a whole (see, for example, Orders M-352, PO-3642, MO-3798-I, MO-3927 and MO-3947), so I have considered whether the attachment, as a whole, is excluded from the scope of the *Act*.

to labour relations or employment matters.

[27] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.⁸

[28] Section 65(6)3 states:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest[.]

[29] If section 65(6) applies to the record, and none of the exceptions found in section 65(7) applies, the record is excluded from the scope of the *Act*.

[30] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.⁹

What types of records are covered by this exclusion?

[31] The type of records excluded from the *Act* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.¹⁰

"In relation to"

[32] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.¹¹

[33] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures

⁸ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

⁹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.

¹⁰ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)." Section 65(6) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions (*Ministry of Correctional Services, supra*).

¹¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.¹²

"Labour relations"

[34] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer- employee relationships.¹³

Section 65(6)3: labour relations or employment-related matters in which the institution has an interest

[35] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use 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.

The college's representations

The "Fanshawe-CCPV final report 070918"

[36] The college states that this report was prepared by a third party for the college's solicitors. It states that the report was collected, prepared, maintained and used in a number of meetings, consultations, discussions and communications regarding the operations of CCPV and the actions of its employees. The college explains that the report was obtained due to its interest, as an employer, in its employees' work performance and the value of their contributions as employees – and that there was an investigation relating to these matters. In its confidential representations, the college described the circumstances regarding the investigation in more detail.

The "Ideal State Governance Model"

[37] The college states that it prepared, maintained and used this record for the college's Board of Governors Subsidiaries Governance Task Force's meeting, and discussions leading up to it. It says that portions of the report relate to the college's

¹² Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

¹³ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

legal position regarding one of the bargaining agents who represents some college employees. The college and this bargaining agent are parties to a collective agreement, and the college considered issues that could result in a grievance under that agreement, with respect to the college's employees. In its confidential representations, the college provides other details about this matter.

[38] The college submits that none of the exceptions at section 65(7) apply to either of the records withheld under section 65(6)3.

Analysis/findings

[39] Based on my review of the two records withheld under section 65(6)3 and the college's representations, I find that each record is excluded from the scope of the *Act* under section 65(6)3. I find that both records were prepared, maintained and/or used by the college, or on its behalf, in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. Since the records relate to its employees' work performance and a collective agreement governing its employees, respectively, I find that these matters inherently involve the college's interest as an employer. Therefore, the records each meet the three-part test for section 65(6)3.¹⁴ As a result, I will not consider the college's alternate claims over the information at issue in these records.

Issue B: Does the section 65(8.1)(a) of the *Act* (research) apply to exclude portions of a CCPV proposal from the *Act*?

[40] The college claims section 65(8.1)(a) to portions of a record a specified CCPV proposal, attached to record EM-244. For the reasons that follow, I do not uphold that decision.

[41] Section 65(8.1) of the *Act* excludes certain records relating to research and teaching from the *Act*. As a result, the *Act's* access scheme does not apply to them. The purpose of this provision is to protect academic freedom and competitiveness.¹⁵

[42] Section 65(8.1)(a) states:

¹⁴ Since neither of these records is an agreement or expense account listed in the exception to the exclusion at section 65(7), the exception to the exclusion at section 65(6) does not apply. Section 65(7) states that the *Act* applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

¹⁵ Order PO-2693, *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*, 2018 ONSC 3696.

(8.1) This Act does not apply,

(a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution[.]

[43] Research is "... a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." The research must be able to be linked to specific, identifiable research projects conducted or proposed by a specific faculty member, employee or associate of an educational institution.¹⁶

[44] The research exclusion is to be narrowly construed, and legislative intent must be kept in mind when interpreting the meaning of the word "research" in section 65(8.1)(a). Universities were made subject to the *Act* in 2005 to make them more transparent and accountable to the people of Ontario, but section 65(8.1)(a) protects academic freedom because of the importance of research and innovative study programs in universities.¹⁷

[45] Section 65(8.1) applies where there is "some connection" between the record and the specific, identifiable "research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution."¹⁸

The college's representations

[46] The college only states the following about section 65(8.1) and the CCPV proposal:

The redactions relate to detailed information on research projects at Fanshawe College that are being completed. The information regarding the details of the research projects at Fanshawe [has] been redacted.

