



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2250

Appeal PA-030125-2

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 a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

Any letters, memos, correspondence or documents, including press lines and ministerial briefings and notes to file, about private-public partnerships to build new long-term care facilities in Ontario which discuss in general or specific terms the number of facilities to be built and/or issues of oversupply and undersupply of such facilities and/or options available to the Ministry of Health to deal with the issue from five years ago (October 21, 1997) until the present.

The Ministry identified 18 records responsive to the request and granted access to Records 17 and 18. The Ministry denied access to the 16 remaining records on the basis of sections 12(1)(b) and (e) (Cabinet records), 13(1) (advice or recommendations) and/or 22(a) (publicly available) of the *Act*. The Ministry also stated that a fee of \$812.40 was payable for the 27 hours of search time and 12 pages of photocopying.

The requester, now the appellant, appealed the decision, including the fee.

During mediation, the Ministry provided the appellant with a copy of the index of records. As a result of his review of the index, the appellant was able to locate copies of Records 1, 2, and 3 for which the Ministry had claimed section 22(a). Records 1, 2, and 3 and the section 22(a) exemption are therefore no longer at issue in this appeal.

Also during mediation, the Ministry agreed to review its access decision and granted partial access to some of the records that it had previously withheld in full. The Ministry issued a revised decision letter to the appellant together with a revised index of records reflecting this change.

Mediation was otherwise not successful and the appeal was transferred to the adjudication stage. I began my inquiry by sending a Notice of Inquiry to the Ministry setting out the issues on appeal and seeking written submissions. In its representations, the Ministry raised for the first time the application of section 17 (third party information) to Records 6 and 7. Because section 17 is a mandatory exemption, I added it as an issue in this appeal.

I then sent copies of the Notice of Inquiry to four parties whose interests might be affected by the disclosure of portions of Records 6 or 7 (the affected parties), inviting them to submit representations. One of the affected parties responded. That party, whose interests relate only to Record 7, does not object to the release of the portion of Record 7 that pertains to it.

I then sent a copy of the Notice of Inquiry to the appellant. In that Notice I summarized the affected party's position. I also enclosed a copy of the Ministry's representations. The appellant chose not to make representations.

RECORDS:

Records 4 through 16 remain at issue in this appeal:

- Record 4 is a Long-Term Care Multi-Year Investment Plan (1998/99 to 2003/04) dated March 23, 1998 and is described in the Index as a Ministry submission to the Cabinet. The Ministry claims section 12(1)(b) for this record.
- Records 5, 6, and 7 are issue notes dated June 15, 2001, June 19, 2001 and April 17, 2002 respectively. These records are described as having been developed by Ministry staff for the purposes of providing recommendations and advice to the Minister for his decision. Partial access was granted to these records. The Ministry claims section 13(1) for the portions that have been withheld.
- Record 8 consists of briefing material dated September 6, 2002 developed by ministry staff for the purpose of providing recommendations and advice to the Minister. Access to this record was denied in full under section 13(1).
- Record 9 is a submission made to Management Board of Cabinet dated October 10, 2002, developed by Ministry staff for the purposes of providing recommendations and advice to the Cabinet Committee. Access to Record 9 was denied in full under section 12(1)(b).
- Records 10 and 11 are records dated September 24, 2002 and May 2, 2002, and were developed by Ministry staff for the purposes of providing recommendations and advice to the Minister. Both records have been denied in part. The Ministry claims sections 12(1)(e) and 13(1) for Record 10 and section 13(1) for Record 11.
- Records 12, 13, 14, 15, and 16, each consist of slide presentations developed by Ministry staff for the purpose of providing recommendations and advice to the Minister. The records are dated respectively, July 31, 2002, September 11, 2002, September 26, 2002, October 7, 2002 and October 24, 2003. Access to Records 12, 13, and 14 was denied in part. Access to Records 15 and 16 was denied in full. The Ministry claimed section 13(1) for the information that was denied for all five records.

