Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3620

Appeal PA14-480

Lambton College of Applied Arts and Technology

June 16, 2016

Summary: The appellant, a union local representing faculty at a public college, made a request to Lambton College of Applied Arts and Technology (the college) for access to all agreements between the college and a private career college that delivers college programs to international students. The college denied access to five responsive records, in full, on the basis of exemptions at sections 14(1)(f) (right to a fair trial), 17(1)(a) and (c) (third party information), and 18(1)(a) and (c) (economic and other interests). The private career college also claimed the application of sections 17(1)(a) and (c) to the records. A second private career college that has an interest in some of the records consented to disclosure of the information relating to it in the records. In this order, the adjudicator finds that discrete portions of all five records are exempt under section 18(1)(c), and that the public interest override at section 23 does not apply to this information. She rejects the other exemption claims for the remaining information in the records, and orders that it be disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1)(a) and (c), 18(1)(a) and (c), 23.

OVERVIEW:

[1] The appellant is the president of a union local representing faculty at a public college, one of 24 public colleges in Ontario whose faculty is represented by the union as the certified bargaining agent. Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant made a request to Lambton College of Applied Arts and Technology (the college) on behalf of the union for access to all agreements between the college and a named private career college (Affected Party #1) and any of

its affiliates. The agreements relate to the delivery of college programs by Affected Party #1.

[2] The college notified Affected Party #1 of the request in accordance with section 28 of the *Act*. After considering Affected Party #1's views on disclosure, the college issued a decision to withhold access to three responsive records, in their entirety, on the basis of the exemptions at sections 14(1) (law enforcement), 17(1) (third party information) and 18(1) (economic and other interests) of the *Act*.

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

[4] During the mediation stage of the appeal process, Affected Party #1 confirmed it does not consent to disclosure of the records. The college clarified that its section 14 claim is based on section 14(1)(f) of the *Act*, which permits an institution to deny access where disclosure could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication.

[5] During and after the close of mediation, the college identified two additional records as being responsive to the appellant's request. The college issued supplementary decisions to the appellant addressing access to the additional records. In these decisions, the college denied access to the two additional records, in full, on the same bases it claimed to withhold the first three records. The appellant confirmed it wishes to pursue access to all five records.

[6] As mediation did not resolve the issues, the appeal was transferred to the adjudication stage for an inquiry under the *Act*. During my inquiry, I sought and received representations from the college and Affected Party #1, and well as an additional party that is named in the two additional records (the records for which the college issued supplementary decisions). I described this party as Affected Party #2 in the materials issued to the parties during my inquiry.

[7] I received representations from the college, both affected parties and the appellant, which I shared with the parties in accordance with this office's *Code of Procedure* and *Practice Direction 7*. Among other developments, the college in its representations withdrew its reliance on section 14(1)(f) of the *Act*, and consented to the partial disclosure of one of the records. Affected Party #2 consented to disclosure of the information relating to it in the records. Affected Party #1 maintained its objection to disclosing any of the records to the appellant. It also objected to sharing information about some of the records with Affected Party #2.

[8] In this order, I uphold the college's decision in part. I uphold some severances to the records under section 18(1)(c). I order disclosure of other portions of the records that do not qualify for any of the claimed exemptions.

RECORDS:

[9] At issue in this appeal are five records:

- Record 1 is a licence agreement dated January 5, 2011, made between the college, a numbered company and Affected Party #2.
- Record 2 is an undated amendment[1] to Record 1, signed by the college, the numbered company and Affected Party #2.
- Record 3 is a January 9, 2012 amendment to Records 1 and 2, made between the college and the numbered company, now operating as Affected Party #1.
- Record 4 is an October 30, 2012 amendment to Records 1, 2 and 3, made between the college and the numbered company operating as Affected Party #1.
- Record 5 is a November 19, 2013 amendment to Records 1, 2, 3 and 4, made between the college and the numbered company operating as Affected Party #1.[2]

ISSUES:

Preliminary Issue: Does the discretionary exemption at section 19 apply?

A. Does the discretionary exemption at section 18(1)(a) or 18(1)(c) apply to the records? If so, did the college exercise its discretion under section 18?

B. Does the mandatory exemption at section 17(1)(a) or 17(1)(c) apply to the records?

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the applicable exemption(s)?

DISCUSSION:

Background

[10] Some background on the relationship between the college, the numbered company, Affected Party #1 and Affected Party #2, and the nature of the agreements between them, is helpful. The information that follows is taken from the representations

[1] Although Record 2 is undated, Records 3, 4 and 5 refer to Record 2 as an amendment dated May 25, 2011.

[2] For ease of reading, in this order, I refer to both the private career college identified in the appellant's request, and the private corporation that operates the identified private career college as "Affected Party #1." Similarly, I use the term "Affected Party #2" to refer both to a second private corporation, and the private career college operated by that second private corporation. See footnote 3 for more details.

of the college and the appellant, the non-confidential portions of the affected parties' representations, public material available on the college's and affected parties' websites, and publicly-filed court documents.

[11] The college is a publicly funded post-secondary educational institution constituted under the *Ontario Colleges of Applied Arts and Technology Act, 2002*. The college also delivers programs to international students, either directly or through its affiliates. The tuition paid by international students is not subsidized by government funding. The college characterizes its international program as an important entrepreneurial endeavour that allows the college to fund its operation with revenue that is not drawn from public funds.