Analysis/findings

[47] I find that, through the above brief representations, the college has not established that the CCPV proposal is excluded from the scope of the *Act* by section 65(8.1)(a), nor, for the following reasons, is it evident from the face of the record that the exclusion applies.

[48] A whole-record analysis must be taken to determining whether section 65(8.1)(a) applies to a particular record.¹⁹ In other words, the exclusion cannot apply to

¹⁶ Order PO-2693.

¹⁷ *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*, 2018 ONSC 3696.

¹⁸ Order PO-2942; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

¹⁹ See Orders PO-3713, PO-3893-I, and PO-3943.

only portions of a record.²⁰ I must determine, therefore, whether the CCPV proposal, as a whole, is excluded under section 65(8.1)(a).

[49] In Order PO-3893-I, the IPC accepted that records are excluded under section 65(8.1)(a) when there is "some connection between the actual record and the 'research,'" but not when the whole record was not about research, or when there was only a tangential connection to actual research.²¹

[50] I agree with that reasoning, and I adopt it here.

[51] The college has redacted certain general details about various research projects, but I find that these brief, general descriptions relating to the research projects. While I accept that the CCPV proposal includes information relating to various research projects (including past research projects), I am not persuaded that there is "some connection" between this CCPV proposal as a whole and the actual "research" referenced within the proposal itself. Accordingly, this record is not excluded from the scope of the *Act* under section 65(8.1)(a), and I will consider the college's alternate claim, under section 18(1)(c) over the information that the college withheld in the record, below.

Issue C: Does the discretionary exemption at section 18(1)(c) for economic and other interests of the institution apply to the records?

[52] The college claims that the discretionary exemption at section 18(1)(c) applies to 25 records, in full or in part.²² For the reasons that follow, I agree, in part, but I find that the attachments to record EM-150 are not exempt under section 18(1)(c).

[53] The purpose of section 18 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.²³

[54] Section 18(1)(c) says:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution[.]

²⁰ Although, where a whole record is excluded from the *Act*, an institution is a liberty to disclose it, or portions of it, outside of the scheme of the *Act*.

²¹ See paragraphs 63-65 of Order PO-3893-I.

²² The college also claimed section 18(1)(e) over two records, records 540-1 540-2, which I find are exempt under section 15(a) (see Issue F, below), so I do not consider section 18(1)(e).

²³ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

[55] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.²⁴

[56] Section 18(1)(c) requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.²⁵

[57] An institution resisting disclosure of a record on the basis of section 18(1)(c) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.²⁶

[58] The institution must show that the risk of harm is real and not just a possibility.²⁷ However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.²⁸

[59] 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.²⁹

The college's evidence

[60] The college states that it has invested millions of dollars into the business endeavour that is the CCPV.

[61] It points to its affidavit evidence (which I have summarized above) for further details supporting its representations regarding the highly competitive nature of the business that the CCPV engages in, its business opportunities and negotiations,³⁰ and

²⁴ Orders P-1190 and MO-2233.

²⁵ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

²⁶ Orders MO-2363 and PO-2435.

²⁷ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

²⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

²⁹ Orders MO-2363 and PO-2758.

³⁰ For example, the college submits that public access to confidential pricing information or project offerings is harmful to optimal negotiations because it discourages third parties from making concessions,

the reasons that it considers certain types of information to be competitively sensitive to keep its reputation as a research institute that will maintain the confidentiality of its clients' products or ideas. The college submits that these potential harms apply and that the IPC has recognized them as a legitimate basis for restricting public access to confidential pricing and analogous information. In the circumstances, the college argues that its concerns are valid, and the risk of harm is real, non-speculative, and sufficient to meet the "considerably above a mere possibility" and "somewhat less than a likelihood" standard established by the Supreme Court of Canada.³¹

[62] The college describes most of the records withheld under section 18(1)(c) as a record of the college's internal discussions,³² and generally describes the subject matter of each (for example, internal discussions about commercial activities and sales).

