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Order F13-28

PRIVATE CAREER TRAINING INSTITUTIONS AGENCY OF BRITISH COLUMBIA

Hamish Flanagan, Adjudicator

December 6, 2013

CanLII Cite: 2013 BCIPC No. 37
Quicklaw Cite: [2013] B.C.I.P.C.D. No. 37

Summary: PCTIA identified a series of reports as responsive to an applicant's request for information about three private colleges. PCTIA provided notice to the owner of the colleges, Eminata Group, that it planned to disclose the reports to the applicant. Eminata requested a review of PCTIA's decision because it believed disclosure would harm its interests under s. 21 of FIPPA. The adjudicator found s. 21 applied to some of Eminata's enrolment information in the reports. The adjudicator also ordered PCTIA to withhold some information because it would unreasonably invade third parties' personal privacy under s. 22 of FIPPA if released. The rest of the information in the reports was ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21 and 22; *Private Career Training Institutions Act,* [SBC 2003] c. 79, s. 2.

Authorities Considered: B.C.: Order 03-15, 2003 CanLII 49185; Order F12-13, 2012 BCIPC 18; Order F10-06, 2010 BCIPC 9; Order F13-19, 2013 BCIPC 26; Order F08-03, 2008 CanLII 13321; Order F05-09, 2005 CanLII 11960; Order 01-36, 2001 CanLII 21590; Order 03-02, 2003 CanLII 49166; Order 00-09, 2000 CanLII 8798; Order 00-22, 2000 CanLII 14389; Order No. 26-1994, 1994 CanLII 1432; Order No. 45-1995, [1995] B.C.I.P.C.D. No. 18; Order No. 315-1999, 1999 CanLII 1281; Order F13-02, 2013 BCIPC 2; Order F11-08, 2011 BCIPC 10; Order 01-39 [2001] B.C.I.P.C.D. No. 40; Order 00-10, 2000 CanLII 11042; Order F12-08, 2012 BCIPC 12; Order 01-53, 2001 CanLII 21607. **Ont.:** Order P1614, 1998 CanLII 14311 (ON IPC); Order 16, 1998 O.I.P.C. No. 16.

Cases Considered: *Canada Packers Inc. v. Canada (Minister of Agriculture),* (1989), 53 D.L.R. (4th) 246, [1988] 1 F.C.J. No. 615; *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3; *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4th) 417 (FCTD); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4th) 356 (FCTD); *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101.

INTRODUCTION

[1] A journalist requested information from the Private Career Training Institutions Agency of British Columbia ("PCTIA") about three private post-secondary colleges in BC owned by the third party, the Eminata Group ("Eminata").

[2] PCTIA is a Crown Corporation established under s. 2 of the *Private Career Training Institutions Act* ("PCTI Act"). PCTIA performs regulatory functions for private career training institutions in British Columbia. These functions include setting basic education standards for registered private career training institutions and establishing standards of quality that must be met by accredited institutions.

[3] PCTIA identified five reports as responsive to the journalist's request, and sought Eminata's views on disclosing them. Eminata responded that disclosure would harm its business interests under s. 21 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). PCTIA decided to release the records and Eminata requested that the Office of the Information and Privacy Commissioner ("OIPC") review PCTIA's decision. Mediation did not resolve the matter and it was referred to inquiry.

ISSUES

[4] Eminata argues that the records should be withheld because disclosure would be harmful to their business interests under s. 21 of FIPPA.

[5] Section 22 is a mandatory exception to the right of access under FIPPA. Under s. 22, a public body "must" refuse to disclose any personal information in circumstances where the disclosure would be an unreasonable invasion of personal privacy. Even where s. 22 is not raised in an inquiry, I am obliged to consider its application where, as here, on my review of the records it is apparent that there is some personal information in them to which s. 22 may apply.

[6] Therefore, the issues in this inquiry are whether PCTIA must withhold information from the records it intends to release because disclosure:

1) would be harmful to the business interests of Eminata under s. 21 of FIPPA; or

2) would be an unreasonable invasion of a third party's personal privacy under s. 22 of FIPPA.