[12] Affected Party #1 is one of the affiliates that currently delivers the college's programs to international students for a licensing fee paid to the college. The signatories to the agreements comprising Records 3, 4 and 5 are the college and a numbered company, operating as Affected Party #1.

[13] Records 1 and 2 predate Records 3, 4 and 5. The signatories to the agreements comprising Records 1 and 2 are: the college; Affected Party #2; and the same numbered company that is a signatory to the agreements in Records 3, 4 and 5. In Records 1 and 2, the numbered company is identified as operating as Affected Party #2.

[14] The college, Affected Party #1 and Affected Party #2 are currently involved in litigation. In the main suit, the numbered company and Affected Party #1 are suing Affected Party #2 and its directors. The defendants to the main suit have filed a counterclaim against several parties, including the numbered company, various corporations associated with Affected Party #1 and the college.[3] Among the claims made by Affected Party #2 in its countersuit is the allegation that the college and Affected Party #1 entered into a new agreement that is substantially similar to, and that is in breach of, earlier agreements made between the college and Affected Party #2.

[15] In its pleadings, Affected Party #2 states that it had an agreement with Affected Party #1 to assist it in obtaining the appropriate licence to operate a private career college in Toronto. As part of this agreement, Affected Party #2 incorporated the numbered company that is a signatory to all five of the agreements contained in the records. After obtaining the required licence, Affected Party #2 transferred the shares of the numbered company to Affected Party #1 in 2009.

[16] On January 5, 2011, the college, the numbered company and Affected Party #2

[3] The parties named in the pleadings are, among others: the numbered company; the Canadian corporation that operates a private career college; and another Canadian corporation that operates a different private career college. For the sake of convenience, in this discussion about the litigation between the parties, I will refer to the corporations (and their directors) named in the pleadings, as well as the private career colleges operated by the corporations, as "Affected Party #1" or "Affected Party #2" as appropriate. See also footnote 2.

entered into the agreement in Record 1 for the delivery of college programs to international students by Affected Party #2.

[17] Affected Party #2 alleges that at an unknown later date, Affected Party #1 and the college entered into a new agreement, substantially similar to that contained in Record 1, without Affected Party #2. Affected Party #2 claims that the contractual relationship in Record 1 was never terminated, and that the agreements contained in Records 3, 4 and 5 represent a breach of the terms of the original agreement.

[18] In its representations in this appeal, the college takes the position that the agreements in the records reveal its business arrangements from 2011 to 2012 with Affected Party #2, and then, from 2012 to the present, its arrangements with Affected Party #1. In its statement of defence to Affected Party #2's counterclaim, the college takes the position that the agreements in Records 1 and 2 were restricted in their application to the college and the numbered company, notwithstanding that Affected Party #2 is a signatory to these agreements. It takes the position that the agreements in Records 1 and 2 could be altered or amended without involving Affected Party #2, as it has no contractual interest in Records 1 and 2.

[19] Affected Party #1 states that the precise nature of its current business arrangement with the college is one of the issues in the current litigation. According to the college, it has specifically refused to produce Records 3, 4 and 5 to Affected Party #2, and these records are currently the subject of a production dispute in the litigation.

[20] The college has confirmed that the litigation is ongoing at the present date.

Preliminary Issue: Does the discretionary exemption at section 19 of the *Act* apply?

[21] Before addressing the main issues in this appeal, I will address as a preliminary issue the relevance of section 19, as Affected Party #1 alludes to this exemption in its representations.

[22] In support of its section 14(1)(f) and section 17 claims for the records, Affected Party #1 proposes that the records are also subject to solicitor-client privilege. This appears to be based on the argument that the records comprise a licensing arrangement made between it and the college, which was negotiated and prepared by their respective lawyers. Affected Party #1 also refers to the common interest exception to waiver of privilege, on the basis their lawyers had a shared goal of successfully completing the transaction for the benefit of the two parties, the college and Affected Party #1.

[23] I find it unnecessary to consider these arguments, for the following reasons.

[24] First, section 19, the discretionary exemption corresponding to a claim of solicitor-client privilege, was not raised by the college for any of the records. When an affected party claims the application of a discretionary exemption that has not been

claimed by the institution, this office considers whether the affected party is entitled to do so. The general approach taken by this office has been described as follows:

> As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. This result would occur, for example, where release of a record would seriously jeopardize the rights of a third party.[4]

[25] I find this is not one of those rare occasions. The college did not deem section 19 to be applicable to the records. In addition, the college withdrew its reliance on section 14(1)(f), relating to the preservation of the right to a fair trial, which is the basis for Affected Party #1's argument that the litigation head of solicitor-client privilege may apply. I find that Affected Party #1's interest in the records is appropriately addressed under section 17, which it has claimed for all the records at issue in this appeal, and which I will consider below at Issue C.

