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

ORDER PO-2287

Appeal PA-020106-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Health and Long-Term Care (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to records relating to a fact situation which it set out in its request. The fact situation pertained to the awarding of allocations for long-term care beds in Ontario in 2001 by the Ministry. In the request, the requester, who is a corporate entity, states that it was advised of the Ministry's offer to allocate a certain number of beds to it, confirmed its acceptance of the Ministry's offer, and was subsequently advised that the allocation of beds to the requester was withdrawn.

The Ministry conducted a search for responsive records within both its Legal Services Branch and its Long-Term Care Redevelopment Project. In its decision, it granted access to some of the records and denied access to others either partially or in full, relying on the discretionary exemptions in section 13(1) (advice to government), sections 18(1)(d) and (e) (economic and other interests), and section 19 (solicitor-client privilege) of the *Act*. It also provided two indices identifying the responsive records.

The requester (now the appellant) appealed the Ministry's decision.

In its appeal, the appellant indicated that it was appealing the application of the exemptions and also questioned whether the Ministry had carried out a reasonable search for responsive records. The appellant stated specifically that it was interested in access to information regarding "how, when and by whom" the "Ministry's attention was directed" to certain proceedings involving the appellant.

During the course of mediation, certain issues were narrowed or clarified. The Ministry agreed to conduct another search, and subsequently located further records responsive to the request. The Ministry issued a supplementary decision that granted partial access to some of these additional records, and denied access to one record in its entirety. The Ministry relied on the mandatory exemption in section 21(1) of the *Act* (invasion of privacy) in its decision to withhold access to part or all of these additional records.

The Ministry also revised one of the indices to more fully describe one of the records to which access had not been granted.

Mediation did not resolve all of the issues and the file was transferred to the inquiry stage of the process. A Notice of Inquiry was initially sent to the Ministry and to two affected parties, to invite their representations on the facts and issues raised by the appeal. Representations were received from all of these parties.

Following receipt of the representations, and after addressing issues concerning the confidentiality of portions of the representations, the Notice of Inquiry, together with the non-confidential portions of the Ministry's representations, was sent to the appellant. The appellant provided representations in response.

In this appeal I must decide whether the exemptions cited by the Ministry apply to the records for which they are claimed.

RECORDS:

The records at issue are described in two indices prepared by the Ministry and sent to the appellant. Index A is an index of records from the Legal Services Branch, and Index B is the index from the Long-Term Care Redevelopment Project. The only record on Index B remaining at issue is Record 16.

The records at issue in Index A consist of correspondence, issues notes, email messages, handwritten notes, legal documents, memoranda and other material. Partial access has been granted to some of the records in Index A, with access to others denied entirely. Record 16 in Index B, denied in its entirety, is titled "Application Summary" and is a 40-page document consisting of a number of component sections. The Ministry relied on sections 13(1) and 19 in relation to the records in Index A, and sections 13(1) and 18(1)(d) and (e) in relation to Record 16 of Index B.

With respect to the records that were subsequently located, and for which the Ministry claimed the exemption in section 21(1), these records consist of photocopies of a number of newspaper articles and a letter. The photocopies of the newspaper articles have been disclosed to the appellant, but information consisting of the name of an individual and a fax/telephone number located at the top of each page was severed and not disclosed. In addition, the Ministry denied access in its entirety to the letter to the Ministry from an individual.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry takes the position that section 19 applies to a number of records identified in the Legal Services Index of Records (Index A). Specifically, it claims that this exemption applies to Records 4, 5, 7-15, 18-26, 28, 31, 32, 33, 39, 40, 41, 44, 45 and 46.

General principles

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges that apply in the context of institution counsel giving legal advice or conducting litigation.

The Ministry takes the position that both solicitor–client communication and litigation privilege apply to all of the records for which the section 19 claim has been made.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27]. Furthermore, confidentiality is an essential component of the privilege. The Ministry must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The Ministry has provided detailed representations on the application of the section 19 exemption to the records for which it is claimed. In its representations, the Ministry identifies each record specifically, and identifies the author of the record and the reasons why the record would qualify for the solicitor-client privilege exemption.

The appellant does not address this issue in its representations.

