



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

# ORDER P-356

Appeal P-910167

Ministry of Health



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# ORDER

## BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for records related to a proposal by the Scarborough General Hospital to construct an office building.

The Ministry identified 10 responsive records which were prepared in the form of a package numbered from pages 1-190. The Ministry provided access to five of the records, but denied access to the remaining five pursuant to sections 13(1), 17(1) and 19 of the Act. The requester appealed the Ministry's decision.

During mediation, the Ministry withdrew the section 19 exemption claim entirely, and the section 17 claim with respect to Records 2, 3 and 5.

Further attempts to mediate the appeal were not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and two organizations that had an interest in the records (the affected persons), namely the SGH Medical Mall Limited Partnership (the SGH Partnership) and Scarborough General Hospital (the Hospital). During the course of the inquiry, the two appraisal firms which authored Records 4 and 5 (the first appraisal firm and the second appraisal firm) were added as affected persons and afforded the opportunity to make representations. Representations were received from all parties to the appeal, with the exception of the Hospital.

The records which are at issue in this appeal, together with the exemptions claimed, are numbered and described as follows:

- Record 1: A ten page letter dated October 31, 1990 from a consultant to the Minister of Health (pages 1-10 of Ministry package), denied in its entirety pursuant to section 13(1);
- Record 2: Land Lease between the SGH Partnership and the Hospital (pages 13-95 and pages 132-155 of Ministry package), denied in its entirety pursuant to section 17(1);
- Record 3: Excerpt from Hospital Operating Policy Manual (pages 96-97 of Ministry package), denied in its entirety pursuant to section 17(1);
- Record 4: Property Value Appraisal of the first appraisal firm (pages 98-126 of Ministry package), denied in its entirety pursuant to section 17(1);
- Record 5: Property Value Appraisal of the second appraisal firm (pages 127-131 and pages 156-184 of Ministry package), denied in its entirety pursuant to section 17(1);

The records all relate to the SGH Partnership's proposal to construct an office building on land owned by the Hospital and to be leased to the SGH Partnership. Pursuant to section 4(4) of the Public Hospitals Act, prior approval of the Minister of Health is required in order to lease Hospital lands.

Before providing her approval, the Minister retained a consultant as a fact-finder to review and assess the SGH Partnership proposal. Record 1 is the consultant's report. The remaining records were reviewed by the consultant and attached as schedules to his report. Record 2 is a copy of a draft lease between the SGH Partnership and the Hospital; Record 3 is an excerpt from the Hospital Operating Policy Manual; and Records 4 and 5 are appraisals of the value of the land.

## **ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 13 of the Act applies to Record 1.
- B. Whether the mandatory exemption provided by section 17 of the Act applies to Records 2, 3, 4, and 5.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the discretionary exemption provided by section 13 of the Act applies to Record 1.**

The Ministry submits that section 13(1) applies to Record 1 in its entirety. Section 13(1) of the Act reads:

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.

Advice for the purposes of this section must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process [Order 118, P-304 and P-348]. "Recommendations" should be viewed in the same vein [Orders 161, P-248 and P-348].

The Ministry submits that disclosure of Record 1 would reveal the consultant's advice and recommendations about the proposal which were "intended to provide the Minister with information on which she could make a decision regarding her approval or lack of approval for the lease of part of the Hospital's land".

The Ministry acknowledges that a large portion of Record 1 consists of factual background material. Specifically, it states that the information under the following headings is factual information: "Review of Information Available, and Persons Interviewed", "Historical Perspective of Medical Office Building at Scarborough General Hospital", "Proposal" and "Ministry Policy and Guidelines". The Ministry also acknowledges that there is some factual information contained in the remaining parts of the report, but submits that it is unreasonable to sever this information because it is integrated with the consultant's opinion and advice.

I have carefully reviewed Record 1 and the representations of the parties. In my view, disclosure of all parts of the record beginning with the third full paragraph on page 7 up to but not including the closing sentence and signature on page 10 of the record, would reveal the advice and recommendations of a consultant retained by the Ministry. As such, these parts of Record 1 qualify for exemption under section 13(1) of the Act. With respect to any factual material contained in these parts of the record, in my view, it is so interwoven with the advice and recommendations that it cannot reasonably be severed pursuant to section 10(2) of the Act.

I find that disclosure of pages 1 through 6 and up to the end of the second full paragraph on page 7 of Record 1 would not reveal advice or recommendations, and accordingly, these parts of the report do not qualify for exemption under section 13(1).

Section 13 of the Act provides the Ministry with discretion to disclose a record even if it meets the test for exemption. With respect to those parts of Record 1 which I have found qualify for exemption under this section, I am satisfied that the Ministry has exercised its discretion in accordance with proper legal principles and I find nothing improper in the circumstances.

**ISSUE B: Whether the mandatory exemption provided by section 17 of the Act applies to Records 2, 3, 4, and 5.**

Sections 17(1)(a), (b) and (c) of the Act read as follows:

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;

In order to qualify for exemption under sections 17(1)(a), (b) or (c) of the Act, the following three-part test must be satisfied:

- (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 types of harms specified in (a), (b), or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) claim invalid (Order 36).

Since the Ministry has withdrawn its exemption claim for Records 2, 3 and 5, the affected persons resisting disclosure bear the burden of proving that section 17(1) applies to those records. For Record 4, the Ministry and the first appraisal firm share the burden of proving the applicability of section 17(1).

#### **RECORD 2 - The Land Lease**

The SGH Partnership is the only affected person resisting disclosure of this record. It submits that the lease contains sensitive commercial and financial information, which was supplied to the consultant implicitly in confidence. It also submits that the record is the result of extensive negotiations, and that its release would prejudice its competitive position and result in undue gain to other parties.