[63] Later in the inquiry, the college stated that it relies on these submissions to fully or partially withhold information in: attachments (a), (c), (d), (e), and (h2) to record EM- 154 (under a revised access decision, issued during the inquiry), an agenda attachment to record EM-244, and the CCPV proposal attached to record EM-244 (already discussed under Issue B).

Analysis/findings

[64] To begin, I find the college's representations and affidavit evidence to be helpful and persuasive evidence about the college's economic/commercial interests in maintaining the confidentiality of most of the emails and attachments withheld under section 18(1)(c), with two exceptions (the attachments to record EM-150). Given the CCPV's purpose and interests, and having reviewed the emails and attachments withheld, I find that disclosure of the information at issue (except for the attachments to record EM-150) would be harmful to the college on the basis of a reasonable expectation of prejudice to the college's economic interests or competitive positions.

[65] I also find that these harms can be inferred from the records themselves.

[66] Record 542-1 is a record for the college's board of directors relating to financial arrangements. I find that disclosure of this record would prejudice the CCPV's economic interests or competitive positions because the financial arrangements described in this record directly relate to the CCPV's ability to competitively attract and retain employees to run the CCPV.

[67] Records EM-131, EM-133, EM-140, EM-142, EM-143, EM-144, EM-145, EM-147, EM-148, EM-151, EM-152, and EM-153 are emails (some with attachments), each of

demonstrates what an institution is willing to give, and unfairly improves the competitive position of the college's competitors at the expense of the college.

³¹ In *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para. 199.

³² These are records EM-131, EM-133, EM-140, EM-142, EM-143, EM-144, EM-147, EM-148, EM-152, EM-153, EM-150, and EM-151.

which relates to the CCPV's commercial opportunities or options and/or other related financial information that I find is related to its competitiveness and economic interests. These records contain detailed information about the CCPV's financial and other economic interests, some of which also contain detailed information about the CCPV's clients or potential clients. I find that disclosure of the latter would reasonably be expected to harm the CCPV's economic or other competitive positions, given the evidence about the CCPV's shared interests in maintaining confidentiality to be and remain competitive.

[68] With respect to the attachments to record EM-154, from the attachment names in the cover email that was disclosed to the appellant (and the disclosed portions of these records), it is clear that these attachments are reports or other documents discussing revenue, sales forecasts, certification, re-organization of the business, and similar information relating to the CCPV. On my review of the information at issue in these attachments, I find that by their nature, they are intrinsically related to the CCPV's interests as a business, and find that disclosure of the information within them would reasonably be expected to prejudice the college's economic interests and competitive positions. For the same reasons, I find that the information at issue in the agenda and CCPV proposal which were attached to record EM-244 as "Foundational CCPV Reading Materials," are exempt under section 18(1)(c).

[69] While I accept that record EM-150 itself is also exempt under section 18(1)(c) for the same reasons described above, I find that its attachments are not. They are the cover letter to an amending agreement (a contract) between the college and a federal government agency, as well as the amending agreement itself. Based on the evidence before me, I am not persuaded that section 18(1)(c) exempts these records from disclosure. Without sufficient evidence that disclosure of the cover letter could reasonably be expected to prejudice the economic interests or competitive position of the college, I will order the cover letter disclosed.

[70] In conclusion, I uphold the college's decision to withhold the above-noted information at issue under section 18(1)(c), but I do not uphold its decision to withhold the attachments to record EM-150. Since the college has claimed the mandatory exemption at section 17(1)(b) over the amending agreement itself, I will discuss that record again, under Issue E.

Issue D: Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply?

[71] The college withheld three records (correspondence), in full or in part, under section 19. For the following reasons, I uphold that decision.

[72] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states, in part:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege[.]

[73] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up two “branches.” An institution must establish that at least one branch applies.

[74] Here, the college claims branch one applies.

Common law solicitor-client communication privilege

[75] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.³³ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.³⁴ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.³⁵

[76] The privilege may also apply to the lawyer’s working papers directly related to seeking, formulating or giving legal advice.³⁶

[77] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.³⁷ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.³⁸

[78] The college describes the information at issue in records 537-1 and 537-2 as legal advice received by the college from its solicitor. It describes record EM-06 as communication from the college to its solicitor, requesting legal advice.