I have reviewed the records at issue, and make the following findings:

- Records 4, 7, 10, 11, 12, 13, 14, 15, 19, 21, 23, 24, 25, 32 and the first two pages of Record 33 are e-mail messages from counsel for the Ministry to other counsel or to the client. Record 46 is a transcription of a voicemail message from one

counsel to another counsel. I find that these records are confidential communications to or from counsel directly related to seeking or providing legal advice. Accordingly, I find that these records qualify for exemption under the solicitor-client communications privilege found in section 19 of the *Act*.

- Record 5 and the last three pages of Record 33 are draft documents, prepared by counsel and attached to correspondence from counsel for the Ministry to other counsel or to the client. I find that these records are confidential communications to or from counsel directly related to seeking or providing legal advice. Accordingly, I find that these records also qualify for exemption under the solicitor-client communication privilege found in section 19 of the *Act*.

- Records 9, 18, 20, 26, 31, 39, 40, 41, 44 and 45 are notes prepared or created by counsel. I find that these notes constitute counsel's working papers directly related to seeking, formulating or giving legal advice, and that they qualify for exemption under section 19 of the *Act*.

- Record 22 is an Issue Note and Record 28 is a Briefing Note. Both records were prepared by counsel for the Ministry in relation to the matters for which legal advice was sought, and the Ministry takes the position that these records set out legal advice and analysis for the client. I agree, and find that these records qualify for exemption under section 19 of the *Act*.

- Record 8 is a draft document prepared by the client. Based on the information provided to me, it was clearly provided to counsel to seek counsel's legal advice concerning the document, and counsel responded. I find that this record is a confidential communication to counsel directly related to seeking legal advice. Accordingly, I find that it qualifies for exemption under the solicitor-client communication privilege found in section 19 of the *Act*.

Accordingly, all of the records for which the section 19 exemption claim was made qualify for exemption under that section.

As I have found that the records listed above qualify for exemption under section 19, it is not necessary for me to determine whether any of the other exemptions apply to these records.

ADVICE TO GOVERNMENT

The Ministry has denied access to portions of Records 2, 3, 6 and 27 of Index A, and to all of Record 16 of Index B, on the basis of the exemption found in section 13 of the *Act*. 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 (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)]

The Ministry submits:

> Records 2, 3, 6 … and 27 are briefing notes that clearly have a section dealing with advice or recommendations for a course of conduct. …. The advice or recommendations is not limited to that particular section of each document. The background sections of each document identify advice and recommendations and the reasons that the advice or recommendations were given previously.
>
> The advice and recommendation was intended to provide the basis for a decision by the Assistant Deputy Minister, and Deputy Minister and the [Ministry's] office with respect to options.
>
> …
>
> 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 the staff.

The Ministry provides the following submissions regarding the application of section 13 to Record 16 of Index B:

> The record was prepared by Ministry public servants as part of a briefing note and provides a recommendation and confidential advice to the Minister for his decision on the awards of new long-term care beds, as part of the 2001 Bed Allocation process. Consequently, section 13(1) applies to the record.

The appellant does not address the possible application of section 13(1) to the records.

Findings

Record 2

Record 2 is an issue note dated June 1, 2001 prepared by Ministry staff to brief the Minister on "2001 Bed Allocations". The Ministry has disclosed the portion entitled "Background", parts of the portion entitled "Discussion", and parts of the Appendix to the Record. Access was denied to the remaining parts of this record, including the portion entitled "Recommendation".

The description of the issue in the heading on page 1 of Record 2 does not contain or reveal advice or recommendations and should be disclosed.

The severed portions of the section headed "Discussion" contain an analysis of a situation addressed in the record. In my view, disclosing the severed portions of this section would reveal the advice or recommendations of a public servant, or would permit one to accurately infer the advice or recommendations, and qualifies for exemption under section 13(1).

The "Recommendation" section of Record 2 clearly contains a recommendation for the purpose of section 13(1), and qualifies for exemption.

The severed portions of the Appendix also refer to advice received in the context of analyzing the issues raised. In my view, disclosing the severed portions of the Appendix would reveal the advice or recommendations, or would permit one to accurately infer the advice or recommendations, and qualifies for exemption under section 13(1).

The only other portions of Record 2 remaining at issue consist of information identifying the authors of the record and their senior management superior at the Ministry. I find that information identifying the author of an issues note of this nature is not the type of information intended for protection under section 13(1). Accordingly, these portions of Record 2 do not qualify for exemption and should be disclosed.

Record 3

Record 3 is also an issue note dated June 1, 2001 prepared by Ministry staff to brief the Minister on "2001 Bed Allocations". The Ministry has disclosed parts of the "Background" section of this record, and parts of the Appendix to the Record. Access was denied to the remaining parts of this record, including the portion entitled "Recommendation".