DISCUSSION

[7] **Records in Issue**—The information in issue comprises five assessment reports prepared by PCTIA about three post-secondary colleges owned by Eminata. Two of the reports are assessments of Eminata colleges' compliance with PCTIA standards ("Compliance Reports"); the other three reports are assessments of whether Eminata colleges meet PCTIA's accreditation requirements ("Accreditation Reports").

[8] **Harm to Third-Party Business Interests: s. 21**—Section 21(1) of FIPPA requires public bodies to withhold information that would harm the business interests of a third party if disclosed. It sets out a three-part test for determining whether disclosure is prohibited, all three parts of which must be established before the exception to disclosure applies. These are the relevant FIPPA provisions:

> **Disclosure harmful to business interests of a third party**
>
> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> …
>
> (iii) result in undue financial loss or gain to any person or organization, …

[9] The principles for applying s. 21 are well established.[1] The first part of the test requires the information to be a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of or about a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

[10] Section 57 of FIPPA establishes the burden of proof on the parties in the inquiry. In the case of information that is not personal information, it is up to Eminata to prove that the applicant has no right of access to the record or part.[2] For information in the reports that is personal information, the applicant has the burden of proving that the disclosure of information would not be an unreasonable invasion of privacy.[3]

[11] I will consider the elements of s. 21 in turn.

"Trade secrets or commercial, financial and/or technical information of or about a third party": s. 21(1)(a)

[12] The reports described above can be further broken into two parts for the purpose of considering s. 21. First, the templates created by PCTIA to carry out its compliance and accreditation assessment work. In the compliance reports this comprises a set of questions, a checkbox (yes/no/not applicable) to record PCTIA's answer to each question, and fields for recording comments where PCTIA can elaborate on the checkbox answers. In the accreditation reports this comprises background about the accreditation process, examples of evidence required to satisfy accreditation quality standards and checkbox-type assessments. This template material is not "information of or about a third party" and therefore cannot be withheld under s. 21. The second type of information is the information entered into the templates, including for example populated checkboxes and evaluative comments including discussion of whether quality standards are met ("assessment information"). The question is whether the assessment information falls within any of the categories under s. 21(1)(a).

[13] Eminata's submissions identify certain assessment information that is about their College enrolments which it defines as "Vital Eminata Information." The "Vital Eminata Information" is described by Eminata as:

> a. Its enrolment by educational program and location of Eminata's existing or potential educational facilities;

[1] See for example, Order 03-02, 2003 CanLII 49166 and Order 03-15, 2003 CanLII 49185.
[2] Section 57(3)(b) FIPPA.
[3] Section 57(3)(a) FIPPA.

b. All enrolment numbers by product and location; and

c. All enrolment information for the various campus locations operated by Eminata.

[14] Eminata's submissions list specific examples of information in the accreditation reports they say are included in that definition. I assume these examples are not exhaustive and that Eminata's position is that all assessment information that meets their definition is "Vital Eminata Information," including that in the compliance reports.

[15] Eminata also says the assessment information includes "Internal Eminata Information" which they describe as information about Eminata's operations, particularly information in the accreditation reports.[4] Eminata says the Vital Eminata Information and the Internal Eminata Information in the reports comprises commercial, financial and/or technical information or trade secrets of Eminata under s. 21(1)(a).

Trade secrets

[16] There are four criteria in Schedule 1 to FIPPA for information to qualify as a trade secret:

> "Trade secret" means information… that:
>
> (a) is used or may be used, in business or for any commercial advantage,
>
> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
>
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (d) the disclosure of which would result in harm or improper benefit.

[17] Eminata's submissions do not establish that any of the assessment information meet any of the above criteria and therefore it does not constitute trade secrets.

Technical information

[18] Previous orders have defined "technical information" under s. 21(1)(a)(ii) as information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts, such as architecture, engineering or electronics.[5] This usually involves information prepared by a

[4] Initial submission of Eminata at para. 18; affidavit of V Tesan at paras. 30-31.
[5] See, for example, Order F12-13, 2012 BCIPC 18, and Order F10-06, 2010 BCIPC 9.

professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, equipment or entity.[6] Nothing in Eminata's submission points specifically to any technical information in the assessment information, and none is evident from my review of it.

