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

ORDER PO-2180

Appeal PA-020264-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of any records prepared by the Ministry or provided to the Ministry by outside companies that relate to "on-hold" times experienced by callers to Telehealth Ontario from January 1, 2001 to the date of the request.

The Ministry located the responsive records and denied access to them on the basis of the following exemptions in the *Act*:

- section 17(1) - third party commercial information
- section 18(1) - economic and other interests of the Ministry

The Ministry subsequently clarified that it was relying specifically on sections 17(1)(a), (b) and (c) and sections 18(1)(c), (e), (f) and (g).

The Ministry also indicated that large portions of the records are not responsive to the request.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant agreed to remove all portions of records identified as "non-responsive" from the scope of the appeal. Mediation was otherwise not successful, and the file was moved to the adjudication stage of the appeal process.

I sent a Notice of Inquiry to the Ministry and the service provider for Telehealth Ontario (the affected party) and received representations from both parties. I then sent the Notice, along with the non-confidential portions of the two sets of representations to the appellant. The appellant responded with representations, which raised the possible application of the public interest override in section 23 of the *Act*. I decided to give the Ministry and the affected party an opportunity to respond to this new issue, and both parties provided reply representations.

RECORDS:

The records consist of 25 weekly or monthly statistical reports compiled by the affected party. Each report includes a range of statistical and other information on the operation of the Telehealth Ontario program, but the only portions at issue in this appeal are the sections dealing with performance indicators and response times.

DISCUSSION:

THIRD PARTY INFORMATION

Section 17(1) states:

> 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, if 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;

Section 17(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 17(1) is designed to protect the "informational assets" of businesses or other organizations that provide information to the government [Order PO-1805].

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of information which, while held by government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the Ministry and/or the affected party must satisfy each part of the following three-part test:

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

2. the information must have been supplied to the Ministry 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 section 17(1) will occur [Orders 36, P-373, M-29 and M-37].

Part one: type of information

The Ministry submits that the records contain the affected party's trade secrets, as well as commercial and financial information. The affected party, on the other hand, only claims that the records contain commercial information.

Commercial information has been defined by this office as information that relates solely to the buying, selling or exchange of merchandise or services [Order P-493].

The Ministry issued a Request For Proposals for the development, implementation and provision of triage, health advice and health information services to the public through toll-free telephone access. The affected party submitted a proposal and was selected as the successful bidder by the Ministry. The Ministry and the affected party then entered into an agreement for "Telecare Service", a copy of which was provided to me during the course of this inquiry. This agreement creates performance standards for the affected party, one of which involves response times. Fees paid by the Ministry are tied to these performance standards.

In my view, the agreement between the Ministry and the affected party relates to the buying and selling of telehealth services, and would fall within the scope of the definition of "commercial" information in section 17(1). However, the agreement is not at issue in this appeal.

The records at issue here are produced by the affected party in order to fulfil its performance reporting responsibilities to the Ministry under the terms of the agreement. They contain a description of the various performance standards themselves, as well as actual performance levels achieved on individual standards during the weeks or months covered by the report. In some instances the records also include comments explaining a particular performance level. Although it could be argued that the information at issue in this appeal is not directly related to the services provided to the public under the Telehealth Ontario program, in my view, that would be interpreting the term "commercial information" too narrowly. The reports are created by the affected party in order to fulfil its contractual obligations under the agreement, and deal specifically with the terms of the agreement itself. As such, I find that they fall within the scope of the definition of "commercial" information for the same reasons as the agreement itself.

Therefore, part one of the section 17(1) text has been established.

Part 2: Supplied in Confidence

In order to satisfy part 2 of the test, the affected party and/or the Ministry must show that the information was "supplied" to the Ministry "in confidence", either implicitly or explicitly.

"Supplied"

Given the nature of the relationship between the Ministry and the affected party, and the affected party's obligation to report on its performance under the terms of the "Telecare Service" agreement, it is clear that the records provided by the affected party to the Ministry in this context satisfy the "supplied" component of part 2 of the test.