The description of the issue in the heading on page 1 of Record 3 does not contain or reveal advice or recommendations and should be disclosed.

The severed portion of the "Background" section contains a summary of the Application Assessment, including a reference to a recommendation. In my view, disclosing this portion of this section would reveal the advice or recommendations of a public servant, or would permit one to accurately infer the advice or recommendations, and qualifies for exemption under section 13(1).

The undisclosed section headed "Discussion" contains a summary of actions taken by the Ministry. In my view, this information simply contains background information of a factual nature, and does not reveal the advice or recommendations of a public servant. I find that it does not qualify for exemption under section 13(1).

The "Recommendation" section of Record 3 clearly contains a recommendation for the purpose of section 13(1), and qualifies for exemption.

The severed portions of the Appendix also refer to advice received in the context of analyzing the issues raised. In my view, disclosing the severed portions of the Appendix would reveal the advice or recommendations, or would permit one to accurately infer the advice or recommendations, and qualifies for exemption under section 13(1).

The only other portion of this record remaining at issue consists of information identifying the author of the record and their senior management superior at the Ministry. As set out above, I find that information identifying the author of an issue note of this nature is not the type of information intended for protection under section 13(1). Accordingly, this portion of Record 3 does not qualify for exemption and should be disclosed.

Record 6

Record 6 is an issue note dated June 18, 2001 prepared by Ministry staff. The Ministry has disclosed the introductory information, and parts of the "Background" and "Current Status" sections of this record. Access was denied to the remaining parts of this record.

The severed portion of the "Background" section contains the same summary of the Application Assessment as contained in Record 3. For the same reasons as referred to under Record 3, I find that disclosing this portion of this section would reveal or would permit one to accurately infer

the advice or recommendations of a public servant. Accordingly, it qualifies for exemption under section 13(1).

The undisclosed portions of the "Current Status" section contain a summary of actions taken by the Ministry, including a reference to a recommendation and an actual recommendation. In my view, disclosing these portions of this section would reveal or would permit one to accurately infer the advice or recommendations of a public servant, and section 13(1) applies to them.

The only other portion of this record remaining at issue consists of information identifying the author of the record, her work telephone number, and her senior management superior at the Ministry. As set out above, I find that information identifying the author of records of this nature is not the type of information intended for protection under section 13(1). Accordingly, this portion of Record 6 does not qualify for exemption and should be disclosed.

Record 27

Record 27 is an issue note dated July 10, 2001 prepared by Ministry staff. The Ministry has disclosed this record in full, but for one portion under the "Background" section, and information identifying the author of the record and her work telephone number

The severed portion of the "Background" section contains reference to specific advice, and in my view would reveal or would permit one to accurately infer the advice or recommendations of a public servant. Accordingly, it qualifies for exemption under section 13(1).

The only other portion of this record remaining at issue consists of information identifying the author of the record and her work telephone number. As set out above, I find that information identifying the author of records of this nature is not the type of information intended for protection under section 13(1), and should be disclosed.

Record 16 (Index B)

Record 16 of Index B is a document entitled "Application Summary". The Ministry identifies that it was developed by Ministry staff and a consultant for the purpose of providing recommendations and confidential advice to the Minister in relation to decisions regarding bed allocations. The Ministry also indicates that it contains assessment criteria for the 2001 bed allocation process, including seven specific assessments.

I have carefully reviewed Record 16 to determine whether it qualifies for exemption under the *Act*. Record 16 contains a four-page Application Summary, including a one-page score sheet identifying the actual weighted score assigned to the appellant's application, compared to the maximum possible weighted score. It also consists of seven additional documents, each containing specific assessments of the appellant's application in regards to seven different areas of review.

As identified above, previous orders have clearly set out that "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.

In my view, the information contained in Record 16 does not qualify as "advice or recommendations" for the purpose of section 13(1) of the *Act*.

Much of the information contained in Record 16 consists of scores or summaries of assessments made on the appellant's application. The Ministry's representations on the scoring process or decision-making process are brief, simply setting out that this record was prepared by Ministry public servants as part of a briefing note and provides a recommendation and confidential advice to the Minister for his decision on the awards of new long-term care beds.

