



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2675

Appeal PA06-322

Ministry of Training, Colleges & Universities



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NATURE OF THE APPEAL:

A journalist submitted a request to the Ministry of Training, Colleges and Universities (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

... a copy of the ministry's Private Career College System database, or its equivalent, containing the following fields: "Registration", "Registered Courses", "OSAP", "Registration Fees", "Address", "Batch Status", "Doc. CheckList", and "Inspection/Issues". I request the database in electronic format (CD-Rom, DVD or floppy disk) for the years 2000 to present.

By way of background, the *Private Career Colleges Act* requires that private career colleges (PCCs) be registered with the Ministry. Currently, the Ministry's registry contains more than 500 PCCs. These PCCs offer career training programs in fields such as business, information technology, health services, hairstyling, tractor trailer operation, welding, and automotive technology. Unlike public universities and colleges, PCCs do not receive any operating or capital funds from the Ontario government.

The Ministry's Private Institutions Branch, which regulates PCCs, located information responsive to the request in its Registration Information for Career Colleges (RICC) database. The Ministry then issued a decision letter to the requester, granting him partial access to the information in the database, which was provided to him on a CD. In addition, it provided him with an index (listing) of database fields that indicated he was being denied access to certain fields pursuant to the exemptions in sections 14(1)(l) (commission of an unlawful act or control of crime), 17(1) (third party information), 18(1) (economic and other interests) and 21(1) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision to this office.

During the mediation stage of the appeal process, the appellant stated that he would like to pursue access only to the withheld information contained within the database fields listed under the index headings, "Incident" and "Incident Detail."

Under the "Incident" heading, the appellant is pursuing access to the following fields:

- INCIDENT ID
- TYPE CODE
- SUBTYPE CODE
- BRIEF DESC
- STATUS CODE

Under the "Incident Detail" headings, the appellant is pursuing access to the following fields:

- INCIDENT DETAIL ID
- INCIDENT ID

- CORRESPONDENCE NUMBER
- FULL DESC.

The Ministry provided this office with sample records from the RICC database relating to “incidents” at specific PCCs. In general, these records contain information about complaints that have been filed with the Ministry against PCCs mainly by students but also by other PCCs.

The Ministry is denying the appellant access to the information in the above fields pursuant to the mandatory exemption in section 17(1) of the *Act*. It is not claiming that the section 14(1)(l) or 18(1) exemptions apply to the information in these fields. Consequently, these exemptions are no longer at issue in this appeal.

The appeal was not resolved in mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by issuing a Notice of Inquiry to the Ministry and inviting it to submit representations. In response, the Ministry submitted representations to this office. I then issued the same Notice of Inquiry to the appellant, along with a copy of the Ministry’s representations. The appellant submitted representations in response. Next, I sent the appellant’s representations to the Ministry for the purpose of inviting it to submit reply representations. The Ministry submitted representations by way of reply. Finally, I sent the appellant a copy of the Ministry’s reply representations, and he responded by providing sur-reply representations to this office.

In its reply representations, the Ministry stated that it had reconsidered its original access decision and had now decided to provide the appellant with records “relating to annual inspections of [PCCs] which are included in the database records that formed the subject of the Appellant’s original request ...” The Ministry further stated that its reply representations “should be deemed to apply to the remaining records at issue – generally, those that involve a complaint about a given PCC.”

After reviewing this portion of the Ministry’s reply representations, it was not entirely clear to me which fields in the sample records have been disclosed to the appellant and which remain at issue, because the information at issue in this appeal relates to complaints against PCCs, not “annual inspections of PCCs.” Consequently, I asked an adjudication review officer to contact the Ministry to clarify this matter. The Ministry confirmed that the information in the following fields remains at issue:

- “Title” (referred to as “BRIEF DESC.” in the index, which presumably means “brief description” of the complaint).
- “Details” (referred to as “FULL DESC.” in the index, which presumably means “full description” of the complaint).

The Ministry claims that the mandatory exemption in section 17(1) of the *Act* applies to the withheld information in these fields.

As noted above, these two database fields contain details of complaints filed against PCCs by students and other PCCs. If the undisclosed fields in the records at issue contain “personal information,” as that term is defined in section 2(1) of the *Act*, this raises the possibility that the personal privacy exemption in section 21(1) of the *Act* might be at issue in this appeal.

However, in his representations, the appellant states that he is not pursuing access to any personal information:

... I submit that the s. 21 exemption has no application to my request. I have specifically indicated that I wish to have all personal information severed or redacted from the information and records to be provided to me pursuant to the Request. The severed or redacted records will not, therefore, contain any “personal information”. Put another way, the Subject Fields will be anonymized prior to their disclosure to me and will not be about an “identifiable individual.”

Consequently, the section 21(1) exemption is not at issue in this appeal. The only remaining issue is whether the information in these two database fields is exempt from disclosure under the mandatory exemption in section 17(1) of the *Act*.