"In confidence"

With respect to whether the information was supplied "in confidence", part 2 of the test requires a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the affected party expects that the information would be

treated confidentially; this expectation must be reasonable, and must have an objective basis. The expectation of confidentiality can arise implicitly or explicitly [Order M-169].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the Ministry
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose which would not entail disclosure

[Order P-561]

Neither the Ministry nor the affected party claim that the information at issue in this appeal was supplied explicitly in confidence. The Ministry points to "watermarks" on fax cover sheets submitted by the affected party that "state standard wording for the confidentiality caution". No fax cover sheets are at issue in this appeal and, absent more compelling evidence, I would not rely on boilerplate wording on a fax cover sheet as adequate evidence of explicit confidentiality expectations in any event.

Both parties argue that the information was supplied implicitly in confidence, and each relies on the confidentiality provisions of the agreement in support of its position.

The Ministry submits:

> … The available evidence indicates a "reasonable expectation of confidentiality" on the part of the affected third party company. Under the circumstances, given the contractual assurances about confidentiality, there was a clear understanding that all information provided would be kept confidential, subject only to the limits provided in legislation or explicitly in the above documentation.

In addition to relying on the confidentiality provision in the agreement, the affected party submits:

> In addition, the Contract provides that Confidential Information shall only be disclosed within [the affected party] on a need to know basis, and that all documents that contain such Confidential Information be returned to [the Ministry] on request, or in any event on the termination of the contract.

> [The affected party] reasonably expected that the On-Hold Information would be retained as confidential for a number of reasons. As noted earlier, performance information may result in a financial penalty to [the affected party]. As such it is commercial information. [The affected party] assumed that the confidentiality obligations [in the agreement] were reciprocal, notwithstanding its acknowledgement that [the *Act*] applies to information relating to the Contract, because generally such sensitive commercial information is kept in confidence.
>
> In support of this assumption, please note that Section 15.1 of the Contract makes the RFP [Request for Proposals] for this work part of the Contract. The second paragraph of Section 13.3 of such RFP specifically provides that "The Ministry shall consider all Proposals submitted in response to this RFP as confidential and if the Ministry receives a request for information in connection with any Proposals, the Ministry shall consider this when making a release."

I have reviewed the confidentiality provisions in Article 11 of the agreement and, in my view, they do not establish any explicit confidentiality obligations on the part of the Ministry with respect to information obtained from the affected party under the terms of the agreement. Rather, they impose confidentiality obligations on the **affected party**. The agreement requires the affected party to treat any and all information "acquired or learned" in the course of performing its responsibilities as confidential, and prohibits the affected party from using or disclosing any such information without the prior written consent of the Ministry.

The agreement also includes Article 8, which deals with intellectual property ownership and licensing. This article makes it clear that the affected party is the "owner or authorized licensee" of the "Technology" (i.e. the software, databases, equipment and telecommunications network used in the provision of Telecare Services), but that the Ministry owns "any reports prepared or provided under this Agreement in relation to the monitoring, evaluation or operation of the Technology or the provision of the Telecare Service". According to the agreement, the affected party also assigns the Ministry its right, title and interest in "the Databases relating to the Callers or other call information and the Telecare Line".

I dealt with a similar issue in a recent order (Order PO-2169) involving the Ministry of the Environment and a request for data gathered from various garage facilities under the Ministry's "Drive Clean Program". In rejecting the Ministry's section 17(1) exemption claim in that case, I stated:

> The confidentiality provisions of the Drive Clean performance agreement bind the facilities, but not the Ministry. The wording of clause 13.3 is clear and unambiguous in providing that all information obtained by the facility "in conducting emissions tests and performing emissions-related repairs will be used solely for such purposes and will not otherwise be used or disclosed". No corresponding confidentiality clause applies to the Ministry and, in my view, it is not reasonable to read clause 13.3 as incorporating implicit reciprocal confidentiality obligations on the Ministry. It is clear from the text of the