[79] Having reviewed the records, I agree with the college’s characterizations of the records.

[80] Therefore, I accept the college’s submission, and I find, that these records fall squarely within branch one of section 19 because they are communications through which legal advice is sought and provided. As there is no evidence of a waiver of privilege, this finding stands.

³³ Orders PO-2441, MO-2166 and MO-1925.

³⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

³⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

³⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

³⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

Issue E: Does the mandatory exemption at section 17(1) for third party information apply to the records?

[81] For the reasons that follow, I find that record EM-122 is exempt from disclosure under section 17(1)(b), but there is insufficient evidence to conclude records EM-126, EM-127, attachment (g) to record EM-154, and three specified attachments to record EM- 244 are exempt under section 17(1) (one of which is the same as the aforementioned contract attached to record EM-150).

[82] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,³⁹ where specific harms can reasonably be expected to result from its disclosure.⁴⁰

[83] Section 17(1) states, in part:

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, if the disclosure could reasonably be expected to,

(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[.]

[84] For section 17(1) to apply, the party arguing against disclosure 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;
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.

[85] In this appeal, the college opposes disclosure to the records it withheld under section 17(1). The affected party involved with record EM-122 opposes disclosure of that record. The affected party involved with attachment (g) of record EM-154 and three specified attachments to record EM-244 advised the IPC that it has no objections to disclosure. The affected party involved with record EM-126 indicated that it would

³⁹ *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.*).

⁴⁰ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

not provide representations, and the affected party involved with record EM-127 did not respond to the IPC invitations to provide representations.

[86] Due to my finding that only record EM-122 is exempt under section 17(1), I will discuss the three-part test as it pertains to that record, and only part two of the test regarding the other records.

Part 1 of the section 17(1) test: type of information

[87] The IPC has described the types of information protected under section 17(1) as follows:

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.⁴¹ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁴²

[88] The college and the affected party involved in record EM-122 submit, and I find, that record EM-122 (including its attachments) contains commercial information. This record was generated because the affected party was seeking the college's assistance due to CCTV's expertise on a particular matter, to assist the affected party's competitive position with respect to a certain commercial opportunity. The affected party states, and I accept, that the record contains information about its target customer and commercial opportunity, and various details about business strategy; further details about this were provided in the affected party's confidential representations.

[89] Therefore, based on my review of record EM-122 and its attachments, and the parties' representations, I find that record EM-122 and its attachments meet part one of the test for section 17(1).

Part 2: supplied in confidence

Supplied

[90] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁴³

[91] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate

⁴¹ Order PO-2010.

⁴² Order P-1621.

⁴³ Order MO-1706.

inferences with respect to information supplied by a third party.⁴⁴

[92] The contents of a contract between an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). Contractual provisions are generally treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.⁴⁵

[93] There are two exceptions to this general rule:

- **the “inferred disclosure” exception.** This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.⁴⁶
- **the “immutability” exception.** This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.⁴⁷

In confidence

[94] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an *objective* basis.⁴⁸

[95] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and

⁴⁴ Orders PO-2020 and PO-2043.

⁴⁵ 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*).

⁴⁶ Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

⁴⁷ *Miller Transit*, cited above at para. 34.

⁴⁸ Order PO-2020.

- was prepared for a purpose that would not entail disclosure.⁴⁹

The three specified attachments to record EM-244, and the contract attached to record EM-150

[96] The disclosed email itself (record EM-244) and the index of records indicate right in the attachments' names that the three attachments withheld under section 17(1)(b) are agreements. Two of these agreements are amendment agreements, and one is a contribution agreement. One of these agreements is the aforementioned contract attached to record EM-150, so my analysis below applies equally to it.

[97] Based on my review of these agreements, I find that they are contracts involving the college and an affected party.

