

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3327

Appeals PA11-542 & PA12-100

Seneca College of Applied Arts and Technology

March 31, 2014

Summary: An individual submitted an access request to Seneca College of Applied Arts and Technology for a broad range of records, including those relating to his recruitment, hiring and dismissal by the college. The college decided to disclose some records to the requester but withheld others under the exclusion in section 65(6) (labour relations and employment records) and various exemptions in the *Act*. The requester appealed the college's decision to withhold three records and claimed that the college had not conducted a reasonable search for responsive records (appeal PA11-542). A private company appealed the college's decision to disclose 21 records to the requester and claimed that these records should be withheld under the mandatory exemption in section 17(1) (third party information) (appeal PA12-100). The adjudicator finds that the college conducted a reasonable search for records responsive to the request. In addition, he finds that the three records at issue in appeal PA11-542 and most of the records at issue in appeal PA12-100 cannot be disclosed to the requester under the *Act* because they are excluded by section 65(6)3. However, he finds that four records in appeal PA12-100 are not excluded from the *Act* under section 65(6)3 and do not qualify for exemption under section 17(1). He upholds the college's decision to disclose these records to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1), 24 and 65(6)3.

Orders Considered: Orders M-899, MO-1412, MO-3010, PO-2105-F, PO-2952 and PO-3194.

Cases Considered: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (Div. Ct.).

OVERVIEW:

[1] An individual submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Seneca College of Applied Arts and Technology (the college) for the following records:

Part One: personal information under s. 47 of [the *Act*]

1. All correspondence (hard copy, electronic or otherwise) and briefing notes related to [the requester's] dismissal from Seneca College.
2. [The requester's] complete personnel file at Seneca College, including all performance evaluations.
3. All correspondence (hard copy, electronic or otherwise) between employees of Seneca College to and from [a named individual] or any other employees or representatives of [three named companies] concerning [the requester]. To facilitate your search, the e-mails will include (but not limited to) the following domains: [a number of email addresses and 1 website].
4. All correspondence and documents from March 1, 2010 to the present containing views or opinions of [the requester]. For greater certainty, this includes any correspondence with respect to written references provided by employees at Seneca College.
5. All correspondence and documents relating to [the requester's] decision to move from Toronto to Ottawa between July 1, 2010 and August 30, 2010.
6. All correspondence and documents relating to recruiting and hiring [the requester] for the positions of Professor and Chairman of what is now known as [a named institute]. For greater clarity, [this institute] has had previous names including [other names].

Part Two: request under s. 10 of [the *Act*]

1. All policies and procedures relating to the termination of employees and contractors and the effective date of those policies.

2. All policies and procedures relating to reimbursement of expenses of employees and contractors and the effective date of those policies.
3. All policies and procedures relating to intellectual property and copyright of employees and contractors and the effective date of those policies.
4. All contracts and agreements between Seneca College and [a named company] effective between October 1, 2009 and April 20, 2011.
5. All contracts and agreements between Seneca College and [the same named company as #4] signed between October 1, 2009 and April 30, 2011 (if different from #3 above).
6. All contracts and agreements with Seneca College that pertain to the [named institute] between October 1, 2009 and April 30, 2011. For greater clarity, [the institute] has had previous names including [other names].
7. All documents (electronic or otherwise) concerning the funding of [the named institute] and its predecessors [names]. These documents include the funding provided internally by Seneca College, and the sources of funding obtained from outside Seneca College. For greater clarity, documents related to "funding" include any documents pertaining to Seneca's allocations or re-allocations of resources to directly or indirectly support the [named institute] initiative including (but not limited to) sharing employees, sharing contractors, and administrative support.

[2] By way of background, the college hired the requester to be a professor and the chair of a new institute. He had been introduced to the college by the head of a private company that partnered with the college to establish the institute. Shortly after commencing his position, a contractual dispute developed between the requester and the college, and he was dismissed. The requester retained legal counsel to seek redress for his dismissal.

[3] After locating records that were responsive to the requester's access request, the college notified the private company under section 28 of the *Act*, which requires an institution, before granting access to a record, to notify a person whose interests might be affected by disclosure.

[4] After receiving representations from the private company, the college issued a decision letter to the requester that granted him partial access to the responsive records. It refused to disclose some records because it claimed that they are excluded from the *Act* under section 65(6) (labour relations and employment records). In addition, it denied access to other records and parts of records under the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in 19(1)(c) (solicitor-client privilege). It also advised the requester that, "There are no policies or procedures pertaining to the termination of employees and contractors."