[26] Moreover, its proposed treatment of contracts as solicitor-client privileged, owing solely to the involvement of lawyers in their drafting, would exempt from the right of access many—if not all—agreements negotiated between institutions and third parties. I find this result inconsistent with this office's interpretation of the section 19 exemption, which considers, on a case-by-case basis, whether conditions attracting solicitor-client communication privilege or litigation privilege are met, including whether there has been waiver or termination of privilege. It would also run counter to the jurisprudence developed by this office, which has been upheld by the courts, supporting a general right of access to information in contracts entered into by government institutions.[5] Such a blanket treatment of agreements would also be contrary to the *Act*'s purpose to provide a right of access to government information in accordance with the principles that information should be available to the public, and that necessary exemptions from the right of access be limited and specific.[6]

[27] I dismiss this aspect of Affected Party #1's appeal.

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[4] Order M-430. See also Orders P-257, M-10 and P-1137.

[5] *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."*), *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*"Miller Transit"*), and many others.

[6] Section 1(a).

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

If so, did the college exercise its discretion under section 18?

[28] The college claims that Record 1 is exempt, in full, under section 18(1)(a), and that parts are also exempt under section 18(1)(c). It also claims section 18(1)(c) applies to parts of Records 2, and to Records 3, 4 and 5 in their entirety.

[29] These sections of the *Act* state:

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

[30] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[7]

[31] I will consider each of the college's claims in turn.

Section 18(1)(a): information that belongs to government

[32] For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

Parties' representations

[33] The college describes Record 1 as an agreement containing information about the college's business arrangements with its affiliate, who is given licence to use college courses and programs under certain conditions and in exchange for certain fees. This includes information about the services the college offered, the quality and other controls required by the college of its affiliate, the allocation of risk between the college and the affiliate, and prices, fees and commissions charged. The college submits that this all qualifies as "commercial information."

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[7] Toronto: Queen's Printer, 1980.

[34] It also submits that the second part of the test is met, because the college paid its former legal counsel to develop the agreement contained in Record 1 as a template for future agreements, and the template is therefore the college's property, amenable to protection under the law of copyright.

[35] The college argues the agreement also has intrinsic or potential monetary value, because the college could sell its template, if it desired, to other publicly-funded colleges and universities who wish to license their courses and programs of study for their own international educational programs. It notes that it paid legal fees to develop the agreement in Record 1, and saved legal fees by subsequently using the agreement as a template for future agreements.

[36] The college also notes that it treats all five records at issue as confidential, and refers to a confidentiality clause contained in Record 1 as well as in all its subsequent licence agreements.

[37] As noted above, Affected Party #2 consents to disclosure of its information in Record 1.

[38] Affected Party #1 supports the college's reliance on section 18(1)(a).

[39] The appellant agrees there is commercial information in Record 1, but argues that Record 1 would also include other information of interest to the public that should be disclosed in the interests of public accountability.

[40] It also disputes that the information in the record can "belong to" the college or to the government, or have potential or actual monetary value. It submits that information in the record relating to program standards (set by the Ministry of Training, Colleges and Universities), and about how the college's affiliate adheres to these standards, cannot be said to belong to the college. It also argues that information about public colleges, such as program descriptions, financial information, staffing arrangements, workload, program measurements and program quality, are accessible to the public on the internet, and that this type of information about how the college's programs are run by its affiliate does not have monetary value.

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

[41] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[8]

[42] This exemption is arguably broader than section 18(1)(a) in that it does not

[8] Orders P-1190 and MO-2233.

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.[9]

[43] For this exemption to apply, the institution must provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[10]

[44] 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.[11]

Parties' representations

[45] The college submits that disclosure of certain portions of Records 1 and 2, and of any part of Records 3, 4 and 5, could reasonably be expected to give rise to the harms in section 18(1)(c). The college identifies three ways in which harms covered by this section could arise: through the use of this information by competitors in the international education field, or by private provider affiliates or potential affiliates with which the college negotiates, and through the adverse use of this information against the college in the ongoing litigation. The college provides an affidavit of its dean of international education in support of its claims.

[46] The dean reports that the revenues associated with the college's international programming are significant, amounting, in the fiscal year ending March 2015, to approximately $7.3 million from international students attending programs at the college and at college affiliates. He states that the college makes significant investments to develop these revenues, including by promoting and administering relationships with licensees and potential licensees, and managing a network of overseas recruitment agents.

[47] The college competes for international student revenues with all schools that offer post-secondary education to international students, but competes most closely with those that offer post-secondary education to international students who seek to study in Canada or to obtain a Canadian credential. The college's direct competitors in this endeavour are all publicly-funded Ontario colleges and universities that also enrol international students directly, or provide courses and programming through

[9] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[11] See Orders MO-2363 and PO-2758.

relationships with Canadian affiliates. The dean provides several examples of competing domestic affiliations.

[48] As the essential offering from all competitors—namely, Canadian courses and programs and academic credentials—is the same, the dean explains that the college competes for the strongest affiliates based not only on the quality of the college's courses and programs, but also on other measures, including: the other services the college offers to affiliates; the administrative costs the college imposes on affiliates to meet its quality control and risk management objectives; the allocation of risk between the college and affiliates; and the price the college charges for its affiliation and for use of its courses and programs.

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

[50] The college notes that it treats all five records at issue as confidential. It also expects, based on the confidentiality clauses in its agreements with affiliates, and the nature of these relationships, that affiliates will also maintain the confidentiality of the agreements' terms. The college submits that disclosure of the information contained in the records could reasonably be expected to give rise to the kinds of harms contemplated by section 18(1)(c). The dean elaborates on the college's three main concerns about disclosure.

