Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4117

Appeal PA17-442

Ministry of Colleges and Universities

February 26, 2021

Summary: This order deals with whether an application to the Ministry of Colleges and Universities (the ministry) from a private career college is exempt from disclosure under the mandatory exemptions in sections 17(1)(a) and/or 17(1)(c) (third party information). In this order, the adjudicator finds that the record is not exempt from disclosure under section 17(1) and orders the ministry to disclose it to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a) and 17(1)(c).

Orders and Investigation Reports Considered: Order PO-4111.

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

OVERVIEW:

[1] This order deals with the sole issue arising from an appeal of an access decision. The Ministry of Training, Colleges and Universities (the ministry) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to a student complaint about a third party private career college.

[2] The ministry located numerous responsive records. After consulting the private career college (the affected party), the ministry disclosed certain records to the requester. The ministry withheld other records, either in whole or in part, claiming the

application of the mandatory exemptions in sections 21(1) (personal privacy) and 17(1) (third-party information), as well as the discretionary exemption in section 19 (solicitor–client privilege) of the *Act*. The requester, now the appellant, appealed the ministry's decision to this office.

[3] During the mediation of the appeal, the ministry maintained its position that no additional records may be disclosed, and the affected party confirmed its position that the records that were withheld under section 17(1) may not be disclosed.

[4] The appellant confirmed that she wished to proceed with the appeal, but advised that she was no longer seeking access to the information that was withheld under section 21(1) or the information withheld under section 19. Consequently, the records withheld under these two sections of the *Act* are no longer at issue in this appeal, and the sole record at issue is the one for which the ministry and the affected party claim the application of section 17(1).

[5] The file then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I sought and received representations from the ministry and the affected party, which were shared with the appellant. In its representations, both the ministry and the affected party clarified that they were relying on sections 17(1)(a) and 17(1)(c) to withhold the record. I then sought representations from the appellant, who provided them.

[6] For the reasons that follow I find that the record is not exempt under either section 17(1)(a) or section 17(1)(c) and I order the ministry to disclose it to the appellant.

RECORD:

[7] The record is a 188-page application to the ministry for approval of a paralegal program.

DISCUSSION:

[8] The ministry provided background information regarding the record at issue. The ministry states that it regulates private career colleges,[1] fulfilling a consumer protection role which requires all private career colleges to be registered with the Superintendent, requires vocational programs to be approved by the Superintendent, and for various student protection requirements to be adhered to by these colleges.

---

[1] The underlying legislation is the *Private Career Colleges Act*, *2005*, S.O. 2005, c.28, Sched L.

Applications for program approval must be in the form specified by the Superintendent, including but not limited to the following information:

- The named program, in this case, a paralegal program;
- The admission requirements;
- The equipment and facilities;
- Any statement or report made by or on behalf of the Law Society of Ontario (as the regulatory body for paralegals);
- The name and description of each subject and module in a program;
- The number of hours of instruction for each subject and module;
- The methods of evaluation that will be used; and
- An evaluation of the program by a third party with expertise in such programs.

[9] The format of the record was provided by the ministry, and the information was then completed by the affected party. The affected party advised this office that the information contained in the record at issue was submitted to the ministry in 2010.

[10] The sole issue in this appeal is whether the mandatory exemptions in sections 17(1)(a) and/or 17(1)(c) apply to the record.

[11] These sections state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > . . .
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[12] Section 17(1) is designed to protect the confidential "informational assets" of

businesses or other organizations that provide information to government institutions.[2] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[3]

[13] For section 17(1) to apply, the ministry and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[14] The ministry's position is that the record contains commercial and financial information. The affected party's position is that the record contains commercial information.

[15] Commercial and financial information listed in section 17(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

---

[2] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] Order PO-2010.
[5] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[6]

Representations

[16] The ministry submits that the record contains commercial or financial information about the affected party. In particular, the ministry argues, the record sets out at length the affected party's plans to run the school and conduct the paralegal program, including the following:

- program development and maintenance;
- admissions requirements;
- program delivery information;
- evaluation and grading system;
- intended program outcomes;
- list of subjects;
- module outline for subjects;
- practicum/training information;
- accreditation information;
- training completion plan; and
- financial aid information.