[5] The requester appealed the college's decision to refuse him access to some records and parts of records and also claimed that the college had not conducted a reasonable search for records responsive to his request. The Information and Privacy Commissioner (IPC) opened appeal PA11-542 and referred it to mediation.

[6] During mediation, the college issued revised decision letters to both the requester and the private company stating that it had decided to disclose additional records to the requester and was denying access to some records under the following additional exemptions: sections 13(1) (advice and recommendations), 18(1)(c) (economic and other interests) and 21(1) (personal privacy). The private company objected to the disclosure of 21 records that the college had decided to disclose and appealed the college's decisions to the IPC. Consequently, the IPC opened appeal PA12-100, which is a third-party appeal, and referred it to mediation.

[7] Neither of these appeals was resolved during mediation and they were both moved to adjudication for an inquiry. The college, the requester and the private company were all invited to submit representations. In the notices of inquiry that I issued to the requester and the private firm, I indicated that the section 65(6) exclusion might apply to a number of records in appeal PA12-100, even though the college did not claim it for those records, and invited them to make submissions on that issue.

[8] None of the parties submitted representations in response to the notices of inquiry that were sent to them. However, the private company indicated that it wishes to rely on the submissions that it made in its original appeal letter to the IPC.¹

[9] I have decided to dispose of both appeals together in this order.

RECORDS:

[10] In appeal PA11-542, there are three records at issue, which are summarized in the chart in Appendix A, which is attached to this order.

¹ Letter dated March 9, 2012.

[11] In appeal PA12-100, there are 21 records at issue, which are summarized in the chart in Appendix B, which is also attached to this order.

ISSUES:

- A. Does section 65(6) exclude the records from the *Act*?
- B. Does the discretionary exemption at section 13(1) apply to the records?
- C. Does the discretionary exemption at section 18(1)(c) apply to the records?
- D. Did the institution exercise its discretion under sections 13(1) and 18(1)(c)? If so, should this office uphold the exercise of discretion?
- E. Does the mandatory exemption at section 17(1) apply to the records?
- F. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- G. Does the mandatory exemption at section 21(1) apply to the information at issue?
- H. Did the college conduct a reasonable search for records?

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

A. Does section 65(6) exclude the records from the *Act*?

[12] Section 65(6)3 states:

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

...

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

[13] If section 65(6) applies to the records, and none of the exceptions found in section 65(7)² applies, the records are excluded from the scope of the *Act*.

[14] IPC orders had previously found that the term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to."³ However, in the 2010 decision, *Ontario (Attorney General) v. Toronto Star*,⁴ the Divisional Court addressed the meaning of the term "relating to" in section 65(5.2) of the *Act* and found that it requires "some connection" between the records and the subject matter of that section. It rejected the imputation of a "substantial connection" requirement into the meaning of "relating to."

[15] The IPC has concluded that the Divisional Court's findings in *Toronto Star* also apply to the words, "in relation to" in section 65(6).⁵ Consequently, for section 65(6) to apply, an institution must show that there is "some connection" (not a "substantial connection") between the records and the subjects mentioned in paragraph 1, 2 or 3 of this section.

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

[17] The college claims that the following records are excluded from the *Act* under sections 65(6)3: records 28, 43 and 55 (appeal PA11-542). The college did not claim that any of the 21 records at issue in appeal PA12-100 are excluded from the *Act* under section 65(6). However, after these appeals were transferred to me, I reviewed these records, which the college has decided to disclose to the requester. I concluded that it is possible that the section 65(6)3 exclusion applies to a number of these records.

² Section 65(7) states:

This Act applies to the following records:

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

³ e.g., see Order P-1223.

⁴ 2010 ONSC 991 (Div. Ct.).

⁵ Order MO-2589.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[18] Even though the college did not raise this exclusion for these records, the interpretation of sections 65(6) and (7) is a preliminary issue which goes to the IPC's jurisdiction to continue an inquiry. Consequently, I have an obligation to raise and consider the possible application of the section 65(6) exclusion to those records, even though it was not claimed by the college in its revised decision letters.

[19] For section 65(6)3 to apply, it must be established that:

1. the records were collected, prepared, maintained or used by the college or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the college has an interest.

[20] I am satisfied that all of the records at issue in both appeals were collected, prepared, maintained or used by the college, and that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications between college officials, the requester and the private company about various matters. Consequently, I find that parts 1 and 2 of the section 65(6)3 test have been met.