[98] During the inquiry, this affected party advised the IPC that it does not object to disclosure. Although this may appear to engage section 17(3) of the *Act*,⁵⁰ which would permit disclosure, it does not here. As noted in Final Order PO-3540-F, the effect of section 17(3) is to convert the mandatory exemption at section 17(1) into a discretionary one. However, that is that is not the case here because I find, below, that section 17(1) does not apply to these records to begin with.⁵¹

[99] The college's representations do not address the long-standing general rule about contracts, or its two exceptions.⁵²

[100] Based on my review of the contracts and the college's representations, I find insufficient basis from departing from the general rule that contracts are not "supplied" within the meaning of section 17(1), in relation to these three contracts. As a result, the information at issue in them does not meet part two of the test, and is not exempt under section 17(1) of the *Act* (since all three parts of the test must be met). I will discuss the college's alternate claim over this information under Issue F.

Attachment (g) to record EM-154

[101] The affected party involved with this attachment is the same one involved with the contracts discussed above. In Order P-1236, the adjudicator similarly had before her the consent of an affected party, and therefore found it difficult to conclude that the information at issue had been provided in confidence, either explicitly or implicitly. I agree with that reasoning, and adopt it here. Given the affected party's lack of objection to disclosure, I find that there is insufficient evidence to conclude that the "in

⁴⁹ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

⁵⁰ Section 17(3) of the *Act* says: "A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure."

⁵¹ See Order PO-3540-F, para. 19.

⁵² Rather, the college states that the exemption was applied to these attachments because the affected party asked that would be done, during the college's third party notification process.

confidence" element of part two is met. As a result, the information at issue in this attachment cannot be exempt under section 17(1) and it is not necessary to consider section 17(3) for it. I will discuss the college's alternate claim over it under Issue F.

Records EM-126 and EM127

[102] Records EM-126 and EM-127 are email exchanges involving a different affected party in each record. One of these affected parties advised the IPC that it would not provide representations in the inquiry; the other did not respond to the IPC. The college made general submissions that the records were supplied in confidence, highlighting its shared interest in confidentiality with the parties that it does business with, as noted in the VP's affidavit. Regarding records EM-126 and EM-127 specifically, it states that these are records "containing confidential information concerning a third party business."

[103] Without representations from the affected parties, there is limited objective evidence that any supply of information was "in confidence."

[104] Having reviewed records EM-126 and EM-127, I find that they do not indicate an explicit objective expectation of confidentiality. I also find that there is insufficient evidence to conclude that there was an implicit objective expectation of confidentiality either, given the nature of the subject matter of each, on the evidence before me.

[105] As a result, I find that these records do not meet the "in confidence" element of part two of the test, and cannot be exempt under section 17(1) of the *Act*. Since no other exemptions were claimed over these records, I will order them disclosed.

Record EM-122

[106] The college and the relevant affected party submit, and I find, that this record was supplied in confidence to the college. As noted, this record was generated by the affected party and presented to the college to seek the CCTV's assistance with a commercial opportunity for the affected party. It contains details relating to the affected party's commercial interests and competitive opportunity, as summarized under part one of the test. In the circumstances, I am satisfied that the affected party's supply of the record was made to the college in confidence. Therefore, record EM122 meets part two of the test.

Part 3: harms

Could reasonably be expected to

[107] Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not

assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁵³

[108] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁵⁴ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁵⁵

[109] In my view, the circumstances surrounding record EM-122 (and its attachments) are analogous (though not identical) to those in the appeal resolved by Order PO-4076, where I found that the schedules to two contracts were exempt under section 17(1)(b).⁵⁶ Those schedules contained the details of the for-profit third party's idea that the third party asked (and paid) the institution to test. In Order PO-4076, I found the background information provided by the institution helpful in explaining how part three of the test was met. In addition, I accepted that information about the purpose and subject matter of what a for-profit company is studying is a valuable form of intellectual property, and that the pillar of the relationship between a testing facility such as the institution's and third parties seeking the institution's services in relation to their confidential and/or proprietary information, is trust. As a result, I stated the following:

The university submits, and I accept, that if a third party were to no longer supply similar information to it through such commercial relationships, this would result in a loss of revenue to the university, which would deplete the resources available for the university to perform other research. The university submits, and I accept, that the loss of such work would reasonably be expected to also result in the loss of opportunity to perform tests, to improve testing procedures, and to gain valuable insights into subject matter being tested. In addition, the university submits, and I accept, that it is in the public interest that similar information continue to be supplied to the university.