Commercial or financial information

[19] In the context of FIPPA, examples of financial information include such things as cost accounting methods, pricing policies, profit and loss data, overhead and operating costs, and the amount of insurance coverage obtained.[7]

[20] "Commercial information" relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary value.[8] The information itself must be associated with the buying, selling or exchange of the entity's goods or services. An example is a price list, or a list of suppliers or customers.

[21] Some of the assessment information is about enrolment numbers at particular Eminata colleges. In all but one of the reports the enrolment numbers are broken down by program for each college. One report also contains comments from students at one college campus about Eminata's pricing strategy for a course. The examples above are commercial information.

[22] Much of the remainder of the assessment information is about whether Eminata's colleges are complying with regulations and bylaws that all institutions seeking, or seeking to maintain, accreditation with PCTIA, must comply with. Examples include whether Eminata's colleges have basic record keeping requirements in place, and whether certain policies, such as a privacy policy, exist. While in many cases the information is not particularly unique or commercially valuable, that is not required for it to be commercial information. Much of this information still reveals something of the way Eminata's business is conducted and therefore qualifies as commercial information.

[23] In summary, the assessment information Eminata defines as the Vital Eminata Information and the Internal Eminata Information qualifies as commercial information and therefore meets the requirements of s. 21(1)(a).

Supplied in confidence – s. 21(1)(b)

[24] The second part of the s. 21(1) test involves a two-step analysis of whether the information was "supplied", either implicitly or explicitly, "in confidence". The first step is to determine whether the information was

[6] F13-19, 2013 BCIPC 26.
[7] F08-03, 2008 CanLII 13321 at para. 65.
[8] F05-09, 2005 CanLII 11960 at para. 10, citing Order 01-36, 2001 CanLII 21590.

supplied to PCTIA. The second is to determine whether those records were supplied "in confidence".

"Supplied"

[25] Eminata's submissions that the reports were "supplied in confidence" to PCTIA, focus on their confidential nature. Neither PCTIA nor Eminata (on whom the onus rests) provide evidence on specifically what assessment information was "supplied", except that Eminata says that the "Vital Eminata Information" was supplied to PCTIA by Eminata staff. Eminata also submits it is "a matter of objective common sense" that the Internal Eminata Information was supplied.

[26] The meaning of "supplied," was discussed at length in Order 03-02.[9] That order refers to the decision of the Federal Court of Appeal in *Canada Packers Inc. v. Canada (Minister of Agriculture)*.[10] In *Canada Packers* the applicants made an access request for federal government meat inspection team audit reports about certain meat packing plants. The third party, Canada Packers Inc., resisted disclosure of the reports. The case discussed the meaning of the phrase "supplied to a government institution" in s. 20(1)(b) *Access to Information Act*, MacGuigan J. (as he then was) made clear that the portions of the audit reports in issue that comprised judgments were not supplied, saying the following:[11]

> Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar.

[27] However, the general rule in *Canada Packers* is not the end of the matter. As the Supreme Court of Canada has recently noted, the content rather than the form of the information is the important factor.[12] It is not simply that the information is in an audit report that means that the information is not "supplied," but that an audit report is generally comprised of an auditors' judgment. Even in *Canada Packers*, as the quote above reveals, some information in the audit reports was still found to be supplied.[13] Therefore, though the reports were drafted by PCTIA, they can still contain "supplied" information because the

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[9] 2003 CanLII 49166 at paras. 71 and 72. This section was also quoted and applied in Order F10-06, 2010 BCIPC 9.
[10] (1989), 53 D.L.R. (4th) 246, [1988] 1 F.C.J. No. 615.
[11] At para. 12 (F.C.J.).
[12] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3, at para. 157.
[13] Referred to as "employee and volume information". The Federal Court of Appeal judgment does not explain what evidence led to this conclusion.

assessment information can contain (or repeat) information extracted from documents which were "supplied to" the public body by Eminata.