DISCUSSION:

FEES

Sections 48(1)(c) and 57(1) require an institution to charge fees for requests under the *Act*; and section 57(4) provides for the waiver of fees in certain circumstances. More specific provisions regarding fees and fee waivers are found in sections 6 through 9 of Regulation 460. Section 57(5) provides that the Commissioner's Office may review the amount of a fee or fee estimate, or the institution's decision not to waive a fee.

In its decision letter, the Ministry advised the appellant that it was charging a fee of \$812.40. The amount payable was itemized as follows in a fee statement enclosed with the decision letter:

Search time	\$30.00 per hour	27 hours	\$810.00
Photocopy charges	\$00.20 per page	12 pages	\$ 2.40
TOTAL			\$812.40

In my Notice of Inquiry, I asked the Ministry to provide detailed responses to a number of questions aimed at determining whether the fees charged to the appellant complied with the various statutory and regulatory provisions. The Ministry chose not to respond to the fees issue in its representations. Although not clear, it is possible that the absence of representations is intended to imply a waiver of fees on the Ministry's part.

As noted above, section 57(5) of the *Act* provides requesters with a right to ask the Commissioner to review the amount of a fee charged by an institution. Although there is no burden of proof specified in the *Act* with regard to fees, the burden of proof in law generally requires the person who asserts a position to establish it and, in my view, an institution seeking to impose a fee bears the onus of demonstrating that it is permitted by the statutory and regulatory requirements set in the *Act*. Evidence to establish how a search fee has been determined must be provided in order for me, as a delegate of the Commissioner, to discharge my review responsibilities under section 57(5). To find otherwise would require me to simply accept an institution's statement without any evidence to support it, which clearly cannot have been the intent of the fee regime set out in the statute.

Accordingly, if the search fees have not been waived, I find that there is no basis for me to uphold the fees based on the evidence before me, and I find that these search fees cannot be charged.

As far as the photocopy charges are concerned, I will include a provision in this order permitting the Ministry to charge the per-page photocopy rate for all pages of records ordered disclosed.

CABINET RECORDS

The Ministry claims sections 12(1)(b) and (e) as the basis for denying access to Records 4 and 9, and section 12(1)(e) as the basis for denying access to portions of Record 10.

These sections read as follows:

12(1) A head shall refuse to disclose a record where the disclosure of the deliberations or decision of the Executive Council or its committees, including,

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

Previous orders have established that use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the type of record enumerated in the various sub-paragraphs of section 12(1)), qualifies for exemption under section 12 (Orders P-22, P-331, P-894 and P-1570). It is also possible for a record that was never placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1). This could occur where disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or permit the drawing of accurate inference with respect to these deliberations (Orders P-226, P-293, P-331, P-361 and P-506).

Section 12(1)(b)

In order for Records 4 and 9 to qualify for exemption under section 12(1)(b), the Ministry must establish that:

1. the records contain policy options or recommendations; and
2. the records were submitted or prepared for submission to Cabinet or its committees.

The Ministry submits:

[The Ministry] submits that Records at issue were prepared by [the Ministry] for recommendation to Cabinet on the issues and information shown as discussed and considered therein. [The Ministry] further submits that there is *prima facie* evidence that the Records are subject to this exemption. Several previous [Commissioner’s Office] decisions have consistently found that submissions to Cabinet and its Committees qualify for the exemption in section 12(1)(b) [Orders P-1034, P-1312, P-1327]. The information and recommendations contained in the Records were received and deliberated at such meetings. Cabinet would have considered the information and recommendations in the Records and deliberated on the issues presented. There is also evidence in the substance of the Records that provides evidence that these Records provided supporting material indicating that these Records formed a part of the supporting material and were prepared for the same purposes. It is a common part of submissions to the Minister to supply supplemental information to support the proposals or to provide more detail in answer to follow up questions on the deliberation of the proposals. ...

