



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2213

Appeal PA-020278-2

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 the following request under the *Freedom of Information and Protection of Privacy Act* (the Act):

I understand that the Government of Ontario rebates to physicians a significant portion of the fees they pay to the Canadian Medical Protective Association [(CMPA)]. I am interested in getting particulars of this program, that is, the Agreement or regulations involved and the amounts.

The Ministry advised the requester to forward his request to the Ministry's Freedom of Information (FOI) office. The requester then asked the Ministry's FOI office for the following:

- (a) A Memorandum of Understanding signed by CMPA, [Ontario Medical Association (OMA)], and the Ministry of Health and Long-Term Care. I don't know the date, but the document is mentioned in the current CMPA website.
- (b) The amounts paid by the Ministry under the Memorandum in the years to which it applies. I do not ask for amount paid to or for any individual. I request yearly totals. I also ask for a breakdown by specialties or regions if that information already exists.
- (c) Predecessor Agreements, or Memorandums of Understanding for earlier time periods. My understanding is that the subsidy program for Medical Malpractice insurance began in 1986, but I am not sure of that.
- (d) With regard to the predecessor Agreements, information similar to that mentioned in (b)
- (e) With regard to (b) and (c), I ask how the amounts paid are calculated. I suppose that information is in the Agreements, but if other documents are needed, I ask for those.

The Ministry granted access, in part, to records responsive to the request. The Ministry provided information responsive to part (b) of the request and advised that it does not collect data by specialty or region. However, the Ministry indicated that the CMPA fee schedule is available on the CMPA web site and that it is broken down by specialty or region. The Ministry also provided information responsive to part (e) of the request. With respect to part (e), the Ministry stated:

Under the 1987 MOHLTC [the Ministry of Health and Long Term Care]/OMA Agreement, the government agreed to subsidize physician malpractice coverage. Since 1987, the government has continued to pay the difference between the 1986 fee and the current fee.

Access was denied to the record responsive to part (a) of the request, in its entirety, pursuant to section 17(1) of the *Act*. Access was also denied to records responsive to parts (c) and (d) of the request on the basis that they do not exist.

The requester, now the appellant, appealed the Ministry's decision to deny access to the Memorandum of Understanding (MOU). In addition, he believes that the other records he is seeking must exist and that further agreements also exist based on the Ministry's response to part (e) of his request.

The appellant also raised section 29(1)(b)(ii) (adequacy of decision letter) of the *Act* as an issue. He stated that the Ministry did not provide reasons, in its decision letter, for citing the section 17(1) exemption.

During the mediation stage, the appellant advised that in addition to pursuing his appeal with respect to section 29(1)(b)(ii) of the *Act*, he wanted sections 24 and 29(1)(a)(ii) (reasonable search) of the *Act* to be considered as an issue in this appeal. He stated that the Ministry did not specify, in its decision letter, that he could appeal its decision that responsive records do not exist.

Also during mediation, the appellant explained to the mediator that, at a minimum, the 1987 MOHLTC/OMA Agreement ought to exist as well as any reimbursement agreements that pre-date the signing of the 2000 MOU. The Ministry agreed to conduct a further search in an attempt to locate the 1987 MOHLTC/OMA Agreement and any other previous agreements. The Ministry advised that it conducted a further search and did not locate any other responsive records.

Further mediation was unsuccessful and the appeal was referred to adjudication.

After the completion of the mediation stage but prior to the issuance of the Notice of Inquiry, the appellant sent this office a letter setting out his position on the issues in dispute. He also raised the possible application of section 23 of the *Act* (the public interest override).

This office then sought representations from the Ministry on all of the issues raised by the appellant including section 23, and from two affected parties on the application of the section 17(1) exemption only. The non-confidential portions of the appellant's pre-inquiry representations were shared with the Ministry and the two affected parties.

The Ministry submitted representations, as did one of the two affected parties. Also, at this time, one of the affected parties and the Ministry advised that the MOU had been published in the July/August 2003 edition of the *Ontario Medical Review*. The Ministry subsequently issued a supplementary decision letter in which it advised that it was withdrawing its section 17(1) exemption claim in regard to the MOU and would be providing the appellant with access in full to it. Accordingly, section 17(1) is no longer at issue and, by extension; it is no longer necessary for me to consider the application of sections 29(1)(b)(ii) and 23.

Accordingly, the sole remaining issue identified in the Notice of Inquiry provided to the Ministry was whether it had conducted a reasonable search for responsive records. The Ministry agreed to share the non-confidential portions of its representations that address only the reasonable search issue with the appellant. The appellant also made representations raising the question of whether the Ministry properly interpreted the scope of the request. The appellant's representations were shared with the Ministry, in their entirety. The Ministry then made additional representations by way of reply, addressing the issues raised by the appellant.

