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

ORDER P-1291

Appeal P-9600196

Ministry of Health

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BACKGROUND:

The National Blood Supply Program is funded by the provincial and territorial governments through the Canadian Blood Agency (CBA), a non-profit corporation created in 1991 under Part II of the Canada Corporations Act with the participation of the Ministries of Health of each of the provinces and territories. The CBA also offers advice to the provincial and territorial Health Ministries about blood product funding policy through its own staff based in Ottawa. The mandate of the CBA is to "coordinate and finance the National Blood Supply Program in accordance with the Ministers of Health for the therapeutic use of human blood, blood products or their substitutes".

The Canadian Blood Committee (CBC) was the predecessor to the CBA and was similarly established to direct and coordinate the Canadian Blood System.

NATURE OF THE APPEAL:

The Ministry of Health (the Ministry) received a request from a newspaper reporter under the Freedom of Information and Protection of Privacy Act (the Act) for the minutes of meetings of the CBA for the years 1991 to 1995 inclusive. The Ministry identified 27 sets of minutes as responsive records and denied access to all of them, claiming the application of section 15(a) of the Act (relations with other governments).

The requester (now the appellant) appealed the denial of access.

During the course of mediation, the Appeals Officer identified that two sets of minutes of meetings held by the CBA's predecessor (Records 17 and 20), the CBC, were included in the documents identified by the Ministry. The appellant and the Ministry were both provided with an opportunity to provide their views with respect to whether these records are responsive to the appellant's request. Having reviewed these records and the wording of the request, I find that Records 17 and 20 are not responsive. Therefore, the records at issue in this appeal consist only of the 25 sets of minutes of the CBA.

In his letter of appeal, the appellant contends that full disclosure of the records would be in the public interest. Therefore, section 23 (compelling public interest) was also identified as an issue in this appeal.

A Notice of Inquiry was sent to the appellant and the Ministry. In addition, each of the other 11 Provincial and Territorial Departments/Ministries of Health were identified as parties whose interests may be affected by the disclosure of the records. Each of these parties was also invited to make submissions. Following that notification, an additional party, a private agency, was identified as having a potential interest which could be affected by the outcome of this appeal. That party's interest raised the possible application of the mandatory provision set out in section 17 of the Act (third party information).

Accordingly, all of the parties who received the initial Notice of Inquiry which sought submissions on the application of section 15(a) to the records, as well as the private agency, were provided with a further opportunity to make representations on the application of section 17 of the Act to the records.

Representations in response to the first Notice of Inquiry were received from the Ministry, the Chair of the CBA and eight of the provincial/territorial representatives. With respect to the Supplementary Notice of Inquiry on the application of section 17, representations were received from the Ministry, the private agency and six of the provincial/territorial representatives.

PRELIMINARY ISSUE:

CUSTODY OR CONTROL

Several of the provincial representatives have raised the issue of whether the documents which are the subject of this request are within the custody or control of the Government of Ontario. They argue that the nature of the CBA is such that no single provincial or territorial government can be said to exercise control or jurisdiction over its records.

The CBA's members consist of each provincial and territorial Minister of Health, who then appoints a member to the CBA Board of Directors. Records generated by the CBA are distributed amongst its Board of Directors, including the representative of the Ontario Ministry of Health, a Ministry employee. In this way, the Minutes of CBA meetings have found their way into the record holdings of the Ontario Ministry of Health.

In Order P-270, Commissioner Tom Wright made the following findings with respect to records in the custody of Ontario Hydro:

> The provincial Freedom of Information and Protection of Privacy Act is a provincial law of general application that applies to records in the custody or under the control of a ministry of the Government of Ontario, and any other provincial agency, board, commission, corporation or other body designated as an institution in the regulations. Ontario Hydro is designated as an "institution" in Ontario Regulation 516/90 under the Act.
>
> The records in issue in this appeal - agendas and minutes of SOATIC (a joint technical committee at the senior executive level of AECL and Ontario Hydro) - are records that are in the custody of Ontario Hydro, an institution under the Act.
>
> Section 10 of the Act provides every person with the right of access to a record or a part of a record in the custody or under the control of an "institution". That right is made subject to the specific exemptions set out in sections 12 to 22 of the Act. These exemptions are intended by the Legislature to protect certain defined interests.

In my view, the principles expressed above are equally applicable to records in the custody of the Ontario Ministry of Health which came into its possession as a function of its participation in a national blood products program. I find that the records at issue in this appeal, though not the "property" of the Ministry, are within its custody for the purposes of the Act. As such, I find that I have the necessary jurisdiction to determine whether these records are subject to disclosure or are properly exempt under the Act, in whole or in part.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims that section 15(a) of the Act applies to all of the records at issue in this appeal.

