



Information and Privacy  
Commissioner/Ontario

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

# **INTERIM ORDER PO-1781-I**

Appeal PA-990275-1

Ministry of Health and Long Term Care



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## **NATURE OF THE APPEAL:**

The appellant submitted a request to the Ministry of Health and Long - Term Care (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for copies of all information regarding the proposed regulation and accompanying standards of practice submitted by the Royal College of Dental Surgeons of Ontario (the affected party) dealing with orders to dental hygienists. The time frame of the request is May 1998 to present.

The Ministry located 76 records and granted partial access to them. The Ministry denied access to the remaining records in whole or in part pursuant to the exemptions in sections 12, 13, 17, 18, 19 and 21 of the Act. In addition, the Ministry noted that some information was removed from the records as it considered this information to fall outside the scope of the request.

The appellant appealed the Ministry's decision.

During mediation, a number of records and parts of records were removed from the records at issue. However, all of the exemptions claimed by the Ministry as well as the issue of responsiveness of portions of two records remain at issue.

I sent a Notice of Inquiry to the Ministry and affected party, initially. Both parties submitted representations in response to this office.

## **ISSUE:**

The Ministry's representations consisted of three documents entitled "Public Representations", "Confidential Facts and Evidence" and "Confidential Affidavit of Facts and Evidence". The Ministry also included a number of enclosures which were referred to in the affidavit. The Ministry consented to the first document being shared with the appellant, but asked me to withhold the second and third documents from both the appellant and the affected party.

Counsel for the affected party did not indicate in his representations whether any portion of them could be shared with the appellant. However, in response to my queries in this regard, counsel wrote to this office and indicated that he "ha[d] no instructions from my client to offer to share its Submission with the Appellant". In discussions with the Adjudication Review Officer, counsel clarified that he does not wish his representations to be shared with the appellant.

The purpose of this interim order is to rule on the Ministry's request to withhold its "Confidential Facts and Evidence" and "Confidential Affidavit of Facts and Evidence" and the affected party's request to withhold its representations in their entirety.

## **DISCUSSION:**

### **Sharing of representations procedure**

[IPC Interim Order PO-1781-I/May 8, 2000]

In the Notice of Inquiry cover letter to the Ministry and the affected party, I stated:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The *Inquiry Procedure* document states:

In its representations, the first party must indicate clearly, and in detail:

- which information in its representations, if any, the party wishes the Adjudicator to withhold from the second party; and
- its reasons for this request (see confidentiality criteria below).

The document later sets out the criteria for withholding representations, as follows:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and

- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

### **The Ministry's confidentiality request**

The Ministry addressed the confidentiality of representations issue with respect to the document entitled "Confidential Facts and Evidence" as follows:

This submission of "Confidential Facts and Evidence" satisfied the IPCO's "confidentiality Criteria for Representations" because its disclosure would disclose much of the substance of the records. Accordingly, such information would in and of itself be subject to the exemptions in ss. 12(1), 13(1), 17(1), 19 and 21(1) of FIPPA. The MOHLTC submits that it is impossible to make adequate submissions to the IPCO in this appeal without reference to portions of the records at issue.

With respect to the document entitled "Confidential Affidavit of Facts and Evidence", the Ministry stated:

The Enclosed affidavit of "Confidential Facts and Evidence" is for the sole use of the Information and Privacy Commission (the IPCO) only and in accordance with s 55(1) of the *Freedom of Information and Protection of Privacy Act* may not be disclosed to the Appellant or the affected party. Nor may any information contained in this Affidavit be paraphrased, quoted or reported by the IPCO in any manner in its order resolving this appeal ...

In both cases, the Ministry included the following statement:

[In the event the IPC] nevertheless intends to disclose part or all of the enclosed ... despite s. 55(1), we hereby require that notice be given to the MOHLTC prior to that disclosure, and that the MOHTLC be given a reasonable opportunity the make submissions as to why it should not be disclosed.

### **The affected party's confidentiality request**

As I indicated above, the affected party stated only that he does not wish his representations to be shared with the appellant.

### **Findings**

#### **Further opportunity to make submissions on the sharing of representations**

Based on the *Inquiry Procedure* document, parties are not permitted a further opportunity to make submissions on the sharing of representations issue, barring exceptional circumstances. The opportunity to do so is provided at the time the original representations are made. There are no exceptional circumstances

which would take this case outside the norm. As a result, this interim order constitutes my decision on this issue, and I will not be providing the Ministry or the affected party with an additional opportunity to make submissions in this regard.

