



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

ORDER P-655

Appeal P-9300610

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 access to "all working documents, reports, memoranda, correspondence and any other record of information" related to applications by a named company (the Company) to relocate its laboratory and specimen collection centres (SCC's) from three specific locations. The Ministry located 119 records which were responsive to the first of the three locations identified in the request. No records responsive to the other two locations were located.

The Company was notified of the request by the Ministry pursuant to section 28(1) of the Act, and was invited to make representations on whether the documents should be released. The Company objected to the disclosure of all responsive records. Despite the Company's objections, the Ministry decided to release the records to the requester, subject to certain severances. The Company appealed the Ministry's decision to disclose the records.

Mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Company, the original requester and the Ministry. Representations were received from the Company and the original requester.

Prior to proceeding to inquiry, the original requester requested access to the representations of the Company and to a copy of the records for the purpose of argument at the inquiry. Neither of these two matters was pursued at inquiry, however, and I will not consider them further in this order.

ISSUES:

The issues to be addressed in this appeal are as follows:

- A. Whether the mandatory exemption provided by section 17 of the Act applies to the records.
- B. Whether Records 70 and 71 contain "personal information" as defined in section 2(1) of the Act, and if so, whether the mandatory exemption provided by section 21 of the Act applies.

A list of the records at issue is set out in Appendix "A" to this order.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 17 of the Act applies to the records.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) of the Act, the party resisting disclosure, in this case the Company, 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 (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

Both the Company and the original requester submitted extensive representations. I have carefully reviewed these submissions and the records at issue. The following are my conclusions based on this review.

Part One

"Commercial information" is information which relates to the buying, selling or exchange of merchandise or services (Order P-493). In its representations, the Company indicated that its business activities consist of the provision of laboratory and specimen collection services for which a licence is a prerequisite. In my view, the application for a licence to operate a laboratory or SCC at a proposed location and any correspondence arising from and relating to that application is directly linked to the commercial activities of the Company. I am satisfied that the records at issue all relate to the Company's applications for a licence to operate a laboratory or SCC at proposed locations, and thereby contain commercial information.

In my view, the first part of the test has been met.

Part Two

The second part of the test has two elements. First, the information must have been **supplied** to the Ministry and secondly, it must have been supplied **in confidence**, either implicitly or explicitly.

Several previous orders have determined that information contained in a record would reveal information "supplied" within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228, P-241 and P-472).

With respect to the first element of part two of the test, I am satisfied that the information contained in the records was either supplied by the Company to the Ministry or would reveal information supplied by the Company.

Regarding the second element, the Company submits that all information relating to an application for a licence to operate at a proposed site would have been submitted in confidence.

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the application of the second part of section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act, which is identical to section 17(1) of the Act:

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

I adopt these comments for the purposes of this appeal.

To assist in understanding the Ministry's involvement in the industry, both parties provided background information relating to the Laboratory and Specimen Collection Centre Licensing Act (the Licensing Act), which provides a complete scheme for the licensing and regulation of laboratories and SCC's in Ontario.

There is no confidentiality provision in the Licensing Act which would create or support an expectation of confidentiality on the part of an applicant. The records do not expressly indicate that they were being submitted in confidence or that they were created or maintained in a confidential manner.

In support of its expectation of confidentiality regarding information relating to "proposed locations", the Company provided background information relating to the competitive nature of the laboratory and SCC industry and the implications of premature disclosure of a proposed site.

Based on the evidence before me relating to the industry, it is my view that information relating to a proposed location for a laboratory or SCC would have been submitted by the Company with an expectation of confidentiality as to the location of the proposed site. In my view, this expectation of confidentiality was implicit by virtue of the competitive nature of the industry, and was reasonable and had an objective basis.

Similarly, any records created by the Ministry which identify proposed locations would reveal information supplied by the Company in confidence.

Record 12 is a Ministry generated document which contains information relating to the Company's status. The Company submits that as a private company it is, in general, not required

to reveal its financial position, and information of this nature would be provided to the Ministry implicitly in confidence. For the same reasons as above, I find this expectation of confidentiality to be reasonable and with an objective basis. In my view, disclosure of the information relating to the Company's status contained in Record 12 would reveal information supplied by the Company implicitly in confidence.

I do not agree, however, that the Company's expectation of confidentiality regarding the balance of the information contained in the records is reasonable or that this expectation has an objective basis.

Part Three

Under part two, I found that the Company had a reasonable expectation of confidentiality **only** with respect to information which would identify the proposed locations of laboratories or SCC's or which would reveal information relating to the Company's status.

In order to satisfy part three of the test, the Company must demonstrate that disclosure of the information at issue could reasonably be expected to result in one of the harms specified in (a), (b) or (c) of section 17(1) of the Act. Detailed and sufficient evidence setting out the facts and circumstances that could lead to a reasonable expectation that harm could occur if the information at issue was disclosed is necessary to satisfy the "harms" test (Orders P-246 and P_500).

