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

ORDER PO-2433

Appeals PA-040250-1, PA-040251-1 and PA-040311-1

Ministry of Health and Long-Term Care

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BACKGROUND:

On September 11, 2000, Canada's First Ministers agreed that "improvements to primary health care are crucial to the renewal of health services" and highlighted the importance of multi-disciplinary teams. In response to this agreement, the Government of Canada established the $800,000,000 Primary Health Care Transition Fund (PHCTF).

Over a six-year period (2000-2006), the PHCTF is supporting provinces and territories in their efforts to reform the primary health care system. Specifically, it provides support for the transitional costs associated with introducing new approaches to primary health care delivery. In addition to direct support to individual provinces and territories, the PHCTF is also supporting various pan-Canadian initiatives, and offers the opportunity for participation by health care system stakeholders. Although the PHCTF itself is time-limited, the changes it is supporting are intended to have a lasting and sustainable impact on the health care system.

Collaboration among federal, provincial, and territorial governments is a key element of the PHCTF. It was established after an intergovernmental advisory group, with representation from all jurisdictions, provided advice on fund design and project selection from the outset, and that group continues to play an active role. All governments agreed to the five common objectives of the PHCTF. All initiatives must support at least one of these objectives.

The PHCTF consists of five funding envelopes (Provincial/Territorial, Multi-jurisdictional, National, Aboriginal, Official Languages Minority Communities). All funding allocations have been completed and no further funding is available.

The provincial/territorial envelope accounts for the bulk of PHCTF funding ($576,000,000) and is directly supporting provinces and territories in their primary health care reform activities. Funds were allocated on a per capita basis, and smaller jurisdictions (Prince Edward Island and the three northern territories) received an additional $4,000,000 each to ensure sufficient funding for initiatives on a significant and sustainable scale.

Initiatives were negotiated on a bilateral basis between each province/territory and the federal government, based on the unique circumstances of each jurisdiction and the common objectives of the PHCTF. All other PHCTF-funded activities are intended to complement provincial and territorial activities.[1]

NATURE OF THE APPEAL:

The requester submitted the following three requests for access to information to the Ministry of Health and Long-Term Care (the Ministry) pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> **Ministry file number A-2004-00936/pmc**
>
> All correspondence (including but not limited to evaluation criteria, notes to file, etc.) associated with the four (4) Primary Health Care Transition Fund (PHCTF)

[1] Source: Health Canada website (www.hc-sc.gc.ca)

> Provincial envelope project proposals submitted by [a named company] in June 2003 to the PHCTF Project Co-ordinator – Alternative Payment Programs Branch Ministry of Health and Long-Term Care (MOHLTC).
>
> **Ministry file number A-2004-00935/pmc**
>
> Contracts for all 45 of the Primary Health Care Transition Fund (PHCTF) projects initially identified by [the] Health and Long-Term Care Minister […] in a news release on 26 March 2004.
>
> **Ministry file number A-2004-00980/pmc**
>
> All correspondence (including but not limited to letters, notes to file, e-mail) associated with [the Ministry's] Primary Health Care Transition Fund (PHCTF) files G03-02598 and G03-02604 […]. Specifically, the application, notes to file, referral for evaluation/review, review results, comparative ranking, and other information associated with these files is being requested.

Processing of the requests

The Ministry rendered decision letters responding to all three requests.

The Ministry granted partial access to the records responsive to each request and applied the exemptions found in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act* to deny access to the severed portions. The Ministry provided the appellant with an index of records for each of the three requests.

In addition, the Ministry sought acceptance and payment of fees in the following amounts for the three requests:

- $455.83 for request A-2004-00936/pmc
- $1,897.29 for request A-2004-00935/pmc
- $418.20 for request A-2004-00980/pmc

In each case the Ministry informed the requester that written acceptance of the fee, along with a cheque or money order for payment of the fees in full, would be required before the request could be processed further.

With regard to request A-2004-00980/pmc the requester asked that the $418.20 fee be waived. The requester also clarified his request, confirming that he was only interested in information collected by the Ministry commencing November 27, 2003 which relates to the November 2003 round of the "Ontario Provincial Envelope of the Primary Health Care Transition Fund" and,

specifically, documents associated with the evaluation of the revised file G03-02598 and the revised file G03-02604. As a result, the Ministry revised its decision, applied the section 17(1) exemption to some of the information that was responsive to the clarified request and dropped its claim for the section 21(1) exemption in relation to this particular request. The Ministry provided a revised index of records listing six responsive records and issued a revised fee in the total amount of $372.00. The requester then further narrowed this request to record 2 of the revised index of records, the Primary Health Care 2003/2004 Transition Fund Projects Evaluation Criteria for Proposal Number G03-05540, dated January 26, 2004 (January 2004 Evaluation Criteria). The Ministry again lowered its fee to a total of $74.00 ($60.00 for search time; $10.00 for preparation time and $4.00 for photocopying). The requester paid the $74.00 fee.

The three appeals: PA-040250-1, PA-020251-1, PA-040311-1

The requester (now the appellant) appealed the Ministry's decisions regarding each of the three requests and the following three appeals were opened by this office:

- PA-040250-1 (request A-2004-00936/pmc) regarding the application of the section 17(1) and section 21(1) exemptions to the information at issue and the Ministry's fee in the amount of $455.83

- PA-040251-1 (request A-2004-00935/pmc) regarding the application of the section 17(1) and section 21(1) exemptions to the information at issue and the Ministry's fee in the amount of $1,897.29

- PA-040311-1 **(**request A-2004-00980/pmc) regarding the application of the section 17(1) exemption to the information, the Ministry's fee in the amount of $74.00 and its refusal to grant a fee waiver

Shortly after appeal PA-040250-1 was opened the appellant narrowed the scope of his request to the following two items on the Ministry's index of records:

- Primary Health Care 2003/2004 Transition Fund Projects Evaluation for Proposal Number G03-02598, dated September 10, 2003 (September 2003 Evaluation)

- Primary Health Care 2003/2004 Transition Fund Projects Evaluation for Proposal Number G03-02604, dated October 11, 2003 (October 2003 Evaluation)

The Ministry reduced its fee to $234.20, comprised of $180.00 for search time (6 hours at $30.00 per hour), $44.00 for preparation time (44 pages) and $10.20 for photocopies (51 pages at $0.20 per page). The appellant paid the $234.20 fee and requested that the Ministry waive all or part of the search and preparation charges associated with the fee.

Shortly after appeal PA-040251-1 was filed the appellant narrowed the scope of his request to

records 17, 31 and 36 of the Ministry's index of records and the Ministry reduced its fee to $279.80, consisting of $240.00 for search time (8 hours at $30.00 per hour), $27.00 for preparation time (27 pages) and $12.80 for photocopies (64 pages at $0.20 per page). The appellant submitted payment for the $279.80 fee. The appellant also requested that the Ministry waive all or part of the search and preparation charges.

