

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3332

Appeal PA12-104

Queen's University

April 16, 2014

Summary: A student organization at Queen's submitted a request to the university under the *Freedom of Information and Protection of Privacy Act* for access to student athletics budget information for 2012 and 2013. Queen's denied access to certain portions of the team budgets, claiming that their disclosure would result in an unjustified invasion of personal privacy under section 21(1) and would prejudice the university's economic interests or competitive position under section 18(1)(c). The requester appealed the university's decision and claimed that there is a public interest in disclosure of the information under section 23. In this order, the adjudicator finds that section 18(1)(c) applies to exempt the budget information and that section 23 does not apply to override the exemption.

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

OVERVIEW:

[1] This order addresses the decision of Queen's University (Queen's or the university) in response to the request submitted by a student organization under the

Freedom of Information and Protection of Privacy Act (the *Act*) for access to detailed budget and operations information about student athletics programs and teams.¹

[2] The organization subsequently submitted a new request for access to "operating budgets for each Varsity Team for 2011-12." After identifying the budget records that were responsive to the revised request, Queen's granted partial access to them, but withheld information pursuant to the discretionary exemption in section 18(1)(c) (prejudice to economic interests) and the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

[3] The student organization (referred to as the appellant in this order) appealed the university's access decision to this office. During the mediation stage of the appeal, the appellant provided the following itemization of their areas of interest:

Information from the 2012 fiscal year (in the pre-committed, committed, actual, annual budget and YTD [year-to-date] variance and % columns) for the Total Revenue line item for the following sports: *Men's basketball, Football, Women's Soccer, Men's Volleyball, Women's Hockey, Women's Volleyball, Women's Rugby, Men's Hockey*

And for the Total Position Control Salaries line item for the following sports: *Men's Basketball, Football, Men's Volleyball, Women's Hockey, Women's Volleyball*

And for the Total Salary and Benefits Expenses line item for the following sports: *Men's Basketball, Football, Men's Volleyball, Women's Hockey, Women's Volleyball, Women's Rugby, Men's Hockey*

And for the Total Expenses line item for the following sports: *Men's Basketball, Football, Men's Volleyball, Women's Hockey, Women's Volleyball, Men's Hockey*

¹ The initial request referred to: Breakdown of each line item in the Expenses category on Athletics budgets and actual expenses for 2008-09, 2009-10, 2010-11 and 2011-12. Attached budget lists 14 total expense items: Rentals, Recreation Administration, Aquatics Programs, Camps and Sports Days, Fitness and Wellness Programs, Intramurals and Sports Leagues, Sports Clubs, IU Administration, Athlete Services, Strength and Conditioning, High Performance Fund, Playoffs, Varsity Teams. If not otherwise covered in the above request, a breakdown of funding each Queen's team/club received from Athletics, listed in Queen's Athletics budgets and actual expenses for 2008-09, 2009-10, 2010-11 and 2011-12. Operating budgets for each inter-university team, OUA club and competitive club for 2008-09 and 2009-10. Operating budgets for each Varsity Team, Varsity Club and Recreational Club for 2010-11 and 2011-12.

[4] When the appellant also expressed interest in obtaining the same information for 2013, Queen's agreed to include the 2013² budget information in the scope of this appeal, but maintained its original position on access. In turn, the appellant argued that the public interest override in section 23 of the *Act* applies. As a mediated resolution of the issues was not possible, the appeal was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

[5] As the adjudicator assigned to conduct an inquiry, I sought and received submissions from the parties: first from Queen's and, next, from the appellant, who was provided with a copy of the university's initial submissions. Finally, I offered Queen's an opportunity to submit representations in reply to the appellant's position on the application of the public interest override. After Queen's provided its reply submissions, I concluded my inquiry.

[6] In this order, I find that the information is exempt under section 18(1)(c) of the *Act*, and I uphold the university's exercise of discretion under the exemption. I also find that section 23 does not apply to override section 18. In light of my finding under section 18(1)(c), it is unnecessary for me to review whether section 21(1) also applies to the same information.

