

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-3954-F

Appeal PA12-265-2

University of Ottawa

May 10, 2019

Summary: The appellant made a request to the university for all records, in specified university offices, relating to a named company. The university granted access to some records and withheld access to records on the basis of the research exclusion in section 65(8.1), the discretionary exemption in section 18(1) (economic or other interests) and the mandatory third party information exemption in section 17(1). The adjudicator issued Interim Order PO-3463-I, disposing of the section 65(8.1), section 17(1), and reasonable search issues. The adjudicator also found that section 18(1) did not apply to some of the records for which it was claimed. In this order, the adjudicator upholds the application of section 18(1) for the remaining records at issue.

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

Order Considered: Order PO-3243.

OVERVIEW:

[1] The appellant made a request to the University of Ottawa (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

[C]opies of all records related to [named company].

and sent to/by and/or received to/by and/or in the possession physically and/or electronically of:

The Office of the President
The Office of the Vice-President, Governance, formerly known as
the Office of the Secretary, including legal Counsel
The Office of the Vice President, Academic
The Office of the Vice President, Resources
The Communications Office (a.k.a. The Communications
Directorate)
The Office of the Dean of the Faculty of Graduate and Postdoctoral
Studies
The Office of the Assistant Dean and Secretary of the Faculty of
Graduate and Postdoctoral Studies
The Office of the Vice Dean of the Faculty of Graduate and
Postdoctoral Studies
The Office of the Dean of the Faculty of Science
The Office of the Dean of Telfer School of Management
The Office of Marketing and Development of Telfer School of
Management
The Office of Administrative Services of Telfer School of
Management
[Named professor] in his role as Goldcorp Chair in Economic
Geology
The Office of the Department of Earth Sciences
The Office of the Dean of the Faculty of Social Sciences
The Office of the Department of Economics
The Office of the School of Political Studies
The Office of the School of International Development and Global
Studies
The Office of the Graduate School of Public and International
Affairs

Between March 1, 2007 and present.

[2] This office initially dealt with this request as a deemed refusal and thus appeal file PA12-265 was opened. This appeal file was resolved when the university subsequently issued a decision. The university granted access to some records and withheld access to records, in full and in part, under the research exclusion in section 65(8.1), the mandatory exemptions at sections 17(1) and 21(1), and the discretionary exemption at section 18(1).

[3] The appellant appealed the university's decision and the current appeal file was opened.

[4] After conducting an inquiry, I issued Interim Order PO-3463-I. In that order, I find the records are not excluded under section 65(8.1) of the *Act*. I find that sections 17(1) and 18(1) do not apply to the records for which they were claimed and ordered

the disclosure of these records. Finally, I find the university's search to be reasonable.

[5] Following the interim order, I sought further representations from the parties on the remaining issue in the appeal, the application of section 18(1) to those records which I found were not excluded from the *Act* by section 65(8.1). The university provided representations and the appellant did not.

[6] In this order, I uphold the application of section 18(1) to the records remaining at issue.

RECORDS:

[7] The remaining records at issue are comprised of emails and attached correspondence relating to an endowment provided by a named company, and to the university's internal strategies in soliciting donations. In particular, the remaining information consists of records 28 – 32, 35 – 51, 55 - 58, 71, 72, 102 and 103.

DISCUSSION:

[8] The sole issue in this appeal is the application of section 18(1)(c) to the records remaining at issue. 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] The purpose of section 18 is to protect the economic interests of institutions, including educational institutions, by providing an exemption to disclosure for certain commercially valuable information.

[10] For the section to apply, the institution must provide evidence of a reasonable expectation of harm that would occur if the records were disclosed. The evidence must demonstrate that this risk is well beyond the mere possibility or speculation of harm, though it does not need to prove that disclosure will in fact result in said harm. The level of evidence required to establish a reasonable expectation of harm is a contextual question, and will depend on the type of issue and seriousness of the consequences.¹

¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[11] Section 18(1)(c) is intended 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.²

[12] In its representations, the university submits that the remaining records at issue can be divided into two broad categories: (a) internal communications relating to the endowment payment funding the Goldcorp Chair in Economic Geology, and (b) records containing information about the university's strategies in soliciting donations. I agree with this categorization for the purposes of this order.

[13] The university argues that section 18(1)(c) applies to both categories of records, and disclosure of records in either category could reasonably be expected to cause harm to the university's economic interests. The university submits, citing Order PO-2619, that establishing the reasonable expectation of harm is sufficient to justify the application of this section.

[14] The university further notes, as is outlined above, that the threshold for a reasonable expectation of harm in the *Act* requires institutions to go beyond mere speculation of harms, but does not require proof on a balance of probabilities.³ In this instance, the university is not required to prove that economic harm is more likely than not as a result of disclosure. However, the evidentiary burden remains on the university to show a real possibility of such harm.

[15] The potential economic harms raised by the university fall into two broad streams: direct economic losses or lost economic opportunities, and disclosure of proprietary material that would advantage the competitive position of other universities.

[16] In the former stream, the university claims that disclosing records relating to internal communications about the Goldcorp Chair endowment would impair its ability to secure donations in the future. At the time it submitted representations, the university still relied on the donor in question for financial support. The university submits that losing the ongoing support of the donor would represent a direct economic harm.

[17] The university posits that such a loss would impede its ability to continue to deliver its educative mandate, as it may no longer be able to attract the highest calibre of students and faculty.

² Orders P-1190 and MO-2233.

³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

[18] In the latter stream, the university submits that disclosure of the records at issue (particularly those containing strategic solicitation information) would provide an advantage to other universities competing for private funding. In particular, the records contain insights into relationships with individuals at potential donor organizations. The university submits that this information would enable a competitor to utilize strategies developed by the university in future fundraising environments. Similarly, the university contends that records relating to the structure of the donor agreement would advantage other universities competing for donor funding.

[19] This office has previously held that disclosure of information of a covenant between a university and a named donor could reasonably be expected to prejudice the university's competitive position. In Order PO-2619, Adjudicator Diane Smith found that disclosure would give strategic insight to competing universities, and could be expected to hinder the ability of the university to secure large donations in future. The records at issue in this appeal contain similarly sensitive strategic information.

[20] As outlined earlier, establishing a reasonable expectation of economic harm is a contextual inquiry. I accept that universities rely on private funding to deliver their research and education mandates. As the university states, "government restraint" in funding necessitates that it diversify its income streams, including the cultivation and maintenance of private wealth donor relationships. This point must be considered in tandem with this office's mandate of promoting transparency and accountability for taxpayer funded institutions. However, in this case, I am satisfied that disclosure of the information at issue could reasonable be expected to harm the university's economic interests and section 18 applies to exempt the information at issue.

[21] As this is a discretionary exemption, I turn now to assess the university's exercise of its discretion.

[22] Institutions must exercise discretion when applying a discretionary exemption, such as section 18(1). A proper exercise of discretion should not be in bad faith, or take into account any irrelevant considerations. The university submits that it properly exercised its discretion and considered only relevant factors.

[23] The university identified age of the records as a relevant consideration, and acknowledged that the records are several years old. However, it further argued that while the records are several years old, they pertain to ongoing matters, and that disclosure may prejudicially affect the university's interests in the present. Based on my review of the records, I agree with this assessment.

[24] The appellant did not provide any representations to suggest that the university did not exercise its discretion properly. Upon careful review of the university's representations and the nature of the records at issue, I do not find any improper exercise of discretion.

ORDER:

The university's application of section 18(1)(c) is upheld. The appeal is dismissed.

Original signed by _____
Stephanie Haly
Adjudicator

_____ May 10, 2019