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

ORDER PO-2435

Appeal PA-030311-2

Ministry of Health and Long-Term Care

Smart Systems for Health Agency

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to the province's e-Physician Project (ePP), including the Smart Systems for Health Agency (SSHA). Specifically, the requester sought access to records including Request for Proposals, contracts, invoices, timesheets, reports and memos related to consultants hired for the project.

The Ministry issued an interim decision letter including a fee estimate of $8,820 for processing the request. The requester then narrowed his request to the following:

- a list of all consultants hired for the E-Physician Project
- a description of what each consultant was hired to do, and
- how much each consultant was paid or is being paid.

Based on the narrowed request, the Ministry issued a revised fee estimate in the amount of $1,788.14. The requester, now the appellant, appealed the fee estimate.

During mediation, the appellant requested that the Ministry waive the fee, and the Ministry denied this request. The issues of the amount of the fee estimate and the denial of a fee waiver were resolved by Order PO-2255, which upheld the decision of the Ministry not to waive the fee, but ordered the Ministry to reduce the fee to $193.00.

On receipt of the fee payment of $193.00, the Ministry issued a decision granting partial access to the records. The Ministry denied access to portions of the records pursuant to the mandatory exemptions at sections 17(1) (third party information) and 21(1) (invasion of privacy) of the *Act*.

The appellant appealed the Ministry's decision.

During mediation, it became clear that, in addition to withholding information on the basis of the section 17(1) and 21(1) exemptions, the Ministry had identified additional portions of one of the records as non-responsive to the request and had withheld those portions from the appellant. The appellant confirmed that he wished to pursue access to all of the withheld portions of the records, including those that the Ministry identified as non-responsive. Responsiveness was added as an issue in the appeal.

Further mediation was not possible and the file was transferred to the adjudication stage of the appeal process.

I began my inquiry by sending a Notice of Inquiry to the Ministry and 85 affected parties. The affected parties were asked to address only Issues A (sharing of representations), C (third party information), D (personal information) and E (invasion of privacy), but not Issue B (responsiveness of records), while the Ministry was asked to address all issues. In its representations, the Ministry pointed out that, at the time of the appellant's original request, SSHA was not listed as a separate institution under Regulation 460 of the *Act*. It was a distinct organization within the Ministry. However, it subsequently became an institution under the *Act*, separate and apart from the Ministry. A Notice of Inquiry was therefore also sent to SSHA as an institution.

I received representations from the Ministry and from SSHA. I also received responses from 32 of the affected parties.

I then shared the Ministry's and SSHA's representations with the appellant and he responded with his own representations. I decided not to share the affected parties' responses with the appellant because all of the essential points in support of the exemption claims are covered in the Ministry's and SSHA's representations.

Because both the Ministry and SSHA have responsive records within their custody or control, I am directing this order to both institutions.

RECORDS:

The records at issue in this appeal have been broken down to three separate groups. They are as follows:

Record 1: Record 1 consists of eight pages from SSHA. SSHA claims section 17(1) applies to portions of this record; more specifically, to the daily rates charged by consultants. SSHA also claim that portions of the record are non-responsive to the appellant's request.

Record 2: Record 2 is a 7-page contract log labeled as document 1A. The log is a summary of the service level agreements and business cases that comprise Record 3. The Ministry claims that section 17(1) applies to portions of the record; specifically to the per diem and ceiling amounts charged by vendors. The Ministry also claims section 21(1) applies to other portions of this record.

Record 3: This consists of 61 records comprised of both service level agreements and business cases. Each agreement contains between 8 and 13 pages and is given a separate document number, from document number 1 through document number 61. The Ministry claims that section 17(1) applies to portions of the service level agreements and that section 21(1) applies to portions of the business cases.

DISCUSSION:

RESPONSIVENESS

SSHA denied access to portions of Record 1 on the grounds that the information is non-responsive to the request.

As indicated, Record 1 is an eight page charted list of consultants contracted by SSHA. The list contains information on 72 contracts. SSHA submits that only 11 of those contracts relate to the ePP and are therefore covered by the scope of the request. SSHA takes position that the other 61 contracts did not relate to the ePP and are non-responsive to this request.

The appellant's request does specifically ask for, "a list of all consultants hired for the e-Physician Project". Having reviewed the record, and having no evidence to the contrary, I agree that those specific 61 contracts in Record 1 are not responsive to the appellant's request.