RECORDS:

[7] The information at issue consists of certain withheld portions of the operating budgets (2012 and 2013 fiscal years) for the varsity teams identified in the following list:

Total Revenue line for: Men's basketball, Football, Women's Soccer, Men's Volleyball, Women's Hockey, Women's Volleyball, Women's Rugby, Men's Hockey

Total Position Control Salaries line for: Men's Basketball, Football, Men's Volleyball, Women's Hockey, Women's Volleyball

Total Salary and Benefits Expenses line for: Men's Basketball, Football, Men's Volleyball, Women's Hockey, Women's Volleyball, Women's Rugby, Men's Hockey

Total Expenses line for: Men's Basketball, Football, Men's Volleyball, Women's Hockey, Women's Volleyball, Men's Hockey

² I received electronic copies of the 2013 budget records during the inquiry stage of the appeal.

ISSUES:

- A. Would disclosure of the varsity team budget information prejudice Queen's economic interests under section 18(1)(c)?
- B. Did Queen's properly exercise its discretion under section 18(1)(c)?
- C. Is there a compelling public interest in disclosure of the information sufficient to outweigh the purpose of section 18(1)(c)?

DISCUSSION:

A. Would disclosure of the varsity team budget information prejudice Queen's economic interests under section 18(1)(c)?

[8] Queen's claims that section 18(1)(c) of the *Act* applies to exempt the budget information from disclosure. Section 18(1)(c) states:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[9] Broadly speaking, section 18 is designed to protect certain economic interests of institutions covered by the *Act*. Section 18(1)(c) takes into consideration the consequences that would result for an institution if a record was released. This can be contrasted with sections 18(1)(a) and (e), which are concerned with the type of the record, rather than the consequences of disclosure.

[10] For section 18(1)(c) to apply, Queen's must demonstrate that disclosure of the information "could reasonably be expected to" lead to the specified result. To meet this test, Queen's is required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.³

[11] It should not be assumed that harms under section 18 are self-evident or can be substantiated by submissions that merely repeat the words of the *Act*. The need for public accountability in the expenditure of public funds is an important reason behind

³ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

the need for “detailed and convincing” evidence to support the harms outlined in section 18.⁴

Representations

[12] Queen’s explains that it is a priority to have its varsity team programs compete and be successful at the highest level of interuniversity sport competition in Canada. Queen’s suggests that successful varsity teams contribute positively to the university’s “brand, reputation, campus life, [and] school spirit, as well as providing economic benefit through enhanced revenue generation from tickets, merchandise, sponsorship/advertising and philanthropic giving.” In this context, Queen’s opposes disclosure of the budget information based on its concern that it will prejudice the university’s current and future economic interests in relation to sponsorship opportunities for its student-athletes and the programs that benefit them, and that it will prejudice its competitive position in recruiting athletes and coaches.

[13] Regarding the specific budget information withheld from the appellant, Queen’s submits that its disclosure would result in the release of each team’s total operating budget and confidential salary information. In an appendix to its representations, Queen’s provides a detailed explanation of how that particular information would be disclosed if certain identified budget lines were not withheld.⁵

[14] Queen’s submits that it competes with other public and private institutions to recruit the best student athletes, sponsorships and alumni support. Queen’s states that since all of these contribute to the economic and competitive position of the university overall, disclosure of the requested athletics budget information would “jeopardize the competitive position of the university by deterring potential star athletes, sponsors and alumni donations.” Queen’s elaborates on this by providing additional evidence from:

- Director, Athletics and Recreation at Queen’s University
- Director, Intercollegiate and High Performance Sport, University of Toronto
- Director, Sport and Recreation, York University; and
- two head coaches of varsity teams at Queen’s

⁴ Orders MO-1947 and MO-2363.

⁵ The appendix is divided into two sections, with charts illustrating the content and relevance of each line or column at issue in the team budget reports: “Each Varsity Team Budget is divided into two sections: Section 1 = Statement of Operations Summary Report and Section 2 – Actual line by line transactions that are rolled up in Summary Report.”

[15] According to Queen's Director of Athletics and Recreation, the university relies on funding from sponsorship, advertising and marketing to fund its varsity team program and services. Given this reliance, Queen's submits that disclosure of the confidential budget information at issue would impact its efforts to secure funding, influence the level of that funding, and/or alter expectations with respect to service levels and deliverables. Queen's refers to the limited size of the university sports market, which it claims results in a very competitive milieu for the acquisition of sponsorship and advertising dollars. Queen's submits that it is common for sponsors to be approached by competing universities "on a local, provincial or national scale at the same time." Revealing Queen's team budget information would prejudice its economic interests because sponsors choose to associate with universities based on the presentation of "value/benefits/deliverables" as represented in those budgets and since other universities do not disclose this type of information, the perception of what Queen's is offering would be skewed if only Queen's budget information were to be released into this competitive environment.

