

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3940

Appeal PA17-70

Ministry of Health and Long-Term Care

March 26, 2019

Summary: The Ministry of Health and Long-Term Care received an access request under the *Freedom of Information and Protection of Privacy Act* regarding records that discuss defending health care professionals against medical liability or medical malpractice claims in Ontario. The ministry denied access to the responsive briefing materials, citing the exemptions in section 12(1) (Cabinet records) and 13(1) (advice or recommendations). This order upholds the ministry's decision under section 12(1)(b) and partly upholds its decision under section 13(1). The adjudicator orders the non-exempt information disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12(1)(b) and 13(1).

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (MOHLTC or the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), which was clarified as follows:

Any correspondence received that includes a reference to Canadian Medical Protective Association (CMPA) and any briefing materials that include CMPA references in them provided that it is in relation to the legal defence of doctors.

Access to general records (non-personal information) pertaining to existing defence organizations for health care professionals, including the Canadian Medical Protective Association and [a specific provider of

healthcare liability insurance]. I am seeking all records that discuss defending professionals against medical liability or medical malpractice claims in the Province of Ontario. From April 1, 2014 and April 1, 2016.

[2] After notifying a third party pursuant to section 28(1) of the *Act*, the ministry issued a decision granting partial access to the 15 records that were identified as responsive to the request. Information was withheld pursuant to sections 12(1) (Cabinet records), 13(1) (advice or recommendations), 15 (relations with other governments), and 17(1) (third party information) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During the mediation stage of the appeal, the appellant advised the mediator that he is not pursuing access to the information that was withheld pursuant to section 17(1) of the *Act*. Accordingly, section 17(1) is no longer at issue in this appeal.

[5] No further mediation was possible. Accordingly, this file was transferred to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry. I sought and received the representations of the ministry and the affected party (another government). I shared both of their representations with the appellant, except for the confidential portions.¹ The appellant did not provide representations in response.

[6] In this order, I uphold the ministry's decision under section 12(1)(b) and partly uphold its decision under section 13(1). As I have upheld the ministry's decision to withhold portions of Record 4 under section 13(1), it is unnecessary for me to also consider whether the information at issue in this record is exempt under section 15. I order the ministry to disclose the non-exempt information.

RECORDS:

[7] The following records are at issue:

Record #	Description of Record	Released?	Exemptions claimed
1	Cabinet Submission	No	12(1)(b)
4	Briefing Note dated October 1, 2015	In Part	13(1), 15
5	MOHLTC Cabinet Presentation	No	12(1)(b)

¹ I will only be referring to the non-confidential portions of these parties' representations in this order, although I will be considering their representations in their entirety.

6	Briefing Note dated May 30, 2014. "Issue: Ontario subsidizes physician medical liability protection costs ... "	In Part	13(1)
10	Slide deck dated September 18, 2014. "Fiscally Sustainable and Accountable Ontario Physician Malpractice ... "	In Part	13(1)
11	Slide deck dated November 8, 2014. "Update about the Reimbursement of ... "	In Part	13(1)
12	Slide deck dated December 19, 2014. "Fiscally Sustainable and Accountable Ontario Physician Malpractice ... "	In Part	13(1)
15	Draft slide deck dated February 2015. "Fiscally Sustainable and Accountable Ontario Physician Malpractice ... "	In Part	13(1)

ISSUES:

- A. Does the mandatory Cabinet records exemption at section 12(1)(b) apply to Records 1 and 5?
- B. Does the discretionary advice or recommendations exemption at section 13(1) apply to the withheld portions of Records 4, 6, 10 to 12, and 15?
- C. Did the institution exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the mandatory Cabinet records exemption at section 12(1)(b) apply to Records 1 and 5?

[8] Section 12(1)(b) reads:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

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

[9] The ministry states that Record 1 is a draft Cabinet submission document that contains a number of policy options, a recommended option, and comments from the ministry on the draft submission. It states that:

Record 1 was prepared by the ministry for the Treasury Board/Management Board of Cabinet ("TB/MBC"), a committee of Cabinet. The cover page of Record 1 has the title "Confidential Cabinet Submission, TB/MBC ...", which clearly indicates that the record was prepared for a Cabinet committee's consideration.

[10] The ministry states that Record 5 is a draft document that contains a number of policy options and a recommended option. It states that:

Record 5 was prepared by the ministry for the Health, Education and Social Policy Committee ("HESP"), a committee of Cabinet. The title on the cover page of Record 5 is "..., Ministry of Health and Long-Term Care (MOHLTC), Health, Education and Social Policy (HESP) Committee" which clearly indicates that the record was prepared for a committee of Cabinet's consideration.

Analysis/Findings

[11] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made.²

[12] Based on my review of Records 1 and 5, I agree with the ministry that the mandatory exemption in section 12(1)(b) applies. These records were prepared for submission to a committee of Cabinet, as set out in the ministry's representations. Both records contain policy options, along with a recommended option, for consideration by the identified committee to which it was to be submitted.