[21] The more difficult issue is determining whether these meetings, consultations, discussions and communications were about "labour relations" or "employment-related" matters in which the college has an interest, as stipulated in part 3 of the section 65(6)3 test. It is challenging to make this determination in the absence of representations from the parties. However, the records themselves provide some useful factual evidence. The college hired the requester to be a professor and the chair of a new institute. He had been introduced to the college by the head of a private company that partnered with the college to establish the institute. Shortly after commencing his position, a contractual dispute developed between the requester and the college, and he was dismissed.

[22] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.⁷ In the circumstances of this case, the college and the requester negotiated a unique contract that governed the working relationship between them. Based on my review of the records, I cannot see any

⁷ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

evidence that the requester's relationship with the college, including his hiring and dismissal, was part of a collective bargaining arrangement or analogous relationship. Consequently, I find that the meetings, consultations, discussions and communications that took place were not about "labour relations" matters.

[23] I will now determine whether these meetings, consultations, discussions and communications were about "employment-related" matters. Previous IPC orders have generally found that the term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁸ However, other orders have extended the section 65(6)3 exclusion to relationships between an individual and an institution that have the "trappings of employment," even though the individual is not an employee. For example, in Order M-899, the adjudicator found that although police officers are not considered employees under the common-law, their relationship with police services board, as governed by the *Police Services Act*, constitutes employment.⁹

[24] In Order MO-3010, Senior Adjudicator Sherry Liang concluded that the dismissal of a volunteer football coach by a school board was not an "employment-related" matter for the purposes of section 52(3)3 of the *Municipal Freedom of Information and Protection of Privacy Act*, which is the equivalent to section 65(6)3. Although the facts in that case are substantially different from those in the appeals before me, Senior Adjudicator Liang commented on previous IPC orders that have applied the section 65(6)3 exclusion to relationships between an individual and an institution that have the "trappings of employment":

It is clear from the decisions in this area that where the phrase "employment-related matters" has been extended to cover relationships between an institution and individuals who are not typical employees, those relationships contain many of the indicia of employment. In Order PO-2952, for instance, the adjudicator described, with respect to Order-in-Council appointees of the Ontario Rental Housing Tribunal, "all of the trappings of employment" in the facts before her:

In my view, regardless of the process through which board members attain their positions and the importance of maintaining independence in their decision-making, all of the trappings of employment are evident through adherence to the *Code of Conduct*; including performance reviews and discipline, all of which fall within the responsibility of the Board. The request in the current appeal was for records relating to performance issues, complaints and the manner

⁸ Order PO-2157.

⁹ See also Order PO-2952.

in which the member's appointment was terminated. In my view, the records at issue and any other records that might be responsive to this request relate to matters which fall within the purview of the Board as an "employer."

[25] In the appeals before me, there is evidence that suggests that the requester was not an employee in a traditional sense. For example, he invoiced the college for his work and sent an email to its staff in which he stated that he "would like all payments processed for me operating as a business rather than an employee of the college."

[26] However, the records themselves also reveal that the college and the requester signed a formal contract which stipulated that he was to be appointed chair of the new institute and a professor at the college. Under the terms of the contract, the college agreed, amongst other things, to pay him a "salary" for both the chair and professor positions. In addition, other records reveal that the college created a work station for him in one of its buildings, provided him with a college-linked email address, voicemail and an "employee i.d. #," and also gave him access to the staff parking lot.¹⁰

[27] In my view, these are all indicia that although the requester may not have been an employee in a traditional sense, his positions as a professor and the chair of the new institute at the college had many of the "trappings of employment." Consequently, I find that the meetings, consultations, discussions and communications documented in the records about his recruitment, hiring and dismissal by the college are about "employment-related" matters, as required by part 3 of the section 65(6)3 test.

[28] However, to satisfy part 3 of this test, it must also be established that the college had "an interest" in these employment-related matters. The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.¹¹ In my view, given that the college hired, paid and later dismissed the requester from his positions as a professor and the chair of a college-based institute, it clearly had an interest in these employment-related matters that extended beyond a "mere curiosity or concern."

[29] In short, I am satisfied that the college's collection, preparation, maintenance and use of the records at issue in the two appeals have "some connection" to meetings, consultations, discussions or communications about employment-related matters in which it has an interest. Consequently, I find that the following records are excluded from the *Act* under section 65(6)3:

- Appeal PA11-542 – records 28, 43 and 55.