[110] In my view, this reasoning is applicable to record EM-122, and I adopt it here.

[111] The affected party involved in record EM-122 provided both confidential and non-confidential representations in support of its position opposing disclosure of record EM-122. I found the affected party's confidential representations to be persuasive with

⁵³ Orders MO-2363 and PO-2435.

⁵⁴ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁵⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

⁵⁶ The college claims section 17(1) over record EM-122, without specifying whether it meant section(s) 17(1)(a) through 17(1)(d). The affected party claims section 17(a) applies. Given my finding that section 17(1)(b) applies, it is not necessary to also consider whether sections 17(1)(a), (c), and/or (d) apply.

respect to part three of the test, particularly in light of the nature of both its business (which I cannot disclose) and the college's business (through the CCVP). Considering the affected party's evidence, and the college's affidavit evidence regarding the CCPV's nature and purpose, and related confidentiality interests vis-à-vis its client's confidential information, I find that if record EM-122 and its attachments were to be disclosed, it would be reasonable to expect that a third party would no longer supply similar information to the college, this would result in a loss of revenue to the college and the loss of opportunities to gain or retain similar clients. Given the CCPV's purpose and the potential for providing this publicly funded college with sources of revenue in addition to tax dollars and tuition, I also find that it is in the public interest that similar information continue to be supplied to the college. Therefore, I find that record EM-122 and its attachments meet part three of the test.

[112] In conclusion, I uphold the college's section 17(1) claim over record EM-122 and its attachments, but not for the other records over which it claimed section 17(1).

Issue F: Does the discretionary exemption at section 15 for information received from other governments apply to the records?

[113] For the reasons that follow, I partially uphold the college's decision to withhold information (in full or in part) under a section 15 exemption.

[114] Section 15 acknowledges that the Ontario government creates and receives records in the course of its relations with other governments. Its purpose is to protect these working relationships between governments,⁵⁷ and to allow the Ontario government to receive information in confidence, building the trust required to conduct affairs of mutual concern between governments.⁵⁸

[115] Section 15 says:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution; [or]

(b) reveal information received in confidence from another government or its agencies by an institution

(c) reveal information received in confidence from an international organization of states or a body thereof by an institution

⁵⁷ Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

⁵⁸ Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

and shall not disclose any such record without the prior approval of the Executive Council.

"Could reasonably be expected to"

[116] The exemptions found in section 15 apply where disclosure of the record "could reasonably be expected to" lead to one of the harms specified in paragraphs (a) to (c).

[117] Parties resisting disclosure of a record cannot simply assert that the harms under section 15 are obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 15 are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁵⁹

[118] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁶⁰ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁶¹

[119] Sections 15(a), 15(b), and 15(c) are three exemptions. I note this because the college specifically claimed section 15(b) over portions of attachment (g) to record EM-154 and the three contracts attached to record EM-244, but simply listed "section 15" as the basis of withholding records 540-1, 540-2, EM-114, EM-115, EM-116, and EM-117. On my review of the information at issue, it does not appear that section 15(c) could be relevant, but I will consider whether they are exempt under sections 15(a) or 15(b), below.

Prejudice to intergovernmental relations - section 15(a)

[120] For section 15(a) to apply, the institution must show that disclosure of the record could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution.⁶²

[121] The college states, and I find, that records 540-1, 540-2, EM-114, EM-115, EM-116, and EM-117 contain information exchanged between the college and the Province of Ontario, which is a "government" for the purpose of section 15(a). I find that the federal agency involved in the attachments to records EM-154 and EM-244 is also a "government" for the purpose of section 15(a).

⁵⁹ Orders MO-2363 and PO-2435.

⁶⁰ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁶¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

⁶² See Orders P-270, PO-2247, PO-2369-F, PO-2715 and PO-2734.

Records 540-1 and 540-2

[122] The VP's affidavit specifically highlights harms from disclosure of records relating to the business affairs of the CCPV and the college, such as records 540-1 and 540-2.

[123] The college describes record 540-1 as a record of the college's in-camera deliberations and resolution relating to a matter which arose between the Province of Ontario and the college. It describes record 540-2 as correspondence from the college to the Province, which, in part, captures discussions between the college and the Province. Based on my review of these records, I agree with this characterization of them.