Mediation of the three appeals

PA-040250-1 (request A-2004-00936/pmc)

During the mediation stage the Ministry issued a revised decision letter, granting partial access to the records responsive to the appellant's narrowed request, withdrawing its reliance upon sections 17(1) and 21(1) and introducing for the first time the section 18 exemption (economic and other interests) [specifically, sections 18(1)(a) (information that belongs to government), (b) (research) and (d) (injury to financial interests)] to deny access to this information. The Ministry informed the appellant that it is denying his request for a waiver of the $234.20 fee.

PA-040251-1 (request A-2004-00935/pmc)

During the mediation stage the appellant further narrowed the scope of his request to record 36, the Agreement between the Ministry and a named company (the affected party), comprised of a contract and six attached schedules (the Agreement). The Ministry notified the affected party and sought its representations on the disclosure of the information at issue. The affected party provided representations. Subsequently, the Ministry issued a revised decision in which it:

1. amended its access decision and denied access to the Agreement in its entirety, relying on sections 17(1) and 21(1) of the *Act* to deny access

2. reduced the fee to $240.00 (8 hours search time at $30.00 per hour) and refunded $39.80

3. denied the appellant's request for a fee waiver

PA-040311-1 (request A-2004-00980/pmc)

During the mediation stage the appellant withdrew the fee and fee waiver denial issues from this appeal, leaving the application of the section 17(1) exemption to the January 2004 Evaluation Criteria as the sole issue remaining in this appeal. However, during the initial stage of this inquiry, the Ministry indicated in its representations that it had claimed, in error, the application of section 17(1) to this information and that it had always intended to claim the application of sections 18(1)(a), (b) and (d). Therefore, the Ministry relies on sections 18(1)(a), (b) and (d) with regard to the January 2004 Evaluation Criteria.

The issues for adjudication

1. Should the Ministry be permitted to raise the section 18(1)(a), (b) and (d) discretionary exemptions in appeals PA-040250-1 and PA-040311-1?

2. If the answer to question 1 is "yes", do sections 18(1)(a), (b) and/or (d) apply to the information at issue in those appeals?

3. Does the section 17(1) exemption apply to the withheld information in appeal PA-040251-1?

4. Does the withheld information in appeal PA-040251-1 contain "personal information" and, if so, does the section 21(1) exemption apply to exempt that information from disclosure?

5. Should the Ministry's revised fees in the amount of $234.20 (PA-040250-1) and $240.00 (PA-040251-1) be upheld?

6. Should the Ministry's decisions to deny fee waivers in appeals PA-040250-1 and PA-040251-1 be upheld?

I commenced my inquiry by sending a Notice of Inquiry to the Ministry and the affected party, seeking representations from the Ministry on all of the issues set out above and from the affected party on the application of the section 17(1) exemption in respect to the information at issue in appeal PA-040251-1. In addition, with respect to appeals PA-040250-1 and PA-040311-1, I felt that it was unclear whether the Ministry had notified any affected parties that may have an interest in the outcomes of these appeals. Therefore, as a preliminary issue, I asked the Ministry for particulars regarding the identity of the affected parties and its notification efforts.

The Ministry submitted representations; the affected party did not. The Ministry agreed to share the non-confidential portions of its representations with the appellant.

I then sent a Notice of Inquiry to the appellant and sought representations on all of the issues set out above. I enclosed a copy of the Ministry's non-confidential representations with my Notice of Inquiry. The appellant submitted representations followed by supplementary representations, which he agreed to share in their entirety with the Ministry.

I determined that the appellant's representations raised issues to which the Ministry should be given an opportunity to reply. I provided the Ministry with a complete copy of the appellant's representations and sought reply representations. The Ministry responded with reply representations, which it agreed to share in their entirety with the appellant. I then sought and received sur-reply representations from the appellant.

RECORDS:

PA-040250-1

The following two records, for which the Ministry relies on the discretionary exemptions at sections 18(1)(a), (b) and (d) of the *Act*, remain at issue:

- September 2003 Evaluation
- October 2003 Evaluation

PA-040251-1

The following record, for which the Ministry relies on the exemptions at sections 17(1) and 21(1) of the *Act*, remains at issue:

- the Agreement (contract between the Ministry and the affected party with six attached schedules)

PA-040311-1

The following record, for which the Ministry relies on the discretionary exemptions at sections 18(1)(a), (b) and (d) of the *Act*, remains at issue:

- January 2004 Evaluation Criteria

DISCUSSION:

PRELIMINARY ISSUES

Notification of affected parties

The appellant states that the Ministry has failed to discharge its notification responsibilities for appeals PA-040250-1 and PA-040311-1. In particular, the appellant submits that the Ministry has not provided the details of its notification efforts, including copies of all notifications sent and responses received from affected parties.

Section 28(1) of the *Act* outlines an institution's obligations to notify an affected party where a record to be disclosed might contain information referred to in section 17(1), or personal information whose disclosure might constitute an unjustified invasion of personal privacy.

Sections 28(1) and (2) read:

> (1) Before a head grants a request for access to a record,

> (a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or
>
> (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.
>
> (2) The notice shall contain,
>
> (a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;
>
> (b) a description of the contents of the record or part thereof that relate to the person; and
>
> (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.

In my initial Notice of Inquiry, which I sent to the Ministry, I noted that it was not clear whether the Ministry had notified any affected parties that may be impacted by the outcomes in appeals PA-040250-1 and PA-040311-1. At the time of making this observation the Ministry had just withdrawn its reliance on sections 17(1) and 21(1) to the information at issue in appeal PA-040250-1 while the application of section 17(1) was still at issue in appeal PA-040311-1.

The Ministry does not address this notification issue in its initial representations. However, in reply representations the Ministry states that it is only claiming the application of the section 17(1) and 21(1) exemptions in respect of appeal PA-040251-1 in which case no notification of affected parties would be required under sections 28(1) and (2) for PA-040250-1 and PA-040311-1.

I confirm that the Ministry has made it clear that it is claiming only the application of section 18(1) to appeals PA-040250-1 and PA-040311-1. In addition, I have carefully reviewed the records at issue in these appeals and I am satisfied that sections 17(1) and 21(1) are not relevant. Accordingly, I conclude that the Ministry was not required to provide notice under sections 28(1) and (2) in regard to appeals PA-040250-1 and PA-040311-1.

Late raising of a discretionary exemption

This office's *Code of Procedure* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims after an appeal has been filed. Section 11.01 of the *Code* is relevant to this issue and reads:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

These guidelines for the late raising of discretionary exemptions were found to be reasonable by the Divisional Court in the judicial review of Order P-883 (*Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)**.**

Sections 18(1)(a), (b) and (d) are discretionary exemptions and, subject to the guidelines in section 11.01 of the *Code*, must be raised within 35 days of the issuance of the Confirmation of Appeal by this office.

As mentioned above, the Ministry has raised the application of the exemptions in sections 18(1)(a), (b) and (d) late in the appeal process in regard to the information at issue in appeals PA-040250-1 and PA-040311-1.

