

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3943

Appeal PA17-224

York University

April 24, 2019

Summary: A request was submitted to York University (the university) under the *Freedom of Information and Protection of Privacy Act* for access to documents produced as a result of the 2015-16 cyclical review of the undergraduate Criminology programs offered at York University. The university denied access to the responsive records in part, citing the application of the exclusion in section 65(8.1) regarding records respecting or associated with research and teaching materials and the discretionary economic and other interests exemptions in sections 18(1)(c) and 18(1)(f).

In this order, the adjudicator does not uphold the university's decision that section 65(8.1) applies. She does, however, partly uphold its decision under section 18(1). She orders the university to disclose the non-exempt information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.

F.31, as amended, sections 65(8.1)(a) and (b), and 18(1)(c) and (f).

Orders Considered: Orders PO-3594, PO-3641, PO-3642, PO-3713, and PO-3893-I.

OVERVIEW:

[1] A request was submitted to York University (York or the university) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to the following information:

...copies of the documents produced in Criminology as a result of the 2015-16 cyclical review of the undergraduate programs in Criminology offered at York University. Specifically, the documents I am seeking are:

- 1) the program self-study;
- 2) the external evaluation;
- 3) the internal institutional evaluation of the program self-study and the external review; and
- 4) any follow-up documents that include plans to implement and monitor the recommendations issuing from this cyclical review process.

[2] The university denied access to the responsive records, in part, pursuant to sections 18(1) (economic and other interests) and 21(1) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the university's decision.

[4] During the mediation stage of the appeal, the appellant confirmed that he is not pursuing access to the portions of the records containing the personal information of other individuals. Therefore, the portions of the report containing personal information are no longer at issue.

[5] As mediation was not successful in resolving the issues, the file was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry.

[6] Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[7] The university then issued a supplemental decision letter dated October 12, 2018, disclosing portions of Record 1, entitled "Self-Study Report of the Criminology Program." It also claimed the application of the section 65(8.1) exclusion regarding records respecting or associated with research and teaching materials to exclude pages 57 to 297 of Record 1 from the *Act*.

[8] Further to the university's October 12, 2018 supplemental decision, the university provided additional representations as to the application of the research and teaching materials exclusion in section 65(8.1) of to pages 57 to 297 of Record 1. These representations were provided to the appellant, who did not provide representations in response.

[9] In this order, I do not uphold the university's decision that sections 65(8.1)(a) or 65(8.1)(b) apply. I do, however, partly uphold its decision to deny access under sections 18(1)(c) and 18(1)(f).

RECORDS:

[10] There are 4 records at issue in this appeal:

- Record 1 - Self-Study Report of the Criminology Program
- Record 2 - Review of the Agenda of Concerns raised in Record 1
- Record 3 - Evaluation Conducted by the External Review Committee
- Record 4 - Criminology Program's Response to Record 3

[11] The university has withheld part of Record 1 and all of Records 2 to 4. It has claimed the application of sections 18(1) and (c) to all four records and section 65(8.1)(a) or (b) to pages 57 to 297 of Record 1.

ISSUES:

- A. Does the section 65(8.1)(a) or (b) exclusion for records respecting or associated with research and teaching materials exclude pages 57 to 297 of Record 1 from the *Act*?
- B. Do the discretionary economic and other interests exemptions at sections 18(1)(c) or 18(1)(f) apply to the records?
- C. Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the section 65(8.1)(a) or (b) exclusion for records respecting or associated with research or teaching materials exclude pages 57 to 297 of Record 1 from the *Act*?

[12] York claims that the exclusions in sections 65(8.1)(a) and (b) apply to exclude portions of Record 1 from the *Act*. Section 65(8.1) states, in part, that:

This Act does not apply,

(a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution; or

(b) to a record of teaching materials collected, prepared or maintained by an employee of an educational institution or by a

person associated with an educational institution for use at the educational institution.

[13] The university states that pages 57 to 297 of Record 1 are a compilation of course syllabi or outlines created by faculty members for their undergraduate Criminology courses during the 2015-16 academic year. It states that in the syllabi, instructors set out for the students the vision of the course as well as the expanded course description and objectives. This includes supplementary and required reading lists, reading schedules, presentation and assignment topics, other instructional materials, and institutional policies and procedures that relate to the course or student.