[124] The IPC asked the ministry involved in records 540-1 and 540-2 for representations, but was advised that the ministry is not taking a position, and therefore, is not submitting representations. While this is relevant, it is not determinative of whether section 15(a) applies to records 540-1 and 540-2.

[125] The evidence before me, including the affidavit evidence, persuades me to conclude that the college's commercial interests are related to its intergovernmental interests. Considering this, and the contents of records 540-1 and 540-2, I am satisfied that disclosure of these records could reasonably be expected to prejudice the conduct of relations between the college and another government. Therefore, I find that these two records are exempt under section 15(a) of the *Act*.

Record EM-114

[126] This record is an email, which the college describes as correspondence from it to an agency of the Province. It says the email captures, in part, discussions between the college and the Province. The same ministry involved with records 540-1 and 540-2 is involved with this record.

[127] From my review of the email, in light of the college's commercial interests, which are tied to its intergovernmental relations, I am satisfied that disclosure of this email would be prejudicial to the college's intergovernmental relations with the agency of the Province that was the recipient of the email and/or to the Province, due to the nature of its contents. As a result, I find that this email is exempt under section 15(a).

Records EM-115, EM-116, and EM-117

[128] The college describes records EM-115, EM-116, and EM-177 as ones created by the college to describe its communication with an agency of the federal government, and which capture discussions between the college and the federal agency, in part.

[129] The federal agency advised the IPC that it does not object to disclosure.

[130] Considering the affected party's position, the contents of the emails themselves,

the college's limited representations about them, and the college's intermingled commercial and intergovernmental interests, I am not persuaded that there is sufficient evidence that disclosure of these emails would reasonably be expected to prejudice intergovernmental relations as contemplated by section 15(a).

[131] I will now consider whether these three emails are exempt under section 15(b), along with the records that the college specifically claimed that exemption over.

Records Reveal information received from another government - section 15(b)

[132] For section 15(b) to apply, the institution must show that disclosure of the record could reasonably be expected to reveal information the institution received in confidence⁶³ from another government or its agencies.⁶⁴

[133] The disclosure of a record "reveals" information received from another government if it would permit the drawing of accurate inferences with respect to that information.⁶⁵

[134] The section 15(b) exemption is meant to protect the interests of the organization that *provided* the information, not the institution that received it. Whether the provider of the information is concerned about its disclosure or not in a specific case can be important in deciding whether the information was received "in confidence."⁶⁶

[135] Since the federal agency involved in records EM-115, EM-116, EM-117, attachment (g) to record EM-154 and the three contracts attached to record EM-244 does not object to disclosure,⁶⁷ I find that section 15(b) does not apply to the information at issue in these records. Since these records are not exempt under section 15(b) as claimed (or under section 17(1), as discussed in Issue E), and no other exemptions were claimed, I will order the college to disclose the information at issue in these records to the appellant.

Issue G: Did the institution exercise its discretion under sections 15, 18, and 19? If so, should the IPC uphold the exercise of discretion?

[136] The sections 15, 18, and 19 exemptions are discretionary (the institution "may"

⁶³ See Order MO-1896.

⁶⁴ See Orders P-210, PO-2569, PO-2647, PO-2666 and PO-2751.

⁶⁵ Order P-1552.

⁶⁶ Orders M-844 and MO-2032-F.

⁶⁷ Regarding as it did for its claim under section 17(1), the college indicated that section 15(b) was applied to these records because the third party asked for it to be applied at the notification stage. The college also states that the redactions under the federal access to information law "appear to be reasonable under FIPPA and the corresponding FIPPA redactions were applied." However, I do not have the legal authority to determine whether the federal law applies to these records, and the issue before me is whether the provincial law applies.

refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[137] In addition, the IPC 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, or it fails to take into account relevant considerations.

[138] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶⁸ The IPC cannot, however, substitute its own discretion for that of the institution.⁶⁹

What considerations are relevant to the exercise of discretion?

[139] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant.⁷⁰

[140] Here, the college states, and I accept, that it took the following considerations into account:

- that generally information should be made available
- that exemptions should be limited and specific in their application
- the interests which the particular exemptions seek to protect
- the fact that the requester is an organization rather than an individual, and is therefore not seeking personal information, and
- the fact that the information is very sensitive to the college.