¹⁰ Records 34, 40 and 43.

¹¹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

- Appeal PA12-100 – records 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 (in part), 25 (in part), 26, 27, 30, 31 and 32.

[30] In my view, the only records that are not excluded from the *Act* under section 65(6)3 are records 13, 24 (first email only), 25 (first email only) and 29 in appeal PA12-100.

[31] Record 13 is a memorandum of understanding between the college and the private company with respect to the establishment of an analysis centre. The requester is not a party to this agreement and it does not refer to him. Consequently, this record has no connection to the employment-related matters involving the college and the requester and it is not excluded from the *Act* under section 65(6)3. However, the private company objects to the disclosure of this record, and in the next section of this order, I will examine whether it is exempt under the mandatory third party information exemption in section 17(1) of the *Act*.

[32] Records 24 and 25 contain emails between college staff and the private company regarding various issues, including the proposed contract with the requester. The emails that discuss this proposed contract are excluded from the *Act* under section 65(6)3. However, the first email in each these records has little or no connection to the employment-related matters involving the college and the requester and they are not excluded from the *Act* under section 65(6)3. The private company objects to the disclosure of these records, and in the next section of this order, I will examine whether the first email in each record is exempt under the mandatory third party information exemption in section 17(1) of the *Act*.

[33] Record 29 is an email from a college director to the requester and other individuals that includes several attachments. In my view, this record has little or no connection to the employment-related matters involving the college and the requester and it is not excluded from the *Act* under section 65(6)3. Although the private company objects to the disclosure of this record, the requester is fully aware of its contents. He is listed as a recipient on the email from the college director and therefore received both the email itself and the attachments. Consequently, it would produce an absurd result to withhold this record under section 17(1) or any other exemptions, and I uphold the college's decision to disclose it to the requester.

[34] In summary, I am upholding the college's decision to withhold the three records at issue in appeal PA11-542, because these records are excluded from *Act* under section 65(6)3. In addition, I will be ordering the college not to disclose most of the records at issue in appeal PA12-100. Although the college decided to disclose these records to the requester, I find that these records cannot be disclosed under the *Act* because they are excluded by section 65(6)3. In my view, none of the exceptions in section 65(7) apply to them.

[35] Given that these records are excluded from the *Act* under section 65(5)3, it is not necessary to determine whether the sections 13(1), 18(1)(c) and 21(1) exemptions claimed by the college apply to specific information in them. Consequently, the only issues left to be resolved in this order are Issues E (third party information) and H (search for responsive records).

THIRD PARTY INFORMATION

E. Does the mandatory exemption at section 17(1) apply to the records?

[36] It must be determined whether the following records in appeal PA12-100 qualify for exemption under section 17(1): records 13, 24 (first email only) and 25 (first email only). The college decided to disclose these records to the requester, and the private company appealed that decision, because it submits that they are exempt under section 17(1).

[37] 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.

[38] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹² 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.¹³

[39] For section 17(1) to apply, the party resisting disclosure, which is the private company, 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.

[40] The private company submits that the records should be withheld on the following grounds:

- the agreement between the college and the itself contains a confidentiality clause that prohibits the parties from disclosing information;
- disclosing the records, which contain its trade secrets and technical information, would violate the agreement’s explicit confidentiality provision and also potentially interfere with its competitive position in the marketplace; and
- if information is disclosed in contravention of the agreement, it would be required to re-evaluate the services it provides, and the flow of information related to those services.

¹² *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.).

¹³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[41] The types of information listed in section 17(1) have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁴

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.¹⁵

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.¹⁶

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.¹⁷ The fact that a record

¹⁴ Order PO-2010.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹⁸

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.¹⁹

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships.

[42] The first emails in records 24 and 25 in appeal PA12-100 do not contain the types of information protected by section 17(1) of the *Act*. There are no trade secrets, scientific information, technical information, commercial information, financial information or labor relations information in these emails. Consequently, those emails cannot qualify for exemption under section 17(1) and must be disclosed to the requester.

[43] Record 13 in appeal PA12-100 is a memorandum of understanding (the agreement) between a financial centre at the college and the private company with respect to the establishment of a new analysis centre. Although the private company suggests that this agreement reveals its "trade secrets and technical information," I find that there is no such information in the agreement. In my view, however, the agreement contains commercial and financial information.

