Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-913

Appeal P-9400423

Ministry of Health

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant submitted a request to the Ministry of Health (the Ministry) for access to "all working documents, reports, memoranda, correspondence and any other record of information" related to applications by a named company (the affected party) to relocate its laboratory and specimen collection centres (SCC's) from three specific locations.

The Ministry located 119 records relating to the first of the three locations identified in the request. No records relating to the other two locations were found.

Most of the responsive records identified by the Ministry were the subject of a third party appeal (file number P-9300610) which was initiated by the affected party. Appeal P-9300610 dealt with information which the Ministry had decided to disclose. That appeal was resolved by Order P-655.

The subject matter of the current appeal consists of the records and parts of records which the Ministry decided **not** to disclose, and which were not dealt with in Order P-655. The Ministry relies on the following exemption to deny access to some of the records which remain at issue:

- solicitor-client privilege - section 19.

In addition, the Ministry has refused to grant access to parts of several records at issue on the basis that they are not responsive to the request.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were submitted on behalf of both parties.

Subsequently, it became apparent that, in addition to the reasons for denying access referred to above, the Ministry was relying on the mandatory exemption provided by section 17(1) of the Act (third party information) to deny access to some of the information it has withheld from disclosure. For that reason, a supplementary Notice of Inquiry was sent to the appellant and the Ministry, inviting representations on the application of section 17(1). In addition, since it appeared that disclosure could have an impact on the interests of the affected party, both the original Notice of Inquiry and the supplementary notice dealing with section 17(1) were sent to the affected party, inviting representations on all the issues in the appeal. In response to these notices, representations were received from the appellant, the Ministry and the affected party.

DISCUSSION:

RESPONSIVENESS OF RECORDS

As noted above, the Ministry has not disclosed some portions of the records at issue on the basis that they are not responsive to the request. This issue relates to Records 41, 42, 43, 98 and 106.

All three parties to this appeal have been invited to submit representations on this subject, and I have considered these in reaching my decision on this issue.

Before deciding whether parts of these records are not responsive to the request, and therefore outside the scope of this appeal as the Ministry alleges, I must address a more general submission made by the appellant in this regard.

This submission was succinctly stated in the appellant's representations as follows:

> In light of section 10, it is submitted that the Ministry does not have the legal right to refuse to disclose portions of documents that have been produced on the grounds that they are not relevant to the request for disclosure that has been made.

Section 10 of the Act states as follows:

> (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.
>
> (2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In my view, it is significant that section 10(1) refers to access to a "record or part of a record". On this basis, I read section 10 as permitting government organizations to disclose "part of a record" if only part contains responsive information. Moreover, the approach which flows from this interpretation is desirable from a practical perspective in relation to the access scheme in the Act, because it recognizes that government organizations create records for a variety of reasons, and some documents may be created to serve multiple purposes.

While this analysis is, in my view, a completely sufficient rationale for adopting an interpretation which permits non-disclosure of parts of records on the basis of non-responsiveness, there is another consideration of a practical nature which, in my view, is an even more compelling reason to adopt this interpretation. Given the nature of government record-keeping (as discussed in the preceding paragraph), it is quite possible that parts of records which are clearly irrelevant to the subject matter of a request could contain personal information or sensitive commercial information whose potential disclosure would trigger the notice requirements of section 28(1) of the Act. This section requires government organizations to notify individuals and/or business entities whose information may be disclosed. If I accept the argument advanced

by the appellant, government organizations (and, potentially, the Commissioner's office, under section 50(3) of the Act) would be required to expend scarce resources to comply with these requirements in relation to information which has no bearing on the subject matter of a request. In my view, this would be a misinterpretation of the legislature's intention in enacting section 10(1).

The view that section 10(1) permits government organizations to withhold parts of records as non-responsive is also consistent with the approach taken to this issue in Order P-154 and many subsequent orders.

For all these reasons, I find that section 10(1) permits government organizations not to disclose parts of records on the basis that they are not responsive to a request.

Moreover, I am of the view that the power of the Commissioner and his delegates to consider whether information in a record (as opposed to a whole record) is within the scope of a request is supported by the following comment of the Ontario Court (General Division) Divisional Court in Re Attorney General of Ontario and Fineberg et al., 19 O.R. (3d) 197, at page 201:

> In our opinion, the [Inquiry] Officer must have the jurisdiction to consider the information and the records at issue, in light of the wording of the request. Such jurisdiction necessarily entails a right to determine the scope of the request **and the related relevance of the information at issue**. (emphasis added)

Accordingly, I find that I have the jurisdiction to determine whether the parts of the record which the Ministry has withheld from disclosure on the basis that they are not responsive to the request are in fact non-responsive, and if they are, to find that they fall outside the scope of this appeal.

To determine whether I will uphold the Ministry's position that parts of the records are non-responsive, I have carefully reviewed the portions of the records for which the Ministry makes this claim, and compared their contents with the wording of the request. In my view, the Ministry's determination, to the effect that passages dealing with applications other than those mentioned in the request are not responsive, was a reasonable and proper assessment based upon a reasonable interpretation of the request. Since all of the information which was withheld on this basis deals with applications other than those mentioned in the request, I also agree with the Ministry's determination as to which parts of the records are non-responsive.

Moreover, the appellant's representations indicate that, subsequent to initiating this appeal, the appellant submitted a new request to the Ministry for access to Records 41, 42, 43, 98 and 106 **in their entirety**. These are precisely the same records as the ones which the Ministry has partially withheld as non-responsive in this appeal. The Ministry has responded to this new request, and its response is the subject of Appeal P-9500079.