In my view, the information contained in Record 16 is similar to the "scoring sheets" reviewed by Adjudicator Cropley in Order PO-1993, upheld on judicial review in *Ontario (Minister of Transportation) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.). In that appeal, Adjudicator Cropley had to decide whether records used by the Ministry of Transportation as part of the Consultant Evaluation Process, in which staff evaluated and assigned scores for each consultant, qualified for exemption under section 13(1). She found that they did not, and stated:

> I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed. Broadly viewed, the Ministry's approach could be taken to mean that every time a government employee expresses an opinion on a policy-related matter, or sets pen to paper, the resultant work is intended to form part of that employee's recommendations or advice to senior staff on any issue.
>
> As I noted above, the purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations **within the deliberative process**. The importance of protecting this type of information is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice within the deliberative process of government decision-making and policy-making. Ultimately, it is the recipient of the advice or recommendations who will make the decision and thus be held accountable for it.
>
> …

> According to the Ministry, its evaluators are "Ministry staff with the requisite education and knowledge of the construction industry needed to evaluate the consultants' proposals". In conducting their review of the proposals submitted to the Ministry pursuant to RFP's, these individuals are, as I noted above, establishing the factual basis upon which advice and/or recommendations may ultimately be made. Moreover, in this case, the entire exercise may be even further removed from the deliberative process through its very design.

I adopt the approach taken by Adjudicator Cropley in PO-1993, and upheld by the Divisional Court.

In my view, Record 16 does not contain information which suggests a course of action that will ultimately be accepted or rejected by the person being advised. Rather, it contains the factual basis and scoring upon which advice and/or recommendations may ultimately be made. Accordingly, the information contained in Record 16 does not qualify as "advice or recommendations" for the purpose of section 13(1) of the *Act*.

ECONOMIC AND OTHER INTERESTS

The Ministry claims that Record 16 from Index B qualifies for exemption under sections 18(1)(d) and (e) of the *Act*. These sections read:

A head may refuse to disclose a record that contains,

> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (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;

Section 18(1)(d)

Section 18(1)(d) is a harms-based exemption claim. It is available if the Ministry can demonstrate that disclosure of information contained in a record could reasonably be expected to cause injury to the financial interests of the Government of Ontario or the ability of the Government to manage the provincial economy (Orders P-219, P-641 and P-1114).

The words "reasonably be expected to" appear in section 18(1)(d). In order to establish that the particular harm in this section "could reasonably be expected" to result from disclosure of a record, the Ministry must provide "detailed and convincing" evidence sufficient 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)* (1988), 41 O.R. (3d) 464 (C.A.)).

The Ministry submits:

> The record reveals assessment and evaluation criteria developed by Ministry staff and a contracted consulting firm for the purpose of evaluating and assessing applications made in the 2001 LTC Bed Allocation, which was a competitive process. The same assessment and evaluation criteria have been used subsequently in other selection processes and these criteria will be used in the future, if needed, for a similar assessment of proposals for bed allocation.
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> The Long-Term Care Redevelopment Project (LTCRP) has the responsibility for the proper administration of the long-term care bed allocation process and any allocation processes on behalf of the Government of Ontario. One of the purposes of the bed allocation processes is to create a competitive marketplace for the allocation of beds and to encourage applicants to compete against each other to provide the best services for the money that will be provided by the Ontario government. The premature disclosure of this type of information could reasonably be expected to be injurious to the financial interests of the Government of Ontario because it will lessen competition in the government selection processes and provide an unfair advantage to those who receive the information as a result of freedom of information requests over those who do not receive such information (per Orders P-1062 and PO-1894).
>
> The value that the Ontario government can achieve from the processes is maximized when the bed allocation awards are based on competition and uncertainty in the market place about what other competitors might apply for. That value can be lost due to the disclosure of the confidential criteria for assessing the viability of competitive applications in relation to the government policy on strategic capital investments, as it would allow current and future potential competitors to take advantage of this information to reduce uncertainty and competition to the detriment of the Government of Ontario.

The Ministry then identifies that, in its view, the disclosure of the records could reasonably be expected to interfere with its ability to discharge its responsibilities in managing the provincial economy, and to adversely affect the government's ability to protect its legitimate economic interests.

Finally, the Ministry reviews the importance and significance of the health care system in Ontario, and identifies that the Ministry's role has evolved into that of being a comprehensive manager of health-related programs and services, the end result of which is to "modernize, streamline and integrate all facets of the health care system, so that the limited available resources may be utilized as efficiently and effectively as possible".