[44] There are several clauses in the agreement that establish a business relationship between the college and the private company, including the exchange of services. This is sufficient to find that the agreement reveals information that is "commercial information."

[45] In addition, clause 10 of the agreement sets out the specific financial contributions the private company is required to make to the college, including a student scholarship. I find that this specific information, which is in dollar amounts, qualifies as "financial information."

[46] In short, I find that the agreement contains commercial and financial information, as required by part 1 of the section 17(1) test. I will now proceed to determine whether this information was "supplied in confidence," as required by part 2 of the section 17(1) test.

¹⁸ Order P-1621.

¹⁹ See note 14 above.

Part 2: supplied in confidence

[47] To satisfy part 2 of the section 17(1) test, the private company must show that the commercial and financial information in the agreement was “supplied” to the college in confidence, either implicitly or explicitly.

[48] I will start by examining the “supplied” element of part 2 of the test. 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.²⁰

[49] The IPC has found in previous orders that 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*²¹ and recently reaffirmed in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*²² It is consistent with the intent of the *Act*, which recognizes that public access to information contained in contracts between the government and the private sector is essential in establishing governmental accountability for the expenditure of public funds.²³

[50] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. 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. The “immutability” exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.²⁴

[51] The private company did not provide any submissions as to whether it “supplied” the commercial and financial information in the agreement to the college, nor did it comment on the previous IPC orders and court decisions that have found that the provisions of a contract between a public institution and a third party are generally treated as mutually generated, rather than “supplied” by the third party. In addition, it

²⁰ Order MO-1706.

²¹ See note 12 above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.)

²² 2013 ONSC 7139 (Div. Ct.).

²³ *Ibid.*, at para 44.

²⁴ Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above at note 20).

did not provide any submissions on the “inferred disclosure” and “immutability” exceptions to this general rule.

[52] In my view, the terms of the agreement were clearly negotiated and agreed upon between the college and the private company. In other words, the commercial and financial information in the agreement was subject to negotiation and mutually generated, which means that it cannot be considered to have been “supplied” by the private company for the purposes of section 17(1) of the *Act*. There is no evidence before me to suggest that either the “inferred disclosure” or “immutability” exceptions apply to this information.

[53] Although the private company submits that the agreement contains a confidentiality clause that prohibits the parties from disclosing information, the college and the private company cannot “contract out” of the *Act* or remove records held by the college from the transparency requirements of the *Act*. In addition, it is not necessary to consider the “in confidence” element of part 2 of the section 17(1) test, because I have already found that the private company has failed to satisfy the preliminary requirement that it “supplied” the information in the agreement to the college.

[54] In short, I find that the private company has failed to satisfy part 2 of the section 17(1) test. Although it submits that the harms contemplated in part 3 of the test could reasonably be expected to occur if the information at issue in the agreement is disclosed, it must satisfy all three parts of the test to establish that the information at issue is exempt from disclosure. If the party resisting disclosure fails to meet any part of this test, the section 17(1) exemption does not apply. Given that I have found that the private company has failed to satisfy part 2 of the test, the agreement between the college and private company does not qualify for exemption under section 17(1) and must be disclosed to the requester.

SEARCH FOR RESPONSIVE RECORDS

H. Did the college conduct a reasonable search for records?

[55] The requester submits that the college did not conduct a reasonable search for records that are responsive to his request.

[56] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.²⁵ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution’s decision. If I am not satisfied, I may order further searches.

²⁵ Orders P-85, P-221 and PO-1954-I.

[57] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.²⁶ To be responsive, a record must be "reasonably related" to the request.²⁷

[58] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²⁸

[59] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²⁹

[60] During the adjudication stage of the appeals process, the requester did not submit representations on any issues, including whether the college conducted a reasonable search for responsive records. In these circumstances, I find that the requester has not provided a reasonable basis for concluding that additional responsive records exist.

[61] Moreover, previous IPC orders have concluded that an institution should not be ordered to conduct further searches for responsive records in cases where the section 65(6) exclusion has been found to apply to those records which have been already located.³⁰ Given that I have found that all of the records at issue in the two appeals (except for four) are excluded from the *Act* under section 65(6)3, there is a very high likelihood that any additional responsive records that might exist are also excluded by the same provision. Consequently, I find that no useful purpose would be served in ordering the college to conduct a further search for responsive records.

[62] In short, I find that the college conducted a reasonable search for records that are responsive to the request.

ORDER:

1. I uphold the college's decision to withhold the following records from the requester (appeal PA11-542) because they are excluded from the *Act* under section 65(6)3: records 28, 43 and 55.