[51] The first is the use of this information by competing universities and colleges to optimize their own position, by replicating or otherwise responding to the college's confidential approach to dealing with its affiliates. This might include competitors adjusting their own dealings with current and potential affiliates, adjusting their agent commission rates, and making investments based on a location analysis that considers the precise boundaries of the college's Toronto affiliation. The dean submits that the terms and information at issue are key to the college's competitive endeavour, are confidential, and are very difficult to discern from publicly available information. As this type of information is not shared or known between competitors in this line of business, disclosure of the college's terms and conditions for its affiliates would put the college at a competitive disadvantage. On this point, the college draws an analogy between the information at issue in this appeal and that found exempt in Order PO-2569. In that order, information about the government's relationship with a private company was found to be exempt on the basis its disclosure would provide competitors with an insight into the government's business strategy and the tools it is prepared to use to attract business.

[52] The dean also raises concerns about the use of this information by affiliates and potential affiliates, which will affect the college's ability to obtain the best possible outcome in future negotiations. He explains that the college actively seeks new affiliates, and frequently renegotiates terms with its affiliates, as evidenced by the

number of amendments to the original agreement comprising the records at issue in this appeal. Future negotiations are likely to be prejudiced by disclosure of the confidential pricing information in the records, revealing what the college is prepared to give in negotiations and discouraging third parties from making concessions. The college notes that both these potential harms have been recognized by this office as legitimate bases for restricting public access to confidential pricing and analogous information. Similarly, disclosure could reasonably be expected to harm the college's ability to attract international agents, which it does in part based on the commission rates it offers. These rates are confidential and are competitively sensitive for the same reasons.

[53] Finally, the college submits that disclosure of the records could reasonably be expected to harm its litigation strategy in the $10-million lawsuit in which it is currently involved. The college reports that it has refused to produce Records 3, 4 and 5 to Affected Party #2 in this dispute, because its litigation counsel has advised that production will adversely affect its litigation strategy. While it acknowledges that the existence of litigation does not, on its own, justify a restriction on public access to records, it submits that disclosure of the records in this case can reasonably be expected to undermine the college's position in outstanding litigation, which poses an obvious risk of harm to its economic interest.

[54] As noted, Affected Party #2 consents to disclosure of the information about it in Record 2.

[55] Affected Party #1 supports the college's reliance on section 18(1)(c) for all the records.

[56] The appellant only peripherally addresses the application of section 18(1)(c) to the records. On the matter of competition, the appellant argues that the college cannot be said to be in competition with other colleges or universities in the "traditional entrepreneurial sense," given it is a not-for-profit public entity. It also disputes the sensitivity of information about the geographic boundary of the college's affiliation, and the details of its payments to recruitment agents. It counters that information about agent commissions has been disclosed by other colleges, and provides one example of such information it obtained through an access-to-information request made to another public college.

[57] The appellant's arguments focus more generally on the importance of disclosure of the records for public accountability purposes, including to ensure that the college has complied with an existing collective bargaining agreement when contracting with private career colleges for the delivery of its programs. The appellant also raises general concerns about the sort of "contracting out" arrangements between public colleges and private career colleges reflected in the records, as it submits such arrangements improperly direct public resources for private profit, and are not in the best interests of students.

[58] In reply, the college states that the question of whether contracting with private

affiliates constitutes a breach of the collective agreement is irrelevant to the issues in this appeal.

[59] The college submits that information about the geographic boundary of its affiliation is sensitive because there are no restrictions on where colleges may operate. It also disputes the relevance of another public college's having disclosed to the appellant one particular commission rate that it paid to one particular, unnamed, agent. The college maintains its position that it treats commission rates as confidential, and that the college does not have access to its competitors' commission rates. The college observes that the purpose of section 18 is to protect an institution from being put to a relative disadvantage by being required to disclose information that other competitive actors do not disclose or are not required to disclose. It also maintains that section 18 applies to the competitive activities of government institutions, even when they are not engaged in commerce in the "traditional" sense described by the appellant.

Analysis and findings

[60] For the reasons that follow, I find that some discrete portions of the records are exempt under section 18(1)(c). I find that other portions of the records are not exempt under either section 18(1)(a) or 18(1)(c).

[61] To begin, I reject the college's claim that section 18(1)(a) applies to Record 1, in its entirety, because it serves as a template for similar agreements made with private career colleges. I do not accept that the structure of an agreement, or general terms that are used in standard form agreements, are the type of informational asset that section 18(1)(a) is meant to protect. The fact that the college paid legal counsel to develop the agreement in Record 1 does not confer onto a standard form agreement a monetary value within the meaning of section 18(1)(a). To have "monetary value" within the meaning of this section, the information itself must have an intrinsic value. 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.[12] Nor does the fact, on its own, that the information has been kept confidential.[13] Although the terms of an executed agreement between the college and a third party may contain financial or commercial information, I am not persuaded that the structure of the agreement has an intrinsic value to the college, or to other publicly-funded colleges or universities who enter into similar agreements.