The appellant does not address the issue of the possible application of section 18(1)(d) and (e) to the records.

Findings

As set out above, Record 16 from Index B is a document entitled "Application Summary". The Ministry identifies that it was developed by Ministry staff and a consultant for the purpose of providing recommendations and confidential advice to the Minister in relation to decisions regarding bed allocations. The Ministry also indicates that it contains assessment criteria for the 2001 bed allocation process, including seven specific assessments.

The Ministry's position that section 18(1)(d) applies to this record appears to be premised upon the view that, because the record contains assessment and evaluation criteria for bed allocations in 2001, and because these criteria have been used in other selection processes and will be used in the future, if needed, for a similar assessment of proposals for bed allocation, the disclosure would provide an unfair advantage to those who receive the information as a result of freedom of information requests over those who do not receive such information. Essentially, the Ministry is taking the position that applicants for bed allocations who are aware of the criteria used to determine bed allocations will have a competitive advantage over those who are not aware of the criteria. The result, in the Ministry's view, will be that competition in the government selection processes will be lessened in the event that certain applicants have an "unfair advantage" over other applicants.

I do not accept the Ministry's position that the information contained in Record 16 should be withheld from the applicant on the basis that disclosing the criteria used to evaluate the application would result in the harms contemplated by section 18(1)(d). I have not been provided with "detailed and convincing evidence" that the disclosure of the criteria upon which the Ministry based its bed allocation decisions in 2001 could reasonably be expected to be "injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy". The Ministry refers to the possible prejudice that may result from disclosing these criteria, but I am not persuaded by the Ministry's representations that disclosing to applicants the criteria used to assess their applications could result in the identified harm.

Furthermore, even if I were persuaded that the section 18(1)(d) harms may result (which I am not) the Ministry has not convinced me that it will necessarily reuse the criteria used in 2001. Indeed, its reference to the re-use of the criteria "if needed" suggests that there is no specific plan to reuse these criteria in the future.

The Ministry also refers to its concern that disclosure of information concerning what other "competitors" might apply for will reduce competition and result in harm to government interests. Although I agree that access to a competitor's application and assessment information might, in some instances, allow competitors to gain an unfair advantage in competition, the information at issue in this appeal relates to the appellant, and the criteria used in the review of

the appellant's application. In that regard it is not seeking information about other competitors' processes.

Accordingly, I find that section 18(1)(d) does not apply to Record 16.

Section 18(1)(e)

Previous orders have established that, in order to qualify for exemption under subsection 18(1)(e), the Ministry must establish the following:

> 1. the record must contain positions, plans, procedures, criteria or instructions; and
>
> 2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and
>
> 3. the negotiations must be carried on currently, or will be carried on in the future; and
>
> 4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution."
>
> [See Order P-219]

The Ministry has not provided specific representations on how section 18(1)(e) may apply to Record 16 of Index B. It appears that the Ministry is of the view that, because the record may contain "criteria" which an applicant for bed allocations must meet, section 18(1)(e) applies. However, the requirements necessary to qualify for exemption, as set out above and provided to the Ministry, require more than simply identifying that the record contains criteria. It also requires that the Ministry establish that the criteria must be intended to apply to negotiations, carried on currently or in the future, conducted by or on behalf of the Government of Ontario or an institution.

I am not persuaded that the criteria contained in Record 16 are intended to apply to negotiations carried on by the Government of Ontario or the Ministry. The Ministry's representations refer to the criteria as the "assessment and evaluation criteria" developed for the purpose of "evaluating and assessing applications made in the 2001 LTC Bed Allocation" process. The Ministry has not identified how the Ministry or the Government of Ontario will apply the information contained in the records to negotiations carried on currently or to be carried on in the future. To the extent that the Ministry refers to concerns about disclosing the record, it identifies its concern that parties receiving the record will be given an advantage over competitors, and I address this issue under section 18(1)(d) above. The Ministry has not persuaded me that the record contains information intended to be applied to negotiations to be carried on by the Ministry or the

Government of Ontario, and I find that Record 16 is not exempt from disclosure under section 18(1)(e) of the Act.

For the reasons set out above, I find that Record 16 does not qualify for exemption under sections 18(1)(d) or (e) of the *Act*.