The Confirmation of Appeal for appeal PA-040250-1 is dated September 23, 2004. The Ministry was advised in the Confirmation of Appeal that it had until October 29, 2004 to raise any new discretionary exemptions. There is no indication in the file that the Ministry ever raised the application of the section 18(1) exemptions prior to this date. The Mediator's Report (the Report), which was issued on November 25, 2004, states that the Ministry first advised the mediator that it was relying on section 18(1) to deny access to information at issue in appeal PA-040250-1 on November 15, 2004. The Ministry then sent a letter to this office dated November 25, 2004 (the same date the Report was issued) confirming its intention to rely on sections 18(1)(a), (b) and (d) to the information at issue in that appeal.

The Confirmation of Appeal for appeal PA-040311-1 is dated December 9, 2004. The Ministry was advised in the Confirmation of Appeal that it had until January 16, 2005 to raise any new discretionary exemptions. The Ministry first raises the application of sections 18(1)(a), (b) and (d) to deny access to the information at issue in that appeal in its initial representations, dated April 22, 2005. In those representations the Ministry indicates that it had made a "clerical error" in raising the application of section 17(1) to the information at issue in appeal PA-040311-1.

I must decide whether or not I should consider the section 18(1) exemptions in appeals PA-040250-1 and PA-040311-1, despite the fact that they were raised after the expiry of the 35-day time period.

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In its initial representations the Ministry's focus in respect of this issue is on the late raising of section 18(1) to the information at issue in appeal PA-040311-1. The Ministry's initial representations do not address the late raising of section 18(1) to the information at issue in appeal PA-040250-1. The Ministry argues that its reliance on section 17(1) and its failure to raise section 18(1) in its initial decision letter for appeal PA-040311-1 was a clerical error. It argues that it should be permitted to claim the application of section 18(1) in the context of that appeal since the information at issue is substantially similar to the information at issue in appeal PA-040250-1.

The appellant states that he cannot "in good faith" allow the Ministry to "disregard established procedures" and introduce new discretionary exemptions after "identified deadlines have passed." The appellant states that the Ministry's efforts to apply section 18(1) late, "after the fee was paid, demonstrate that the [Ministry] was acting in bad faith and/or for an improper purpose."

In reply, the Ministry states that it "mistakenly omitted to provide submissions on the late raising of the section 18 exemption" for the information at issue in appeal PA-040250-1. In support of its position on the late raising issue with regard to the information in appeal PA-040250-1, the Ministry states:

1. It raised the application of section 18 "as early as possible, once the Ministry

realized that section 18 was more properly applied to the records [in this appeal]". The Ministry notes that section 18 was raised "only seventeen days after the deadline for the raising of new discretionary exemptions" and the appellant was "formally" notified of its intention to rely on the exemption in a new decision letter issued ten days later.

2. The adjudicator "should exercise his discretion" to consider the section 18(1) exemptions raised since the Ministry has "in effect substituted a more proper exemption claim in respect of these records", reflecting its "ongoing efforts to apply exemptions only in accordance with the *Act* and established IPC jurisprudence."

3. The late raising of these exemptions "did not prejudice the appellant's ability to make complete submissions in this appeal."

4. There is "no procedural bar" preventing the adjudicator from exercising his discretion to consider the section 18 exemptions in this case. The Ministry submits that "while the late raising of new discretionary exemptions is not usual, established IPC procedures contemplate new discretionary exemption claims [being raised]."

The appellant was given an opportunity to respond to the Ministry's reply representations. In sur-reply the appellant reiterates the arguments he made in his first set of representations. The appellant states that he feels strongly that I must reject the Ministry's efforts to raise the application of section 18 late in the appeal process and to broadly apply it, in order to safeguard the integrity of the mediation and adjudication processes.

Having carefully reviewed the parties' representations, I have decided not to allow the Ministry to raise the section 18(1)(a), (b) and (d) exemptions in respect of the information at issue in appeals PA-040250-1 and PA-040311-1. I acknowledge the Ministry's view that it raised the section 18(1) exemptions as early as possible after becoming aware of its omission and I understand that it attributes the mistake, at least with regard to appeal PA-040311-1, to a clerical error. However, I do not find the Ministry's position compelling. The Ministry is an institution with considerable experience under the *Act*. It is engaged in the processing of access to information requests on a regular basis. In addition, the section 18(1) exemptions are intended to protect an *institution's* interests rather than those of an outside party, and I would expect the Ministry to be mindful of protecting its own interests and familiar with the circumstances in which the section 18(1) exemptions might apply. I also note that this is not a case where the volume of records is particularly high. In my view, the Ministry's case is not aided by the fact that after identifying its error with respect to appeal PA-040250-1, albeit beyond the 35-day period for raising discretionary exemptions, it still failed to raise the section 18(1) exemptions for appeal PA-040311-1. The Ministry did not raise the section 18(1) exemptions for appeal PA-040311-1 until after being invited to submit representations in this inquiry.

While it may be true that the appellant's ability to submit representations in response to the Ministry's reliance on the section 18(1) has not been compromised, in my view, there is an inherent unfairness to an appellant in finding out late the basis for an institution's denial of access. An appellant should have an opportunity to know what exemptions are being claimed before deciding to proceed with an appeal, and barring unusual circumstances, should certainly have this opportunity before being required to pay fees. In this case, the appellant paid his fees believing that the Ministry was denying access to the information at issue in appeals PA-040250-1 and PA-040311-1 pursuant to section 17(1). Therefore, it is conceivable that the appellant would have chosen not to pay the fees or pursue the non-disclosed information with regard to the records in these appeals had he known before October 29, 2004 that the Ministry was relying on the section 18(1) exemptions. In other words, while he was initially faced with one barrier to access, after paying the fee he learned that he was faced with two. In any event, due to the Ministry's actions the appellant was not afforded the opportunity to decline to pay the fee.

In the specific circumstances of this appeal, I find that the integrity of the process would be compromised or the interests of the appellant prejudiced if I were to allow the Ministry to rely on section 18(1)(a), (b) and (d) in regard to the information at issue in appeals PA-040250-1 and PA-040311-1. Given this finding, I am not required to consider the application of the section 18(1) exemptions to these appeals. Nevertheless, in order to fully address the question of access to the records at issue, I have decided to address, in the alternative, the potential application of sections 18(1)(a), (b) and (d) in appeals PA-040250-1 and PA-040311-1.

ECONOMIC AND OTHER INTERESTS

General principles

As stated above, the Ministry is claiming the application of sections 18(1)(a), (b) and (d) for the withheld portions of the records at issue in appeals PA-040250-1 and PA-040311-1, namely the September 2003 Evaluation and the October 2003 Evaluation (appeal PA-040250-1) and the January 2004 Evaluation Criteria (appeal PA-040311-1). The information at issue in all of these records consists strictly of the evaluation criteria for funding proposals submitted to the Ministry.

Section 18(1)(a), (b) and (d) state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

> (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;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

In support of its position on the application of the discretionary exemptions in sections 18(1)(a), (b) and (d), the Ministry provides general representations that do not address the specific elements of sections 18(1)(a), (b) or (d).