[28] Information contained in a record is also considered to have been "supplied" to a public body if its disclosure would permit the drawing of accurate inferences with respect to information actually supplied in confidence to the public body.[14]

[29] Audit type report information may also be characterized as being obtained through independent inspection by the auditor, rather than being supplied in confidence by the audited entity.[15] In this way, the auditor or inspector of their own initiative takes or gathers information from the entity or its information systems, and uses this information to complete the audit report. The inspector is not merely passively reviewing information supplied to them by the audited entity. To do the latter could undermine the rigour of an audit, which requires an independent assessment of an entity. The issue of whether information was obtained as a result of inspection rather than supplied by Eminata is particularly relevant to the compliance reports because s. 12 of the *PCTI Act* clearly empowers inspectors to obtain documents of their own initiative rather than relying on them to be supplied:

> **Inspectors**
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> 12(1) The registrar may appoint inspectors for the purposes of determining whether
>
> (a) it is appropriate to suspend or cancel a registration or accreditation or change the terms and conditions attached to a suspension, or
>
> (b) a person has failed to comply with this Act, the regulations, the bylaws or the terms and conditions attached to a suspension.
>
> (2) An inspector conducting an inspection for the purposes of making a determination described in subsection (1) may, without a warrant,
>
> (a) enter business premises,

[14] Order 03-02, 2003 CanLII 49166 at para. 40, citing Order 00-09 2000 CanLII 8798, at p. 6, Order 00-22, 2000 CanLII 14389, Order No. 26-1994, 1994 CanLII 1432, Order No. 45-1995, [1995] B.C.I.P.C.D. No. 18 and Order No. 315-1999, 1999 CanLII 1281. *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101, at paras. 32-34. Order 01-39, 2001 CanLII 21593, Judicial Review dismissed on other grounds in *CPR v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.

[15] See for example Ontario Order P1614, 1998 CanLII 14311, where Adjudicator Cropley stated "In my view, the school did not simply provide the records to the Ministry pursuant to the mandatory reporting requirements of the Education Act. Rather, the school provided access to its documents, classrooms, students and staff in order to enable the Ministry's employees to conduct an investigation into the school's academic operations. In Ontario Order 16, [1988] O.I.P.C. No. 16, Commissioner Linden referenced *Canada Packers* and said: "the information in the records was not supplied by the third parties to the institution as required by the Act. Rather, the institution obtained the information itself through inspections required by statute."

> (b) examine a record or any other thing,
>
> (c) demand that a document or any other thing be produced for inspection,
>
> (d) remove a record or any other thing for review and copying, after providing a receipt,
>
> (e) use data storage, information processing or retrieval devices or systems that are normally used in carrying on business in the premises to produce a record in readable form, or
>
> (f) question a person.

Application to the records

[30] The question is whether the assessment information used to populate the five reports was "supplied" by Eminata. The burden is on Eminata to establish this information was "supplied."

[31] Much of the assessment information consists of PCTIA's judgments, comments or observations. For the compliance reports, it is the judgment of the PCTIA auditor about whether Eminata is complying with statutory obligations and bylaws that apply to accredited institutions. For the accreditation reports it is whether PCTIA's accreditation standards have been met. Applying the general principle in *Canada Packers Inc.*[16] discussed above, Eminata does not supply this information. Put another way, as a regulator conducting an audit or inspection, the PCTIA's judgments about Eminata are not supplied by Eminata, they are its own independent assessment.

[32] Parts of the comments sections of the assessment information contain very detailed and specific information that are in some cases closer to factual statements than PCTIA judgments, so that the information allows accurate inferences to be made about Eminata commercial information from the assessment information. Some of the Eminata commercial information that can be deduced by inference may have been supplied in confidence to PCTIA by Eminata during the assessment process. However, there is no evidence before me of which, if any information in the reports, if disclosed, would permit an accurate inference about information that was supplied in confidence by Eminata.

[33] Some of the assessment information is factual information that does not involve any exercise of judgment by PCTIA's auditor. The question is whether the factual information in the reports was supplied by Eminata, or obtained by PCTIA's own independent investigation. There is evidence that both entities were sources of factual information.[17]

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[16] (1989), 53 D.L.R. (4th) 246, [1989] 1 F.C.J. No. 615.

[17] The accreditation reports state that one stage in the preparation of the accreditation reports involved preparing an accreditation application with supporting documents for the PCTIA and

[34] The onus is on Eminata to show that information in the reports was supplied. In general, Eminata's submissions do not provide sufficient detail to determine which factual information in the reports was supplied. The source of information in the reports is also often not explained in the records themselves.