DISCUSSION:

SCOPE OF THE REQUEST

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

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- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The Ministry is of the view that the request relates only to the 2000 MOU "and to any predecessor Agreements" and does not, therefore, include the 1987 or the new 2004-2008 Agreement. It submits that because the 1987 Agreement was between only the OMA and the Ministry, and did not include the CMPA, it was not a "predecessor agreement" and therefore it falls outside the scope of the request.

The appellant takes the position that the request was worded in a sufficiently broad fashion as to include not only the identified and disclosed 2000 MOU but also any other agreements relating

to the reimbursement of doctors such as the 1987 Agreement and the new (2004-2008) Agreement. The appellant suggests that the Ministry “misdirected itself by choosing to search for an MOU signed by [the Ministry], CMPA and CMA [the Canadian Medical Association].”

In order to resolve the question of whether the 1987 and the “new” Agreements fall within the ambit of the appellant’s request, as originally formulated, one must first examine carefully the scope of the requests. In part (c) of the request, the appellant specifically asks for access to:

Predecessor Agreements, or Memorandums of Understanding for earlier time periods. My understanding is that the subsidy program for Medical Malpractice insurance began in 1986, but I am not sure of that.

In my view, the request as formulated is sufficiently broad to include the 1987 Agreement and the related information outlining the total payments made pursuant to that Agreement. Based on a literal reading of the request, it is clear that the appellant was seeking access to records relating to the subsidy program for malpractice insurance which began around 1986. I find that the Ministry has applied an overly-restrictive interpretation of the request by identifying only records which pertain to a tripartite agreement between the CMPA, OMA and itself. I find that the appellant’s request, particularly part (c), is drafted in such a way as to include the 1987 Agreement or MOU, regardless of the fact that it may not have included the participation of the CMPA. I note that parts (b) and (d) of the request also include records pertaining to the amounts paid by the Ministry under the 1987 Agreement.

The request is also clearly seeking only those records relating to the subsidy program prior to the conclusion of the 2000 MOU. I find that the request is not, therefore, sufficiently broad in its scope to include the 2004-2008 Agreement, which was negotiated only after the date of the request.

I will, accordingly, order the Ministry to provide the appellant with a decision respecting access to the 1987 Agreement, and any records relating to the payments made pursuant to that Agreement, using the date of this order as the date of the request.

REASONABLENESS OF SEARCH

In appeals involving a claim that responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the Ministry to prove with absolute certainty that responsive records do not exist.

However, in my view, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations of the parties

The Ministry submits that:

The request provided sufficient description of the records being sought to enable the program area to limit searches to the Operational Support Branch files related to Medical Malpractice Coverage and all files of Memorandums of Understanding. This Branch is responsible for the management of all external processes that include insurance provided to physicians of Ontario. The Registration and Claims Branch were consulted as a result of the search to enable t[he] program area to respond to the amounts of reimbursements paid by the Ministry. This branch is responsible for the financial records relating to malpractice insurance premiums and liability protection coverage. The appellant was provided with the search areas in the Ministry's decision letter.

It goes on to add that:

Searches for the documents outlined in the request were initially carried out by staff of the Operational Support Branch related to Medical Malpractice Coverage and files of Memorandums of Understanding (MOUs). The result of the initial search was that the May 2000 MOU signed by the CMPA, OMA and the Ministry were located. This record was responsive to part (a) of the request.

In addition, the Registration and Claims Branch was contacted with respect to part (b) of the request, i.e. the amounts paid by the Ministry under the MOU in the years to which it applies.

No documents were located for part (c) and (d) of the request as no predecessor agreements existed prior to the 2000 MOU, the first tripartite MOU regarding Medical Malpractice Coverage. This was communicated in the decision letter to the appellant.

At the behest of the Mediator, the Ministry conducted a further search of its record-holdings and located a copy of the 1987 Agreement between the Ministry and the OMA. I have addressed this document in my discussion above.

The appellant's submissions focus on the Ministry's misinterpretation of the scope of his request which has been addressed above.

Findings

The Ministry successfully located a copy of the 1987 Agreement during the mediation stage of this appeal. I have determined that this record, along with the accompanying financial information sought by the appellant, falls within the ambit of the request. As a result, records relating to all aspects of the appellant's request, as framed, have been identified.

I find that the Ministry's search for responsive records was reasonable, based on its representations. Specifically, I find that the Ministry's searches of its Operational Support Branch record-holdings met its obligations under section 24 of the *Act*, as is evidenced by the identification of the records sought by the appellant. Accordingly, I dismiss this aspect of the appeal.

ORDER:

1. I order the Ministry to provide the appellant with a decision letter on access to the 1987 Agreement and the accompanying financial information in accordance with section 26 of the *Act*, treating the date of this order as the date of the request.
2. I find that the Ministry's search for responsive records was reasonable and I dismiss that part of the appeal.

Original signed by: _____
Donald Hale
Adjudicator

December 11, 2003