Section 18(1)(a): information that belongs to government

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, the Ministry must establish that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

The main thrust of the Ministry's submissions that relate to section 18(1)(a) is as follows:

1. There is an expectation of confidentiality regarding this information in order to ensure a fair and objective evaluation process. Consistent with this expectation, all evaluators were required to enter into an Evaluation Agreement with the Ministry before they were permitted to evaluate proposals. In addition, the Ministry points out that the first page of the records at issue state: "Confidential Draft. Internal to [Ministry] only. Not for Distribution."

2. The evaluation criteria were developed as a Ministry tool that may be used again to evaluate future proposals for government funding. In the Ministry's view, full disclosure of the criteria would be akin to providing the appellant with the correct answers to a test and would provide the appellant with a distinct advantage over the competition in the future.

3. There is "potential monetary value in the evaluation criteria belonging to the Ministry" as it is the "result of diligent research, expertise and primary health care experience from Ministry staff or experts employed by the Ministry." The Ministry submits that in an "age of limited health care dollars" it has developed valuable criteria that could "evaluate primary health care systems across Canada", which it could "market and 'sell'" to other governments that are struggling to assess there own primary health care programs. The Ministry concludes that it, therefore, has a "proprietary interest in the evaluation criteria."

With regard to meeting the three part test under section 18(1)(a), the Ministry's representations touch on the second and third elements but do not directly address the first element. However, based on my review of the records at issue, it would appear that the only category that might apply under the first element is "commercial information".

Commercial information is defined as information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].

I am prepared to accept that the evaluation criteria at issue qualify as commercial information since it is used to assess proposals submitted by private sector entities for health care funding, which in my view constitutes a commercial purpose.

With respect to the second element, for information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trademark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information. [PO-1763, PO-1783, PO-2226]

In each of the above examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts

will recognize a valid interest in protecting the confidential business information from misappropriation by others [Order PO-1805 and Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.)]

The Ministry has not established that the evaluation criteria contained in the records "belongs to" it in the sense described above. The Ministry's representations in this respect are vague and do not include any reference to particular passages in the records that might contain information that it claims to own. I understand that the Ministry asserts that it has an expectation of confidentiality. I also acknowledge the Ministry's view that the evaluation criteria are the product of diligent research, expertise and experience. However, in my view, the Ministry's representations, and in particular, the information at issue in the records, do not support such a finding.

The evaluation criteria contained in these records consists of checklists of questions and suggested responses that the evaluator would follow - much in the form of a roadmap - to guide him/her through the assessment process. In my view, the evaluation criteria are generic in nature and would be ascertainable to any prospective applicant for funding familiar with the PHCTF program. For example, Health Canada's website provides a link to a site dedicated to the PHCTF (www.hc-sc.gc.ca/hcs-sss/prim/phctf-fassp/index_e.html), which provides a wealth of publicly available information regarding the goals and objectives and funding guidelines for the five funding envelopes that are the focus of the program. In my view, it is reasonable to expect that an individual who is familiar with the program could infer the evaluation criteria with a reasonable degree of accuracy from these publicly available goals and objectives. For obvious reasons, I cannot provide specific examples. I find that the evaluation criteria do not on their face or in the circumstances reveal that they are the product of diligent research, expertise and experience.

In the circumstances, I am not persuaded that the Ministry has any proprietary interest in the records in the traditional intellectual property sense. Further, I am not persuaded that the information is in the nature of a trade secret that the courts would protect from misappropriation as confidential business information deriving its value from not being generally known.

Furthermore, even if I were to find that the information "belongs to" the Ministry, I am not satisfied that it has monetary value or potential monetary value. In my view, the information at issue represents a merely roadmap or checklist for evaluators to follow, which is comprised of generic questions that would be known to any person or organization seeking approval of a proposal for primary health care funding.

Accordingly, even if I were to permit the Ministry to rely on section 18(1)(a), I find that it would not apply.

Section 18(1)(b): research

Section 18(1)(b) is a harms based discretionary exemption. This means that the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)].

For section 18(1)(b) to apply, the institution must show that:

(i) the record contains information obtained through research of an employee of the institution, and

(ii) its disclosure could reasonably be expected to deprive the employee of priority of publication.

Previous orders have upheld the exemption in circumstances where cogent evidence was provided to support the position that an employee intended to publish a specific record [Order PO-2166].

As stated above, the Ministry submits that the creation of the evaluation criteria is the result of "diligent research". This is the full extent of the Ministry's representations in relation to the application of this specific section.

Even if I were to find that the Ministry has met the first element of the test under this section, and this is not clear on the evidence before me, I find that the Ministry has not provided detailed and convincing evidence to establish that disclosure of this information could reasonably be expected to deprive a Ministry employee of priority of publication.

Accordingly, even if I were to permit the Ministry to rely on section 18(1)(b), I find that it would not apply.

Section 18(1)(d): injury to financial interests

As with section 18(1)(b), in order to qualify for exemption under section 18(1)(d) the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result by providing "detailed and convincing" evidence to establish a "reasonable expectation of harm".

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398].

The Ministry submits that disclosure of the evaluation criteria "could significantly injure the government's financial interests." The Ministry asserts that it would have to spend "additional money in order to have its employees and primary care experts develop new evaluation criteria, since the integrity of a fair and objective evaluation process would be compromised…" The Ministry views disclosure of the evaluation as being "analogous to providing answers in an examination question." The Ministry submits that it would be "reasonably forseeable" that disclosing the evaluation criteria would harm the "integrity and fairness" of the evaluation process and its financial interests. The Ministry states that the "additional time and expense" it would have to expend in developing new criteria would "likely have to be taken from another Ministry initiative…"

I acknowledge the Ministry's position. However, on my review of the evaluation criteria and the Ministry's representations, I am not convinced that disclosure of the evaluation could reasonably be expected to lead to the harms suggested.

As I found earlier in my discussion of section 18(1)(a), the evaluation criteria at issue consist of a checklist of generic questions and suggested responses that would be obvious to any reasonably informed person or organization planning to submit a funding proposal for a primary health care project. For example, the January 2004 Evaluation Criteria at issue in appeal PA-040311-1 seek to evaluate the relationship between the proposal and the basic objectives of the PHCTF, the regulated professions that are included in its scope, which particular goals are addressed, the general applicability of its results, the competence of the project design, and basic questions about the abilities of the proposed project team.

I have also reviewed the information at issue in appeal PA-040250-1 (September 2003 Evaluation and October 2003 Evaluation) and find that it is similar to the information at issue in appeal PA-040311-1 (January 2004 Evaluation Criteria).

In my view, the information contained in these records serves as a useful guideline for evaluators to follow to assess the responsiveness of a proposal to the mandate of the PHCTF. However, I am not satisfied that the Ministry has provided detailed and convincing evidence that disclosing this information could reasonably be expected to result in the financial harms it has suggested in its representations. As stated above, in my view, the questions and suggested responses are obvious to anyone mildly familiar with the mandate of the PHCTF. Therefore, I am unconvinced that revealing the contents of this information would require the development of new criteria. I do not see how knowing this information would give one applicant an advantage over another thus making the application process unfair.

