



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **INTERIM ORDER PO-2307-I**

**Appeal PA-030264-1**

**St. Lawrence College of Applied Arts and Technology  
(Brockville)**



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## **NATURE OF THE APPEAL:**

St. Lawrence College of Applied Arts and Technology (the College) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the College Student Appeal Committee, including:

- all of the college's by-laws, regulations, policies and procedures, and other writings;
- any other discussion notes, memoranda and other writings about reforms to the committee or the appeal process available to students with grievances against the college or its teachers.

The College identified six responsive records. It granted access to Records 1 and 2 and withheld access to the other four records on the basis of the exemption in section 13(1) of the *Act* (advice to government).

The requester (now the appellant) appealed the decision.

During mediation, a number of issues were resolved:

- The College provided the appellant with a proper index of records that describes each record and the exemption applied where access was denied.
- The College located a seventh responsive record.
- The College provided the appellant access to Records 5, 6 and 7.

The appeal moved to the adjudication stage of the appeal process for Records 3 and 4 only.

The inquiry was initiated by providing a Notice of Inquiry to the College, seeking representations on the application of section 13(1) to the two remaining records. The College decided not to submit representations in response to the Notice. The Notice was then sent to the appellant, and he too declined to provide representations.

## **RECORDS:**

Record 3: St. Lawrence College Appeals Policy - A Report of Compliance with Procedural Fairness and Recommendations Towards Greater Congruence, prepared by a staff member of the College's Counselling Department, dated April 16, 2003 (8 pages)

Record 4: E-mail message sent by the author of Record 3 to another College official, dated June 16, 2003 (2 pages)

## **DISCUSSION:**

### **ADVICE TO GOVERNMENT**

#### **General principles**

Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, 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.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways:

- The information itself consists of advice or recommendations.
- The information, if disclosed, would permit one to accurately infer the advice or recommendations given.

[Orders P-1037, P-1631, PO-2028]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2028, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)].

As stated in the Notice of Inquiry, section 53 of the *Act* stipulates that where an institution refuses access to a record, the burden of proof that the record falls within the exemption lies upon the institution. Other than its decision letter denying access on the basis of section 13(1), I have no evidence from the College in support of this exemption claim. Accordingly, unless the requirements of the exemption are clear on the face of the records, I will conclude that the College has not discharged its burden of establishing the requirements of the exemption claim, and the records will be ordered disclosed.

Record 3 is a report prepared by a staff member from the College's Counselling Department. The report itself does not identify the recipient, but it would appear from the content of Records 3 and 4 that it was submitted to the College's Academic Council. The report describes the appeal processes in place at the College in the spring of 2003, along with the author's analysis and evaluation of these policies and recommendations for change. Having carefully reviewed the contents of Record 3, I find that much of its content consists of "factual or background information", "analytical information", "evaluative information" and/or "views", all of which are among the categories of information that fall outside the scope of the section 13(1) exemption. Certain other portions, under the headings "Potential Resolutions" on pages 3, 4 (twice), 6 (three times) and 7, and the section headed "Other Recommendations" on pages 7-8 contain "advice or recommendations" as these terms are used in section 13(1). In each of these latter cases, the information under the headings suggests a course of action that will ultimately be accepted by the person being advised, and therefore qualifies for exemption under section 13(1).

Record 4 is an email from the author of Record 3 commenting on the review of Record 3 by the College's Academic Council. Having carefully reviewed the contents of this record, I find that it does not itself consist of any advice or recommendations. I have also compared the content of Record 4 with the portions of Record 3 that qualify for exemption under section 13(1), and I find that disclosing Record 4 would not permit one to accurately infer the recommendations contained in Record 3. Accordingly, I find that Record 4 does not qualify for exemption and should be disclosed.

### **EXERCISE OF DISCRETION**

The section 13(1) exemption is discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, the College must exercise discretion in deciding whether or not to disclose it.

The Commissioner may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

The decision letter provided by the College in response to the appellant's request contains no reference to the exercise of discretion when deciding to claim section 13(1) as the basis for denying access. The Notice of Inquiry asked the College to provide representations on the factors it considered in exercising discretion but, as noted earlier, the College decided not to provide any representations in response to the Notice.

In the circumstances, I am not persuaded that the College has properly exercised discretion in denying access to the portions of Record 3 that I have determined qualify for exemption under section 13(1), and I will include a provision in this interim order requiring it to do so.

### **INTERIM ORDER:**

1. I uphold the College's decision that portions of Record 3 under the headings "Potential Resolutions" on pages 3, 4 (twice), 6 (three times) and 7, and the section headed "Other Recommendations" on pages 7-8 fall within the scope of the section 13(1) exemption. I have attached a highlighted copy of Record 3 with the copy of this order sent to the College that identifies the portions that fall within the scope of section 13(1).
2. I order the College to disclose Record 4 and the portions of Record 3 not covered by Provision 1.
3. I order the College to exercise discretion regarding the application of section 13(1) to the portions of Record 3 covered by Provision 1, and to provide me and the appellant with an outline of the factors considered in exercising discretion in this context by **August 26, 2004**. I then ask the appellant to provide representations to me on whether the College properly exercised its discretion by **September 10, 2004**.
4. In order to verify compliance with Provision 1 of this interim order, I reserve the right to require the College to provide me with a copy of the records it discloses to the appellant.
5. I remain seized of this appeal in order to deal with any issues stemming from the exercise of discretion by the College.

Original Signed By: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

August 12, 2004 \_\_\_\_\_