This sections read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

For a record to qualify for exemption under section 15(a), the Ministry must establish that:

1. the relations must be intergovernmental, that is relations between an institution and another government or its agencies; and

2. disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

[Order P-908]

Part One of the Test

The Ministry contends that the intergovernmental nature of the CBA stems from the fact that the CBA is a mechanism by which all of the provincial/territorial governments work with each other to carry on a national blood supply program. In this respect, the Ministry asserts that the CBA is intergovernmental in purpose, composition, and function.

The Chair of the CBA submits that the records at issue are the written records of discussions of the Agency Board Members, appointed by and reporting to the provincial/territorial Ministers of Health.

Although the members of the CBA are not themselves "governments", as agents of the provincial and territorial governments they are capable of conducting "intergovernmental relations" on behalf of their respective governments. Intergovernmental relations can be understood as the ongoing formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiations between various levels of government.

In view of the above, I accept that the relations between the Ministry and the CBA are intergovernmental within the meaning of section 15(a) of the Act.

Part Two of the Test

The Ministry submits that, prior to the exercise of its discretion not to release the records, it contacted the affected parties (the respective ministries/departments of the provinces and territories) to ascertain their positions on the disclosure of the records and the possible application of section 15(a) to them. In its submissions, the Ministry relies upon the views expressed by the affected parties. Specifically, the Ministry maintains that the other members of the CBA have expressed grave concerns regarding the disclosure of the records and have clearly advised the Ministry that they would be very reluctant to share information with the Government of Ontario in the future should the records at issue be released.

Both the Ministry and the affected parties contend that the release of the records at issue would have a "chilling effect" on intergovernmental negotiations with Ontario. The parties resisting disclosure assert that the CBA process is dependent upon the fullest access to the views and other information conveyed by other governments. If the records at issue were released, they contend that future processes would likely be less open, the verbal exchange at CBA meetings would be reduced, and this in turn would significantly affect the quality and effectiveness of the CBA.

The affected parties contend that the issues discussed at the Board meetings are highly sensitive and to achieve candid discussions, the meetings are confidential. They argue that the minutes reflect the positions taken by various individual Board members and reflect the sensitive nature of the Board's discussions. The Ministry and the affected parties who made representations have provided detailed submissions regarding the context of the records and the reasons why they feel that prejudice to the conduct of intergovernmental relations would result from disclosure.

Having reviewed these representations and the records, I find that the Ministry has provided sufficient evidence to establish that disclosure of the discussion portions of the CBA meetings which are recorded in the minutes could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations. It is these passages which capture the details and substance of the discussions and any views expressed by individual members of the CBA.

The decisions of the CBA are captured in the "Motions" sections of the minutes. The motions of the CBA which were carried reflect the decisions of its members as a whole and in this way, do not represent the perspective of any one of its members. In this respect, I draw a distinction between the information recorded as part of the general discussions of the Agency, and the carried motions, which record the actual decisions of this publicly-funded and publicly-accountable body. Accordingly, I find that section 15(a) only applies to those portions of the minutes which document the discussions which took place at each of the CBA meetings.

In his letter of appeal, the appellant contends that the minutes of the predecessor agency were publicly available. The Ministry and the Chair of the CBA acknowledge that this was the case and have addressed this issue in their representations. They contend that while the former members of the CBC became CBA directors, there are various fundamental structural differences between the two organizations.

Specifically, these parties point out that the committee members of the CBC were appointed by their respective Health Ministers. The members of the CBA are the provincial/territorial Health Ministers, each of whom appoint a representative to the CBA Board of Directors. In addition, while the CBA is a non-profit corporation, the Ministry and the Chair of the CBA indicate that the CBC was a federal/provincial/territorial committee with a secretariat funded by the federal government which provided administrative support. While the CBC was staffed by federal public servants, the staff of the CBA are employed by it and are not public servants.

In addition, while the CBC had a consultative role amongst governments, the Ministry and the CBA Chair submit that it could not conclude arrangements relating to the delivery of the National Blood Supply Program directly, without the agreement of each individual provincial and territorial Health Ministry.

Having reviewed the role and function of both the CBA and its predecessor, I find that, while there are various structural differences between the two bodies, the mandate of the CBA clearly requires its members to act in accordance with their respective Health Ministers in regulating the publicly-funded National Blood Supply Program. In my view, such a body must have some degree of public accountability. The CBA itself addressed this issue in its minutes of September 25, 1991. Under the heading, "Item 12 - Policy on Access to Information", the following resolution was approved:

(1) Access to the working documents and records of the Canadian Blood Agency may be granted if a written request is submitted and is expressly approved by the Executive Committee.

(2) The Agency will maintain a frank, open communications posture with the public and media, designed to foster a climate of mutual trust, encourage dialogue and disclose as much information as is necessary or appropriate to the circumstances, so that the Canadian public will gain a better understanding of the blood system.