> agreement that the government owns the data collected through the Drive Clean program and, absent explicit language restricting the owner's use of the data, it is not reasonable to infer any such restrictions.
>
> …
>
> … In my view, had the Ministry intended to bind itself to restrictions on its use of the data gathered through the Drive Clean program, it is reasonable to expect that this would have been addressed in the performance agreement itself. That has not been done.
>
> …
>
> I also give minimal weight to the statements by a number of facilities that they joined the program on the basis of an expectation that information provided to the Ministry would be treated confidentially. While it might be reasonable for facilities to expect that their proprietary information would be held in confidence, in my view, absence explicit assurances to the contrary, it is not reasonable for facilities to expect that any such confidentiality would extend to the government's own proprietary information.

In my view, similar considerations apply in this case.

It is clear from the terms of the agreement that reports generated by the affected party and submitted to the Ministry as part of the performance evaluation process (which contain the specific information at issue in this appeal) are owned by the Ministry, not by the affected party. It is also clear that the confidentiality provisions in the agreement bind the affected party and not the Ministry. As was the case in Order PO-2169, in my view it is not reasonable to read these confidentiality provisions as incorporating implicit confidentiality obligations on the Ministry and, absent explicit language restricting the Ministry's use of the data, it is not reasonable to infer any such restriction.

For these reasons, I find that the affected party did not supply the reports containing the information at issue in this appeal in confidence, either explicitly or implicitly, and therefore part 2 of the section 17(1) test has not been established.

Because all three parts of the section 17(1) must be established in order for a record to qualify for this exemption, section 17(1) of the *Act* does not apply.

ECONOMIC AND OTHER INTERESTS

The Ministry claims that the records qualify for exemption under sections 18(1)(c), (e), (f) and (g) of the *Act*.

These sections read as follows:

> 18. (1) A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Sections 18(1)(c) and 18(1)(g)

Sections 18(1) (c) and (g) are harms-based exemption claims.

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosing information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

Section 18(1)(g) provides a different discretionary exemption for information including proposed plans, policies or projects, where disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

The Ministry's representations challenge the long-standing position of this office on the proper interpretation of the phrase "could reasonably be expected to" that appears in a number of different sections of the *Act*.

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order

> to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

To elaborate on Senior Adjudicator Goodis' statement, *Ontario (Workers' Compensation Board)* established the evidentiary standard to be applied for harms-based exemptions in the *Act*. *Ontario (Minister of Labour)*, which was decided after *Ontario (Workers' Compensation Board)*, made an exception to this standard for two specific exemptions, sections 14(1)(e) and 20, both of which deal with endangerment to the life or safety of an individual. Section 18 was not addressed by the Court in *Ontario (Minister of Labour)* and, in my view, it is not relevant in the context of this appeal.

Applying the harms test described in Order PO-1747, I find that unless the Ministry provides detailed and convincing evidence to establish a "reasonable expectation of probable harm" if the records are disclosed, its section 18(1)(c) and section 18(1)(g) exemption claims must fail.

The Ministry's representations do not deal with the various section 18 exemptions individually. They consist of the following general submissions:

> Although the Ministry informs [the affected party] of its marketing initiatives for staff planning purposes, it is not clear whether the impact on the number of callers to *Telehealth Ontario* is both predictable and measurable.
>
> There are several key performance standards that the Ministry monitors on an on-going basis and wait-time information is only one of many key performance indicators.
>
> Much of the reporting constitutes proprietary information supplied in confidence to the Ministry, and if released, may affect the future working relationship between the Ministry and [the affected party] and/or may jeopardize any future Request for Proposal bidding process on the *Telehealth Ontario* program.
>
> The Request for Proposal (RFP) for the Telephone Health Advisory Service (THAS) for the new Family Health Networks was issued February 10, 2003. A decision to release this information to this single requester could potentially interfere with a fair and equitable RFP process by allowing a bidder to have greater insight into the telecare business model than do others.