[35] However, I am satisfied from the report's context that Eminata supplied some factual information that is contained in the assessment information in the accreditation reports. In some places in the accreditation reports the authors specify the source of facts in the assessment information as being a document supplied to them by Eminata prior to the audit team conducting any investigation or gathering of information by its own initiative. In these instances I am satisfied there is sufficient evidence to conclude that these parts of the assessment information are supplied.[18]

[36] The supplied information also includes most of the enrolment information that Eminata identifies in detail in its submissions as the "Vital Eminata Information".[19] As a matter of practicality it would have been very difficult for the PCTIA auditor to have independently gathered the enrolment numbers that form part of this information, and it is not publicly available, so it is a logical inference that this information, and the enrolment information related directly to it, which comprises most of the "Vital Eminata Information" was supplied by Eminata to PCTIA.

[37] In summary, some of the information in the reports does not meet the supplied requirement because:

a) it contains judgments made by PCTIA;

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reading documents submitted to PCTIA by Eminata. PCTIA's site visit report for one Eminata college refers to information being supplied to PCTIA. However, another phase in the accreditation process is PCTIA's investigation, and there is evidence that PCTIA gathered some information in the reports about Eminata's colleges from its own research including on-site visits and from information on the institution's and other's websites.

[18] In Record 1 at p. 12 the third paragraph starting "The administration…" and all the bullet points that follow; at p. 15, part of the last sentence "The accreditation report… Officers;" and all information on p. 49 up to but excluding the last paragraph. In Record 2 at p. 13, the paragraph that begins "The review of Accreditation Report…"; at p. 14 the paragraph starting "The administration…" and all the bullet points that follow; at p. 45, the sentence that starts "The policy states…" to the last bullet on p. 46; at p. 47, last paragraph, first sentence; at p. 51, last paragraph, first sentence; at p. 61 the sentence that reads "The accreditation report…Committees"; at p. 65 the sentence that begins "Possible procedures…" to the end of the last bullet. Record 3 at p. 13 the sentence that begins "The Mission Statement…" to the end of the last paragraph; at p. 14 the sentence that begins "The administration…" to the end of the last bullet; p. 43 the sentence that begins "The policy states…" to the last bullet at the top of p. 44; p. 49 the sentence that reads "The Accreditation Report… Committees"; p. 60 the sentence that reads "The Accreditation Report… Committees".

[19] Paragraph 16 of Eminata's initial submissions. The information identified in para. 16 that is not supplied is in Record 1 at pp. 22, 28, 29, and 30.

b) no evidence has been provided to establish that information was supplied rather than obtained by PCTIA through other means, such as its own independent investigation including interviews and site inspection of facilities and records; or

c) no evidence has been provided to show that accurate inferences can be made from the audit reports about information that was supplied in confidence.

[38] I am satisfied that some information in the reports is "supplied" for the purposes of s. 21(1)(b):

a) assessment information it is clear from the wording and content of the reports was supplied in documents provided by Eminata to PCTIA, including:

i. most of the "Vital Eminata Information";[20]

ii. some information that would fall within Eminata's definition of the "Internal Eminata Information".

"In Confidence"

[39] The test for whether information was supplied explicitly or implicitly, "in confidence" is objective and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient.[21]

[40] Eminata cites s. 20 of the *PCTI Act* as evidence that information in the reports was supplied in confidence. Section 20 states:

> 20 The board, a board member or an officer, employee or agent of the agency must not disclose or be compelled to disclose any information or record, received or made in the course of duties under this Act except
>
> (a) if disclosure is necessary in the administration of this Act, the regulations or the bylaws,
>
> (b) with the consent of the person to whom the information or record relates,
>
> (c) in court proceedings, or
>
> (d) if an enactment of British Columbia, a province or Canada requires the disclosure.

[20] The "Vital Eminata Information" not supplied is in Record 1 at pp. 22, 28, 29, and 30.

[21] Order F13-02, 2013 BCIPC 2, at para. 18 from Order F11-08, 2011 BCIPC 10, at para. 24, citing Order 01-39 [2001] B.C.I.P.C.D. No. 40 citing *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4th) 417 (FCTD); see also *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4th) 356 (FCTD).