[14] The university also states that the customary practice at York is that course syllabi are prepared and maintained by individual faculty members. It states:

Instruction on the creation of course syllabi from the York University Senate Committee on Academic Standards, Curriculum & Pedagogy is limited to guidance on university policies that relate to the student and formatting...

Collective agreement provisions related to the ownership of intellectual property of works created for courses, such as syllabi, are treated differently than materials created for administrative purposes. Article 23 of the York-YUSA collective agreement deals with the ownership of intellectual property related to patents and copyright...¹

Typically, faculty members control the intellectual property rights to their teaching materials, not the university, and this should inform any assessment of such records under *FIPPA*.

Course syllabi are an example of materials prepared and maintained by individual faculty members for teaching. The university does not maintain a central repository of syllabi under the institution's control. Short summaries of the course description for the undergraduate Criminology courses, which are customarily maintained by the university, have been released to the requester...

¹ The university relies on Section 23.02, which says, in part, Notwithstanding section 13(3) of the Copyright Act, the parties agree that, the copyright to all forms of written, artistic, and recorded works (including, but not limited to, lecture courses and videos thereof, computer programmes, choreographic numbers, cartographic materials, bibliographic materials, and course materials, including correspondence course packages, course packages to be delivered on the Internet, multimedia instructional packages and interactive text books) shall be retained by the employee(s) responsible for the origination of the materials in whole or in part, pro-rated to reflect the contribution of the originator(s).

While the *Act* does not provide a precise definition of 'teaching materials', course syllabi are works created by faculty members to engage and motivate their students. Under our collective agreement, faculty members typically control the intellectual property rights to their teaching materials with the understanding that academic freedom informs their creation. These records are in the custody and control of the university to meet the requirements set out in the Ontario Universities Council on Quality Assurance...

Analysis/Findings

[15] The university has only claimed the application of the exclusions to pages 57 to 297 of Record 1, which is a 333 page record, entitled, "Self-Study Report of the Criminology Program."

[16] This office has consistently taken the position that the exclusions at section 65² are record- and fact-specific. Therefore, in order to qualify for an exclusion, a record is examined as a whole. The whole-record method of analysis is also described as the "record-by-record" approach.³

[17] In Order PO-3642, Adjudicator Jenny Ryu dealt with a claim where an institution attempted to exclude part of a record under section 65(6).⁴ She stated that:

[i]n making this claim, it is possible the ministry is implicitly acknowledging that the record, as whole, was not prepared in relation to

² See Orders PO-3893-I, PO-364, M-797, P-1575, PO-2531, PO-2632, MO-1218, and PO-3456-I.

³ See Oder PO-3893-I in particular.

⁴ This section reads:

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:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
4. Meetings, consultations, discussions or communications about the appointment or placement of any individual by a church or religious organization within an institution, or within the church or religious organization.
5. Meetings, consultations, discussions or communications about applications for hospital appointments, the appointments or privileges of persons who have hospital privileges, and anything that forms part of the personnel file of those persons.

discussions about labour relations or employment-related matters within the meaning of section 65(6)3.

[18] Adjudicator Ryu concluded that an exclusion cannot apply to part of a record that is not itself excluded. She reviewed several IPC orders where an institution attempted to exclude only part of a record under section 65(6) and noted that in each case, "the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the *Act*."

[19] Adjudicator Ryu found that this approach was consistent with the language of the exclusions, which applies to records that meet the relevant criteria and noted that it corresponds with the Legislature's decision not to incorporate a requirement for the severance of excluded records in the *Act*.

[20] Adjudicator Alec Fadel in Order PO-3893-I adopted the approach taken in Order PO-3642 and found that the application of an exclusion must be considered in the context of the whole record for records where a university claimed the exclusion applied in part. The adjudicator decided to consider the application of the exclusion to the whole record in order to determine the appellant's access rights under the *Act*. In Order PO-3893-I Adjudicator Fadel, using the record-by-record approach, found that the record was excluded from the *Act* under section 65(6).

[21] Adjudicator Fadel further found that the institution's decision to disclose some of the record was not improper as section 65(6) is an exclusion, not a mandatory exemption. An institution may choose to disclose information outside of the *Act*.