As far as section 18(1)(c) specifically is concerned, the Ministry submits:

> In particular, for example, section 18(1)(c) provides [the Ministry] with a discretionary exemption which can be claimed where disclosure of the record could reasonably be expected to: (i) prejudice it in the competitive marketplace, (ii) interfere with its ability to discharge its responsibilities in managing the provincial economy; or (iii) adversely affect the government's ability to protect its legitimate economic interests [Order P-441]. In this case, disclosure of the requested information could reasonably be expected to result in the harms set out in (ii) and (iii).

In my view, the Ministry's representations fall far short of the detailed and convincing evidence necessary to establish either of the section 18(1)(c) or section 18(1)(g) harms. The specific submissions on section 18(1)(c) simply re-state the requirements of the exemption and offer no evidence whatsoever in support of the position that any harms could reasonably be expected to occur if the information is disclosed. I would reach this same conclusion even if I were to apply the lower standard in *Ontario (Ministry of Labour)*, which I specifically decline to do.

The Ministry's more general submissions do not speak directly to any of the harms described in sections 18(1)(c) or (g). The Ministry is not in a "competitive position" with respect to the delivery of its telehealth program and, based on the Ministry's representations, I have no basis for concluding that disclosure could reasonably be expected to prejudice the Ministry's "economic interests", as required in order to fall within the scope of section 18(1)(c). Similarly, even after taking into account additional arguments included in the confidential portion of the Ministry's representations, I am not persuaded that disclosing the information contained in the reports could reasonably be expected to result in "premature disclosure of a pending policy decision" or "undue financial benefit or loss to a person". The February 2003 RFP process identified by the Ministry has presumably already been administered. In any event, I am not persuaded on the basis of the sketchy details provided by the Ministry that the harm under section 18(1)(g) could reasonably be expected to result even if the particular information at issue in this appeal had been disclosed before that separate competitive selection process was completed.

For these reasons, I find that the records do not qualify for exemption under either section 18(1)(c) or section 18(1)(g) of the *Act*.

The Ministry's representations refer to section 18(1)(d), although this exemption was not identified in the Notice of Inquiry. In any event, I find that the Ministry's representations do not meet the evidentiary standard necessary to establish a reasonable expectation of probable harm to "the financial interests of the Government of Ontario or to the ability of the Government of Ontario to manage the economy of Ontario" should the records at issue in this appeal be disclosed.

Sections 18(1)(e) and 18(1)(f)

Sections 18(1)(e) and 18(1)(f) are not harms-based exemptions.

To qualify for exemption under section 18(1)(e), the record must contain "positions, plans, procedures, criteria or instructions". The Ministry does not identify which of these various categories applies here. I can only assume that the Ministry is purporting to characterize the performance standards in the agreement as a "criteria". If I am correct in making this assumption (which is by no means clear), then, based on the arguments put forward by the Ministry, I am not convinced that a performance standard established in an existing agreement is "intended to be applied to [current or future] negotiations", as required in order to establish the section 18(1)(e) exemption.

Similarly for section 18(1)(f), I find that the records at issue here cannot be accurately characterized as a "plan or plans", and clearly are not related to "management of personnel" or the "administration of an institution".

Accordingly, I find that the records do not qualify for exemption under sections 18(1)(e) or 18(1)(f).

In summary, I find that the records do not qualify for exemption under section 17(1) or section 18(1) and should be disclosed to the appellant.

In light of my findings, it is not necessary for me to consider the application of section 23 of the *Act*.

ORDER:

1. I order the Ministry to disclose the records to the appellant by **October 29, 2003** but not before **October 24, 2003**.

2. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant, only upon request.

Original signed by: September 23, 2003
Tom Mitchinson
Assistant Commissioner