I have concluded that this new request is aimed at clearing up any issue of responsiveness arising from the wording of the request which is the subject of the present appeal, with regard to these particular records. In

my view, having submitted this new request, the appellant cannot now continue to maintain that these records, in their entirety, are responsive to the request which is the subject of the present appeal. The two positions are inconsistent, and because of the multiplicity of proceedings which have resulted from the appellant's approach to this issue, they cannot be seen as mere arguments in the alternative. In my view, the appellant has, in effect, conceded the issue of responsiveness in this appeal by submitting its new request.

For all these reasons, I uphold the Ministry's determination that parts of Records 41, 42, 43, 98 and 106 are not responsive to the request which is under consideration in this appeal, and I agree with the Ministry's analysis as to which particular parts are non-responsive. Accordingly, I will not consider those parts of the records further in this order.

SOLICITOR-CLIENT PRIVILEGE

The Ministry has claimed that section 19 of the Act applies to exempt Records 67, 72, 77, 84, 85, 99, 109, 111 and 112, in their entirety, from disclosure.

Section 19 reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This exemption consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

With the exception of Record 84, the records for which this exemption has been claimed consist of memoranda prepared by Ministry counsel and sent to senior officials within the Ministry, pertaining to various aspects of a relocation application made by the affected party. Record 84 is a memorandum prepared for, and sent to, Ministry counsel relating to the same subject.

The Ministry submits that each of the records for which it has claimed section 19 qualifies under both Branch 1 and Branch 2 of the exemption. I will begin by considering whether Branch 1 applies.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
   (b) the communication must be of a confidential nature, **and**
   (c) the communication must be between a client (or his agent) and a legal advisor, **and**
   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation. (Order 49)

The Ministry submits that all the records for which section 19 has been claimed meet the requirements for exemption under the first part of Branch 1, as described above, because they consist of written communications of a confidential nature between solicitor and client, directly related to the giving or seeking of legal advice. I have reviewed these records in detail and I agree with the Ministry's assessment in this regard. Accordingly, I find that Records 67, 72, 77, 84, 85, 99, 109, 111 and 112 meet the requirements of Branch 1, and they are all exempt from disclosure under section 19.

The appellant submits that I must consider the possibility of severance, with a view to disclosing portions of the records which are not exempt. I have considered the possibility of severance, but in my view, since it is clear that the entire contents of these records are related to seeking, formulating or giving legal advice, the exemption applies to these records in their entirety.

The appellant also states that, since section 19 is a discretionary exemption, I must satisfy myself that the Ministry's exercise of discretion was in accordance with the principles of the Act. Based upon the Ministry's representations, I am satisfied that its exercise of discretion was in accordance with accepted legal principles, and was consistent with the purposes of the Act.

THIRD PARTY INFORMATION

The records at issue which I have not dealt with previously in this order consist of the parts of Records 41, 42, 43, 98 and 106 to which the Ministry has applied the third party information exemption, set out in section 17(1) of the Act. These passages are distinct from those which I have previously found to be non-responsive.

Section 17(1) provides, in part, as follows:

> 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;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency.

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the institution 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 (a), (b) or (c) of subsection 17(1) will occur.

As previously noted, Order P-655 (issued by Inquiry Officer Laurel Cropley) arose from the same request which gave rise to this appeal. In her consideration of section 17(1) in that order, Inquiry Officer Cropley dealt with information which is virtually identical to that which has been severed from the above-noted records in this appeal, based on that same exemption. This information consists of the locations of proposed SCC's, or information which would disclose proposed SCC locations.

In Order P-655, Inquiry Officer Cropley found that this information was commercial, satisfying part 1 of the test. She went on to find that it was supplied to the Ministry, notwithstanding that the documents themselves were created by the Ministry (as were the records under consideration here). She also found that the affected party (who was the third party appellant in Order P-655) had a reasonable expectation of confidentiality with regard to proposed SCC locations, or other information it supplied which could reveal proposed SCC locations. Accordingly, part 2 of the test was met for this information. I agree with Inquiry Officer Cropley's findings in Order P-655 with respect to parts 1 and 2 of the test.

In the context of the present appeal, I have reviewed the records and the representations submitted by all parties on this issue. As I stated above, the information which has been severed from Records 41, 42, 43, 98 and 106 in this appeal, pursuant to section 17(1), is virtually identical to the information relating to proposed SCC locations which Inquiry Officer Cropley considered in Order P-655. In my view, her

findings with respect to parts 1 and 2 of the test are equally applicable to the information under consideration here, and I find that parts 1 and 2 of the test have been met.

With respect to part 3 of the test, the affected party has provided detailed evidence concerning the competitive harm it would suffer should the location of proposed sites be prematurely disclosed to its competitors. Based on the facts and circumstances described by the affected party, I am satisfied that disclosure of the proposed locations or information that would reveal these locations could reasonably be expected to result in the harm outlined in section 17(1)(a) of the Act. In my view, all of the information in the records under consideration here, which the Ministry has withheld under section 17(1), consists of proposed SCC locations or information which would reveal these locations, and part 3 of the test has been met.

Since all three parts of the test have been satisfied with respect to the information in Records 41, 42, 43, 98 and 106 withheld by the Ministry under section 17(1), I find that the exemption applies to that information.

ORDER:

I uphold the Ministry's decision.

Original signed by: April 24, 1995
John Higgins
Inquiry Officer