[22] Similar to his analysis under section 65(6), Adjudicator Fadel also used the whole record approach for the information sought to be excluded under section 65(8.1)(a). He relied on the findings of Adjudicator Colin Bhattacharjee in Order PO-3713, where Adjudicator Bhattacharjee found that section 65(8.1)(a) applies to a "record," not parts of a record. Consequently, even though the university claimed that parts of some records were excluded from the *Act* under section 65(8.1)(a), Adjudicator Fadel in Order PO-3893-I determined whether each record as a whole was excluded under that provision.

[23] In deciding whether the exclusion in section 65(8.1) applies, I adopt the approach set out above, namely, that the application of the section 65(8.1) exclusions must be considered in the context of the whole record, even though the university has claimed that the exclusion only applies to part of Record 1.

[24] The university provided both confidential and non-confidential representations to describe this record. In its non-confidential representations, it states that Record 1 is a report that identifies certain challenges associated with the university's Criminology program.

[25] Besides identifying that pages 57 to 297 contain course syllabi, which the university has claimed are excluded under sections 65(8.1)(a) and (b), the university has described:

- pages 43 to 46 as containing information from its Libraries Annual Report, 2013-2014, which was previously available on the website of the York University Libraries; and,
- pages 48 to 297 as containing detailed information for relatively current university Criminology courses and includes the 2015/16 course descriptions and outlines, schedules of topics, required and optional readings.⁵

[26] Based on my review of Record 1, I find that neither section 65(8.1)(a) nor section 65(8.1)(b) apply to exclude this record from the *Act*.

[27] Section 65(8.1)(a) excludes records related to research. Research is defined as "... a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." The research must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution.⁶

[28] This section applies where it is reasonable to conclude that there is "some connection" between the record and the specific, identifiable "research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution"⁷

[29] The university has not provided sufficient evidence to support or establish its claim that the information at issue consists of research records. Nor do I find that the information at issue, which consists of course syllabi, qualifies as research records within the meaning of section 65(8.1)(a), as set out above.

[30] Therefore, as the information at issue is not information respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution, I find that it is not excluded under section 65(8.1)(a).

[31] Concerning section 65(8.1)(b), this section excludes records of teaching materials collected, prepared or maintained by an employee of an educational

⁵ As noted above, pages 57 to 297 of these pages contains course syllabi created by faculty members for their undergraduate Criminology courses during the 2015-16 academic term.

⁶ Order PO-2693.

⁷ Order PO-2942; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

institution for use at the educational institution. I find that the record, although it may contain teaching materials in the form of course syllabi, is not a "record of teaching materials" for the purposes of section 65(8.1)(b). It is a report on a review of the entire Criminology program. The full name of Record 1 is:

York University
Criminology
Department of Social Science
Faculty of Liberal Arts and Professional Studies
Cyclical Program Review 2015-2016
Self-Study Report and Program Brief
Review Period: 2008-2016
Submitted: August 15, 2016

[32] The Table of Contents for this record, which has been disclosed, reads:

Criminology
Self-Study Report

Part I

1. Introduction
2. General Objectives of the Program
3. Program Curriculum, Structure and Learning Outcomes
4. Admission Requirements
5. Resources
6. Student Employment
7. Quality Enhancement

Part II

Quality Indicators and Outcome Measures

1. Student Survey
2. Courses Offered
3. Teaching Complement
4. Admissions
5. Student Enrolment
6. Library Resources

Part III

Curriculum Vitae of the Faculty

Part IV

Appendices

[33] As stated above, the only portion of Record 1 that the university is claiming is subject to the exclusion in section 65(8.1)(a) or (b) are the course syllabi. These are found in Part I of Record 1, under Resources.

[34] As noted above, the whole record is examined in order to determine the application of an exclusion set out in section 65.

[35] From my review of the record, and as the above table of contents suggests, the record as a whole is not a record of teaching materials. Rather, it is a review of the criminology program at York. For that reason, section 65(8.1)(b) does not apply.

[36] In conclusion I find that Record 1 is not excluded under section 65(8.1)(b) of the *Act*, as it is clearly not a record of teaching materials prepared or maintained by a faculty member as claimed by the university. It is not a record prepared or maintained by a faculty member. Instead, it is a comprehensive review of the entire Criminology program over an eight-year period.

[37] As Record 1 is not excluded from the application of the *Act*, I will consider whether the claimed exemptions at section 18(1)(c) or 18(1)(f) apply to the withheld portions of it.