Record 1 also contains the start and end date for contracts that are responsive to the appellant's request as well as the number of days worked each month under those contracts. SSHA argues that these dates are not responsive to this request. In its representations, SSHA states the following:

> In its initial representations to the Ministry, SSHA indicated that it considers the start and end dates of employment of all consultants as personal information pursuant to s.21(1)(f) and 21(3)(d) of FIPPA.
>
> However, as a result of a reconsideration of this information in light of the clarified request, SSHA now asserts that this information does not fall into any of the following categories of information:
>
> - A list of all consultants hired for the ePP;
> - A description of what each consultant was hired to do; and
> - How much each consultant was paid or is being paid.
>
> Information on start and end dates of employment of consultants does not provide any information that is of relevance in light of the above noted categories of information. As such, this information should be considered not responsive to the request and should be withheld in full.

SSHA makes a similar argument with regard to the number of days worked each month by the consultants.

With respect, I do not agree with SSHA on this issue. I find this to be an overly narrow interpretation of the appellant's request. The start and end dates of the contracts are highly relevant to the issue of how much each consultant is being paid. Simply providing a per diem rate, without a start and end date, does not provide sufficient context to assess the financial impact of the contract on SSHA, and by extension, the taxpayers of the province. Similarly, the number of days worked each month by the consultants provides a necessary context to understand the financial arrangement between SSHA and the consultants. Therefore, I find that the start and end dates and the number of days worked per month for responsive contracts in Record 1 are responsive to the appellant's request.

THIRD PARTY INFORMATION

Section 17(1) is identified as the only exemption applicable to Record 1. Section 17(1) has also been claimed as the only exemption for the Service Level Agreements (SLAs) of Record 3 and those parts of Record 2 relating to the SLAs.

Although initially, the Ministry relied on section 21(1) of the *Act* as the only exemption for the SLAs and Record 2, in its representations the Ministry claimed the mandatory exemption at section 17(1) of the *Act* for the SLAs and Record 2 and withdrew the section 21 exemption from the SLAs only. SSHA provided the representations for Record 1. I will consider the section 17 exemption for Record 1, Record 2 and the SLAs of Record 3.

Section 17(1) (a) (b) and (c) state:

> 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (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)(a), (b) or (c) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

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

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) or (c) of section 17(1) will occur.

Part 1: type of information

The Ministry and SSHA take the position that these three records contain either "commercial information" or "financial information". Previous orders have defined these terms 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 [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].

The Ministry submits that Record 2 and the SLAs of Record 3 contain specific and detailed per diem and fee ceiling amounts which amounts to "commercial information" and "financial information". SSHA submits that Record 1 explains in detail the vendor's rates and prices for the provision of service and qualifies as "financial information".

I concur. These records are the basis of a commercial arrangement entered into by the Government of Ontario and vendors for the services related to the ePP. The records contain a breakdown of the rates charged and ceiling amounts for services by the affected parties. Clearly, these records meet the definitions of both "commercial information" and "financial information".

Therefore the requirements of Part 1 of the section 17(1) test have been established.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the Ministry and SSHA must establish that the information was "supplied" to the Ministry by the affected parties "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be "supplied" to an 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 (Orders PO-2018, MO-1706).

Service Level Agreements (Group 3)

The Service Level Agreements (SLAs) are contracts between the Ontario Family Health Network (the organization within the Ministry that hosted the ePP) and named consultants. The SLAs originated from a Request for Proposal (RFP) issued by Management Board Secretariat (MBS).

In Order MO- 1706, Adjudicator Bernard Morrow states:

> … [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "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". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

In its representations the Ministry describes the process which led to the SLAs' creation:

> MBS issued an RFP for the provision of information technology services on behalf of Ministries and Schedule 1 Agencies. Successful proponents who responded to the RFP were selected, and were required to enter into a Vendor of Record (VOR) agreement with MBS, in accordance with the terms and conditions of the RFP. The VOR agreement provided that if a Ministry/Agency required the services of a particular Vendor, they would have to enter into an SLA with that Vendor. The form of the SLA was itself prescribed in the VOR.

The Ministry's representations acknowledge that the SLAs are contracts but explain why they believe they still qualify as "supplied":

> Although the Record 3 consists of contacts, the per diem information in the Appendices of each of these contracts was not a negotiated item. As described under the heading "Records at Issue", these agreements resulted from the issuance of a MBS RFP. Proposals submitted by potential vendors in response to government RFPs are not negotiated; a vendor's per diem rates in particular, as contained in their proposals, cannot be a negotiated item. The Ministry either accepts or rejects the proposal in its entirety.

As in Order MO-1706, just because the SLAs may substantially reflect the terms of the RFP, it does not necessarily follow that they were "supplied" by the third parties within the meaning of section 17(1).