The lease contains details of a transaction involving the lease of land. In my view, the information qualifies as commercial information, thereby satisfying the first part of the test.

Regarding the second part of the test, the SGH Partnership acknowledges that there is no evidence of explicit confidentiality. However, it points out that Record 2 was supplied to the Ministry (through the consultant) as part of the process for approval of the project under section 4(4) of the Public Hospitals Act, and states:

"To acquire the necessary consent of the Ministry to the proposed lease the Hospital had to make full disclosure of the relevant information. The Tenant and the Hospital were most certainly not prepared to make the documentation available to third parties or the general public."

In the circumstances of this appeal, I am prepared to accept that there is a certain degree of confidence implicit in the approval process, and I am prepared to accept that the second part of the test has been satisfied.

Turning to the third part of the test, it has been established in a number of previous orders that the party resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Orders 36, 47, 48, 68 and P-323).

The SGH Partnership submits that:

"By releasing this information other parties will obtain the structuring of a financial deal that required four years of work and expense to bring together."

and further,

"The release of such information to third parties could interfere significantly with our negotiations by providing to third parties, at no cost to them, the structuring and documentation necessary for that third party to develop competing or similar projects and allow them to underbid such projects."

The SGH Partnership provides no further details in support of its position, other than various restatements of these two points. In my view, the SGH Partnership submissions are, at best, generalized references to possible harm. They are speculative and lack sufficient supporting evidence to satisfy the requirements of the third part of the test.

In my view, the SGH Partnership has failed to provide sufficient detailed and convincing evidence to establish the requirements for the third part of the test, and I find that Record 2 does not qualify for exemption under section 17(1) of the Act.

### **RECORD 3 - Excerpt from the Hospital Operating Policy Manual**

None of the parties made representations about this record.

Because section 17(1) is a mandatory exemption, I have independently reviewed the contents of this record to determine if there is anything to indicate that it qualifies for exemption under this section. I do not feel that there is, and, in the absence of any representations from the parties, I find that it does not qualify for exemption under section 17(1).

### **RECORD 4 - Property value appraisal of the first appraisal firm**

Only the first appraisal firm and the Ministry made representations regarding this record.

Having reviewed the record, I find that it contains information which is properly characterized as "commercial information", and for the reason outlined in my discussion of Record 2, I am prepared to accept that it was supplied to the institution implicitly in confidence, thereby satisfying parts one and two of the test for exemption.

Turning to the third part of the test, the Ministry submits that the release of this record could reasonably be expected to interfere with the first appraisal firm's contractual negotiations; prejudice the competitive position and interfere with the contractual negotiations of, and cause

undue harm to, the Hospital; and, result in similar information no longer being supplied to the Ministry.

The first appraisal firm submits that "the client is not to release reproductions of the report, disseminate any or all of the report or otherwise convey its contents to the public without the written consent and approval by the appraiser".

I find it difficult to accept the Ministry's arguments that are based on harm to the Hospital under section 17(1)(a) and (c). These parts of section 17 are designed to protect the interests of affected persons, not the Ministry. If, as the Ministry submits, release of Record 4 could prejudice significantly the competitive position of the Hospital or result in undue loss to the Hospital, I would have expected to receive representations from the Hospital to that effect. However, despite being afforded the opportunity to do so, the Hospital chose not to make representations or indicate that it was relying on the Ministry's representations. In these circumstances, the arguments about harm to the Hospital are, in my view, speculative.

Further, I do not accept the Ministry's claim that the type of information contained in Record 4 would no longer be supplied. I note that the Ministry did not object to the release of the appraisal submitted by the second appraisal firm (Record 5), and I feel it is also relevant that the Minister's approval is mandatory for these type of development projects. In my view, it is reasonable to assume that parties seeking the Minister's approval would continue to submit appraisals, if required to do so in order to obtain the necessary Ministry approvals.

Finally, I find that the submissions about possible harm provided by the first appraisal firm are speculative and not sufficient to establish an exemption claim under section 17(1).

In summary, I find that the Ministry and/or the first appraisal firm have failed to provide sufficient evidence to establish the requirements for the third part of the section 17(1) exemption test, and I find that Record 4 does not qualify for exemption under section 17(1) of the Act.

#### **RECORD 5 - Property value appraisal of the second appraisal firm**

Only the second appraisal firm and the SGH Partnership made representations regarding Record 5. The second appraisal firm submits that "the report contains information which is confidential" to the Hospital, while the SGH Partnership states: "we feel that it would jeopardize future transactions if the relationship between the land valuation and rental rate were revealed to a third party".

As with Records 2 and 4, I am prepared to accept that the first and second parts of the test for exemption under section 17(1) have been satisfied.

Turning to the third part of the test, in my view, neither the second appraisal firm nor the SGH Partnership has provided sufficient evidence to establish that the type of harm specified in section 17 could reasonably be expected to arise if Record 5 is released. Therefore, I find that Record 5 does not qualify for exemption under section 17(1) of the Act.

In summary, I find that none of Records 2, 3, 4, or 5 qualify for exemption under section 17(1) of the Act, and should be released to the appellant.

**ORDER:**

1. I uphold the Ministry's decision not to disclose all parts of Record 1 beginning with the third full paragraph on page 7 up to but not including the closing sentence and signature on page 10.
2. I order the Ministry to disclose all remaining parts of Record 1 not referred to in Provision 1, and Records 2, 3, 4, and 5 in their entirety to the appellant. This disclosure should be made within thirty-five (35) days, but not earlier than thirty (30) days, following the date of the issuance of this order.
3. The Ministry is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. Any notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.
4. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, only upon my request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ October 8, 1992