RECORDS:

The information remaining at issue in this appeal is found in the following two database fields in the records: (1) “Title” (described as “BRIEF DESC.” in the index) and (2) “Details” (described as “FULL DESC.” in the index).

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry claims that the information in the two database fields is exempt from disclosure under section 17(1) of the *Act*.

Section 17(1) states:

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

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

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

Section 53 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution.

For section 17(1) to apply, the Ministry must satisfy each part of the following three-part test:

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

For the following reasons, I have concluded that the section 17(1) exemption does not apply to the withheld information in the records at issue in this appeal.

Part 1: type of information

In order to satisfy part 1 of the test, the Ministry must prove that the two database fields reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information. The Ministry submits that the database fields contain “commercial information” and “financial information.”

The meaning of these terms has been discussed in prior orders:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621]. While not an exhaustive list, the types of information that would fall under the heading “commercial” include such things as price lists, lists of suppliers or customers, market research surveys, and other similar information relating to the commercial operation of a business [Order 16].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The Ministry submits that each of the records at issue contains “commercial or financial information” about the PCC named in the record:

The information included in the records, generally is of the following types:

- a. Complaints about quality of academic programs or instructors;
- b. Complaints about inaccurate information about courses/programs and recognition of credentials earned therein;
- c. Complaints about harassment;
- d. Complaints about lack of internships/co-op placements;
- e. Complaints about tuition fees or outstanding refunds thereof; and
- f. Complaints about payment collection strategies.

The first four types of complaints detailed above can be characterized as “commercial information.” These complaints relate directly to the service or product sold by PCCs – targeted career education.

The last two types of complaints detailed above can be characterized as “financial information”. These relate to the financial practices of institutions in either collecting or refunding tuition, and many of the records contain the specific dollar figures that are in dispute between the student who is complaining and the PCC that is the subject of the complaint.

The appellant submits that the information in the database fields does not contain “commercial information” or “financial information”:

The first four types of student complaints identified in ... the Ministry’s submission may refer to a PCC’s products or services. However, this does not mean that the complaint itself contains “commercial information” about the PCC. In substance, the complaint is not about the PCC’s products or services but an individual student’s concerns about those products or services. These concerns do not constitute commercial information.

Similarly, the last two types of complaints identified in ... the Ministry’s submissions relate not to the PCC’s tuition fees or payment collection strategies but to specific student concerns regarding them. These concerns do not constitute financial information.

I have carefully reviewed the sample records and considered the parties’ representations. In my view, some portions of the withheld information in the records at issue contain commercial and financial information, for the reasons that follow.

As noted above, “commercial information” is information that relates solely to the buying, selling or exchange of merchandise or services. Some of the complaint information in the two withheld fields (e.g., an instructor harassing a student) has nothing to do with the selling or exchange of products and services by a PCC and is, therefore, not commercial information. However, I accept that the matters set out in complaint types (a), (b) and (d) of the Ministry’s representations (e.g., the quality of a PCC’s academic programs or instructors) relates to the products or services offered by that PCC. I find, therefore, that such information is “commercial information,” for the purposes of section 17(1).

“Financial information” refers to information relating to money and its use or distribution and must contain or refer to specific data. The matters set out in complaint types (e) and (f) of the Ministry’s representations (e.g., complaints about a PCC’s tuition fees or its payment collection strategies) relate to financial disputes between a complainant and a PCC. However, such information only qualifies as “financial information” if it refers to specific data. Consequently, I find that the only portions of the two withheld fields in the records at issue that contain “financial information” are those that reveal specific dollar figures in dispute between a complainant and a PCC.

In summary, I find that some portions of the two withheld fields in the records at issue reveal commercial and financial information for the purposes of section 17(1). Consequently, the Ministry has satisfied part 1 of the section 17(1) test with respect to that information. However, any information in the two withheld fields that does not qualify as commercial or financial information is not exempt under section 17(1) and must be disclosed to the appellant.

I will now assess whether the Ministry has satisfied part 2 of the test with respect to the remaining portions of the two withheld fields in the records at issue that contain commercial and financial information.

Part 2: supplied in confidence

To satisfy part 2 of the three-part section 17(1) test, the Ministry must prove that any commercial or financial information of the PCCs contained in the records at issue was “supplied” to it “in confidence,” either implicitly or explicitly.

Supplied

I will start by determining whether the commercial and financial information in the records at issue was “supplied” to the Ministry. If I find that this information was “supplied” to the Ministry, I will then determine whether it was supplied “in confidence.”

The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706]. 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 inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In its representations, the Ministry suggests that information may qualify as “supplied” for the purposes of section 17(1), even if it is supplied by someone other than the third party to whom the information relates:

When read carefully ... there is no requirement in the section that the information be provided by the same entity that could be adversely affected by its disclosure. In fact, clause 17(1)(c) states that disclosure is not permitted when it could reasonably be expected to “result in undue loss or gain to any person, group, committee or financial institution or agency.