The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or SSHA, to claim that the per diem amount was simply submitted and was not subject to negotiation.

It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.

Further, upon close examination of each of these SLAs, I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

In summary, I find that the SLAs are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1).

Accordingly, it is not necessary for me to address the "in confidence" component of part 2 of the section 17(1) test before concluding that this part has not been established with respect to the SLAs.

Records 1 and 2

Records 1 and 2 are in effect chart form summaries of information from other documents. The affected parties' per diem rates, the contract ceiling and the dates worked are reflected in both documents. As noted, the contracts listed in record 2 for which the Ministry has relied on section 17(1) relate to the SLAs.

SSHA says of the per diems contained in Record 1 with respect to being supplied, "the record was supplied directly to the Ministry in confidence under the assumption that the rates are not to be shared with competing vendors".

The Ministry says of Record 2 with respect to being supplied: "the information in both Records 2 and 3A was originally 'provided' by the Vendors in their proposals, and accepted by the Ministry. As such, this information meets the supplied test".

The position put forward by the Ministry and SSHA on the issue of whether information in Records 1 and 2 was supplied to them is similar to that discussed above with relation to the SLAs. Following my reasoning set out above, I find that this information was not simply supplied to the Ministry and SSHA but were in fact part of a larger negotiation process when the RFP terms were transferred into contract form and agreed to by both parties.

Since none of the records for which the Ministry claims section 17(1) meets part 2 of the test, it is not strictly necessary to consider the "harms" component in part 3, but for the sake of completeness, I will do so.

Part 3: Harms

To meet part 3 of the test, the Ministry and the affected parties, as the parties resisting disclosure, must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

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

The Ministry makes the following comment in its representations on harms in relation to both Record 2 and the SLAs:

> Disclosure of the per diem rates and contract ceiling information could reasonably be expected to prejudice significantly the affected parties' competitive position by disclosing to their competitors their best price for consulting services provided for the EPP…This commercial and financial information could be used by

> competitors to undercut the consultant's bid in future contracts with the government and other entities.

SSHA makes the following statement with regard Record 1 and the harms test:

> The disclosure of the record will give rise to a reasonable expectation that one or all of the harms specified in section 17(1)(a), (b) or (c) will occur. The vendor's competitive position may be harmed as a competitor could obtain specific information about the vendor's business practices including an ability to determine the vendor's profit margins and mark-ups.

Having carefully reviewed the contents of the records, I am not persuaded that disclosing this information could reasonably be expected to result in any of the harms outlined in sections 17(1)(a), (b) or (c) of the *Act*.

Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".

Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

> …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and

> to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP, there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a),(b) and (c), this is not such a case. Simply put, I find that the institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

Accordingly, I find that the requirements of the part 3 harms component of sections 17(1)(a),(b) and (c) have not been satisfied.

In summary, I find that parts 2 and 3 of the section 17(1)(a),(b) and (c) test have not been established by the institutions. Because all three parts of the test must be established in order for a record to qualify for this exemption, I find that the withheld portions of records 1 and 2 and the SLAs of record 3 do not qualify and should be disclosed to the requester.

PERSONAL PRIVACY

I will now consider the remaining records at issue which are portions of Record 2 (items #39, #43, #46 and #49) and the associated business cases (BCs) which are part of Record 3 (which the Ministry identifies as Record 3B). The Ministry is seeking to exempt the names of the individual consultants listed in the four items of Record 2 together with the per diem and contract ceiling that relates to these individuals under section 21(1) of the *Act*. Similarly, the Ministry claims that the per diem information contained in Record 3B that relates to these individuals is exempt under section 21(1).

In order for a record to qualify for exemption under section 21(1), a record must contain "personal information", as defined in section 2(1) of the *Act*. Under this definition, "personal information" means recorded information about an identifiable individual including information relating to "financial transactions in which the individual has been involved" (paragraph (b)), or the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph (h)).

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].

In its representations in support of its position that the names of identified physicians contained in the records constitutes their "personal information" the Ministry states:

> Unlike all the other consultants listed in Record 2 and referred to in the SLAs of Record 3A as "Vendors", these individuals were physicians working in their individual capacity - - not as professional consultants - - providing expertise from a physician perspective. These individuals are therefore distinguishable from the professional consultants listed in Record 2 who were selected through the VOR process. Unlike those consultants, these physicians did not enter into SLAs with the Ontario Family Health Network.