[62] I am also not persuaded that any copyright interest, if it exists, in a standard form agreement means the agreement in Record 1 "belongs to" the college so that the law would recognize a substantial interest in protecting the agreement's structure from misappropriation by another party. I find it reasonable to expect that many agreements entered into between the college and third parties, and between government institutions and third parties in general, are modelled on template agreements or use standard terms subject to modification. I would particularly expect that agreements

[12] Orders P-1281 and PO-2166.
[13] Order PO-2724.

made between public institutions and private provider affiliates in the international education field would cover some of the same topics and contain similar general terms, modified to reflect the bargain struck between the parties to a particular negotiation. I reject the college's argument that the template agreement on which a final agreement is based is itself protected by section 18(1)(a).

[63] In the alternative to its section 18(1)(a) claim, the college submits that section 18(1)(c) applies to portions of Record 1. It also claims that section 18(1)(c) applies to portions of Record 2, and to Records 3, 4 and 5 in their entirety. I am satisfied that the college's evidence establishes a reasonable basis for believing that its economic interests or competitive position could be harmed by disclosure of some discrete portions of each of the records.

[64] First, I accept that disclosure of the amount of the licensing fees paid by the affiliates to the college, and the commission rates paid to international agents, including the terms of payment of those commissions, qualify for exemption under section 18(1)(c). These terms are key elements of the consideration negotiated between the parties for the licensing of college programs, which I accept are maintained in confidence by the parties to these agreements. On this point, I find irrelevant the appellant's evidence that it is aware of one agent commission rate paid by another college. The voluntary disclosure of this information by another institution does not diminish the college's interest in keeping its own commission rates confidential. I also find that other specific terms of the deal struck by the college and its affiliates—namely, the amounts of a security deposit, the terms of negotiation of the security deposit, insurance requirements, compensation for student transfers, sharing of losses for student withdrawals, and amounts to be earmarked for marketing—are all exempt under section 18(1)(c).

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

[66] For similar reasons, I also find exempt under section 18(1)(c) other specific details about the agreements negotiated between the parties—namely, the geographic location covered by the agreements, the duration of the agreements, and a specific condition precedent to program delivery. I accept the college's evidence that disclosure of this information could reasonably be expected to advantage competing colleges and

universities by revealing information that competitors could use to target this affiliate in future negotiations, or to compete with the college in a particular geographic location. I also find these outcomes could reasonably be expected to harm the college's own interests.

[67] In finding that section 18(1)(c) applies to these portions of the records, I explicitly reject the appellant's argument that the college cannot be said to compete with other institutions in entrepreneurial endeavours, because of its status as a not-for-profit public entity. The section 18(1)(c) exemption specifically contemplates that government institutions may engage in money-making endeavours and, in the course of doing so, engage in competition with other entities, including private sector entities.[14] The section 18 exemption as a whole recognizes that government institutions may have certain economic interests worthy of protection, like their private sector competitors in the marketplace.

[68] This does not mean that the section 18 exemption applies to all parts of the agreements to license the college's programs for profit. In fact, I find that the risk of the harms in section 18(1)(c) has not been made out for most parts of the agreements in Records 1 through 5. Specifically, except for the discrete items I have identified above, I find that the agreements' definitions, details of the agreements' grant of licence and exclusivity, other terms of consideration and other portions of the security deposit and indemnity clauses are not exempt under section 18(1)(c). I also find that other parts of the agreements, including those dealing with the instruction and administration of college programs, student transfers and other general topics, are not exempt under this section. Also not exempt are the schedules to the agreements setting out a list of the licensed programs to be offered by the affiliate, and the tuition rates for the various programs, except for the discrete portions of the schedules containing the exempt information I have identified above.

[69] The majority of this non-exempt information is what I will describe as boilerplate terms of agreements, such as articles addressing early termination, confidentiality and dispute resolution, which could be expected to be found in most standard agreements. The risks of harms from disclosure of these standard terms are not evident on their face, and the college has not provided evidence to support a different finding.

[70] Other parts of the agreements address matters that are specific to the particular endeavour entered into by the contracting parties. These include the definitions section and articles setting out how and by whom college programs are to be delivered, student services to be offered by the affiliate, the fee that may be charged for student services and for co-op programs, conditions on marketing and advertising college programs, an amount to be paid by the numbered company to Affected Party #2, and other rights and responsibilities of the parties under the agreements. The college has not explained how disclosure of these parts of the agreements could give rise to the harms in section 18(1)(c), and I am not convinced of the risks of harm from my own review of the records.

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[14] Order P-1190.

[71] Finding that the risks of harms from disclosure have not been made out is a sufficient basis to conclude that section 18(1)(c) does not apply. I also note here that some of the information sought to be withheld has been disclosed to others. For example, general information about student transfers from the affiliate to the college is sought to be withheld in Records 1 and 2. This includes, in Record 2, a student registration agreement that must be signed by students requesting such transfers, which I presume is or was made available to students. I also observe that the fact of student transfers within the international program is not confidential, and is advertised to prospective students on the college's website.[15] For clarity, I confirm that this non-exempt general information about student transfers is distinct from the specific dollar amounts to be compensated by the affiliate to the college for each approved transfer student, which I found above qualify for exemption under section 18(1)(c).