In fact, in my view, making this information publicly available would serve to enhance the effectiveness and efficiency of the proposal process. Applicants armed with the evaluation criteria will be in a much better position to respond more directly to the mandate of the PHCTF in tailoring their proposals and the PHCTF would receive only the best quality proposals. The evaluation criteria do not refer to factors such as unit costs that can be artificially manipulated, but are instead subject to objective evaluation by the Ministry. In my view, public knowledge of

the criteria would actually enhance the Ministry's objectives here, and could not reasonably be expected to allow a party to harm the Ministry's or Ontario's economic interests. I do not see how having more, rather than less, competently prepared proposals would be harmful.

Accordingly, even if I were to permit the Ministry to rely on section 18(1)(d), I find that it would not apply.

As no other exemptions have been claimed for the records at issue in appeals PA-040250-1 and PA-040311-1, namely the September 2003 Evaluation and the October 2003 Evaluation (appeal PA-040250-1) and the January 2004 Evaluation Criteria (appeal PA-040311-1), I will order their complete disclosure to the appellant.

THIRD PARTY INFORMATION

The Ministry takes the position that the information contained in the record at issue in appeal PA-040251-1 (the Agreement) is exempt under section 17(1). As stated above, the Agreement is comprised of a contract and six attached schedules . In its representations the Ministry indicates that it is relying upon sections 17(1)(a) and (c), which read:

> 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; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 Ministry and/or the affected party must satisfy each part of the following three-part test:

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

2. the information must have been supplied to the 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.

The Ministry submitted representations on all parts of the section 17(1) test and I will consider them below.

The affected party chose not to submit representations during this inquiry despite being given an opportunity to do so. However, as stated above, during the request stage, and prior to issuing a decision on access to the appellant, the Ministry notified the affected party, which provided submissions regarding the disclosure of the information at issue in this record. I will reference and consider those portions of its submissions made to the Ministry that are responsive to the three-part test under section 17(1). The affected party takes the position that its information qualifies for exemption under section 17(1)(a) and in some cases also under section 21(1). I will address the application of the section 21(1) exemption below under my discussion of "personal information".

The appellant did make representations that refer to section 17(1); however, they do not address the three-part test under section 17(1).

Part 1: type of information

Representations

The Ministry states that the record at issue is "the agreement between the Ministry and a [named] third party, who satisfactorily met the Ministry's evaluation criteria in order to qualify for PHCTF." The Ministry submits that this record contains commercial information including the affected party's methodologies and the services that the Ministry is "purchasing" with respect to the provision of particular health care services in northern Ontario through the funding of the affected party.

The Ministry states that Schedule B to the agreement formed part of the affected party's application to the Ministry and outlines the affected party's "service delivery methodology".

The Ministry states that Schedule D to the agreement contains financial information, including "detailed pricing information about the proposed fees of employing particular health professionals, using information technology and travel and accommodation for a particular time period."

The affected party states that the Agreement contains "detailed budgeting information" and "detailed information on [its] costing structure."

Analysis and findings

The terms "commercial information" and "financial information" have been defined as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I have reviewed the contents of the Agreement and I am satisfied that this record contains commercial information, since it sets out the agreed upon terms of a commercial relationship between the affected party and the Ministry involving the provision of funding by the Ministry to the affected party pursuant to the PHCTF program for the implementation of a health care project.

In addition, I am satisfied that some of the severed information in this record contains financial information, including a breakdown of implementation costs for the project, as set out in Schedule D of the Agreement.

Part 2: supplied in confidence

Introduction

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

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where

the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. The Divisional Court recently upheld as "reasonable" this office's approach on this issue, finding that information in a negotiated contract had not been "supplied" to the institution in question [*Boeing v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851, leave to appeal refused (November 7, 2005), Doc. M32858 (C.A.)].

The Ministry submits that the Agreement, particularly Schedule B (described above by the Ministry as the affected party's "service delivery methodology"), was supplied by the affected party to the Ministry in response to the Ministry's website announcement inviting applications for PHCTF funding. This is the extent of the Ministry's representations regarding the "supplied" element under part 2 of the test under section 17(1).

The affected party submits that the Agreement describes its "unique and innovative evaluation techniques" and contains "detailed budgeting information that was intended only to provide justification to the Ministry for [its] funding needs."

The main part of the Agreement (the Main Agreement) is simply a contract whereby the Ministry agrees to provide funding to the affected party in exchange for health care services to be provided by the affected party. It may be the case that there was little or no negotiation prior to the creation of the Main Agreement, and that some of the information in it reflects information that originated from the affected party, but this does not negate the application of "supplied" versus "mutually generated" principle [see Orders PO-2018, MO-1706 and the *Boeing* case].

As I stated in Order MO-1706, an exception to this approach may exist where an affected party or the institution have provided convincing evidence that disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution. This is what British Columbia Information and Privacy Commissioner David Loukidelis coined the "inferred disclosure" exception [see British Columbia Order 01-20].

In this case, neither the Ministry nor the affected party has provided me with evidence that any of the information in the Main Agreement meets the inferred disclosure exception or was in any other way "supplied" by the affected party to the Ministry within the meaning of section 17(1). It cannot be said that any of this information may be considered the "informational assets" of the affected party [see *Boeing*]. Accordingly, with regard to the Main Agreement itself, I find that part 2 of the three-part test under section 17(1) has not been met.

Turning to the schedules, I find that the contents of Schedules A, C, D, E and F also comprise terms and conditions that were negotiated between the Ministry and the affected party, and cannot be described as the affected party's "informational assets".

The following generic descriptions of the schedules support this conclusion:

- Schedule A sets out the terms for payment of grant funding by the Ministry to the affected party

- Schedule C sets out the timelines for completion of the project for which the Ministry has agreed to provide funding

- Schedule D sets out the affected party's budget for specific cost categories, namely human resources, supplies and equipment and overhead that the affected party agreed to adhere to and which the Ministry accepted in agreeing to provide funding to the affected party

- Schedule E sets out specific terms relating to the affected party's reporting obligations, to the Ministry, in accordance with a reporting plan provided in an appendix, as well as a statement of goals and deliverables for the project

- Schedule F sets out terms governing the relationship between the affected party, its "collaborating parties" (sub-contractors) and the Ministry

In my view, the information contained in these schedules sets out agreed upon contractual terms that govern the relationship between the Ministry and the affected party in regard to the implementation of the affected party's proposed project. With regard to Schedule C, in particular, while I understand that the affected party takes the position that the budgeting information was intended only to provide justification to the Ministry for its funding needs, it is clear that this document establishes clear contractual expectations regarding costing and funding and that these figures comprise agreed upon terms of the Agreement.

The information contained in Schedules A, C, D, E and F is contractual in nature. None of the information qualifies as the affected parties' informational assets. Therefore, these schedules cannot be considered to have been supplied pursuant to part 2 of the test under section 17(1). In conclusion, I find that part 2 of the three-part test under section 17(1) has not been met with regard to Schedules A, C, D, E and F.

Dealing with Schedule B, I view it differently from those discussed above.

In Order PO-2371, Adjudicator Steven Faughnan dealt with an attachment to a contract described as a "Design Intent Drawing Sample" that had been provided by an affected party. Adjudicator Faughnan found that the attachment had been "supplied" within the meaning of section 17(1). In his analysis, Adjudicator Faughnan referred to an exception to the general principle that information in a negotiated contract will not be found to have been "supplied" where the information is relatively "immutable" or not susceptible of change [see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.)].