As set out above, previous decisions of this office have drawn a distinction between information relating to an individual in a *personal capacity* and information relating to an individual in *a professional or official government capacity*. As a general rule, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The Ministry addresses this distinction in its representations:

> As the IPC explained in PO-1885, where a list of consultants and amounts paid to them during a given time period refers to both named individual consultants and corporate entities, one must distinguish between the two types of consultants in the analysis. Information about payments received by named individuals is personal information. The Ministry submits that this distinction applies to Record 2 and Record 3A.
>
> …The Ministry submits that in this case there is a "sufficient nexus" between the personal finances of the physicians and the financial information in the records that relates to the remuneration they received for their consulting services, such that these portions of Records 2 and 3B constitute the personal information of these individuals.

Having taken the position that the names of the individual consultants, together with their per diems and contract ceilings is personal information, the Ministry submits that this personal information describes the physicians' income, assets and financial activities and, as a consequence, falls under section 21(3)(f) of the *Act*. As such, its disclosure is presumed to constitute an unjustified invasion of the physician's personal privacy.

The distinction drawn by previous decisions of this office between information relating to an individual in a personal capacity and information relating to an individual in a professional or official government capacity has been noted above. As the Ministry notes, previous orders distinguished between individual consultants and consultants working for corporate entities. However, more recent orders of this office indicate that this issue is more complex. In determining whether information relating to a named individual is "personal information", the appropriate approach is to look at the *capacity* in which the individual is acting and the *context* in

which their name appears. This was enunciated in Order PO-2225 where Assistant Commissioner Tom Mitchinson considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. The Assistant Commissioner posed two questions that help to illuminate this distinction:

> Based on the principles expressed in these [previously referenced] orders, the first question to ask in a case such as this is: *"in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ....
>
> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

In applying Assistant Commissioner Mitchinson's analysis to the current appeal, the context in which the names, per diems and ceiling amounts appear is not inherently personal, but is one that relates exclusively to the professional responsibilities and activities of these individuals. As evidenced by the contents of the records themselves, each of these individuals is participating as consultants in a professional business capacity. For example, on the face of Record 2, each individual is listed as a consultant. Further, as is clear from the wording of the BCs that form part of Record 3, the selected individuals are being chosen for their professional, rather than personal, qualifications and experience.

Similar to the business context present in Order PO-2225, the professional context in which the individuals' names appear here removes them from the personal sphere. In addition, there is nothing about the names, per diem or ceiling amounts that, if disclosed, would reveal something of a personal nature about the various consultants. Moreover, in my view, defining a distinction between information that appears in a personal capacity and information that is related to an individual's professional or business activities is even more compelling in the context of government contracts, for the same transparency reasons discussed under section 17(1), above.

I find however, in the current case, I do not need to rely on this analysis. Even if I accept the Ministry's position that the names of the individual consultants, together with their per diems and contract ceilings is personal information and that the disclosure of this information is presumed to constitute an unjustified invasion of the physician's personal privacy under section 21(3)(f) of the *Act*, this information is still not exempt under section 21(1).

Section 21(1) states that "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates…" unless one of the exceptions at

section 21(1)(a)-(f) applies. Section 21(1)(f) provides that the exemption will not apply "if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(4)(b) of the *Act* identifies a particular type of information, the disclosure of which does not constitute an unjustified invasion of personal privacy. Section 21(4)(b) of the *Act* reads as follows:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution; or

I have carefully reviewed the submissions and Record 2 (items #39, #43, #46 and #49) and Record 3B. The records, including the Business Cases that form Record 3B make clear that individual physicians were retained on contracts for personal services. For example, the purpose set out in the Business Case for "CMS ASP RFP Evaluators" reads as follows:

> The approval of the Assistant Deputy Minister is sought to acquire up to 13 IT consultants to provide consulting services to the ePhysician Project. The IT consultants will act as Physician Evaluators for the Clinical Management System Application Service Provider Request for Proposals (CMS ASP RFP).

In my view, (items #39, #43, #46 and #49) and Record 3B disclose financial or other details which clearly derive from contracts for personal services between the physician consultants and the Ministry, which falls squarely within the parameters of section 21(4)(b). Therefore, the disclosure of these records would not constitute an unjustified invasion of the affected person's privacy, and the exception to the exemption at section 21(1)(f) applies. I therefore find that the records do not qualify for exemption under section 21 of the Act.

ORDER:

I order the Ministry and SSHA to disclose all responsive records to the appellant no later than **January 23, 2006** but not before **January 18, 2006**.

Original signed by: December 16, 2005
Brian Beamish
Assistant Commissioner