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

ORDER PO-2255

Appeal PA-030100-2

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The appellants submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Health and Long-Term Care (the Ministry) for access to records relating to the settlement of a lawsuit involving the appellants' daughter who is under the age of sixteen.

The Ministry located responsive records, and decided to grant the appellants access to portions of two records, numbered 50 and 51. The Ministry relied on the exemptions for advice to government (section 13, Record 1), solicitor-client privilege (section 19, Records 2, 4-50) and personal privacy (Records 3, 51) as the basis for denying access to the remaining records. The Ministry provided the appellants with an index describing the records at issue and the corresponding exemptions claims. The appellant appealed the Ministry's decision.

During mediation, the appellants advised that they were not interested in pursuing access to the information withheld from Record 51. Accordingly, Record 51 is no longer at issue in this appeal.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry. Instead of providing representations, the Ministry sent a revised decision letter to the appellant, in which it indicated it had decided to disclose all of the records remaining at issue, with the exception of Records 1 and 50. The appellants confirm that they received the records the Ministry agreed to disclose, and advised this office that they are still interested in pursuing access to these two records.

As a result, the remaining at issue are Records 1 and 50, as described below.

Record	Description	Withheld in full or disclosed in part	Exemption claimed
1	Subrogation claim activity log	Withheld in full	section 13
50	Subrogation claim activity log	Disclosed in part	section 17

The Ministry later submitted representations regarding the two records at issue. Also, since the Ministry had raised section 17 (third party information) for the first time, I notified and received representations from an affected party, a community care access centre (the Centre).

In the circumstances, I decided that it was not necessary to seek representations from the appellants.

DISCUSSION:

PERSON LESS THAN SIXTEEN YEARS OF AGE

Section 66(c) states:

> Any right or power conferred on an individual by this Act may be exercised,

> if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

Under this section, a requester can exercise another individual's right of access under the *Act* if he/she can demonstrate that

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

If the requester meets the requirements of this section, then he/she is entitled to have the same access to the personal information of the individual as the individual would have. The request for access to the personal information of the individual will be treated as though the request came from the individual him or herself [Order MO-1535].

It is not in dispute that the appellants' daughter is less than sixteen years of age and that the appellants have custody of her.

Therefore, I will treat this request as if it came from the daughter herself.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

Both records contain personal information of the daughter, as well as personal information about the appellants. Therefore, the appellants have a right of access to Records 1 and 50 under section 47(1), subject to any exemptions that may apply under section 49.

The records do not contain the personal information of individuals other than the appellants and their daughter.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ADVICE TO GOVERNMENT

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, **13**, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the institution relies on section 49(a) in conjunction with section 13 to withhold Record 1.

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in

Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner), [2004] O.J. No. 163 (Div. Ct.)].

The Ministry submits:

> . . . [O]n its face, Record 1, a Subrogation Claim Activity Log entry, dated December 4, 2000, contains the advice of a public servant and, as such, is exempt under s. 13. The record was written by a Senior Subrogation Consultant and reflects that advice she gave to the Acting Manager of the Subrogation Unit regarding the interpretation of an aspect of the Settlement Agreement with the Appellant. The advice she is giving her Manager, as recorded in these notes, is to adopt a particular interpretation of the Settlement Agreement and relevant legislation. The Manager of the Unit had the discretion to accept or reject the Consultant's advice on this point. The contents of the record therefore relate to a "suggested course of action" in respect of the Settlement Agreement, which could ultimately be accepted or rejected by the Manager during her deliberations on the management of this issue.
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> . . . [U]nlike the record at issue in [Order] P-1570, Record 1 does not just contain the "opinion of its author", but rather, is "advice to a specific decision maker charged with making a determination on an issue."

I do not accept the Ministry's submissions on this issue. In my view, Record 1 consists of factual information together with the consultant's analysis of a particular issue and her opinion in relation to a set of facts and circumstances. Record 1 does not on its face suggest any course of action that the Manager should take, nor do the contents of the record reveal any suggested course of action. Therefore, I find that Record 1 is not exempt under section 49(a) in conjunction with section 13.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/THIRD PARTY INFORMATION

The institution relies on section 49(a) in conjunction with section 17 to withhold a portion of Record 50. The portion at issue reveals the cost for nursing services to be provided to the appellant's daughter.