[17] The ministry further submits that the first ten types of information listed above can be characterized as "commercial information," as it relates directly to the service or product sold by the affected party, namely, targeted career education. The ministry relies on Order PO-4011, in which this office found that private career college records such as affiliation agreements, clinical placement agreements and other records revealed commercial information because they contained information relating to the selling and exchange of services.

[18] Lastly, the ministry submits that the financial aid information qualifies as "financial information" because it relates specifically to the pricing practices of a specific program.

---

[6] Order PO-2010.

[19] The affected party submits that the information at issue is commercial in nature. It submits that it operates as a private educational institution with the intention of making money. As "commercial information" relates solely to the buying, selling or exchange of merchandise or services, it is applicable in this case because the affected party intends to sell the program to students, and it is commercial in nature.

[20] The appellant's representations do not address this part of the three-part test.

Analysis and findings

[21] As previously stated, "commercial information" is information that relates solely to the buying, selling or exchange of merchandise or services. I find that the record at issue reveals "commercial information," because it contains information that relates to the selling and exchange of services. In particular, it reveals that at the time the application was made to the ministry, the affected party intended to sell an educational service (the paralegal program) to students. Consequently, part one of the three-part test has been met.

Part 2: supplied in confidence

[22] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[7]

[23] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[8]

[24] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[9]

[25] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was:

[26] communicated to the institution on the basis that it was confidential and that it was to be kept confidential; and

---

[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] Order PO-2020.

- treated consistently by the third party in a manner that indicates a concern for confidentiality; and
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[10]

Representations

[27] The ministry submits that the information in the record was supplied directly to it by the affected party, and was done so in confidence. The ministry argues that the vast majority of information in the record is not available to the public and that only limited information is available to the public when searching the Service Ontario website for information about registered private career colleges and their approved vocational programs. The ministry's position is that it is objectively reasonable that the affected party would expect confidentiality regarding the record. In addition, the ministry submits that the information has been consistently treated by the affected party in a manner that indicates a concern for confidentiality. Lastly, the ministry submits that although there is a disclaimer on the application for program approval form stating that some of the information on the form could be subject to disclosure under the *Act*, the ministry takes steps to keep the vast majority of this information confidential.

[28] The affected party submits that it supplied the information at issue to the ministry and this was done so in confidence. The affected party submits that none of the information contained in the record is available anywhere, and it forms the basis on which the curriculum was based, but does not consist of the curriculum itself. The record was provided to the ministry through its portal that is only accessible at both ends by specific and limited user access. The affected party's position is that there was an explicit expectation of confidentiality that was reasonable, that the information was treated consistently in a manner that indicated its concern for its protection from disclosure, and that the information was prepared for a purpose which would not entail disclosure.

[29] The appellant submits that the majority of the paralegal course of study is in the public domain, posted on the Law Society of Ontario's website, and that there is complete transparency by the Law Society of Ontario to the public of what they have mandated as the requirements for the paralegal program to all colleges, both private and public.

[30] The appellant goes on to argue that this particular and specified course of study

[10] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

is strictly created and overseen by a licensing body. However, she argues, this does not make it proprietary because the curriculum is already in the public domain, almost entirely created by the Law Society of Ontario, and posted on its website.

Analysis and findings

[31] I find that the information in the record was directly supplied by the affected party to the ministry.

[32] The appellant argues that a paralegal program curriculum is posted on the Law Society of Ontario's website and, therefore, the information in the record is public. I note that where the mandatory exemption in section 17(1) is claimed to withhold a record, that record is subject to the three-part test in section 17(1) of the *Act*, including whether or not it was "supplied in confidence" by the affected party to the ministry.

[33] With respect to whether the record was supplied "in confidence," while there is no evidence on the face of the record itself that its contents were confidential, I accept the representations of both the ministry and the affected party that there was a reasonably held expectation that the information contained in the record would be treated confidentially, and therefore, the record was supplied "in confidence" in 2010 by the affected party to the ministry. As a result, the second part of the three-part test has been met.

Part 3: harms

[34] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[11]

[35] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[12] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[13]

---

[11] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[12] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.
[13] Order PO-2435.