[141] I find that all of these considerations are relevant in the circumstances.

[142] The appellant provided no representations, and in the circumstances, I find that the college did not exercise its discretion in bad faith or for an improper purpose, or having taken into account any irrelevant considerations.

[143] Accordingly, where I have found that any of the exemptions at sections 15, 18, and 19 apply, those findings stand.

⁶⁸ Order MO-1573.

⁶⁹ Section 54(2).

⁷⁰ Orders P-344 and MO-1573.

Issue H: Do the records contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?

[144] The college claimed the personal privacy exemption at section 21(1), in part, over the email addresses and names of various employees found in four emails.⁷¹ However, as I explain below, that is not “personal information,” as that term is defined in the *Act*, so the personal privacy exemption cannot apply to them.

[145] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.”⁷² Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be “about” the individual.⁷³

[146] Sections 2(3) and 2(4) exclude some information from the definition of “personal information,” and say:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[147] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.⁷⁴

[148] The college states that it withheld the name and email address of various employees of a third party supplier to the college and the name and email address of a government employee, submitting that this is “personal information.”

[149] Based on my review of the information withheld in these records, I confirm that it consists of the names and email addresses of various identifiable individuals. I find that the context in which this information appears is a business, profession, or official context, and is excluded from the definition of “personal information” under sections 2(3) and/or 2(4) of the *Act*. I find that, in the circumstances, there is nothing inherently

⁷¹ Records EM-112, EM-244, EM-251, and EM-257.

⁷² “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps (see the definition of “record” in section 2(1) of the *Act*).

⁷³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁷⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

personal about this information such that the names or email addresses withheld would reveal something of a personal nature about any of the individuals involved.

[150] Since these records do not contain “personal information,” the mandatory personal privacy exemption at section 21(1) of the *Act* cannot apply to them. As no other exemptions have been claimed over this information, I will order it disclosed to the appellant.

ORDER:

1. I uphold the college’s decision, in part, and dismiss those aspects of the appeal.
2. I order the college to disclose to the information at issue in the following records to the appellant by **April 4, 2023** but no earlier than **March 30, 2023**: the names and email addresses withheld in records EM-112, EM-244, EM-251, and EM257; records EM-115, EM-116, EM-117, EM-126 and EM-127; the attachments to record EM-150; attachment (g) to record EM-154; and the three contracts attached to record EM-244.
3. I reserve a right the right to require the college to provide me with a copy of the records disclose pursuant to provision 2.

Original signed by: _____
Marian Sami
Adjudicator

February 28, 2023 _____

APPENDIX: RECORDS AT ISSUE

Record(s)	Section(s) of FIPPA
542-1, EM-131, EM-133, EM-140, EM-142, EM-143, EM-144, EM-145, EM-147, EM-148, EM-150, EM-151, EM-152, and EM-153, EM-154 (regarding attachments (a), (c) (d), (e), and (h2), and EM-251 (regarding attachment Fanshawe CCPV – Preliminary)	Section 18(1)(c)
EM-244 (regarding attachment “Fanshawe – CCPV final report 070918”)	sections 65(6)3
EM-244 (regarding attachment “Ideal State Governance Model”)	sections 65(6)3, 15, 18(1), and 19
EM-244 (regarding attachment “037-040 CCPV proposal”)	sections 65(8.1)(a), 18(1)(c), and 21(1)
EM-112, EM-244, EM-251, and EM-257	section 21(1)
EM-114, EM-115, EM-116, EM-117	section 15
EM-122, EM-126, and EM-127	section 17(1)
537-1, EM-06	section 19
537-2	sections 15 and 19
540-1 and 540-2	sections 15 and 18(1)(e)
EM-154 (regarding attachment (g) and EM-244 (regarding three attachments: Amendment agreement, Amending agreement #3, and CCPV Contribution Agreement)	sections 15(b) and 17(1)(b)
EM-244 (regarding attachment 0-CCPV 1 Agenda)	sections 15(1)(b), 17(1)(b), and 18(1)(c)