Based on the submissions of the Ministry and the affected party and my review of Schedule B, I have concluded that it sets out the affected party's philosophy and methodology. In my view, like the drawing sample referred to in Order PO-2371, the information in Schedule B was not a product of negotiation, nor can it be considered an agreed upon term. Therefore, I find that it was "supplied" to the Ministry within the meaning of section 17(1).

In Confidence

Given my findings below, I have decided it is not necessary to consider the "in confidence" element of part 2 of the three-part test under section 17(1).

However, I will consider whether any of the information at issue in the Agreement meets the part 3 "harms" test.

Part 3: harms

General principles

To meet this part of the test, the Ministry and/or the affected 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].

In this case, the affected party and the Ministry have raised the application of sections 17(1)(a) and (c) to the information at issue in the Agreement.

Section 17(1)(a): prejudice to competitive position

Representations

In its letter to the Ministry the affected party states that the Agreement describes its "unique and innovative evaluation techniques", which if shared with the public could "prejudice significantly [its] competitive position when applying for further funding to see the project through to its final stages." The affected party states that the Agreement also contains detailed information on its "costing structure" and, in particular, "reveals salary and benefit details for individuals working on the project."

The Ministry submits that the Agreement contains "detailed and specific information relating to a service delivery model" that the affected party proposed to employ for the implementation of a primary health care project. The Ministry states that disclosure of this information could "reasonably be expected to prejudice [the affected party's] competitive position" with other "non-profit health care organizations" because it would "reveal the details of [the affected party's] commercial and financial operations." The Ministry adds that disclosure of this information would harm the affected party's "competitive position in the provision of primary health care services in Northern Ontario."

In support of its arguments on harm to the affected party's "competitive position" the Ministry draws a parallel to the circumstances in Order PO-1818. The Ministry states that the adjudicator found in that case that the disclosure of affected parties' methodologies outlined in their proposals, which included the description of how they perform their work, could result in prejudice to their competitive position, as competitors could make use of the methodologies and tailor them to their own proposals.

Analysis and findings

The Ministry has made an attempt to provide evidence of harm to the affected party, arguing that if the portions of the Agreement that address the affected party's service delivery model and methodologies are disclosed, the affected party's competitive position in the provision of primary health care could be prejudiced. In making this submission, the Ministry has referenced Order PO-1818. In that case, Adjudicator Donald Hale did find the affected parties' pricing practices and methodologies, as well as the information relating to previous clients, which each submitted in response to a Request for Proposal (RFP), met the harms test under sections 17(1)(a) and (c). However, in my view, the circumstances in Order PO-1818 are distinguishable. In Order PO-1818 Adjudicator Hale received submissions from 11 of 15 affected parties he notified and he states that "[s]everal outline in detail the efforts which they have expended in preparing each proposal and have attempted to demonstrate the unique nature of the work which went into its formulation."

In further describing the affected party's representations, Adjudicator Hale states:

> Each firm has its own way of responding to RFPs, as is reflected in the various proposals themselves. They submit that the proposals are the product of significant research and development, derived from their experience in the industry in supplying similar services to public and private sector clients. The research which went into each proposal required the expenditure of time and money. The affected parties argue that by disclosing the fruits of these efforts, their competitors would gain an unfair advantage and they would suffer an undue loss. As I noted above, the business/management consulting industry is highly competitive, as is evidenced by the number of firms which made submissions in response to this RFP.

> The affected parties concern about disclosure extends not only to the format of the proposals themselves, but also to the recommended strategies and methodologies contained therein. In other words, not only the form, but also the content, of the proposals have a commercial value and ought not to be disclosed.
>
> Each of the affected parties who made representations expressed particular concern about the disclosure of their pricing practices, the methodologies for performing the work required by the RFP, their previous clients and, in some cases, the names and titles of the employees who would perform the work. They argue that the disclosure of pricing strategies would enable competitors to undercut them in future competitions for similar work, thereby gaining an unfair advantage. In addition, the disclosure of the methodologies contained in the proposals would result in competitors being able to make use of the expertise of the firm at no cost to them in future competitions for similar work.
>
> Similarly, the affected parties expressed concern with the disclosure of any information from their proposals which may be contained in the evaluation documentation. The comments made by the evaluators about the strengths and weaknesses of each proposal could allow a logical inference to be made as to the actual contents of the proposal.

In this appeal, no reasonable expectation of the harm mentioned in section 17(1)(a) is apparent from a review of the record itself, and the affected party has provided scant detail of how disclosure of its "unique and innovative evaluation techniques" or its "costing structure" could reasonably be expected to prejudice its competitive position. The affected party provides a cursory statement regarding possible prejudice after being notified by the Ministry at the request stage. The affected party's submissions read as speculative conclusions that fail to provide persuasive evidence of how these potential harms could reasonably be expected to occur in the circumstances. I also note that despite being given an opportunity to submit representations during this inquiry, the affected party did not do so.

The Ministry has provided representations that forecast harms that could accrue to the affected party. However, these again lack detail and particulars of how these harms could reasonably be expected to prejudice the affected party's competitive position. In any event, the affected party is in the best position to provide details regarding competitive harm and it has failed to provide persuasive evidence in that regard.

In conclusion, I find that the affected party's and the Ministry's representations are highly speculative. In my view, neither the records themselves nor the representations of the parties provide detailed and convincing evidence that disclosure of this information could lead to a reasonable expectation of the harm identified in section 17(1)(a) to the affected party.

Section 17(1)(c): undue loss or gain

Representations

The affected party states that disclosure of its unique and innovative evaluation techniques will also result in "undue loss" to its organization through "reduced innovativeness" in approach to primary care in Ontario.

The Ministry states that disclosure of Schedule B would provide the affected party's competitors with the affected party's "delivery model without investing the significant time and expense that [it] incurred to develop and tailor the model" to this project. The Ministry also submits that the affected party's competitors could use the information in Schedule D in future proposals for health care projects.

In addition, the Ministry states that "since [the Agreement] contains detailed commercial and financial information, including a description of the specific service delivery model and its associated costs", disclosure of the Agreement would result in "undue gain" to the affected party's competitors who are also competing for primary health care funding. Finally, the Ministry submits that if the affected party's competitors "learn [the affected party's] expenses for delivering a certain type of primary care services", then the affected party's competitors "may undercut their own prices in attempts to win future RFPs."

The Ministry, therefore, submits that knowledge of the affected party's cost structure will provide its competitors with "an undue gain regarding the pricing of primary care services."

Analysis and findings

With respect to the section 17(1)(c) harm provision, I find that my analysis under section 17(1)(a) applies to a large extent, given that the arguments of the Ministry and the affected party under paragraph (a) are very similar, to those underpinning paragraph (c).

The Ministry has attempted to identify some sources of potential harm in the event portions of the Agreement are disclosed. However, it has failed to demonstrate how disclosure of the information in Schedules B and D could lead to a reasonable expectation of undue loss to the affected party.