[13] I find that disclosure of Records 1 and 5 would reveal the substance of deliberations of the TB/MBC, which is a committee of Executive Council in the case of Record 1, and the HESP Committee of Executive Council in the case of Record 5.

[14] As section 12(1)(b) applies to both Records 1 and 5 and none of the exceptions

² Orders PO-2320, PO-2554, PO-2677 and PO-2725.

to section 12(1)(b) in section 12(2) apply, I find that both Records 1 and 5 are exempt under section 12(1)(b).

Issue B: Does the discretionary advice or recommendations exemption at section 13(1) apply to the withheld portions of Records 4, 6, 10 to 12, and 15?

[15] Section 13(1) states:

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

[16] The ministry states that the severed portions of the records at issue contain advice and recommendations of ministry staff regarding Ontario's Medical Liability Protection Reimbursement Program ("the program").

[17] The ministry states that Records 4, 10, 11, 12 and 15 contain a detailed description and analysis of the options and alternative options regarding the program.

[18] The ministry submits that the severed information on page 2 of Record 6 contains advice because it reiterates the advice found in Records 12 and 15.

[19] The ministry further submits that the withheld portions of pages 3 and 5-8 of Record 4 reveal information provided to the ministry by another province as part of the ministry's analysis of the options. It states that disclosure could impact the "full, free, and frank" flow of information that the ministry receives from this source and would also allow a person to draw accurate inferences about the options being considered by the ministry.

Analysis/Findings

[20] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.³

[21] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

[22] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁴

[23] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[24] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁵

[25] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁶

[26] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).⁷

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

- factual or background information⁸

⁴ See above at paras. 26 and 47.

⁵ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

⁶ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

⁷ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

⁸ Order PO-3315.

- a supervisor's direction to staff on how to conduct an investigation⁹
- information prepared for public dissemination¹⁰

[28] Based on my review of the information at issue in Records 4, 10 to 12, and 15, I accept the ministry's position that it contains advice or recommendations within the meaning of section 13(1).

[29] In particular, I agree with the ministry that these records contain advice or recommendations of public servants about the program, as they contain evaluative analyses of information and material that relate to suggested courses of action that will ultimately be accepted or rejected by the person being advised.

[30] I also agree that disclosure of the information at issue in Record 4 from the affected party would reveal the advice or recommendations of a public servant of the Government of Ontario. Disclosure of this information would allow a person to draw accurate inferences about the option being considered by the ministry.

[31] However, I do not agree with the ministry that the severed information on page 2 of Record 6 contains advice because it reiterates the advice found in Records 12 and 15. At issue in Record 6 is only one sentence. I find that disclosure of this one sentence would not reveal advice or recommendations within the meaning of section 13(1), because the sentence consists merely of factual, background information.

[32] Accordingly, I accept the ministry's position, and I find, that the information at issue in Records 4, 10 to 12, and 15 consists of the ministry's views, opinions, and analysis of various policy options, considerations and alternatives and it is subject to section 13(1). I further find that none of the exceptions in section 13(2) apply to this information. Therefore, subject to my review of the ministry's exercise of discretion, this information is exempt under section 13(1).

[33] As I have found that section 13(1) does not apply to the one sentence at issue in Record 6, and no other exemptions have been claimed for this information, I will order the ministry to disclose this information.

[34] Furthermore, since I have found that section 13(1) applies to the information at issue in Record 4, there is no need for me to also consider whether section 15 applies to that information. Accordingly, I will not review the application of section 15 in this order.

⁹ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹⁰ Order PO-2677.

Issue C: Did the institution exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

[35] The section 13(1) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[36] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹³

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information

¹¹ Order MO-1573.

¹² Section 54(2).

¹³ Orders P-344 and MO-1573.

- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[39] The ministry states that in denying access under section 13(1) to the information at issue in the records, it took into account relevant considerations, including:

- The importance of determining the proper option for the program;
- To protect and ensure frank and honest analysis, advice and recommendations by ministry staff and another province;
- The importance of allowing ministry staff the opportunity to engage in free, full, and frank review of all policy options and related considerations; and,
- The fact that the ministry only severed some portions of the records.

Analysis/Findings

[40] I find that in denying access to the information at issue in the records, the ministry exercised its discretion under section 13(1) in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. In exercising its discretion, the ministry considered in particular the nature of the information, its relevance to the appellant and the purpose of the section 13(1) exemption.

[41] Accordingly, I uphold the ministry's exercise of discretion and find that the information to which I have found that section 13(1) applies is exempt on that basis.

ORDER:

1. I order the ministry to disclose the information at issue on page 2 of Record 6 to the appellant by **May 2, 2019** but not before **April 26, 2019**.
2. I uphold the ministry's decision to withhold the remaining information at issue in the records.

Original Signed By: _____
Diane Smith
Adjudicator

_____ March 26, 2019