Therefore, the wording of the section contemplates that the information supplied by one third party might reasonably affect another third party’s interests and therefore be subject to the exemption in section 17.

The Ministry further asserts that in the circumstances of this particular appeal, the information in the records at issue relating to specific PCCs was “supplied directly” to it by students and other PCCs, which are third parties:

These students and PCCs contacted the Ministry directly to provide this information. This brings the information within the meaning of “supplied” under the *Act* as interpreted by the IPC [Orders PO-2020, PO-2043].

In his sur-reply representations, the appellant submits that the Ministry’s interpretation of the meaning of “supplied” in section 17(1) is not tenable:

... The Ministry has not supplied a single decision of the IPC or the courts to support such an interpretation of s. 17.

It is well-settled that the purpose of s. 17(1) of [the *Act*] is to protect the confidential “informational assets” of business or other organizations that provide information to government institutions [see for example, *Boeing Co.* ...]. It is clear from this purpose that the information being protected by the s. 17(1) exemption is information provided to the Ministry by the business or other organization. It is clear from this purpose that this information must be the “informational asset” of the business or other organization supplying it

I have carefully reviewed the sample records and considered the parties’ representations. In my view, the information in the records at issue was not “supplied,” within the meaning of that term in section 17(1), for the following reasons.

As noted above, 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 inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043]. Moreover, in the *Boeing Co.* case, cited above, the Divisional Court upheld Order PO-2226, which had found that section 17(1) “is designed to protect the confidential “informational assets” of *private businesses or other organizations from which the government receives information* in the course of carrying out its public responsibilities.” (Emphasis added.)

The *Boeing Co.* decision makes it clear that, as a general principle, information qualifies as “supplied” for the purposes of section 17(1) if it is provided to the institution by the third party to whom the information relates. However, in the circumstances of the appeal before me, this is not the case. The commercial and financial information in the records at issue was provided by the complainants, not the PCCs who were the subjects of these complaints. Consequently, I find that this information was not provided to the Ministry by the third party to whom the information relates, as contemplated in the *Boeing Co.* decision.

In my view, there may be limited circumstances in which the information of a third party may qualify as “supplied,” for the purposes of section 17(1), even if this information is provided to an institution by another party. For example, if an agent (e.g., an accountant) is acting on behalf of a business and provides the confidential “informational assets” of that business (e.g., profit and loss data) to an institution, this information would still be considered “supplied,” for the purposes of section 17(1), even though it was not provided to the institution by the third party itself.

However, those types of limited circumstances do not exist in the appeal before me. The PCCs who were the subject of complaints did not provide their “informational assets” to students or other PCCs, who then turned around and supplied this information to the Ministry. In addition, the complainants were not acting as agents for these PCCs and clearly did not provide the information in the records at issue to the Ministry on behalf of these PCCs. Consequently, in the circumstances of this case, it cannot be said that the information at issue has been “supplied,” for the purposes of section 17(1).

In short, I find that the Ministry has failed to prove that the commercial and financial information in the records at issue qualifies as “supplied,” within the meaning of that term in section 17(1). This information was not directly supplied to the Ministry by the PCCs that were the subject of complaints, nor would the disclosure of this information reveal or permit the drawing of accurate inferences with respect to any information that may have been supplied to the Ministry by these PCCs.

Although the Ministry further submits that this information was supplied “in confidence,” it is not necessary to consider the “in confidence” element of part 2 of the three-part section 17(1) test, because I have already found that the Ministry has failed to satisfy the preliminary requirement that the information was “supplied” to it. Consequently, I find that the Ministry has failed to satisfy part 2 of the three-part section 17(1) test.

In its representations, the Ministry submits that the harms contemplated in part 3 of the section 17(1) test could reasonably be expected to occur if the information in the records at issue is disclosed to the appellant. In particular, it asserts that disclosure could reasonably be expected to result in similar information no longer being supplied to the Ministry where it is in the public interest that similar information continue to be so supplied [section 17(1)(b)], and result in “undue loss” for PCCs [section 17(1)(c)].

However, the Ministry must satisfy all three parts of the section 17(1) test to establish that the commercial and financial information in the records at issue is exempt from disclosure. If the Ministry fails to meet any part of this test, the section 17(1) exemption does not apply. Given that I have found that the Ministry has failed to satisfy part 2 of the three-part test, the commercial and financial information in the records at issue does not qualify for exemption under section 17(1) and must be disclosed to the appellant. It is, therefore, not necessary to consider whether the Ministry has satisfied part 3 of the section 17(1) test.

ORDER:

1. I order the Ministry to disclose the remaining information in the records at issue to the appellant by **June 24, 2008** but not before **June 17, 2008**.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records that it discloses to the appellant.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

_____ May 20, 2008