As a result, I find that the release of those portions of the minutes which contain the carried motions of the CBA, and reflect the decisions of the Agency in relation to the regulation of the National Blood Supply Program, would be in accordance with the above-noted policy and would not, therefore, prejudice the conduct of intergovernmental relations.

THIRD PARTY INFORMATION

As set out above, after reviewing the records at issue in the appeal, this office determined that the rights of a private agency may be affected by their disclosure. Accordingly, submissions were sought from all parties, including the private agency, on the potential application of section 17 to some or all of the records.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) of the Act, the parties resisting disclosure 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.

The private agency contends that its ability to make effective representations in this case has been compromised because it was not able to obtain copies of the records at issue. It was the Ministry's position that it is prevented, by virtue of the application of section 15(a), from providing copies of the records to potential affected parties under section 28 of the Act. The agency did, however, provide examples in their representations of the types of information which may attract the section 17 exemption.

As set out above, the potential application of section 17 of the Act was raised by this office in the Supplementary Notice of Inquiry. Examining the content of the records remaining at issue, in conjunction with the representations of all of the parties, I find that I have been provided with sufficient information to enable me to make a determination on the application of this exemption to the remaining portions of the records.

The information remaining at issue in this appeal consists of carried motions reflecting the decisions of the CBA. The vast majority of these motions do not relate to the private agency whose potential interests have been identified. However, I find that Records 1, 2, 5, 6, 9, 11, 14 and 15 include motions which may contain information relating to the private agency which falls within the section 17 exemption.

Type of Information

Having reviewed the passages at issue, I find, aside from the information contained in Record 6, all of the documents relate to budgetary matters, funding issues or ongoing commercial ventures involving the private agency. Accordingly, I find that these portions of the records contain financial and/or commercial information within the meaning of section 17.

Supplied in Confidence

The Ministry submits that references are frequently made to the agency in the records. Occasionally, the information would have been supplied in confidence by the agency but more often the references are linked to discussions of pending CBA policy and decisions with respect to it. The Ministry further contends that section 17 does not apply to these types of references.

As set out above, the Ministry's application of section 15(a) has been upheld in exempting all of the discussion sections contained in the records from disclosure. Having reviewed the records, I agree that most of the information supplied by the private agency to the CBA was contained in the now-exempt discussion sections of the minutes. There remains, however, other references contained in the carried motions portion of the minutes which were provided to the CBA by the private agency.

Following my review of the representations of the Ministry and the private agency, I find that certain information contained in Page 2 of Record 9 (financial situation of the agency), Pages 3 and 8 of Record 12, which are also included in Record 11 (two parts relating first to a commercial proposal and the second to funding) and Pages 3, 8 and 9 of Record 15 (three references, the first and third relating to the financial situation of the agency, the second to a commercial proposal in which it was involved) were all supplied to the CBA, and therefore, the Ministry. I further find that I have been provided with sufficient evidence to conclude that this information was supplied explicitly, in confidence, by the private agency with a reasonably held expectation of confidentiality.

Harms

The Ministry, several of the affected parties and the private agency submit that significant prejudice to the competitive position of the private agency would result from the disclosure of the information contained in the carried motions. Specifically, they contend that negotiations between the agency and the CBA and/or between the agency and other commercial entities involved in blood product manufacture would be significantly prejudiced. They further contend that a consequence of this harm would be that the agency would no longer supply such information to the CBA and/or that third parties would withhold their consent to the disclosure of their information to the CBA in the future.

I have reviewed the submissions provided to me with respect to the application of section 17 to the records. I find that the disclosure of the information contained in the six portions of Records 9, 12 (which is included in Record 11) and 15 described above could reasonably be expected to prejudice significantly the competitive position of the agency, specifically as it relates to third party suppliers from whom the agency may receive confidential information. For this reason, I find that these portions of Records 9, 11, 12 and 15 are properly exempt from disclosure under section 17. I have highlighted the excerpts which I have found to be exempt under section 17 on the copy of Records 9, 11, 12 and 15 which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator. These portions of the records are **not** to be disclosed.

PUBLIC INTEREST IN DISCLOSURE

During the course of mediation, the appellant raised the issue of a public interest in the disclosure of the records at issue. The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question. As the appellant has not made representations to address this issue, I find that I do not have sufficient evidence before me to find a compelling public interest which would clearly outweigh the application of sections 15(a) and 17.

ORDER:

1. I uphold the Ministry's decision to refuse to disclose the information contained in the discussion sections of the records, which are exempt under section 15(a) of the Act. I order that this information **not** be disclosed.

2. Six excerpts from Records 9, 11, 12 and 15 which I have highlighted on the copy of these records and provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator are exempt from disclosure under section 17. I order that this information **not** be disclosed.

3. I order the Ministry to disclose the remaining portions of the records to the appellant by providing him with a copy by **December 5, 1996**.

4. I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: November 14, 1996
Donald Hale
Inquiry Officer