

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3564

Appeal PA12-264

University of Ottawa

December 31, 2015

**Summary:** The appellant sought access to all records related to a specified corporation that were in the possession of 19 named university executives and executive offices. The university located 15 records that it identified as responsive to the appellant's request. The university granted the appellant full access to one record and partial access to two other records. To withhold the remaining information in the responsive records, the university relied on the discretionary exemptions in section 13(1) (advice or recommendations) and 18(1)(c) (economic and other interests) in addition to certain mandatory exemptions under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The university also withheld some information in the records on the basis that it was not responsive to the request. The appellant appealed the university's decision to claim sections 13(1) and 18(1)(c). The university's decision is upheld in part and some records are ordered disclosed to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1) and 18(1)(c).

**Orders and Investigation Reports Considered:** Order PO-3243.

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

### OVERVIEW:

[1] The University of Ottawa (the university) received a request under the *Freedom*

*of Information and Protection of Privacy Act* (the *Act*) for access to all records related to a named corporation that were sent by, received by, or in the physical and/or electronic possession of nineteen specified university executives and executive offices during the period of March 1, 2007, and the date of the request.

[2] The university located fifteen records responsive to the request and issued a decision granting partial access to records 10 and 15, and full access to record 14. The university relied on the discretionary exemptions in sections 13(1) (advice or recommendations), 18 (economic and other interests) and the mandatory exemptions in sections 17 (third party information) and 21 (personal privacy) to withhold the remaining records. The university also withheld portions of records 1, 7, 9, 11, 12 and 15 on the basis that they were not responsive to the request. The appellant appealed the university's decision to this office.

[3] During mediation, the university issued a revised decision granting partial access to records 11 and 12, and complete access to record 13, which was the only record for which the university claimed section 17. Along with its revised decision, the university provided a new index of records indicating which exemptions it relied on for each record. The appellant confirmed that he was not interested in pursuing access to the name and email address withheld as personal information under section 21 in record 10 or to the portions of the records withheld as non-responsive. As a result of mediation, only the discretionary exemptions in sections 13(1) and 18, and their possible application to the corresponding withheld information in records 1 through 9 remained at issue when the appeal was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*.

[4] During my inquiry, I invited the university and the appellant to submit representations on the possible application of sections 13(1) and 18 to records 1 through 9. In my Notice of Inquiry I directed the university's attention to page 12 of the attachment in record 1 which was marked as non-responsive by the university, but appeared to be responsive. I asked the university to consider the possible application of sections 13(1) and 18 to this page. The university submitted representations and agreed to share the non-confidential portions of its representations with the appellant. The university also acknowledged that the additional portion of record 1 on page 12 of the attachment that I identified was in fact responsive. The university stated that it relied on the discretionary exemptions in sections 13(1) and 18 to withhold this portion of the record as well.

[5] In accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*, I shared the university's non-confidential representations with the appellant. I invited the appellant to provide representations in response, however the appellant declined to do so.

[6] In this order, I partially uphold the university's decision and find that part of record 1 is exempt from disclosure under section 13(1). I do not uphold the university's

decision to withhold the remaining information at issue in records 1 through 9 on the basis of section 18(1)(c) and I order it disclosed.

## **RECORDS:**

[7] The records remaining at issue in this appeal are the withheld portions of records 1, 7 and 9, and records 2, 3, 4, 5, 6 and 8 in their entirety. All of the records are correspondence (including attachments) between university officials relating to various fundraising matters.

## **ISSUES:**

- A. Does the discretionary exemption at section 13(1) apply to the part of record 1 for which it was claimed?
- B. Does the discretionary exemption at section 18(1)(c) apply to the remaining withheld information in records 1 through 9?
- C. Did the university exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **A. Does the discretionary exemption at section 13(1) apply to the part of record 1 for which it was claimed?**

[8] Section 13(1) states:

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

[9] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>1</sup>

[10] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

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<sup>1</sup> *John Doe v Ontario (Finance)*, 2014 SCC 36, at para 43.

[11] "Advice" has a broader meaning than "recommendations". It involves an evaluative analysis of information and includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>2</sup>

[12] Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material. Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>3</sup>

[13] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations.

### ***Representations and finding***

[14] The university submits that the specific advice and recommendation in record 1 is located on the second page of the attachment under the "Recommendations" section at the second bullet point. It states that this record was prepared by the Faculty of Science's Faculty Development Office and it contains a recommendation that it received from this office. The university also provides confidential representations describing the specific recommendation. As noted above, the appellant did not provide representations.

[15] The portion of record 1 that the university has withheld as exempt under section 13(1) of the *Act*, is a sentence contained under the heading "Recommendations", and appears in a document that contains an analysis of certain fundraising issues. I agree with the university that the information contained in the withheld sentence qualifies for exemption under section 13(1). There is specific advice, which I am not able to reveal in this order, and a recommended course of action given by a person employed by the university to the university in the form of the larger analysis in which it is contained. Accordingly, I find that the portion of record 1 that the university has withheld under section 13(1) is exempt, subject to my consideration of the university's exercise of

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<sup>2</sup> *Ibid* at paras 26 and 47.

<sup>3</sup> Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v Ontario (Assistant Information and Privacy Commissioner)*, [2004] OJ No 163 (Div Ct), aff'd [2005] OJ No 4048 (CA), leave to appeal refused [2005] SCCA No 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v Ontario (Information and Privacy Commissioner)*, [2005] OJ No 4047 (CA), leave to appeal refused [2005] SCCA No 563.

discretion below.