[16] Queen's argues that disclosure of the information would result in "significant disadvantage" because it would change the university's leveraging position. Queen's elaborates by arguing that disclosure would permit "sponsors/advertisers to unfairly equate budget investment with the university's commitment to programs and by inference the potential value they will receive in return. This inevitably influences/determines which university a sponsor will select to invest in." Queen's provides several examples of these asserted harms, which are not set out in this order. The examples provided relate to specific, future, contractual negotiations with sponsors and suppliers.

[17] Queen's maintains that its ability to attract top performing athletes and coaches is integral to the university's ability to sustain a competitive position in relation to regional, provincial and national peer universities. Given the "complex and extremely competitive" nature of athlete recruitment, Queen's submits that its competitive position would be compromised by disclosure of the budget information because its competitors will use "all information and any means [within the bounds of our Sports Association rules] to gain an advantage" for their university in persuading "top performing student-athletes to commit to their schools." Armed with knowledge of Queen's team budget information, competing coaches and recruiters would be able to create "unfair comparisons" that can greatly influence an athlete's decision about which university to attend. According to Queen's Athletic Director, she has known this type of "negative recruiting" to include the spreading of false or erroneous information by competing universities, all of which is:

... compounded by the fact that these other universities do not release their team budget information and/or budgets at the various universities do not necessarily include the same information, and subsequently comparisons can be readily manipulated ...

[18] Queen's claims that the same arguments tendered respecting compromise to successful student athlete recruitment with disclosure of the withheld information also apply to coach recruitment, thereby supporting the application of section 18(1)(c). Queen's asserts that coach recruitment takes place within an equally, if not more, competitive arena than with student athletes, partly because the pool of qualified and available talent is significantly smaller at that level. Queen's argues that disclosure of the detailed budget information, including coach salaries, could be expected to have a detrimental impact on coach retention and the calibre of future coaching candidates.

[19] Queen's notes that in considering the request to disclose salary information and specific team budgets, she contacted two colleagues at universities with athletics programs that are similar in size and scope to Queen's. Queen's competes against these universities in athletics and they also seek sponsorship, advertising and marketing revenues in a similar fashion. These coaches from the University of Toronto and York University "share similar concerns" with respect to the impact of disclosure, which are outlined below.

[20] According to the University of Toronto's athletics director, they respond to requests for budget information by disclosing the overall intercollegiate budget and the policies that support the development of that budget, but not specific line-by-line budgets for the 44 programs. The reason given for disclosure in this format is that "each institution funds their program in a unique manner using various revenue streams that include donations, fundraising, central university funding, student athletic fees, ancillary fees and sponsorship," which the director contends makes true comparisons between universities inherently problematic.

[21] York University's athletics director confirms that it is not York's practice to release coaches' salaries or detailed program budgets. She submits that releasing "specific budget information without proper context and insight will create an extremely unfair competitive advantage for rival programs and negatively impact our ability to attract and retain the best assets to be as competitive as we can." In reference to attracting sponsorships, York's director refers to the negative impact of disclosing "skewed financial information," by which she appears to mean that the actual budget numbers could be taken out of context, misinterpreted and used as part of a "negative recruiting" campaign.

[22] This thread is picked up by one of Queen's head coaches (men's volleyball), who echoes these concerns about other coaches/team personnel misusing the information to their advantage in what is a "fiercely competitive recruiting environment." According to the coach, even *perceived* budget inequities have influenced athletes to choose other schools. Queen's submits that "negative recruiting" will be promoted by access to budget details by sport personnel for other universities who could suggest that "their sport budget is greater than Queen's (without explanation of potential differences caused by variances ... in the budget such as: coaching salaries, sponsorship dollars,

building utility costs, league travel requiring airline flights, etc.).” Queen’s argues that coaches are “often positioned to defend their program over another in order to attract athletes.” The coach refers to a “ripple effect” of biased (or negative) recruiting tactics by competitors who are armed with disclosed budget information, such that failing to recruit top athletes leads to losses in team performance, competition requests, crowd-size, hosting opportunities, alumni interest and donations.