PERSONAL INFORMATION

As identified above, the Ministry claims that section 21(1) applies to portions of records consisting of photocopies of a number of newspaper articles and a letter. The photocopies of the newspaper articles were disclosed to the appellant, but information consisting of the name of an individual and a fax/telephone number located at the top of each page was severed and not disclosed. In addition, the Ministry denied access in its entirety to the letter to the Ministry from an individual. The section 21 personal privacy exemption applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*.

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including information relating to the individual's employment history (section 2(1)(b)), address or telephone number (section 2(1)(d)), the personal opinions or views of that individual except where they relate to another individual (section 2(1)(e)) or the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (section 2(1)(h)).

The Ministry submits that the information severed from the records containing the photocopies of the newspaper articles consists of a name and a telephone or fax number, and that it qualifies as "personal information" under section 2(1)(d) and (h). The Ministry also submits that the letter contains employment history, expresses the personal opinions or views of an individual, and the name of the individual, and that it qualifies as "personal information" under section 2(1)(b), (e) and (h).

The appellant identifies that it is difficult to address the issue of whether the record contains personal information, as the record is not available to it. The appellant does identify, however, that the letter, which directed the attention of the Ministry to information about the appellant, would not necessarily be personal information about the author; rather, it would primarily be information concerning the appellant.

I have reviewed the records for which the personal information claim has been made. I am satisfied that the information severed from the pages containing the photocopies of the newspaper articles consists of a name and a telephone or fax number, and qualifies as "personal information" under section 2(1)(d) and (h) of the *Act*. With respect to the letter, this record contains the name and address of the author of the letter, as well as that individual's opinions or views, and this information qualifies as "personal information" under section 2(1)(d) and (e) of the *Act*. In addition, portions of this record contain information about the employment history of

the individual, and other portions would reveal other personal information about the individual. This information qualifies as "personal information" under sections 2(1)(b) and (h) of the *Act*.

It should be noted that the appellant is a corporate entity, and the discretionary considerations in Part III of the *Act*, which apply when an individual is requesting his or her own personal information, do not apply in this appeal.

INVASION OF PRIVACY

Where a requester seeks personal information of other individuals, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies.

Neither affected party consented to the release of the information contained in the records, accordingly, the only exception which may apply in the present appeal is that set out in section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(f) is an exception to the section 21(1) prohibition against the disclosure of personal information. In order to establish that section 21(1)(f) applies, it must be shown that disclosure of the personal information at issue in this appeal would not constitute an unjustified invasion of personal privacy (see, for example, Order MO-1212).

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

With respect to section 21(3) the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be resorted to in favour of disclosure.

Section 21(3)(d): presumption against disclosure for employment history

In this appeal, the Ministry relies on the presumption against disclosure found in section 21(3)(d) which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> relates to employment or educational history;

The Ministry submits that this section should be interpreted in such a way that, as long as the record makes reference to or has a connection with the individual's employment, that should be sufficient to trigger the application of the presumption. The Ministry states that the record need not describe the individual's entire work history or experience for the presumption to apply.

The appellant takes the position that, if records simply include some information regarding an individual's employment, this is not sufficient to deny access to the whole record. It also identifies that any "employment" information contained in the record would not be central to the communication itself, which is about the appellant. Finally, the appellant identifies that mere information about the basics of an individual's employment is not sufficient to engage an individual's privacy interests.

I find that the records which contain the name and telephone or fax number of an individual, as well as the bulk of the letter, do not contain information which fits within the section 21(3)(d) presumption. I find that small portions of the letter contain information which qualifies as the "employment history" of an individual. However, I accept the appellant's position that the fact that a record includes some information regarding an individual's employment is not sufficient to deny access to the whole record. In my view, the fact that discreet portions of the letter contain information that fits within the section 21(3)(d) presumption is not sufficient to deny access to the whole record. However, based on my findings below, it is not necessary for me to identify specifically those portions of this record which fit within the section 21(3)(d) presumption.

Section 21(2): factors weighing in favour of or against disclosure

Introduction

In order to determine whether disclosure would constitute an unjustified invasion of privacy under section 21(1)(f), I must consider whether any of the factors under section 21(2) apply.

The affected parties have objected to the release of the information, with reference to the factors in sections 21(2)(f) and 21(2)(h). The appellant takes the position that both section 21(2)(a) and 21(2)(d) apply as factors favouring disclosure in this appeal. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 21(2)(a): public scrutiny

The appellant takes the position that this factor applies in favour of disclosure. It states:

> In this case, a contract was awarded and then denied on the basis of a communication from a third party. These are suspicious circumstances and the contract tendering process should be as transparent as possible.