[72] As another example, schedules to the agreements contain lists of the programs that are licensed to the affiliate (and that the affiliate is therefore allowed to offer to international students), and the tuition and other fees to be charged for the various programs. I note that a list of programs currently available through the college's international program is advertised on the college's website, along with the tuition and additional fees payable for each program. I acknowledge that at least some of the information in the schedules to the agreements in Records 1, 2, 3 and 4 appear to have been superseded by later amendments to the schedules, and may reflect historical, rather than current, program offerings and fees. However, as a general proposition, I would expect a college's program offerings and the tuition and other fees charged to students to be public information, used to attract prospective students, and not treated as confidential information. In any event, I have insufficient evidence of the potential for harm from disclosure of either current or historical program offerings and fees to find that section 18(1)(c) applies.

[73] Other information sought to be withheld is revealed in the pleadings filed by the parties in the ongoing litigation. These include a specific detail about the students that may register for the international program, a material fee, and licensing fees and conditions set out in Record 1. I also observe that these pleadings were part of the college's representations in this appeal, which the college agreed to share, and that were shared, with the appellant during the course of the inquiry.

[74] I recognize that Affected Party #2 has consented to the disclosure of information relating to it in these records. As described, Affected Party #2 is one of three signatories to the agreements in Records 1 and 2. Record 1 comprises the original agreement between the college, Affected Party #2 and the numbered company.[16] Record 2 contains an amendment to Record 1 executed between the same three

[15] "Lambton in Toronto" website, available here: https://www.lambtoncollege.ca/Programs/International/Lambton_in_Toronto/Lambton_in_Toronto/.

[16] The agreement in Record 1 is executed between the college, a corporation that operates the private career college that is Affected Party #2, and a numbered company (that is part of a corporation associated Affected Party #1), then operating as the private career college that is Affected Party #2. See the description of the records, above, and footnotes 2 and 3 on the terminology used in this order.

parties. Records 3, 4 and 5 contain amendments to the original agreement and all subsequent amendments, and are executed between the college and the numbered company, now operating as Affected Party #1. Affected Party #2 is not a signatory to the agreements in Records 3, 4 and 5.

[75] The college acknowledges that Affected Party #2 is privy to the agreements in Records 1 and 2, as it is a signatory to those agreements. It says, however, that Affected Party #2 is not a party or a signatory to the agreements in Records 3, 4 and 5, and therefore has no standing to make representations on the disclosure of those records to the appellant.

[76] I acknowledge that Affected Party #2 has raised as an issue in the ongoing litigation between the parties the ability of the college and Affected Party #1 to modify the terms of the agreements in Records 1 and 2 without the participation of Affected Party #2. However, that issue is not germane to my finding in this appeal that Affected Party #2's interest in the records is limited to Records 1 and 2. I therefore consider the effect of Affected Party #2's consent only in connection with the withheld information in those records.

[77] Although Affected Party #2 has consented to disclosure of the information relating to it in the records, and although it may be appropriate to characterize the whole of the agreements in Records 1 and 2 as relating to it, Affected Party #2 is only one of three signatories to these agreements. The other signatories, the college and the numbered company (now operating as Affected Party #1), have not consented to disclosure of their information in these records. Affected Party #1 notes that the agreement in Record 1 contains a confidentiality clause that binds all the parties to the original agreement.[17] While this office has held that the presence of a confidentiality clause alone does not mean that a record is inaccessible under the *Act*,[18] I accept that the college and Affected Party #1 have their own, equal interests in maintaining the confidentiality of the agreements, separate from those of Affected Party #2, and that they are not bound by Affected Party #2's consent. Affected Party #2's willingness to disclose Records 1 and 2 is not determinative of whether section 18(1)(c) applies, although I accept it may be a factor in the college's exercise of discretion under this section, and I will consider it below.

[78] In finding, above, that section 18(1)(c) applies only to discrete portions of the agreements in Records 1 through 5, I reject the college's claim that Records 3, 4 and 5 should be exempt in full because of the risks of harm from disclosure to the college's litigation strategy. While I accept the college's evidence that these records are currently subject to an ongoing production dispute, I am not persuaded that the existence of litigation alone establishes a potential risk to its litigation strategy, and, more broadly, to the college's economic interests. I do accept that discrete portions of Records 3, 4 and 5—namely, those categories of items I identified above—could reasonably be

[17] I recognize this contrasts with the position taken by the college in its pleadings, where the college maintains that Affected Party #2 is a signatory, but is not a party, to the agreements in Records 1 and 2.
[18] Orders MO-1184, PO-2598 and others.

expected to disadvantage the college in the manner described in section 18(1)(c). For the remaining portions of the records, I conclude that the risks of harms in 18(1)(c) have not been made out. While the college expresses concern that ordering partial disclosure could undermine a position it has taken in ongoing litigation. I am not satisfied that this amounts to a risk to its economic interests or competitive position protected by section 18(1)(c).

[79] In summary, I find that discrete potions of Records 1 through 5 are exempt under section 18(1)(c).

Exercise of Discretion

[80] The section 18(1)(c) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[81] I find the college exercised its discretion under section 18(1)(c), and did so appropriately. In deciding to withhold information under this section, the college states that it considered the public interest in transparency of the college's operations, the nature and sensitivity of the information at issue, including its significance to the college's international education business and in the ongoing litigation between the parties, and the likelihood and degree of the harm that might flow from disclosure. I also recognize that while Affected Party #2 consented to disclosure of all the information in Records 1 and 2, the other signatories to the agreements—namely, the college and Affected Party #1—have their own interests in the records, and have expressly objected to full disclosure of the records to the appellant. I conclude that the college took into account relevant factors, and did not consider irrelevant factors, in exercising its discretion under this section.