[41] Section 20 of the *PCTI Act* provides a default position for PCTIA in relation to information or records it receives. However, s. 20(d) provides that the default position in s. 20 is subject to other enactments, including FIPPA. PCTIA's submission indicates that the fact that it is a public body and therefore subject to FIPPA is listed on PCTIA's website. The implication, which I agree with, is that third parties must expect that information supplied to PCTIA may not be kept confidential because of PCTIA's obligations under FIPPA. Therefore, to the extent that a supplier of information may rely on s. 20 it is useful, but it does not conclusively establish that the information in the report was supplied in confidence.

[42] Eminata also says that even without PCTIA's legislation it is obvious that the information in the reports was supplied in confidence, and that PCTIA did not tell Eminata that information supplied would not be supplied in confidence. Essentially this is an argument that the information was supplied implicitly in confidence. PCTIA agrees that some information was supplied implicitly in confidence[22] but does not provide particulars.

[43] The argument that information was supplied implicitly in confidence was addressed in Order 01-36,[23] where former Commissioner Loukidelis stated:

> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
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> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

[44] The Supreme Court of Canada decision in *Merck Frosst v. Canada (Health)* addressed the specific question of whether publicly available information can be confidential saying:

[22] PCTIA initial submission at para. 10.
[23] 2001 CanLII 21590.

> As set out earlier, information is not confidential if it is in the public domain, including being publicly available through another source. As MacKay J. put it in *Air Atonabee*, at p. 272, to be confidential, the information must not be available from sources otherwise accessible by the public or obtainable by observation or independent study by a member of the public acting on his or her own.[24]

[45] PCTIA's reply submission points out that all of the enrolment information that Eminata calls the "Vital Eminata Information", except the enrolment numbers, is available on PCTIA's website and also on the respective websites of Eminata's colleges. That this information is publicly available on more than one website means the information is not confidential.

[46] I am satisfied that the enrolment numbers for Eminata colleges was supplied in confidence by Eminata. This information is not publicly available and I am satisfied from Eminata's submissions that it takes steps to keep this information confidential.

[47] With regard to the other assessment information that I found was supplied in documents provided by Eminata to PCTIA, I accept the evidence of Eminata, supported by the general statement in PCTIA's submission that it was supplied in confidence.

[48] **Harm to Eminata**—Eminata submits that disclosure of the reports can reasonably be expected to harm their competitive position, and could reasonably be expected to result in undue loss to Eminata or gain to a competitor.

[49] Eminata submits that releasing the enrolment information would reveal Eminata's marketing plans, position in the marketplace and broader competitive dynamics. They also say if the information is released it could be used to target Eminata's programs.

[50] The applicant's submissions question whether harm will result, and, referring to previous orders, emphasises that the harm must be significant and that a third parties' size can be relevant.

[51] I accept Eminata's submission that releasing enrolment numbers for particular courses or campuses meets the significant harm test under s. 21(1)(c)(i). Enrolment numbers by course are akin to sales figures for a private educator like Eminata. Even historic sales figures, (the records contain 2009 enrolment numbers), have been found to meet the s. 21 harm test.[25] Enrolment numbers for particular campuses also reveal important information akin to knowing enrolment numbers by course because of the small size of some

[24] 2012 SCC 3 at para. 146.
[25] See for example Order 00-10, 2000 CanLII 11042.

Eminata campuses and relatively few course offerings at particular campuses. Knowing enrolment numbers for particular courses at Eminata campuses or for specific campuses would allow competitors, including other private education providers (and potentially public education providers) to evaluate the success of Eminata's marketing efforts and to discern the market for particular courses and for markets for particular courses by geographic area. This could lead to targeting of Eminata's more popular courses or campuses by competitors. Therefore I find the harm requirement satisfied for enrolment numbers for particular courses and campuses.

[52] With respect to information concerning the total enrolment numbers of students per College, I find these are sufficiently generic and would not reveal information that would harm Eminata. Each Eminata college has such a wide range of course offerings, across multiple campuses[26] that knowledge of total enrolments at a College will not permit the sort of analysis of the success of Eminata's marketing strategies and techniques that it fears.