Section 17(1) states, in part:

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

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

I will first consider part three of the test. To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The Ministry submits:

> **s. 17(1)(a)**
>
> Disclosure of this information would reveal the content of the CCAC's actual contractual agreement with a nursing agency or agencies. The [Ministry] submits that the IPC's Orders in which it has found that disclosure of "unit price" would

> prejudice a third party's competitive position apply to the information severed from Record 50. What a nursing agency charges for nursing services on an annual basis is commercially valuable information for the nursing agency and could be used to its disadvantage in a subsequent RFP by those nursing agencies who did not participate in the RFP process. Other nursing agencies that wish to participate in a subsequent RFP could use this information to undercut the amount revealed in the record in an attempt to obtain contracts with this, and other CCAC's funded by the [Ministry]. Consequently, disclosure of this financial and commercial information would significantly prejudice the nursing agency's competitive position.
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> **s. 17(1)(c)**
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> . . . [D]isclosure of the severed information could result in undue gain to nursing agencies that in the future may wish to compete in CCAC RFP processes knowing what was historically paid for nursing services. For example, if a nursing agency is aware of 1997 prices, they have the advantage of using this figure to be an indicator of the minimum amount that they should bid for a current nursing services RFP, assuming that costs increase over time. Nursing agencies who are not part of the RFP process currently do not receive *any* information from the CCAC about past payment for services. If these nursing agencies wish to compete in CCAC RFP processes, they would submit their price based on their own projected cost and budget information.

The Centre submits simply that it "agrees with the Ministry's submissions."

I find the Ministry representations unconvincing. First, the record itself does not reveal the identity of the particular nursing agency, and there is nothing before me from the Ministry or the Centre, or otherwise, to indicate that the agency is identifiable in the circumstances.

In addition, the record is well over six years old, making the dollar figure of only marginal relevance to a current RFP process. Also, the Ministry and the Centre appear to concede, by implication, that CCACs disclose these dollar figures to nursing agencies involved in an RFP process. On this basis, one would assume that any harm that would result from disclosure of this information would already have taken place, based on the fact that a number of agencies that compete with one another would be privy to this information. I have no evidence before me to indicate that this type of harm has taken place.

It is reasonable to assume that once a number of competing agencies receive the information, it can no longer reasonably be considered to be confidential information. I am not persuaded that disclosure of this non-confidential information to another nursing agency that may not have been part of the RFP process would result in undue gain to that agency. In my view, this submission is highly speculative and is seriously undermined by the fact that other competitors would be in possession of the same information.

The Ministry refers to past orders of this office dealing with "unit price". The record in this case contains a generalized dollar figure for one year of nursing services. Based on the record itself, there is no indication precisely what services would be provided, or by how many staff, or what type of staff, or any other specific information that could lead to the conclusion that the dollar figure is or reveals a "unit price".

I note also that several recent orders of this office have found contract prices *not* to be exempt under section 17 or its municipal equivalent, usually on the basis that this information is not supplied to the government but rather is mutually generated by the parties (see, for example, Orders PO-2018 and MO-1706). Similarly, it could be argued that the dollar figure at issue here also does not constitute an agency's "informational asset" that is supplied to the government, because it is mutually generated information. Even if it could be said that this information was supplied, I am not satisfied that any past orders regarding "unit price information" are applicable here, for the reasons stated above.

To conclude, I find that the Ministry and the Centre have not met the burden of proof under the third part of the three-part test for exemption under section 17(1)(a) and (c) and, therefore, the withheld portion of Record 50 is not exempt.

ORDER:

1. I order the Ministry to disclose all of Records 1 and 50 no later than **April 20, 2004**, but not earlier than **April 15, 2004**.

2. I reserve the right to require the Ministry to provide me with copies of the records ordered disclosed under provision 1.

Original Signed By: March 18, 2004
David Goodis
Senior Adjudicator