[23] Another head coach at Queen’s (women’s basketball) acknowledges that myriad factors are relevant to successful recruiting efforts, including “academics, athletic opportunity, facilities, scholarships, bursaries, exhibition travel schedule, team clothing packages, support services, environment and many more affecting the decision and choice of prospective student athletes.” He submits that “dollars, time, and resource materials” go into recruiting efforts and provides the following example of how disclosure of the information at issue could prejudice Queen’s competitive position in this regard:

In a sport [basketball] that has only 5 players on the floor at one time, a single top performing student-athlete can have tremendous influence on team performance and success. Any situation that creates a recruiting imbalance resulting in the loss of as few as one top-level student-athlete negatively impacts the competitive position of the [sports] program [at Queen’s]...

[24] After reviewing the representations provided by Queen’s in support of the application of section 18(1)(c), the appellant submits that the evidence provided is “largely anecdotal” and falls short of the “detailed and convincing evidence” required to establish the exemption. In particular, the appellant suggests that Queen’s submissions regarding the impact of disclosing team budgets on sponsorship are speculative because sponsorship decisions are made based on a greater variety of reasons, such as alumni ties, team success, recognition and publicity. The appellant states that “NCAA⁶ teams in the United States disclose their budgets without adverse effects on sponsorship.”

[25] The appellant states that varsity student athletes decide which school to attend based on a host of factors, including the availability of student aid, past team success, coaches’ credentials, alumni and player connections, academic programs, university amenities and the city where the university is located. The appellant claims that prospective coaches have a similarly complex decision to make in choosing where to live and work, one that includes consideration of the team’s history and success, the availability of teaching positions, school and community amenities, and employment opportunities for spouses. Regarding both prospective students and coaches, the appellant submits that Queen’s arguments against disclosure of the information based

⁶ National Collegiate Athletic Association.

on assertions that it would materially influence decision-making are mere speculation. The appellant suggests that disclosure might even benefit coach recruitment as it would be taken as a sign of transparency and, further, "it is naïve to believe that prospective coaches are not aware of other varsity team salaries and budgets."

[26] The appellant submits that the university's position amounts to "speculation of possible harm" and does not support the exemption of the information under section 18(1)(c). Furthermore, the appellant points to the need for accountability in the expenditure of public funds given that the primary source of funding for varsity sports programs is through student fees and, indirectly, through taxes. According to the appellant, in the broader context of cuts to university program and tuition fee increases, it is a "matter of transparency and fairness that students ... know what they are spending their money on."

[27] Queen's reply representations emphasize that the information at issue relates to current (and recent) financial statements and is, therefore, highly relevant to the current competitive position of the university.

Analysis and findings

[28] Section 18(1) of the *Act* recognizes that institutions may have economic interests and compete for business with other public or private sector entities. It provides universities (and other institutions) with a discretionary exemption that can be claimed where disclosing information could reasonably be expected to prejudice the university in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the university, or adversely affect the university's ability to protect its legitimate economic interests.⁷

[29] Section 18(1)(c) is a harms-based exemption where the onus rests on Queen's – as the party asserting the claim that it applies – to demonstrate a reasonable expectation of harm with disclosure. The determination of whether the exemption applies is not necessarily based on previous findings respecting similar information, but depends on the quality of evidence provided by the party asserting the claim.⁸ An institution must submit sufficient evidence to establish that a claimed exemption applies to withhold the information that is otherwise subject to a right of access under the *Act*. Therefore, Queen's was required to provide "detailed and convincing" evidence to demonstrate that disclosure of the particular information at issue could reasonably be expected to prejudice its economic interests or competitive position for the purpose of section 18(1)(c).

⁷ Orders P-441, PO-2569 and PO-2619.

⁸ Order PO-2569.

[30] Queen's provided lengthy and extremely detailed evidence in this appeal, much of it not reproduced in this order. It provided specific examples of harms to its sponsorship and recruitment activities that were detailed and persuasive. In particular, there were examples given by Queen's Athletic Director that, in my view, made a reasonable connection between disclosure of the information and compromise to Queen's contractual negotiations with identified sponsors and suppliers. Therefore, I find the evidence not only sufficiently detailed, but also convincing enough to persuade me of the position taken by Queen's as to the harms that could reasonably be expected to result from disclosure of the team budget information at issue. My further reasons for finding that section 18(1)(c) applies follow.