[53] I find that the remainder of the assessment information, including the information supplied in confidence (excluding the enrolment information discussed above) fails to satisfy the harms test. Much of the assessment information comprises a record of Eminata's compliance with publicly available quality standards or legislative requirements that apply to all private colleges. To the extent that it discloses information about Eminata's operations, it merely reveals the existence, and in some cases some basic information about, certain policies and procedures which are operational features that satisfy the requirements of accreditation. Therefore all of Eminata's accredited competitors would be required to have the same or similar policies and procedures in place. Revealing that Eminata has these mandated policies or procedures or excerpts from those policies or procedures therefore does not cause harm of the sort required by s. 21.

[54] In summary, I find that certain enrolment numbers must be withheld under s. 21. I have highlighted the information that must be withheld under s. 21 in copies of the reports which accompany PCTIA's copy of this decision.

[55] **Third Party Personal Information: s. 22**—Section 22 was neither raised by Eminata in its request to the OIPC for review, nor was it included in the scope of the inquiry set out in the investigators fact report. However, s. 22 is a mandatory exception, which means that information must be withheld when s. 22 applies. I have therefore considered the application of s. 22 to all the records in issue where personal information is present.

[26] The Eminata colleges that are the subject of the reports have between three and eight different campuses each.

[56] The proper approach to s. 22 involves four steps:[27]

1. Is the information personal information?
2. If it is personal information, does it meet any of the criteria identified in s. 22(4), where disclosure would not be an unreasonable invasion of third-party personal privacy?
3. If none of the s. 22(4) criteria apply, would disclosure of the information fall within any of the criteria in s. 22(3), whereby it would be presumed to be an unreasonable invasion of third-party privacy?
4. If s. 22(3) criteria apply, after considering all relevant circumstances, including those listed in s. 22(2), is any presumption rebutted?

[57] There is personal information in parts of the records. None of the criteria in s. 22(4) applies to the personal information, but s. 22(3) does apply to several parts of the reports because they contain:

a) personal information about an identifiable individual's employment, occupational or educational history;[28] or

b) personal recommendations or evaluations, character references or personnel evaluations about an identifiable individual.[29]

[58] Section 22(3) creates a rebuttable presumption that disclosing this information is an unreasonable invasion of the individuals' personal privacy. The information includes comments about instructors by students, about management by instructors, or about instructors' work history, qualifications, teaching experience and references.

[59] Weighing all the factors, including those in s. 22(2), some of the information can be released because it comprises favourable comments by students about instructors at Eminata colleges or by instructors about Eminata management that were not made in confidence, and the students who made the comments are not identifiable. As the reports were created in 2009, most, if not all, of the students making the comments will have completed their studies. The disclosure of this information will not be harmful.[30] Some other information can be released because it comprises favourable comments by PCTIA about Eminata instructors and management. While harm is not the only factor to consider under s. 22, I see no other factors to support withholding this information.

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[27] Order F12-08, 2012 BCIPC 12; Order 01-53, 2001 CanLII 21607.
[28] Section 22(3)(d) FIPPA.
[29] Section 22(3)(g) FIPPA.
[30] Section 22(2)(e) FIPPA lists this as a factor to consider.

[60] The remaining information consists of assessments of the experience and qualifications of instructors and administrative staff at Eminata. The risk of harm to the affected individual's reputation supports the presumption against disclosure and there are no factors that rebut the presumption that disclosure of this information would be an unreasonable invasion of privacy, so the information must be withheld. I have indicated which personal information must be withheld under s. 22 in copies of the records which accompany PCTIA's copy of this decision.

CONCLUSION

[61] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to paras. 2 and 3 below, PCTIA is authorised to disclose the requested information by **January 22, 2014**, pursuant to s. 59 of FIPPA. PCTIA must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

2. I require PCTIA to withhold under s. 21 the enrolment numbers highlighted on the pages in the requested information which accompany PCTIA's copy of this Order.

3. I require the City to withhold, under s. 22, the personal information highlighted on the pages in the requested information which accompany PCTIA's copy of this decision.

December 6, 2013

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F12-49066