Representations

Section 17(1)(a)

[36] The ministry submits that the disclosure of the information in the record could prejudice the affected party's competitive position. It argues that the private career college sector is highly competitive, and that this sector operates without any capital or operating grants from any level of government. Private career colleges, the ministry submits, are almost completely reliant on tuition fees for revenue, and attract their student population by offering education and training within a reasonably short period of time that may lead to a position in a recognized vocation. The ministry argues that although there are many reasons why a student/consumer would choose a particular private career college, its program model is key to the success of a business in such a marketplace. These colleges, the ministry submits, spend a great deal of time, effort and expense to develop a program for approval by the Superintendent and, in this case, it would also require accreditation by the Law Society of Ontario.

[37] If the record was disclosed, the affected party's proprietary program model information would be available for other private career colleges to exploit. For example, the information could be used as a "short cut" to obtain program approval from the Superintendent and accreditation from the Law Society of Ontario.

[38] The affected party submits that it expended a great deal of time, effort and expense to develop a program for the ministry's approval and for the Law Society of Ontario's accreditation. The affected party goes on to argue that the disclosure of the information in the record would put its proprietary information into the public domain. As a result, any educational institution seeking accreditation of a paralegal program could simply copy the affected party's record or take advantage of it. This would result in a huge economic competitive advantage for another private career college to the detriment of the affected party's competitive advantage. In addition, the affected party submits that the disclosure of the information at issue may set the stage as a precedent in which others may try to gain access to other accreditation packages, significantly prejudicing its competitive position in the marketplace.

[39] The affected party also advised that it last offered the paralegal program ending in November 2019. It is not currently offering the program due to low enrolment, but maintains the curriculum on file and may offer the program in the future.[14]

[40] The appellant submits that she strongly disagrees with the ministry's and the affected party's assertion that the public disclosure of the paralegal course study would

[14] In December 2020, I asked staff of this office to seek an update from the affected party about the paralegal program.

significantly prejudice the private college's competitive edge. She argues that the affected party must follow a course curriculum designed for all colleges by the Law Society of Ontario, and that if private colleges are unable to compete at the same level as community colleges' offering the same paralegal program, mandated to all by the Law Society of Ontario, then they should not retain the privilege to offer the program.

Section 17(1)(c)

[41] The ministry submits that the disclosure of the information in the record could reasonably be expected to cause the affected party undue loss. In particular, the records would provide competitors with a significant proportion of the information required to run a competing program. The ministry further submits that the record not only contains information about the courses themselves, the evaluation and grading system and practicum and training information, but it also contains administrative information such as admission requirements and financial aid information, as well as the information the affected party used to obtain accreditation for its paralegal program from the Law Society of Ontario.

[42] The ministry goes on to state:

> Competitors would be "unjustly enriched" by gaining access to this proprietary information and be able the rival the [affected party's] value proposition to students without having to expend as much in financial resources to create a competing paralegal program.
>
> This could reasonably be forseen to have the effect of lost revenue to the [affected party] named in the request, within the meaning of "undue loss" as set out in clause 17(1)(c).

[43] The ministry further submits that section 17(3) does not apply, as the affected party did not consent to the disclosure of the record. Lastly, the ministry submits that it has not identified any information in the record that may now be severed and disclosed.

[44] The affected party argues that it has competed with other private career colleges for students, and may do so in the future for enrollment in the paralegal program. For example, the affected party submits, it had four other private career colleges as direct competitors that offered programs in close geographic proximity. The affected party further submits that disclosure of the record into the public domain and, in effect, to its competitors, would allow them to implement modifications to their programs by making use of the information in the record. This could reasonably be expected to result in undue loss to the affected party and undue gain for other competing private career colleges.

[45] The appellant submits that if the record is *not* disclosed, it could reasonably be expected to cause undue loss to students. In particular, the appellant submits that there is a vested interest in ensuring the paralegal students that are enrolling have a

detailed account of the curriculum requirements, failing which private college students are at a distinct disadvantage. For example, the appellant submits that these students may be enrolled with a private career college that, when audited by the Law Society of Ontario, would fall short of the requirements needed to become licensed paralegals with their licensing body and unable to write the final Law Society of Ontario exam to be licensed. The appellant states that she is aware of at least one instance where this has occurred at a private career college which had offered the paralegal program, and in the end its students were unable to be licensed.