Again, the affected party is in the best position to address harms under this section and it has not provided detailed and convincing evidence that disclosure of the Agreement and, in particular Schedules B and D, could lead to the harms suggested by the Ministry or any other possible harms.

The records themselves also do not substantiate a reasonable expectation of the harm identified in section 17(1)(c). For example, my review of Schedule D indicates that it contains budgeting information for a particular primary health care project. In my view, its relevance is limited to

this project. Therefore, I fail to see how the affected party's competitors could use this information to gain an advantage over the affected party in bidding for future funding projects. It is also not apparent how the disclosure of Schedule B or the remainder of the Agreement could reasonably be expected to have this result.

In conclusion, I find that the harm aspect of the section 17(1)(c) test has not been established for the information at issue.

Subject to my decision regarding the application of section 21 to portions of the Agreement, I will order the disclosure of this record in its entirety to the appellant.

PERSONAL INFORMATION

General principles

The Ministry has raised the application of the mandatory exemption found at section 21(1) to portions of information in the Agreement. As stated above, the affected party has also raised the application of section 21(1).

Because this exemption can only apply to "personal information", I must first determine whether this record in fact contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,

> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Representations

The Ministry states that Schedule D of the Agreement contains the personal information of individuals who work and reside in a named community that is the subject of the project for which it provided funding to the affected party. The Ministry states further that Schedule D "discloses the costs of employing certain types of health professionals by the affected party" to deliver the projects for which it received the funding. The Ministry submits that the named community is "a small community in northern Ontario whereby the identity of individuals can be derived by their respective job titles. Citing Order MO-1441, the Ministry states that where records involve "incidents and individuals of a small community" and an individual can be identified even if their name and address can be severed, the information at issue will qualify as their personal information. In this case, the Ministry submits that once an individual's profession is disclosed in a small community their personal identity can be ascertained as well.

The affected party states in its letter to the Ministry that the financial information contained in the Agreement (Schedule D) "reveals salary and benefit details for individuals working on the

project." The affected party adds that "two employees are carrying out the project and the budgets for each component have been completed separately." The affected party suggests that "anyone with access to this contract will have personal information of these individuals." The affected party states while these individuals are "not specifically named", due to the "high levels of promotion in the region with specific identification of the individuals" disclosure of the detailed salary and benefit information "may be in breach of section 21(1)."

The appellant does not provide representations that are responsive to this issue.

Analysis and findings

Having considered the Ministry's representations, the affected party's position and the contents of the Agreement, I find that most of the information at issue does not constitute the personal information of any individuals within the meaning of section 2(1).

I acknowledge that there are references to individuals in the body of the Agreement, including their names, positions and business addresses. However, in my view, this information is associated with these individuals in a professional or business capacity and does not reveal anything of a personal nature about them. It is, therefore, not information "about" these individuals within the meaning of the definition of personal information in section 2(1).

Schedule D provides a breakdown of costs for the implementation of the project, including costs for human resources, supplies and equipment and miscellaneous items. I note that under the human resources cost category the salaries for 2004/05 and 2005/06 relating to three job titles are listed.

Due to the small size of the community that the project is intended to service and the apparent publicity surrounding its implementation, I agree that it would not be difficult for someone in the community to ascertain the identity of the individuals filling the three job titles.

In addition, although the information relates to these individuals in a professional capacity, I find that specific salary information "crosses the line" and reveals something of a personal nature about the individuals. This conclusion is supported by paragraph (b) of the definition of "personal information" which refers to "financial transactions" of individuals" [see also Order P-380].

Therefore, I find that the individual salary figures for 2004/05 and 2005/06 listed in Schedule D, corresponding to the three job titles, constitute the personal information of identifiable individuals.

Having found that these individual salary figures qualify as the "personal information" of identifiable individuals under section 2(1) of the *Act*, I will now determine the application of section 21(1) to this information.

PERSONAL PRIVACY

Once it has been determined that a record contains personal information, section 21(1) of the *Act* prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f). In order for this section to apply, I must find that disclosure of the personal information would *not* constitute an unjustified invasion of personal privacy.

The appellant states that disclosure would not be an unjustified invasion of personal privacy under section 21(1)(f) for the following reasons:

- the identity of the affected party has already been released
- the affected party did not make representations
- the affected party has charitable status and, as a result, a significant amount of information (including financial records, names of Board Members, etc.) is a matter of public record

While I acknowledge the appellant's views, I find that they are not sufficient to establish that disclosure would not be an unjustified invasion of personal privacy in the circumstances of this appeal. The identity of the affected party and the fact that it did not make representations are irrelevant to this issue. The fact that financial records and board members' names are a matter of public record does not address the question of whether disclosure of salary information would constitute an unjustified invasion of personal privacy, let alone prove that it would *not* do so. Nor do the records themselves provide evidence to support this conclusion.

In the absence of evidence or argument demonstrating that disclosure would *not* constitute an unjustified invasion of personal privacy, the section 21(1)(f) exception to the mandatory exemption at section 21(1) of the *Act* is not established, and I find that the individual salary figures for the three job titles qualify for exemption under that section.

As noted above, the appellant has raised the application of the section 23 "public interest override" in the circumstances of this appeal. I will consider this issue below.

In conclusion, subject to the application of section 23, I find the personal information contained in Schedule D of the Agreement exempt under section 21(1) of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the

record clearly outweighs the purpose of the exemption.

Here, the issue is whether section 23 can override the application of section 21 to the salary information.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

The appellant has provided fairly extensive representations on this issue. The crux of his submissions appears to be that the PHCTF is a matter of significant public interest since it will result in changes to primary health care delivery that will impact on all Canadians. The appellant feels strongly that there is a public interest in the disclosure of the information at issue in this appeal to ensure government accountability and transparency in the use of taxpayer's money for the implementation of the PHCTF program.

I acknowledge the appellant's views. However, I note that as a result of this inquiry the appellant stands to obtain access to most of the information at issue in this appeal. The only information not ordered to be disclosed is the individual salary figures set out in Schedule D that I have found exempt under section 21(1). In my view, any compelling public interest in disclosure that may exist is satisfied by the degree of disclosure required under this order. The evidence before me, including the withheld information in Schedule D, does not support a finding that there is a compelling public interest in the disclosure of that particular information. Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

FEES

General principles

Where the institution's fee is $100 or more, its fee estimate may be based on either:

- the actual work done by the institution to respond to the request, or

- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[Order MO-1699]

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees that could apply in the circumstances of this appeal are found in sections 6, 7 and 9 of Regulation 460 under the *Act*.

Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.
>
> 7. (1) If a head gives a person an estimate of an amount payable under the *Act* and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under Subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

In this case, the issue for me to determine is whether the Ministry's revised fees in the amount of $234.20 (appeal PA-040250-1) and $240.00 (appeal PA-040251-1) comply with the fee provisions in the *Act* and Regulation 460 and should be upheld.