Record 4 is titled “Long-Term Care Multi-Year Investment Plan (1998/99 to 2003/04)”. The Ministry’s index identifies Record 4 as a “submission to Cabinet” containing “recommendations

on a multi-year investment plan for the Long-Term Care sector”. Having reviewed Record 4, I accept that it contains policy options and recommendations and that it was prepared for submission to Cabinet or a committee of Cabinet and therefore qualifies for exemption under section 12(1)(b). Even if Record 4 was itself not brought before Cabinet or one of its committees, based on the content of other records at issue in this appeal, it is clear that disclosing it would either reveal the substance of deliberations of Cabinet or would permit the drawing of accurate inference with respect to these deliberations, thereby bringing Record 4 within the scope of the introductory wording of section 12(1).

Record 9 is a “Management Board Submission” titled “Occupancy Protection for Older Long-Term Care Facilities”. It is clear from the format and substance of Record 9 that it was prepared by Ministry staff for the purpose of providing policy options and recommendations about the administration of long-term care sector, and was presented to Management Board, a committee of Cabinet, in October of 2002. Therefore, I find that Record 9 also qualifies for exemption under section 12(1)(b).

Section 12(1)(e)

Previous orders have held that section 12(1)(e) of the *Act* is prospective in nature. The use of the present tense in this section precludes its application to matters that have already been considered by Cabinet or its committees. [Orders P-22, P-40, P-946 and P-1182]

To qualify for an exemption under 12(1)(e), the Ministry must establish that the record itself has been prepared to brief a Minister in relation to matters that are either:

- (a) before or proposed to be brought before Cabinet or its committees; or
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

[Order 131]

The Ministry submits that Record 10 was prepared to brief the Minister on matters that were deliberated by Cabinet. The Ministry also submits that the withheld portions of Record 10 make specific reference to decisions by Cabinet related to the long-term care sector.

It is clear from the face of Record 10 that it was prepared by Ministry staff to brief the Minister.

The Ministry’s representations make no reference to ongoing consultations among ministers relating to the subject matter of Record 10, and I find that this component of section 12(1)(e) is not relevant in the circumstances of this appeal. Therefore, in order to qualify for this exemption, the Ministry must establish that the subject matter of Record 10 is the subject of ongoing discussion and direction by Cabinet. In that regard, the Ministry submits:

The implementation of the redevelopment projects is not yet complete and current negotiations are in progress for the future. Disclosure of the severed information in these Records could undermine the implementation policies which are sought in relations to the redevelopment projects. Thus [the Ministry] further submits that disclosure of this information could be detrimental to the implementation and negotiations which are not yet completed. Any future changes are to be brought back to Cabinet for approval. Thus disclosure of the details of negotiations could inhibit future Cabinet deliberations on that topic. Furthermore, the full implementation of the redevelopment projects are not complete and Cabinet is reserving consideration and further deliberation on the topic. ...

Although a considerable amount of time has passed since the issues under consideration by Cabinet relating to long-term care strategy were undertaken, it is clear that they involved policy direction extending over a number of years. Based on the Ministry's representations, I am prepared to accept that the issue is one that remains under active consideration by Cabinet and that Cabinet or one of its committees could be asked to provide further direction as the program proceeds through implementation. Accordingly, I find that the matter that is the subject of the ministerial briefing comprising Record 10 remains before Cabinet or its committees, thereby satisfying the remaining requirement of section 12(1)(e).

In summary, I find that Records 4 and 9 qualify for exemption under section 12(1)(b) and that the withheld portions of Record 10 qualify for exemption under section 12(1)(e).

ADVICE OR RECOMMENDATIONS

The Ministry claims section 13(1) as the basis for denying access to the withheld portions of Records 5, 6, 7, 10, 11, 12, 13 and 14, and for Records 8, 15, and 16 in their entirety. Because I have determined that the withheld portions of Record 10 qualify for exemption under section 12(1)(e), I will not consider the record in my section 13(1) discussion.