²⁶ Orders P-624 and PO-2559.

²⁷ Order PO-2554.

²⁸ Orders M-909, PO-2469 and PO-2592.

²⁹ Order MO-2246.

³⁰ Orders MO-1412, PO-2105-F and PO-3194.

2. I uphold the college's decision to disclose the following records to the requester (appeal PA12-100): records 13, 24 (first email only), 25 (first email only), and 29. The college must disclose these records to the requester by **May 7, 2014** but not before **April 30, 2014**.
3. I order the college not to disclose the following records to the requester under the *Act* (appeal PA12-100) because they are excluded by section 65(6)3: records 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 (in part), 25 (in part), 26, 27, 30, 31 and 32.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

_____ March 31, 2014

Appendix A – Records at issue (appeal PA11-542)

Record	Description	Number of pages	College's decision	Exclusion/exemptions
28	Discussion notes – comparison of Feb. 2010 agreement and redlined agreement between college and requester	10	Withheld in full	s. 65(6) s. 17(1)(a) and (c) s. 18(1)(c)
43	Email between college staff re response to Sept. 10, 2010 email from requester	6	Withheld in full	s. 65(6) s. 13(1) s. 21(1)
55	Email between college staff re contract with requester	3	Withheld in part	s. 65(6) s. 13(1)

Appendix B – Records at issue (appeal PA12-100)

Record number	Description	Number of pages	College's decision	Exclusion/exemption
11	Email of Oct. 31, 2009 from private company to college re requester	1	Disclose in full	s. 65(6) s. 17(1)
12	Email of Sept. 13, 2010 from private company to college, with attached comments re requester	3	Disclose in full	s. 65(6) s. 17(1)
13	Memorandum of understanding between college and private company for establishment of analysis centre	2	Disclose in full	s. 65(6) s. 17(1)
14	Email of Feb. 11, 2011 from private company to college re legal issues	1	Disclose in full	s. 65(6) s. 17(1)
15	Emails of Jan. 25, 2011 between private company and college re legal issues	1	Disclose in full	s. 65(6) s. 17(1)
16	Email of June 21, 2010 from private company to college, with attached institute profit model	6	Disclose in full	s. 65(6) s. 17(1)

17	Email of Jan. 19, 2011 from private company to college, with attached letter from requester's lawyer	5	Disclose in full	s. 65(6) s. 17(1)
18	Emails of Jan. 5-6, 2010 between private company and college re draft contract with requester and other issues	1	Disclose in full	s. 65(6) s. 17(1)
19	Emails of Jan. 5-6, 2010 between private company and college re draft contract with requester	2	Disclose in full	s. 65(6) s. 17(1)
20	Emails of Jan. 5-6, and 8, 2010 between private company and college re draft contract with requester	2	Disclose in full	s. 65(6) s. 17(1)
21	Emails of Jan. 11, 2010 between private company and college re contract with requester	1	Disclose in full	s. 65(6) s. 17(1)
22	Emails of Jan. 8 and 11, 2010 between private company and college re draft contract with requester	2	Disclose in full	s. 65(6) s. 17(1)

23	Email of Jan. 12, 2010 from college to private company with attached revised contract with requester	5	Disclose in full	s. 65(6) s. 17(1)
24	Emails of Jan. 18-20, 2010 between private company and college re contract with requester and other issues	2	Disclose in full	s. 65(6) s. 17(1)
25	Emails of Jan. 18-22, 2010 between private company and college re contract with requester and other issues	2	Disclose in full	s. 65(6) s. 17(1)
26	Emails of Jan. 18, 2010 from college to private company with attached revised version of contract with requester	5	Disclose in full	s. 65(6) s. 17(1)
27	Emails of Aug. 19, 2011 between college and private company with attached draft email to requester	5	Disclose in full	s. 65(6) s. 17(1)
29	Email of July 6, 2010 from college director to requester, private company, and others with attached documents	14	Disclose in full	s. 65(6) s. 17(1)

30	Emails of Jan. 5, 2010 between private company and college re draft contract with requester	1	Disclose in full	s. 65(6) s. 17(1)
31	Emails of Jan. 5, 2010 between private company and college re draft contract with requester	1	Disclose in full	s. 65(6) s. 17(1)
32	Email of Jan. 5, 2010 between college staff re draft contract with requester	5	Disclose in full	s. 65(6) s. 17(1)