Parties' representations

With regard to its revised $234.20 fee for the records responsive to appeal PA-040250-1, the Ministry provides the following itemized breakdown in its revised decision letter:

Search time (6 hours @ 30.00 per hour)	$180.00
Preparation time (44 pages)	$44.00
Photocopies (51 pages @ $.20 per page)	$10.20
TOTAL COST	$234.20

In its representations the Ministry elaborates on the calculation of this fee, stating that it was based on "the actual work done to respond to this request after the request was clarified and narrowed." The Ministry states that "over 400 proposals were received and sorted through to find the necessary information" for the appellant. The Ministry submits that the "action required to prepare the records for disclosure is the physical severing of the documents." The Ministry indicates that "there were 44 records severed and therefore $44.00 was charged for the preparation of the request."

With regard to its revised $240.00 fee for the records responsive to appeal PA-040251-1, as set out above, the Ministry submits that it "based its fee on actual work done to respond to this request after the request was clarified and narrowed." The Ministry states that it reduced its fee to a total of $240.00 based on eight hours of search time at $30.00 per hour.

The appellant does not make any representations regarding the calculation of the $234.20 fee for appeal PA-040250-1. With regard to the $240.00 fee for appeal PA-040251-1, the appellant states that the responsive record "was one of 45 contracts [agreements] initially identified in a 26 March 2004 news release by [the Ministry]." The appellant states that a search of 45 agreements "would not take 8 hours." The appellant submits that "any errors or poor file organization with respect to which files should be searched should not be billed to the appellant when clear identification of the requested records was provided."

The Ministry was given an opportunity to reply to the appellant's representations and while it did respond to many issues addressed by the appellant it chose to not respond to the appellant's representations regarding the calculation of its fee for appeal PA-040251-1.

Analysis and findings

Neither party has provided representations that are particularly helpful in deciding this issue.

With regard to the $234.20 fee for the records in appeal PA-040250-1 the Ministry has provided a breakdown of the component parts of its fee and the appellant has not provided any submissions challenging the fee. The Ministry justifies its $180.00 search fee on the basis that 400 proposals were searched over a period of six hours. The Ministry substantiates its $44.00 preparation fee on the basis that 44 previously disclosed records were severed. Based on the fee provisions of the *Act* and Regulation 460 (section 57(1)(b) of the *Act* and item 4 in section 6 of the Regulation), which allow a fee of $30 per hour for preparation time, it would appear that the fee for severing the records has been assessed at two minutes per page, which has been accepted in a number of previous orders (e.g. Order P-565) and which I find to be reasonable in the circumstances.

I am satisfied that the search and preparation fees for appeal PA-040250-1 are reasonable based on the work that Ministry staff performed in processing the appellant's narrowed request. Accordingly, I find that the search and preparation fees are in compliance with the *Act* and regulations. In addition, I am satisfied that the $10.20 charged for photocopies is in accordance with Regulation 460. However, with regard to future appeals involving a fee issue, I would strongly encourage the Ministry to provide significantly greater detail regarding the work of Ministry staff in searching and preparing records for release.

With respect to the $240.00 search fee for the records in appeal PA-040251-1, in my view the Ministry's representations fall far short of providing a reasonable explanation for the calculation of this fee. The Ministry has not provided any information regarding the necessary actions taken to locate the requested records or the estimated or actual amount of time involved in each action. Accordingly, I will reduce the Ministry's search fee by four hours to the amount of $120.00. Since the appellant has paid the full $240.00 fee I will order the Ministry to refund the amount of $120.00 to the appellant.

FEE WAIVER

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 57. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed in the regulations.
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the *Act*:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

In reviewing a decision by an institution denying a fee waiver, this office may decide that all or part of a fee should be waived [Order MO-1243].

It has been established in a number of previous orders that the person requesting a fee waiver must justify the request and demonstrate that the criteria for a fee waiver are present in the circumstances [Orders 10, 111, P-425, P-890, P-1183 and P-1259].

In the appellant's written request for a fee waiver (at the time he was requesting a fee waiver on all three requests) he states that "the dissemination of these records will benefit public health by increasing public awareness of work being pursued as part of the [PHCTF]."

The appellant was then afforded an opportunity to provide representations during this inquiry to justify its request for a fee waiver specifically in respect of the fees paid in appeals PA-040250-1 and PA-040251-1. The only comment made by the appellant that is responsive to the fee waiver issue concerns his criticism of the Ministry for alleged "delays in responding to the request for a fee waiver", which the appellant concludes were "unreasonable" and demonstrate that the Ministry was "acting in bad faith and/or for an improper purpose." However, the appellant does not directly address the criteria for a fee waiver.

As stated above, the appellant has also made representations on the application of the public interest override, in which he states that the PHCTF is a matter of "significant public interest to Canadians." The appellant also states that gaining access to this information is important for government accountability and that this information will "contribute meaningfully to the development or understanding of an important public health issue."

The Ministry submits that the subject matter of the records is of "general public interest only to the extent that they provide information regarding the use of taxpayers' money." The Ministry states that the records at issue "do not relate to a public health or safety issue." The Ministry submits that the records contain commercial information and personal information and that the dissemination of the records "will not yield a public benefit because they do not disclose a public health/safety concern and they do not contribute meaningfully to the development or understanding of an important health or safety issue." The Ministry concludes that the appellant has "provided no evidence that he will be disseminating the records [publicly]."

Based on the appellant's request for a fee waiver and his representations it is clear that he is relying on section 57(4) (benefit to public health or safety) to justify his request for a fee waiver.

In prior orders of this office, the following factors have been found relevant in determining whether dissemination of a record will benefit public health or safety:

- whether the subject matter of the record is a matter of public rather than private interest

- whether the subject matter of the record relates directly to a public health or safety issue

- whether the dissemination of the record would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

I acknowledge the appellant's comments regarding fee waiver, and it may be the case that the records at issue are of general public interest. However, the analysis does not end there. In my view, the appellant has not demonstrated that the subject matter of the records relates directly to a public health or safety issue or that the dissemination of the records would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of an understanding of an important public health or safety issue.

The appellant has made a vague reference to the dissemination of these records benefiting public health by increasing public awareness of work being pursued as part of the PHCTF. However, the appellant has provided no information regarding how disclosure of these records will achieve this end. Finally, the appellant has not given any indication regarding the probability of disseminating these records publicly.

In conclusion, I dismiss the aspect of the appeal regarding the appellant's request for a fee waiver.

ORDER:

1. I order the Ministry to disclose the September 2003 Evaluation, October 2003 Evaluation and January 2004 Evaluation Criteria to the appellant in their entirety by **January 6, 2006**.

2. I order the Ministry to disclose portions of the Agreement to the appellant by **January 11, 2006** but not before **January 6, 2006**, in accordance with the highlighted version of this record included with the Ministry's copy of this order. To be clear, the Ministry should not disclose the highlighted portions of this record.

3. I order the Ministry to reduce its fee in respect of appeal PA-040251-1 from $240.00 to $120.00 and to refund to the appellant any amount in excess of $120.00.

4. I uphold the Ministry's denial of fee waiver in regard to appeals PA-040250-1 and PA-040251-1.

Original signed by: December 7, 2005
Bernard Morrow
Adjudicator