Issue B: Do the discretionary economic and other interests exemptions at sections 18(1)(c) or 18(1)(f) apply to the records?

[38] York withheld portions of Record 1, along with Records 2, 3 and 4 in their entirety, under sections 18(1)(c) and 18(1)(f). The relevant parts of section 18(1) state:

A head may refuse to disclose a record that contains,

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

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public.

[39] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the Act.⁸

[40] The university provided both confidential and non-confidential representations on the application of section 18(1). In York's non-confidential representations, it describes the records, as follows:

⁸ Toronto: Queen's Printer, 1980.

Record 1 is the Self-Study Report of the Criminology Program. This is the first step in the cyclical review process. This report identified certain challenges associated with the program...⁹

Record 2 is a review of the Agenda of Concerns raised in the program's Self-Study Report (Record 1). The document contains the Associate Dean's comments and recommendations.

Record 3 is the evaluation conducted by the external Review Committee. This report contains critical analysis of the details and recommendations in the Self-Study Report as well as raising additional issues. The report concludes with the Committee's recommendations on all issues raised.

Record 4 is the Criminology Program's Response to the External Reviewer appraisal of the Criminology program (Record 3). The document is a discussion of the Criminology program and challenges that have been raised in the earlier stages of the internal review. Recommendations for improvement and potential strategies and plans to respond to these challenges are put forward.

Section 18(1)(c): prejudice to economic interests

[41] Concerning section 18(1)(c), the university states that it competes for undergraduate students with 11 other publicly-funded universities that also offer Criminology programs. It states that a cyclical review is conducted to identify the academic standards of existing programs as well as to ensure ongoing improvement. It states that the current review of York's Criminology program has identified a number of areas of improvement along with plans to address them. The university states that the issues identified by the reviewers in the records focus on specific confidential challenges.

[42] The university states that there are a number of recommended areas of improvement and strategic options identified in the review. It states that:

Record 1 (pages 48 to 297) contains detailed information for relatively current York university Criminology courses. It includes 2015/16 course descriptions and outlines, schedules of topics, required and optional readings. Disclosure of this content would give competing institutions an unfair advantage when constructing their own programs.

The university's economic and competitive position would be at risk if areas identified for improvement or with weaknesses were made available

⁹ The university listed the specific challenges faced by the program.

to competitors offering similar programs. It would allow other institutions to gain valuable insight into York's Criminology program and provide them the opportunity to modify and implement changes to their programs to compete for potential applicants as well as York's current students...

Competitors would be able to gain highly valuable insight into the program's current challenges and our strategies to remedy them.

[43] The appellant relies on Order PO-3594, which concerned a request to Fleming College (the college) for access to records about the review of the college's Emergency Management [EM] post-graduate certificate program, where I made the following finding:

I agree with the college that information in the records that would allow the college's competitors to implement changes to their programs that would exploit the college's weaknesses, would make the college less attractive to new students enrolling in the program... I find that information about weaknesses in the program comes within section 18(1)(c) as being information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of the college.

However, I do not accept the college's argument that information about the EM program's strengths is information that comes within section 18(1)(c). I find that information about the program's strengths is information that the college would publicize and is information whose disclosure would not be prejudicial to its economic interests or competitive position, but beneficial to the same.

[44] The appellant submits that it is implausible that competing institutions construct and revise their programs in order to counteract their competitors' strengths and exploit their weaknesses. He submits that York's competitors construct and revise their programs in order to respond to their students' feedback or labour market needs, to reflect the current state of the field, to fulfill their distinctive mission, or to represent faculty specific research interests and expertise.

Analysis/Findings re section 18(1)(c)

[45] For the exemptions in section 18(1) to apply, the institution must provide detailed 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. How much and what kind of evidence is

needed will depend on the type of issue and seriousness of the consequences.¹⁰

[46] The failure to provide detailed evidence of this nature will not necessarily defeat the institution'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*.¹¹

[47] 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.¹²

[48] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.¹³

[49] The records in this appeal relate to the university's review of its Criminology program.

[50] I agree with the appellant that my findings in Order PO-3594, set out above, are relevant to the circumstances of this appeal. In that order, the records concerned a review of the emergency management program at Fleming College. In this order, the records concern a review of the York's Criminology program.