[31] To begin, I accept that interuniversity sport takes place within an intensely competitive arena, where prospective sponsors, coaches and athletes alike are often courted by the same universities. I conclude that the limited size of these markets is relevant to my determination of this issue. I also accept that a university's varsity teams contribute positively to the university's "brand, reputation, campus life, [and] school spirit" and that team successes are reasonably connected with enhancing this contribution. Next, I am satisfied by the explanation contained in the appendix to the university's representations that disclosure of the withheld budget information would result in the release of total team operating budgets and exact salary information. Finally, I am satisfied that Queen's has established that there is a connection between disclosure of that particular information and varsity team achievement, as manifest in securing sponsorships and recruiting athletes and coaches.

[32] The appellant argues that Queen's submissions respecting prejudice to its competitive position in securing sponsorships with disclosure are speculative. To prove the point, the appellant states that "NCAA teams in the United States disclose their budgets without adverse effects on sponsorship." The appellant does not elaborate on this statement. In my view, this statement presents an unsubstantiated comparison between two distinguishable contexts, and does not support the appellant's position. In the context in which NCAA teams operate, *all* NCAA schools are required to disclose certain budget information, including participation rates, staffing, revenues and expenses (i.e., operating budgets), pursuant to federal statute.⁹ There is a clear distinction to be made: where all universities must disclose such information pursuant to a statutory compulsion, there is a level playing field. Where such information is kept confidential, by practice, the disclosure of one university's complete athletics budget information would set it apart and may reasonably lead to it experiencing disadvantage on the field, as Queen's contends. The fact that this request is for total team budgets for a university in Ontario, Canada, therefore, is relevant to my decision.

⁹ All coeducational institutions of higher learning that participate in any federal student financial aid program and have intercollegiate athletics program must provide information concerning their intercollegiate athletics program under the *Equity in Athletics Disclosure Act of 1994*, Section 485g of the *Higher Education Act of 1965*, 20 U.S.C. 1092. Regulations govern the collection, use and disclosure of this data. Source: <http://www2.ed.gov/inaid/prof/resources/athletics/eada.html>

[33] In saying this, I note that the practice of similar institutions voluntarily disclosing, or withholding, essentially similar information has been held to be a relevant factor in determining the reasonableness of a claim to harm under section 18(1)(c).¹⁰ While the appellant suggests that it would be “naïve to believe that prospective coaches are not aware of other varsity team salaries and budgets,” the evidence before me supports the conclusion that confidentiality of the very detailed budget information at issue is, in fact, maintained as a practice. The additional evidence on this point from York and University of Toronto persuades me that Queen’s could reasonably be expected to be placed at a “recruiting imbalance,” in their words, or competitive disadvantage, were its own complete team budget information, including coach salaries, disclosed.

[34] Furthermore, and with regard to sponsorships and donations, I accept that Queen’s must compete with other universities to attract these funds. In this other competitive context, I am satisfied that disclosure of the information at issue could reasonably be expected to provide insight into Queen’s funding of its varsity athletics programs that could prejudice its economic position.

[35] I am also persuaded by the evidence that disclosure of the detailed budget information may work to the detriment of athlete and coach recruitment. Specifically, I accept that perceived budget inequities may act as a deterrent to prospective students and staff in this particular interuniversity sport context. Essentially, I accept that the disclosure of Queen’s team budget information could be problematic in a context where other universities do not disclose the same information, and because each institution funds its athletics program using a unique combination of revenue streams. While I do not necessarily agree that such information would be misconstrued as a matter of course, the evidence of the three athletics directors as to the existence of “negative recruiting” satisfies me that the deliberate skewing of this specific information may be resorted to by other universities competing with Queen’s in seeking to attract student athletes and coaches. Furthermore, although the appellant is obviously correct that athletes and coaches take many factors into consideration when choosing their university, I do not understand Queen’s to be asserting any denial of this reality. Rather, I accept that Queen’s posits that the team budget information at issue is a relevant factor among many in this decision.

[36] Therefore, subject to my review of Queen’s exercise of discretion below, I find that the withheld team budget information is exempt by reason of section 18(1)(c).

¹⁰ See Order PO-2404. In Order PO-3233, I found the fact that two other post-secondary institutions disclose essentially the same information withheld by Carleton was relevant to my finding that section 18(1)(c) did not apply.

B. Should Queen's exercise of discretion under section 18(1)(c) be upheld?

[37] After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 18 exemption is discretionary, which means that Queen's could have chosen to disclose information, despite the fact that it could withhold it. Queen's was required to exercise its discretion under this exemption.