General principles

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.

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 (Minister of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)* (January 19, 2004), Toronto Docs. 433/02, 25/03 (Ont. Div. Ct.)]

The Ministry submits:

The disclosure of the advice and recommendations would restrict the free flow of information and advice within the Ministry. The documents present very frank analysis of the processes used by the Ministry to reach potentially controversial decisions and the basis for the decisions. Disclosure of such advice and recommendations would inhibit such frank analysis and discussion by staff.

Record 5

Record 5 is an issue note dated June 15, 2001 prepared by Ministry staff to brief the Minister on "Reallocation of D and Other LTC Beds". The Ministry has agreed to disclose the "Background" and most of the "Current Status" sections of the record.

The description of the issue in the heading on page 1 of Record 5 does not contain or reveal advice or recommendations and should be disclosed.

The first substantive section of the record is headed "Recommendation", and contains a detailed approach for the reallocation of beds recommended by the author of the issue note. I find that disclosing this section of Record 5 would reveal recommendations of a public servant, and qualifies for exemption under section 13(1).

The only other portions of Record 5 remain at issue consist of a one-sentence statement beginning on the bottom of page 2, and information identifying the authors of the record and their senior management superior at the Ministry. I find that the one-sentence statement is factual in nature and does not contain nor would it reveal advice or recommendations for the purpose of section 13(1); and that information identifying the author of issues notes of this nature is not the type of information intended for protection under section 13(1). Accordingly, these portions of Record 5 do not qualify for exemption and should be disclosed.

Record 6 and 7

Records 6 and 7 are also issue notes, dated June 19, 2001 and April 17, 2002. They deal respectively with the reallocation of returned D beds to three identified facilities (Record 6) and the allocation of new beds in York Region (Record 7). The Ministry has agreed to disclose portions of the "Background" sections of both records, and has withheld the sections headed "Recommendation" and "Current Status".

I find that the issue description appearing at the beginning of both records, with the exception of the number included in the description of Record 7, do not contain advice or recommendations and should be disclosed.

For the same reasons as outlined for Record 5, I find that the "Recommendation" portion of both records qualifies for exemption under section 13(1). As far as the "Current Status" portions are concerned, I find that disclosing their content would permit one to accurately infer the recommendation contained in each record, and for that reason these portions also qualify for exemption under section 13(1).

The only other portions of Records 6 and 7 that remain at issue consist of the author identification information at the end of each record, and a one-sentence statement at the end of the "Background" portion of Record 6. I find that the sentence does not contain or reveal advice or recommendations; and that the identifying information does not qualify for exemption under section 13(1) for the same reason as similar information found in Record 5. Accordingly, these portions of Records 6 and 7 do not qualify for exemption and should be disclosed.

Record 8

Record 8 is titled "Briefing Material for DMC/MC meeting: Utilization Control/Mitigation Models", and is dated September 6, 2002. It consists of a detailed description of various approaches proposed by the author of the record to be considered in the context of administering the Ministry's program of utilization intervention and controls.

The Ministry's representations do not deal specifically with the content of Record 8 and are, for the most part, simply generalized re-statements of the requirements of the section 13(1) exemption. However, based on my independent review of Record 8, I find that it contains frank and detailed advice and recommendations of the policy staff person, which was prepared and presented for the purpose of providing senior Ministry officials with suggested courses of action that could be accepted or rejected during the course of implementing its utilization and controls program. Therefore, I find that Record 8, with the exception of page one, qualifies for exemption under section 13(1). Page 1, which is simply a title page identifying the topic, author and date of the document, does not contain advice or recommendations and should be disclosed.