### **The Ministry's representations**

Having reviewed the representations in their entirety, including the enclosures to the representations and the confidentiality requests as set out above, I find that large portions of the "Confidential Facts and Evidence" and the "Confidential Affidavit of Facts and Evidence" documents do not fit within any of the confidentiality criteria.

The Ministry's generalized claim of confidentiality is insufficient to establish a basis for my withholding these portions of the representations. The Ministry's claim which is set out above refers to the application of paragraph (a) of the confidentiality criteria. The Ministry has not provided any information which would support the application of the criteria in paragraphs (b) or (c), and the representations do not on their face contain any indication that the portions of the "Confidential Facts and Evidence" and "Confidential Affidavit of Facts and Evidence" which are not highlighted on the copies of these documents that I have attached to the Ministry's copy of this interim order would be exempt or otherwise confidential in nature. Further, some of the information in the representations is already within the knowledge of the appellant, for example, the background information in the "Confidential Affidavit of Facts and Evidence", which describes the Regulation Development Process and the involvement of the appellant in this process.

Much of the information which I have decided to disclose to the appellant consists of generalized references to the records at issue that do not go so far as to reveal the substance of the records claimed to be exempt. The remainder of the information to be disclosed is either in the nature of additional background information which on its face is of a non-confidential nature or which consists of submissions of law and/or argument.

In comparing the "Confidential Facts and Evidence" and the "Public Representations", I note that some information from the "Public Representations" has been replicated in identical or similar form in the Confidential representations. In order to provide for the continuity of the arguments and to facilitate reading comprehension of the Confidential portions of the representations which I am disclosing, I have decided to disclose these portions of the Confidential representations as well as they clearly do not fit within any of the confidentiality criteria.

I have decided not to seek representations from the appellant regarding the application of section 17 to the records. Therefore, I will not be sharing the portions of the Ministry's representations which address this exemption with the appellant.

Finally, I accept that the remaining portions of the Ministry's representations fall within the confidentiality criteria. Accordingly, these portions will not be shared with the appellant.

To the extent that the Ministry's position appears to be based on the Commissioner's lack of authority to make a decision to share the representations of one party with another, I would draw the Ministry's attention to the reasons of Mr. Justice Cosgrove in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, 1999), Toronto Doc. 103/98 (Ont. Div. Ct.) in an order granting the Commissioner's sealing order as asked. In refusing to extend the sealing order to the Ministry's non-confidential representations in that case (and four others heard at the same time), Mr. Justice Cosgrove said:

I have engaged counsel in discussions on sections 52(13) and [55(1)] of the Act. I am, with respect, unable to agree that these sections (in the context of the whole legislation) support the proposition that it was intended that representations be excluded. I have concluded that the Act does not warrant the sealing of the representations.

....

This principle shall apply unless representations are otherwise ruled confidential by the Commissioner.

It is clear that the Divisional Court does not consider that section 55(1) has the effect on the confidentiality of the representations in the matter before me as advanced in the Ministry's submissions, and that the court agreed that decisions on the confidentiality of representations should be made by the Commissioner.

For the above reasons, I have decided that the portions of the Ministry's "Confidential Facts and Evidence" and "Confidential Affidavit of Facts and Evidence" which have not been highlighted should be shared with the appellant. The portions of the "Confidential Facts and Evidence" and "Confidential Affidavit of Facts and Evidence" which I have highlighted in yellow on the copies that I am providing to the Ministry with a copy of this order will not be shared with the appellant due to confidentiality concerns or because I will not be seeking representations from the appellant with respect to them.

### **The affected party's representations**

After considering the affected party's position on this issue, I find that none of the confidentiality criteria applies to any portion of these representations.

As a result, I have decided to share the affected party's representations with the appellant in their entirety.

In making this decision, I note that the affected party did not provide any representations on the issue of confidentiality. In particular, the affected party did not address whether any of the confidentiality criteria referred to above apply to any portions of the submissions.

In reviewing these submissions, I find that they consist, in part, of background information pertaining to the College and its role in governing the profession, which on its face is of a non-confidential nature. The

remaining portions of them consist of submissions of law and/or argument. I also find that they raise new issues which the appellant, in fairness, must be given an opportunity to address.

### **Procedure**

I have attached to the respective copies of this interim order a copy of each party's representations in the form in which they will be sent to the appellant. I intend to send the affected party's representations in their entirety and the non-highlighted portions of the Ministry's "Confidential Facts and Evidence" and "Confidential Affidavit of Facts and Evidence" as well as its "Public Representations" to the appellant, together with a Notice of Inquiry, no earlier than **May 23, 2000**.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ May 8, 2000