[38] On appeal, the Commissioner or her delegated decision-maker (the adjudicator) may determine whether Queen's failed to exercise its discretion. In addition, the Commissioner or her delegate may find that Queen's erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to Queen's for an exercise of discretion based on proper considerations.¹¹ According to section 54(2) of the *Act*, however, I may not substitute my own discretion in place of the university's discretion.

[39] I have upheld Queen's decision to apply section 18(1)(c) to deny access to the information at issue and I must, therefore, review its exercise of discretion under those exemptions.

[40] Regarding its exercise of discretion, Queen's maintains that it exercised its discretion recognizing the purposes of the *Act* and the importance of public disclosure. Queen's states that it applied section 18(1)(c) in a "limited and specific" way to release large portions of the team budgets while withholding only those portions it believed would jeopardize its economic or competitive interests if disclosed. Queen's states that it took into consideration that it had not disclosed such information in the past and the fact that other universities do not disclose such information. Queen's also considered the currency of the information as relevant in its exercise of discretion.

[41] Queen's notes that a summary containing the number of coaches with each varsity team and their employment classification with the university was provided to the appellant. Queen's maintains that disclosure of the withheld information would not increase public confidence in the institution because much of the budget was disclosed, including the coaches' benefits line. Additionally, Queen's states that it proposed a compromise disclosure of the team budget information to the appellant that included salary ranges for all coaches, but the appellant rejected the proposal. Finally, Queen's submits that it concluded that the appellant did not have a sympathetic or compelling need to receive the information.

¹¹ Order MO-1573.

[42] The appellant's representations on the university's exercise of discretion assert that Queen's failed to take various other factors that attract student athletes, sponsorship and alumni support into consideration in its decision about disclosing team budgets. The appellant also submits that Queen's failed to take into account the need for public accountability in exercising its discretion.

Analysis and findings

[43] I have considered Queen's representations on the exercise of its discretion in relying on section 18(1)(c) to not disclose the records. In light of these submissions, I am satisfied that the evidence points to a proper exercise of discretion by Queen's under section 18 with respect to disclosure of the information that is responsive to the appellant's request.

[44] In particular, I am satisfied that Queen's exercised its discretion under section 18 by considering relevant, not irrelevant, factors. In particular, I am satisfied that Queen's properly considered the purpose of the section 18(1)(c) exemption in deciding to withhold only the portions of the team budgets that it did. I note that Queen's considered the practice of similar institutions with respect to this type of information. I have also considered that Queen's offered to disclose certain other budget or salary (range) information to the appellant, although this offer was declined by the appellant. In my view, this offers stands as evidence of a good faith exercise of discretion under the *Act*.

[45] Overall, I find that Queen's exercised its discretion properly in the circumstances, and I will not interfere with it on appeal.

C. Is there a compelling public interest in disclosure of the information sufficient to outweigh the purpose of section 18(1)(c)?

[46] The appellant takes the position that the public interest override in section 23 of the *Act* applies to all of the information withheld by Queen's.

[47] Section 23 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.

[48] Previously in this order, I found that section 18(1)(c) applies to the withheld information. Section 23 could be applied to override the economic interests exemption in section 18(1)(c) if two requirements are satisfied. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the particular exemption.

[49] 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 information and the *Act’s* central purpose of shedding light on the operations of government.¹² Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹³ Any public interest in *non*-disclosure that may exist also must be considered.¹⁴

[50] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances of the appeal.

[51] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.¹⁵

Representations

[52] Respecting section 23, the appellant asserts that there is a compelling public interest in disclosure of the budget information, similar to Order PO-3198, where the adjudicator accepted that there was “a great deal of interest” within the university community about a specific fundraising event and the records related to its organization and connection with the university itself. The appellant indicates that there is a similar heightened interest within the Queen’s community about the use of student fees in the context of rising tuition costs and program cuts. The appellant submits that the team budget records at issue directly relate to the public interest in disclosure.

[53] On the second part of the test under section 23, the appellant argues that:

The compelling public interest in the university community for transparency as to the use of student fees clearly outweigh any speculative possibility of prejudice to the economic interest or competitive

¹² Order P-984.

¹³ Orders P-984, PO-2569 and PO-2789.

¹⁴ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

¹⁵ Order P-244.

position of the university that would arise from disclosure of the varsity team budgets.

[54] Queen's rejects the appellant's suggestion that a compelling public interest in the information exists, arguing that the budget information already disclosed, in conjunction with the coach salary range and grade information that they are willing to disclose, is sufficient to inform the public about university spending in this area. Queen's submits that while team budgets are important to the internal operation of athletics at the university, they "are of little concern to the public at large." Furthermore, according to Queen's, the exact salary of each coach and each total, complete team budget "would not significantly enlighten" or inform the public, given the information that has already been disclosed.