[51] In Order PO-3594, I found that information about the EM program's weaknesses could allow the college's competitors to implement changes to their programs that would exploit the college's weaknesses. This would make the college less attractive to new students enrolling in the program.

[52] Relying on my analysis and reasoning in Order PO-3594,¹⁴ I find that only some

¹⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹¹ Order MO-2363.

¹² Orders P-1190 and MO-2233.

¹³ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

¹⁴ I also rely on Order PO-3641, which concerned a separate request for some of the same records as in Order PO-3594, all of them related to a review of Fleming College's EM program.

of the information at issue in this appeal could reasonably be expected to allow the university's competitors to implement changes to their Criminology programs that could exploit the weaknesses in the York's Criminology program. I accept that disclosure of this particular information could be expected to make the university's Criminology program less attractive to new students. Therefore, I find that its disclosure could reasonably be expected to prejudice York's economic interests or its competitive position in competing for new students.

[53] Based on my review of York's representations and with consideration of my findings in Order PO-3594, I find that disclosure of weaknesses in York's Criminology program could be exploited by other universities that compete for students in the same program.

[54] As was the case in Order PO-3594, I find that information about weaknesses in the program comes within section 18(1)(c), thereby qualifying as information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of York.

[55] In making this finding as to the application of section 18(1)(c), I have specifically considered the information at issue in each of the four records as follows.

[56] Record 1 is the university's Criminology program self-study report and brief for 2015-2016. Above, I listed above the Table of Contents for this record. The university has claimed the application of sections 18(1)(c) and 18(1)(f) for information located in the following portions:

Part I

1. Introduction
3. Program Curriculum, Structure and Learning Outcomes
4. Admission Requirements
5. Resources
6. Student Employment
7. Quality Enhancement

Part II

Quality Indicators and Outcome Measures

- I. Student Survey
2. Courses Offered
3. Teaching Complement
4. Admissions
5. Student Enrolment

Part IV

Appendices (includes Course Syllabi)

[57] I find that only some of the information at issue in Record 1 reveals weaknesses

in the university's Criminology program and is subject to section 18(1)(c), as its disclosure could reasonably be expected to prejudice the economic interests or competitive position of the university.

[58] I find that the remaining information in Record 1 is either general information about the program or information that reveals strengths about the program. This includes the programs' course syllabi, which is the only specific type of information at issue discussed by the university in its representations.

[59] The course syllabi are outlines for the courses in the program offered in the 2015-2016 academic year. The university did not provide specific section 18(1)(c) or (f) representations on any of the specific information at issue in the records, including the course syllabi. From my review of the syllabi, I conclude that they would have been provided to the students taking the specific courses during the 2015-2016 academic year and I find that the syllabi reveal the strengths, not the weaknesses, of the individual courses offered in the Criminology program.

Record 2 is a review of the agenda of concerns raised in Record 1.

Record 3 is an evaluation conducted by the external review committee.

Record 4 is the Criminology program's response to Record 3.

[60] Consistent with my findings regarding the application of section 18(1)(c) to Record 1, I also find that for Records 2 to 4, only those portions of these records that identify and address weaknesses in the university's Criminology program are subject to section 18(1)(c).

[61] I will now consider whether section 18(1)(f) applies to the information in Records 1 to 4 that I have found not subject to section 18(1)(c).

Section 18(1)(f): plans relating to the management of personnel

[62] The university states that the four records at issue were created as required during the cyclical program review process and contain detailed discussions of the plans related to the administration of the Criminology program and staffing concerns. It states that these plans have not yet been put into operation or made public as the institution is still in the early stages of the process review. It states that there are a number of recommended areas of improvements and strategic options for the future that are identified in the review that have not been made public.

[63] The appellant did not provide specific representations on the application of section 18(1)(f).

Analysis/Findings re section 18(1)(f)

[64] In order for section 18(1)(f) to apply, York must show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
 - (i) the management of personnel, or
 - (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public¹⁵

[65] This office has adopted the dictionary definition of “plan” as a “formulated and especially detailed method by which a thing is to be done; a design or scheme”.¹⁶

[66] The university was asked in the Notice of Inquiry to explain whether the records contain plans relating to the management of personnel or the administration of the university that have not yet been put into operation or made public.