In other portions of its submissions, the appellant also refers to its view that the issue is whether a third party can "intercede" in the contract tendering process and that any such communication should not be exempted from scrutiny. It is essentially taking the position that denying access to this record is unfair, and that openness requires disclosure of the records.

Previous orders have determined that, in deciding whether section 21(2)(a) is a factor, institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purposes outlined in that section (Order P-256).

I find that the factor set out in section 21(2)(a) has some relevance in this appeal. I accept the appellant's position that, in these circumstances, where a contract was awarded and then denied on the basis of a communication from a third party, issues concerning the broader interests of public accountability are raised.

However, in my view, this factor has low weight in the circumstances of this appeal. The Ministry has clearly identified for the appellant the basis upon which it decided that the bed allocation would be withdrawn. As identified by the appellant, the Ministry confirms that the decision to re-examine the bed allocation was based on the information regarding the history of the appellant. Portions of the records, including those containing the actual newspaper articles themselves, were disclosed to the appellant. In that regard, the Ministry's decision and the basis

upon which it was made is clear. Although disclosing the remaining portions of the subject records themselves may assist in subjecting the activities of the Ministry to public scrutiny, in light of the information already disclosed to the appellant, this factor has low weight in the circumstances of this appeal.

Section 21(2)(d): relevant to a fair determination of rights

The appellant takes the position that section 21(2)(d) is a relevant factor. It states that its "civil contract rights" have been infringed, and that it is unable to fully determine the reasons for this infringement.

Previous orders have established that, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[See Orders P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)] and PO-1764.]

Based on the appellant's representations, I am not satisfied that the requirements set out above have been established. Although the appellant does not specifically refer to the factors set out above, it identifies its view that it is unfair for a communication regarding it, which initiated the Ministry's decision to re-examine the application submitted by the appellant, to be withheld from it.

I am not persuaded that the interest or "right" referred to by the appellant is in the nature of the sort contemplated by section 21(2)(d). Although the appellant refers to its "civil contract rights", the appellant has not established that the right in question is a legal right, as opposed to a non-legal right based solely on moral or ethical grounds. I am also not satisfied that the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of any such right, nor that the personal information is required in order to prepare

for any proceeding or to ensure an impartial hearing. As identified above, the Ministry indicated to the appellant the reasons why it changed its decision to allocate beds, and also disclosed to the appellant portions of the records. The appellant has not persuaded me that access to the personal information at issue is necessary on the basis of section 21(2)(d).

Section 21(2)(f): highly sensitive

The affected parties take the position that the information in the record is highly sensitive information. In their confidential representations they refer to the reasons why they take this position. Previous orders have determined that information can be considered to be "highly sensitive" if disclosure of the information could reasonably be expected to "cause excessive personal distress to the subject individual". (See Orders M-1053, P-1681 and PO-1736.)

Upon my review of the records, I find that certain information contained in them is highly sensitive information of the identifiable individual(s).

Section 21(2)(h): supplied in confidence

The affected parties take the position that the information in the records was supplied to the Ministry in confidence. I agree. After reviewing the records and the representations of the affected parties, in my view the personal information contained in the records was supplied in confidence by the individuals to whom the information relates, and I find that this factor is relevant in the circumstances of this appeal.

Analysis of factors

I have found that the listed factor in section 21(2)(a) applies, but that it is accorded low weight in these circumstances. I have also found that the factor in section 21(2)(h) applies to all of the information in the records, and that the section 21(2)(f) factor applies to some of the information.

Based on those findings, and on the weighing of the factors, it is my view that the disclosure of the personal information would constitute an unjustified invasion of personal privacy of the affected parties. Accordingly, I uphold the Ministry's decision to deny access to that information on the basis of section 21(1) of the *Act*.

ORDER:

1. I order the Ministry to disclose to the appellant the portions of Records 2, 3, 6 and 27 of Index A which I have found not to qualify for exemption under section 13(1) of the *Act*, and all of Record 16 of Index B, by **June 29, 2004**. I have attached a highlighted version of Records 2, 3, 6 and 27 with the copy of this order sent to the Ministry, in which I have highlighted the portions of these records which should be disclosed.

2. I uphold the Ministry's decision to withhold the remaining records and portions of records on the basis of sections 13(1), 19 and 21(1) of the *Act*.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.

Original signed by: May 28, 2004
Frank DeVries
Adjudicator