[55] Queen's submits that the threshold for establishing a *compelling* public interest is a high one and that this part of the test is difficult to satisfy.¹⁶ Queen's argues that the information at issue in this appeal does not reach that threshold and, further, that the appellant has failed to provide any evidence for the claimed public interest; that is, a specific interest in how funds are administered amongst teams. Queen's also argues that there is a public interest in non-disclosure of the total team budgets. Queen's refers to its "central function in the local economy" of Kingston, asserting that economic injury to the university could result in a negative economic impact on the city, thereby supporting an inference that the public interest in not disclosing certain aspects of the team budgets should take precedence over any public interest in disclosure of the total team budgets.

[56] Queen's refers to a special university council that it says is intended to address transparency issues respecting the athletics department budget, including the use of student fees. Queen's submits that:

Oversight of the Athletic Department's budget ... is the responsibility of the University Council on Athletics and Recreation (UCAR) [cite omitted]. The UCAR is a university-wide committee of the university Senate comprised of nine members – five of whom are students. Two of these students are directly appointed by the undergraduate and graduate student government and an additional student is appointed directly by the Senate. The remaining two are appointed by the Student Athlete Varsity Leadership Council.

[57] Finally, Queen's submits that the public interest that may exist in full disclosure of the team budgets does not outweigh the purpose of section 18(1)(c), which is to

¹⁶ *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.).

protect the economic and competitive position of the university. According to Queen's, the withheld information is precisely what the exemption was intended to protect.

Analysis and findings

[58] In order for me to find that section 23 of the *Act* applies to override the exemption of the information that I have found qualifies for exemption under section 18, I must be satisfied that there is a *compelling* public interest in the disclosure of *that particular information* that *clearly outweighs* the purpose of the economic interests exemption.

[59] I accept that there is a public interest in the university's athletics budget information and, specifically, in it being subjected to scrutiny by, or on behalf of, the individuals that contribute revenue to fund athletic programs through the payment of student fees. I am satisfied that there is a public interest specifically in learning about how athletic budget burdens or shortfalls may effectively be passed on to Queen's students through increased fees.

[60] However, the inquiry does not end with this conclusion because I must also be satisfied that the public interest is a *compelling* one. As stated previously, while the *Act* is silent as to who bears the burden of proof under section 23, it has been acknowledged that it would be unfair to impose the full onus on an appellant who obviously cannot review the withheld information prior to providing representations in support of the application of section 23. This means that I must look to the appellant's representations *and* the information that has been withheld to answer this "compelling question." Having done so, I conclude that sufficient evidence as to the public interest being compelling in the circumstances of this appeal has not been provided by the appellant; nor is it evident upon consideration of the withheld budget information.

[61] A compelling public interest has been found not to exist where, for example, another public process or forum has been established to address public interest considerations¹⁷ or where a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.¹⁸ In this appeal, Queen's referred me to the oversight of varsity athletics (and budgets) through the University Council on Athletics and Recreation. Queen's thereby suggests that public interest considerations have been addressed by, and through, UCAR's role and composition, which includes students appointed by student government, the university Senate and student athletics leadership. I have considered this forum as a possibility for addressing concerns about student funding of athletics and I accept that it may play a role. I have also considered the extent to which Queen's provided access to athletics budget information, and its offer to disclose more in the form of coach salary ranges

¹⁷ Orders P-123/124, P-391 and M-539.

¹⁸ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

and grades. Team budget information disclosed includes, for example, details for operations surplus/deficit, certain types of revenue, non-salary expenses (supplies, uniforms, equipment, rentals/leases, service contracts, travel, accommodations, meals, etc.), casual and overtime salary, fringe benefits, insurance, pensions and honorariums. In my view, meaningful scrutiny of the team budgets is possible. As the evidence provided does not satisfy me that there is a compelling public interest in the disclosure of the withheld information, I find that the first part of the test under section 23 is not met.

[62] Since both components of the first part of the test for the application of the public interest override are not met, it is unnecessary for me to review the second part of the test. Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

I uphold Queen's decision to deny access under section 18(1)(c), and I dismiss this appeal.

Original Signed by: _____
Daphne Loukidelis
Adjudicator

_____ April 16, 2014