[67] The university did not provide representations on the application of section 18(1)(f) to the specific information at issue. I have already found that the information in the records that reveals the weaknesses of the Criminology program qualifies for exemption under section 18(1)(c). I find that much of the remaining information at issue in the records focuses on how the program operates and evaluates the past performance of the program. I am not persuaded that this information consists of plans related to the administration of the Criminology program and staffing concerns, as submitted by the university.

[68] The university only provided specific representations on the course syllabi in Record 1, albeit with respect to the application of section 65(8.1). With particular reference to that record, I find that the course syllabi do not relate to the management of personnel or the administration of the university.

[69] Based on York’s confidential representations, I do, however, accept that certain information in the records contains plans for the management of personnel or the administration of the university, and I find that this information qualifies for exemption under section 18(1)(f).

Conclusion re section 18(1)

[70] In conclusion, I have found that only some of the information at issue in the records fits within the sections 18(1)(c) or 18(1)(f) exemptions.

¹⁵ Orders PO-2071 and PO-2536.

¹⁶ Orders P-348 and PO-2536.

[71] Regarding the information that I have concluded is exempt under sections 18(1)(c) or 18(1)(f), I will consider whether the university exercised its discretion in a proper manner in deciding to withhold this information.

[72] Regarding the information that is not exempt under sections 18(1)(c) or 18(1)(f), since no other discretionary exemptions have been claimed for this information and as no mandatory exemptions apply, I will order it disclosed.

EXERCISE OF DISCRETION

Issue C: Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

[73] The section 18(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.

[74] 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.

[75] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ This office may not, however, substitute its own discretion for that of the institution.¹⁸

[76] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁹

- 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

¹⁷ Order MO-1573.

¹⁸ Section 54(2).

¹⁹ Orders P-344 and MO-1573.

- 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
- 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.

[77] The university states that it publicly discloses relevant information from the records at issue on its website. For example, York states that, in accordance with the Council of Ontario Universities and York University Quality Assurance Protocols and Procedures, it discloses the final assessment report of the outcomes of cyclical program reviews. York states that this document provides the outcomes of the review at issue in the records, and describes the strengths of the program, the opportunities for enhancement, and the recommendations of the reviewers, along with an implementation plan and associated timelines.

[78] The appellant states that in response to information requests to other Ontario universities, he was granted partial or full access to similar records. He also points out that the final assessment report is only a couple of pages long and does not contain the detailed program-specific information set out in the records at issue.

Analysis/Findings

[79] The university has published the final assessment report, which is an executive summary of the review of its Criminology program on its website.²⁰ This document is

²⁰ See http://yuqap.info.yorku.ca/files/2018/10/FAR_CRIM_EXECSUM_Sept2018_final.pdf

entitled, "York University Final Assessment Report - Executive Summary, Criminology," and is five pages long. It is a synthesis of the cyclical review and discusses the implementation of plans to address the recommendations in the cyclical review.

[80] Based on my review of the Executive Summary and the information being ordered disclosed in this appeal, along with the parties' representations, I find that the university exercised its discretion in a proper manner concerning the information I have found exempt under sections 18(1)(c) or 18(1)(f). This information consists of:

- Information that reveals the Criminology program's weaknesses, which I have found exempt under section 18(1)(c) as being information that could reasonably be expected to prejudice the economic interests of York; and
- Information that I have found exempt under section 18(1)(f), which reveals plans relating to the management of personnel or the administration of York that have not yet been put into operation or made public.

[81] I find that in exercising its discretion to not disclose the information that I have concluded is exempt under sections 18(1)(c) or 18(1)(f), the university has taken into account relevant considerations and has not taken into account irrelevant considerations. Therefore, I am upholding the university's exercise of discretion and find that the information I have found subject to sections 18(1)(c) or 18(1)(f) is exempt under these sections.

ORDER:

1. I order the university to disclose to the appellant by **May 15, 2019** the information at issue in the records that I have found not subject to sections 18(1)(c) or 18(1)(f).
2. I uphold the university's decision to withhold access to the remaining information in the records for which sections 18(1)(c) or 18(1)(f) have been claimed. For ease of reference, I have provided the university with this order with a copy of the pages of the records containing the information not to be disclosed, highlighting the information that should not be disclosed to the appellant.

Original Signed By: _____

Diane Smith
Adjudicator

April 24, 2019 _____