**B. Does the discretionary exemption at section 18(1)(c) apply to the remaining withheld information in records 1 through 9?**

[16] 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;

[17] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.<sup>4</sup> The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.<sup>5</sup>

[18] For section 18(1)(c) to apply, the university must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.<sup>6</sup>

[19] The failure to provide detailed and convincing evidence will not necessarily defeat the university's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.<sup>7</sup>

***Representations and findings***

[20] The university submits that the discretionary exemption in section 18(1)(c) applies to all of the withheld portions of records 1 through 9. It states that these portions of the records generally consist of strategic information pertaining to its fundraising activities. The university submits that if disclosed, the withheld information would reveal the university's approaches to fundraising, and this revelation would give

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<sup>4</sup> Orders P-1190 and MO-2233.

<sup>5</sup> Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

<sup>6</sup> *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras 52-4.

<sup>7</sup> Order MO-2363.

other institutions a competitive advantage over it. The university also provides confidential representations to support its submission that disclosure could reasonably be expected to prejudice its economic interests or competitive position.

[21] Having reviewed the university's submissions and the information it seeks to withhold, I am not satisfied that section 18(1)(c) applies. The university's representations are general assertions that are speculative, much like the university's representations in a similar and somewhat related appeal, Appeal PA12-297-2, which involved the same parties, an almost identical request (except for the named corporation) and a claim by the university that section 18(1)(c) applied. Appeal PA12-297-2 resulted in my Order PO-3243, in which I included the following reasoning in rejecting the university's claim of section 18(1)(c):

The university's submissions on this issue, including those found in its confidential representations, are general assertions and speculation. The university asserts that revealing information on suggested research funding initiatives from five years earlier and from two and a half years earlier, will prejudice its economic interests and competitiveness; however, it does not explain why it is reasonable to expect this outcome. The university provides no information on whether the suggested research initiatives mentioned in the records were undertaken successfully, if at all, and what their current status, if any, is. Such information could have assisted the university in demonstrating that it has real economic interests worthy of protection that could be affected by disclosure of the records.

[22] My reasoning in Order PO-3243 is equally applicable in this appeal and I adopt it. The university asserts that disclosure of the withheld information would give other universities a competitive fundraising advantage over it to its detriment, but it does not provide adequate evidence to support this assertion. There is nothing in the information itself that leads me to conclude that disclosure would confer upon other universities a competitive advantage that could, in turn, reasonably be expected to harm the university's economic interests and competitive position. The university's confidential submissions are also not supported by adequate evidence and amount to speculation. They refer to a specific opportunity that the university claims would be jeopardized if the withheld information were disclosed; however, they do not explain why it is reasonable to expect this outcome and more importantly, they do not address how this opportunity qualifies as an economic interest worthy of protection in the circumstances. I am not able to discuss this point further due to confidentiality concerns, however, I note that similar to the information at issue in Order PO-3243, the withheld information in this appeal is not current, with some records dating back five years and others dating as far back as 2007 and 2008.

[23] I find that the university's complete representations do not provide evidence "well beyond" or "considerably above" a mere possibility of harm, which is the test confirmed by the Supreme Court of Canada in *Ontario (Community Safety and*

*Correctional Services) v Ontario (Information and Privacy Commissioner)*<sup>8</sup> and the test the university is required to satisfy in order to establish the application of section 18(1)(c). I find that the remaining information at issue is not exempt under section 18(1) of the *Act*, and since the university has not claimed any other exemptions in respect of this information, I will order it disclosed.

**C. Did the university exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?**

[24] The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[25] If the exercise of discretion is found to be flawed, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>9</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>10</sup> Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant<sup>11</sup>:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

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<sup>8</sup> *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)* *supra* note 6.

<sup>9</sup> Order MO-1573.

<sup>10</sup> Section 54(2) of the *Act*.

<sup>11</sup> Orders P-344, MO-1573

- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

### ***Representations and finding***

[26] The university submits that it properly exercised its discretion in deciding to apply the section 13(1) exemption. It asserts that it did not act in bad faith or for improper purposes when it exercised its discretion. It states that it considered the purposes of the *Act*, whether the requester was seeking his own personal information, whether the requester had a sympathetic or compelling need to receive the information and whether the disclosure would increase public confidence in its operation. It adds that it aimed to disclose as much information as possible and reviewed the records to determine what portion of the records, if any, could reasonably be severed as required by section 10(1) of the *Act*, without disclosing exempt information or non-responsive information. The university submits that after weighing these considerations, it decided to withhold part of record 1 from the appellant.

[27] On my review of the university's representations and the portion of record 1 that I have found exempt from disclosure under section 13(1), I am satisfied that the university properly exercised its discretion to withhold this information. There is no indication that the university made its decision in bad faith or for an improper purpose, or that it took into account irrelevant considerations or failed to take into account relevant ones. The university granted the appellant partial access to some of the responsive records and full access to others, and it applied section 13(1) very narrowly in claiming it only for the withheld portion. Accordingly, I find that the university appropriately exercised its discretion to withhold part of record 1 under section 13(1) and I uphold this exercise of discretion.



**ORDER:**

1. I uphold the university's decision to withhold part of record 1 under section 13(1) of the *Act*.
2. I order the university to disclose to the appellant records 2, 3, 4, 5, 6 and 8 in their entirety, and the portions of records 1, 7 and 9 that I have found do not qualify for exemption under section 18(1)(c). I enclose with this order a copy of records 1, 7 and 9 **showing the information to be disclosed**. The university shall disclose these records and this information to the appellant by **February 5, 2016**, but not before, **February 1, 2016**.
3. I reserve the right to require the university to provide me with copies of the records it discloses to the appellant.

Original Signed by: \_\_\_\_\_  
Stella Ball  
Adjudicator

\_\_\_\_\_ December 31, 2015