[46] The appellant further argues that potential and/or current students who paid for the program at a private college versus at a community college are currently unable to obtain detailed information of the private college's paralegal program offered and/or enrolled in, to ensure they are getting an accredited certificate with the Law Society of Ontario as the outcome when they finish the program.

Analysis and findings

[47] In Order PO-4011, Adjudicator Colin Bhattacharjee summarized the Supreme Court of Canada's approach to the harms set out in sections 17(1)(a) and (c). They are preceded by the words, "could reasonably be expected to . . ." Adjudicator Bhattacharjee stated:

> In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[15] the Supreme Court of Canada cited its previous decision in *Merck Frosst*, in which a unanimous Court addressed the meaning of this phrase and affirmed as correct the elaboration of this standard as a "reasonable expectation of probable harm." It stated the following:
>
> > . . . As this Court affirmed in *Merck Frosst*, the word "probable" in this formulation must be understood in the context of the rest of the phrase: there need be only a "reasonable expectation" of probable harm. The "reasonable expectation of probable harm" formulation simply "captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm": para. 206.[16]
>
> The Court further stated:

---

[15] 2014 SCC 31 (CanLII).
[16] *Ibid.*, at para. 52.

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.[17]
>
> In short, to establish that disclosing the record at issue "could reasonably be expected to" lead the harms set out in the sections 17(1)(a) or (c), the ministry and the college must demonstrate a risk of harm that is well beyond the merely possible or speculative although they need not prove that disclosure will in fact result in such harm.

[48] I adopt the approach taken by Adjudicator Bhattacharjee with respect to the standard regarding the harms in section 17(1)(a) and/or 17(1)(c) and will apply it in this appeal.

[49] I find that the ministry and the affected party have not established that disclosing the application at issue could reasonably be expected to prejudice significantly the affected party's competitive position or interfere significantly with its contractual or other negotiations, as required under section 17(1)(a), or result in an undue loss for the affected party or an undue gain for its competitors, as required under section 17(1)(c). I conclude, therefore, that the third part of the three-part test has not been met and that the record at issue is not exempt from disclosure under section 17(1). As no other exemptions have been claimed with respect to this record, I will order the ministry to disclose it to the appellant.

[50] My reasons for making this finding are that, in my view, the ministry's and the affected party's arguments are speculative and not beyond the merely possible regarding the harms in enumerated in section 17(1)(a) and/or 17(1)(c). Neither the affected party nor the ministry have established how disclosing the particular information in the record could result in the harms set out in sections 17(1)(a) and (c). While I accept that private career colleges engage in competition with one another in

---

[17] *Ibid.*, at para. 54.

order to attract new students, the fact that there is competition within the business is not sufficient to meet the harms test in either section 17(1)(a) or section 17(1)(c). In order to meet the standard of harm in section 17(1)(a), the party claiming the exemption must demonstrate that it could reasonably be expected that the disclosure of the record *prejudice significantly* the competitive position or *interfere significantly* with the contractual or other negotiations of a person, group of persons, or organization. I find that neither the ministry nor the affected party have provided sufficient evidence that the disclosure of the information in the record could reasonably be expected to prejudice significantly the affected party's competitive position as a private career college or interfere significantly with its contractual or other negotiations.

[51] In the case of the harms in section 17(1)(c), the party claiming the exemption must demonstrate that it could reasonably be expected that the disclosure of the record result in *undue loss or gain* to any person, group, committee or financial institution or agency. I find the argument that a competitor could exploit the information in the record at issue, resulting in an undue gain to the detriment of the affected party, to be speculative at best.

[52] Consequently, I am not satisfied that the ministry and/or the affected party have met the threshold referred to above for the harms in section 17(1)(a) and/or section 17(1)(c). In making this finding, I have taken into consideration the fact that the affected party is not presently providing the paralegal program to students, and that were it to offer the program in the future, the information in the record would be out-of-date for those purposes.

ORDER:

1. I order the ministry to disclose the record, in its entirety, to the appellant by **April 6, 2021** but not before **April 1, 2021**.

2. I reserve the right to require the ministry to provide this office with a copy of the record it discloses to the appellant.

3. The timelines noted in order provisions 1 and 2 may be extended if the ministry is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by
Cathy Hamilton
Adjudicator

February 26, 2021