[82] The appellant submits that the college failed to take into account such considerations as the fact information should be available to the public, the public interest in the subject matter of the records, given the ongoing litigation, and the appellant's interest in the records. I find these factors are encompassed in the college's consideration of the public interest in transparency. The appellant also argues that the college failed to consider the threat of privatization at public colleges, the requester's identity as a trade union with a mandate to secure employment for its members, and the effect of a collective bargaining agreement, which it submits may have been violated by the agreements contained in the records. While I find these factors have little to no bearing on the college's determination under section 18(1)(c), they implicitly raise the issue of a public interest override favouring disclosure of the records despite the application of section 18(1)(c). I will consider the appellant's public interest arguments under that heading, below.

[83] On balance, I am satisfied that the college committed no error in its exercise of discretion under section 18(1)(c). I therefore uphold the college's decision to withhold discrete portions of the records under this section.

[84] For the remainder of the records, which are not exempt under section 18(1)(a) or section 18(1)(c), I will consider the alternative exemption claims made by Affected Party #1.

B. Does the mandatory exemption at section 17(1)(a) or 17(1)(c) apply to the records?

[85] Affected Party #1 takes the position that the records are exempt, in full (or alternatively, that specific sections of the records are exempt), under sections 17(1)(a) and (c). These sections 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[.]

[86] The section 17(1) exemption is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[19] 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.[20]

[87] As Affected Party #1 asked that its representations be kept confidential, I will refer to them only in a general way here, although I have considered both confidential and non-confidential representations in making my determination. I conclude that neither section 17(1)(a) nor section 17(1)(c) applies to the remaining information in the records.

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[19] *Boeing Co.*, cited above.
[20] 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) and/or (c) will occur.

[89] Part one of the test requires that the information sought to be withheld be of a certain type. Affected Party #1 submits, and I accept, that the records contain commercial and financial information, as those terms have been defined by this office. The agreements are for the licensing of college programs to affiliate providers in exchange for licensing fees and other consideration, and therefore relate to the buying, selling or exchange of merchandise or services. They also contain the specific dollar amounts and rates from which dollar amounts are to be calculated, comprising financial information.

[90] Part two of the test requires the information to be have been "supplied in confidence" to the institution. The requirement that the information be "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[21] 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.[22]

[91] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[23]

[92] This office's approach to the second part of the test for the application of section 17(1) to executed contracts has been upheld by the Divisional Court on a number of occasions.[24]

[93] Affected Party #1 refers to the confidentiality clause in the agreement in Record 1 in support of its claim there is an explicit intention by all parties that the agreement and all subsequent amendments be kept confidential.

[94] It acknowledges that this office has established a general rule that information

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[21] Order MO-1706.
[22] Order PO-2020.
[23] This approach was approved by the Divisional Court in *Boeing Co.* and in*Miller Transit*, both cited above.
[24] In addition to *Boeing Co.* and *Miller Transit*, cited above, see also: *Grant Forest Products Inc. v. Caddigan,* 2008 CanLII 27474; *Canadian Medical Protective Association v. Loukidelis,* 2008 CanLII 45005; *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario*, 2012 ONSC 3496 (CanLII); *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (Can LII); and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392 (CanLII).

contained in a contract does not normally meet the "supplied" part of the test for application of section 17(1). It submits, however, that the "inferred disclosure" exception to the general rule applies. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[25]

[95] Affected Party #1 submits that disclosure of the licensing fees and business practices contained in the agreements would permit its competitors to draw inferences about its confidential business strategy, seriously undermining its position within the industry. It provides an affidavit of a manager employed by Affected Party #1, who reports some interactions he has had with representatives of other private career colleges that he believes demonstrate that these competitors would be interested in the information contained in the records.

[96] Affected Party #1 has provided little evidence of how disclosure of the records would permit its competitors to draw accurate inferences about underlying, non-negotiable business strategies or other fixed confidential information supplied by it to the college. I find its affidavit evidence unpersuasive on this point. I have also considered whether information in the records qualifies for the "immutability" exception to the general rule, which applies to confidential information supplied by a third party that is not susceptible to negotiation. Examples include financial statements, underlying fixed costs, and product samples or designs.[26] It is not apparent on my review of the records that any of the information remaining at issue qualifies for either exception, and Affected Party #1 has not provided sufficient evidence to explain how it would. In any event, I have already found exempt under section 18(1)(c) the licensing fees that Affected Party #1 seeks to withhold under this section.

[97] As all parts of the three-part test must be met for section 17(1) to apply, it is unnecessary to consider whether the third part of the test is satisfied. For completeness, however, I will briefly address Affected Party #1's arguments on this point.

[98] On section 17(1)(a), Affected Party #1 submits that disclosure of its financial and/or recruitment strategy in the records could potentially harm its competitive position, as its competitors will be able to adjust their pricing and recruitment activities to undercut Affected Party #1. It also argues that disclosure of the geographic boundary of the affiliation agreement could potentially be used by competitors to invest in the region or to engage in predation against Affected Party #1. It also claims that public knowledge of its pricing models will harm its revenue stream and brand among students and prospective students, who are not entitled to private entities' pricing models.