Record 11

Record 11 is a series of charts dated May 2, 2002 titled "Bed Adjustment Recommendation". The Ministry has agreed to disclose portions identifying the various "Service Areas" throughout the province and factual information relating to particular facilities within these areas. The portions that remain at issue consist of the actual recommendation for each facility, together with notes that relate to the recommendation and the coding system used for the various recommendation options.

I find that disclosing all of the withheld portions of Record 11 would reveal "recommendations" for bed adjustments prepared by Ministry staff and presented to the Minister for his consideration. Accordingly, this information qualifies for exemption under section 13(1).

Records 12, 13, 14, 15 and 16

Records 12-16 all consist of a series of slides used for presentation by Ministry staff. Records 12 and 13 are dated July 31 and September 11, 2002 and were used for briefings with the Deputy Minister and Minister; and Records 14, 15 and 16, dated September 26, October 7 and October 24, relate to presentations to the "Provincial Advisory Committee on LTC Utilization". The Ministry has agreed to disclose some portions of Records 12, 13 and 14 to the appellant.

The content of these five records are similar. They lay out the issues under consideration and the work underway in the Ministry during the 2001-02 time period to address various utilization issues. For the most part, I find that the contents do not contain nor would they reveal advice and recommendations as the terms are used in section 13(1). Much of the information is factual in nature, thereby falling with the scope of the section 13(2)(a) exception. Other portions (particularly with respect to Records 12 and 13) consist of a description of the issues under consideration and the roles and responsibilities played by various entities within the utilization intervention and controls program governance structure. Still other portions (particularly with respect to Records 14, 15 and 16) are essentially status reports on various activities undertaken by the Ministry in managing the program.

In Order PO-2028 to support my interpretation of the words "advice and recommendations" I quote from *Public Government for Privacy People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (The Williams Commission). The following quotations is instructive here:

A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations. Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind [16].

Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be “advice and recommendations” in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and “advice.” Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.

With one exception, I find that disclosing the withheld portions of Records 12-16 would not reveal advice or recommendations, and they do not qualify for exemption under section 13(1). The exception is page 17 of Record 13. This page lists potential mitigation strategies that are being presented for consideration by the Minister. I find that these strategies represent recommended actions of a public servant that can be accepted or rejected by the Minister, and therefore qualify for exemption under section 13(1). In my view, disclosing the rest of the withheld information in Records 12-16, would not reveal advice or recommendations within the meaning of section 13(1) as those terms have been interpreted and applied in previous orders.

In summary, I find that the withheld portions of Records 5, 6, 7, 11, pages 2-10 of Record 8, and page 17 of Record 13 qualify for exemption under section 13(1) of the *Act*; and that page 1 of Record 8 and the withheld portions of Records 12-16, with the exception of page 17 of Record 13, do not qualify for exemption and should be disclosed.

Because of my findings relating to Records 6 and 7, it is not necessary for me to consider the section 17(1) exemption as it relates to these records.

ORDER:

1. I do not uphold the Ministry’s search fee. I uphold the Ministry’s photocopy fee in the amount of \$21.20, which represents the per-page allowable fee for all 106 pages of records ordered disclosed.
2. I order the Ministry to disclose Records 12, 14, 15 and 16; all portions of Record 13 with the exception of page 17; page 1 of Record 8; and all portions of Records 5, 6, 7, 10 and 11 that the Ministry agreed to disclose in its revised decision letter. Disclosure under this provision is to be made to the appellant by **March 31, 2004**. I have attached a highlighted version of Records 5, 6, 7, 10 and 11 with the copy of this order sent to the Ministry, identifying the portions of these records that should **not** be disclosed.

3. I uphold the Ministry's decision to deny access to Records 4 and 9; pages 2-10 of Record 8; page 17 of Record 13; and all portions of Records 5, 6, 7, 10 and 11 not covered by Provision 2.
4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the appellant pursuant to Provision 2, upon request.

Original signed By: _____

Tom Mitchinson
Assistant Commissioner

_____ March 10, 2004