[99] On section 17(1)(c), Affected Party #1 submits that disclosure will result in

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[25] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[26] *Miller Transit*, above, at para. 34.

undue loss to it, and gain to its competitors, who will use this information to modify their practices and take advantage of Affected Party #1's previous negotiations with the college. It asserts that its proprietary business model will significantly decrease in value, which will result in encouraging predation by competitors or cutting corners in the offering of services, which will harm students' best interests and therefore be contrary to public policy. It finally submits that disclosure will compromise the goodwill that it has built up over the years.

[100] To satisfy the third component of the test, the party resisting disclosure 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.[27]

[101] Affected Party #1's representations on this issue fall short of demonstrating a risk of harm beyond the purely speculative. Its representations do not connect in any meaningful way the specific information it seeks to withhold in the records with its assertions of the harms that will or could result from disclosure of the information. For example, its assertions that disclosure will cause Affected Party #1 undue losses, as its proprietary business model will be of significantly less value, and that it will have to expend more resources to regain its competitive advantage, do not by themselves persuade me that these harms could reasonably be expected to flow from disclosure. Neither are the potential risks of disclosure evident to me on my review of the information remaining at issue in the records. I observe that some of the specific categories of information to which Affected Party #1 refers in its representations—such as the amounts of the licensing fees and the geographic boundary of the affiliation—are ones I have already found exempt under section 18(1)(c). For the remaining information, I am not satisfied of the risks of harm from disclosure.

[102] As parts two and three of the test are not met, I find that sections 17(1)(a) and 17(1)(c) do not apply to the remaining information.

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the applicable exemption(s)?

[103] The appellant's representations urge that I order disclosure of the records based on a variety of public interest considerations. These representations implicitly raise the application of section 23 of the *Act*, which provides a public interest override for disclosure of exempt information in some circumstance. This section states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

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

[104] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[105] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[28] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[29]

[106] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[30]

[107] The appellant reports that its access request was prompted by concern that the public college whose faculty it represents will enter into an agreement with a private career college like the one reflected in the records. The appellant takes the position that such agreements between public colleges and private career colleges improperly direct public resources for private profit and result in the delivery of lower-quality education to students, loss of job security for unionized faculty, and, ultimately, lower revenues to public colleges, all of which is detrimental to the public interest. The appellant also argues that these types of agreements are made in violation of a collective bargaining agreement negotiated between the public colleges and their faculty, and that disclosure is necessary so that union members at the 24 public colleges can act accordingly to protect their rights and interests.

[108] In reply, the college submits that the interest identified by the appellant is a private one, reflecting the appellant's role as a union local representing a particular constituency that stands to benefit from the elimination of public college affiliations with private entities. It submits, moreover, that the appellant's assertion that contracting out constitutes a breach of a collective agreement is irrelevant to the issues in this appeal. As a result, the college submits, there is no compelling public interest in disclosure of the records.

[109] I conclude that section 23 does not apply in these circumstances. While I accept the general proposition, put forth by the appellant, that there is a public interest in transparency and accountability in the use of public funds, I am not persuaded that disclosure of the discrete categories of information that I found exempt under section 18(1)(c) will satisfy this interest.

[110] The exempt information includes the amounts of licensing fees paid by the private provider to the college, commission rates for international agents, security and

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[28] Orders P-984 and PO-2607.
[29] Order P-984.
[30] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

indemnity requirements and the geographic area covered by the agreements. The remainder of the records, including articles setting out the purpose and nature of the agreements and details of the delivery of college programs by the affiliate, will be ordered disclosed. The disclosed information is sufficient to respond to any public interest that may exist in the delivery of the college's international program by private affiliates. The main interests identified by the appellant, on the other hand, are private interests in advocating for union members against contracting out relationships of the sort reflected in the records. I agree with the college that the question of whether such relationships represent a violation of a specific collective bargaining agreement made with union members is not an interest that is shared by the public more generally. In any event, disclosure of the discrete portions of the records that are exempt would not address this question.

[111] Even if I were to find that there exists a public interest that is sufficiently compelling, I would not be convinced that the interest clearly outweighs the purpose of the section 18(1)(c) exemption. Applied to the specific categories of information I identified above, this exemption permits the college to protect commercially valuable information whose disclosure would hinder its ability to act competitively in the marketplace and achieve the best value-for-money in its dealings with public and private sector entities. I find that any compelling public interest in the exempt information would yield to the important purposes served by allowing the exemption claim in these circumstances.

[112] I find, therefore, that the public interest override does not apply.

ORDER:

1. I uphold, in part, the college's decision to withhold discrete portions of the records under section 18(1)(c).

2. I do not uphold the exemption claims made for the remainder of the information in the records. I order the college to disclose the non-exempt information to the appellant by **July 22, 2016** but not before **July 18, 2016**.

   To assist the college, I enclose with the copy of this order sent to the college a copy of the records, with the **exempt portions highlighted in yellow**. The highlighted portions are not to be disclosed to the appellant. The remainder of the records are to be disclosed by the date set out above.

Original Signed By: June 16, 2016

Jenny Ryu
Adjudicator