In its representations, the Company has provided detailed evidence concerning the competitive harm it would suffer should the location of proposed sites be prematurely disclosed to its competitors, or should details of its status be revealed. Based on the facts and circumstances described by the Company, I am satisfied that disclosure of the proposed locations or information that would reveal these locations, as well as disclosure of details relating to the Company's status would reasonably be expected to result in the harm outlined in section 17(1)(a) of the Act.

I am of the view that all three parts of the test have been met with respect to this information. I have highlighted the portions of the records which should **not** be disclosed to the original requester on the copies of the records I have provided to the Ministry with this order.

ISSUE B: Whether Records 70 and 71 contain "personal information" as defined in section 2(1) of the Act, and if so, whether the mandatory exemption provided by section 21 of the Act applies.

"Personal information" is defined in section 2(1), in part, to mean "recorded information about an identifiable individual", including information relating to the individual's employment history.

Record 70

Record 70 is an "Action Memo" in which reference is made to the Company and its solicitors. In my view the record does not contain recorded information about an "identifiable individual" and, therefore, does not qualify as personal information.

Record 71

Record 71 is a copy of the Company's application for a Licence to Operate a Specimen Collection Centre. Section 2 of the Form contains information relating to the prior work experience of an identified employee. Although not claimed by either the Company or the Ministry, I am of the view that this information qualifies as the personal information of the identified employee under section 2(1)(b) of the Act.

Section 21(1)(f) of the Act prohibits an institution from releasing the personal information of an individual except where such disclosure would not constitute an unjustified invasion of that individual's personal privacy.

Information relating to prior work experience is a category of information included in resumes. This type of information has been considered in previous orders and disclosure has been found to be a presumed unjustified invasion of personal privacy under section 21(3)(d) of the Act (Orders 11, 97, 99, P-273 and P-282).

In my view, disclosure of the personal information contained in record 71 would constitute an unjustified invasion of the employee's personal privacy under section 21(3)(d) of the Act and, as section 21(4) does not apply, should therefore be withheld from disclosure. The portion of Record 71 which should **not** be disclosed to the original requester has been identified on the highlighted copy of the records provided to the Ministry with this order.

ORDER:

1. I order the Ministry **not** to disclose the portions of the records which have been highlighted in the copy of the records provided to the Freedom of Information and Protection of Privacy Co-ordinator at the Ministry with a copy of this order.
2. I order the Ministry to disclose the remaining portions of the records within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provisions 1 and 2, **only** upon request.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ April 15, 1994

APPENDIX "A"

INDEX OF RECORDS		
RECORD	NO. OF PAGES	DESCRIPTION
2	6	Letter to Canadian Medical Laboratories (CML) from Collection Centre Inspection Service (CCIS), March 21/78 Re: Specimen Collection Centre (SCC)
3	1	Letter to CML from CCIS, April 11/78 Re: SCC
4	1	Letter to CCIS from CML, April 25/78 Re: SCC
5	2	Letter to CML from CCIS, May 9/78 Re: Licensing of SCC
6	1	Letter to CCIS from CML, June 7/78 Re: Licence (closure of centre)
7	1	Letter to CML from Director of Laboratory and Specimen Collection Centre Licensing (LSCCL), June 12/78 Re: SCC (cancellation of licence)
8	1	Letter to Director of LSCCL from CML, June 26/78 Re: SCC (objection to cancellation of licence)
9	1	Letter to Director of LSCCL, July 14/80 Re: Licence (request for senior official to review cancellation of licence)
10	1	Letter to CCIS from CML, December 10/82 Re: SCC (reactivation of licence)
11	1	Letter to CML from CCIS, December 29/82
12	4	Memorandum to Director of LSCCL from Minister of Health with Public Interest Evaluation attached
13	1	Letter to CML from Director of LSCCL, February 25/83 Re: Application (not approved)
14	1	Letter to Director of LSCCL from CML, Oct 11/83 Re: Reactivation of licence
15	1	Letter to CML from CCIS, October 17/83 Re: Licence application to establish a SCC
16	1	Handwritten note
17	1	Letter to CML from CCIS, October 17/83 Re: Licence application to establish a SCC
18	1	Letter to Laboratory Inspection Services (LIS) from CML, January 12/84 Re: Reactivation of licence
19	1	Letter to CML from CCIS, January 25/84 Re: Licence application to establish a SCC
20	2	Memorandum to Director of Laboratory Services Branch (LSB) from LIS, May 14/84 Re: CML application to reinstate a SCC
21	3	Synopsis of review of Laboratory utilization and referral patterns regarding application to reinstate a SCC
22	1	Action request, June 5/84

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RECORD	NO. OF PAGES	DESCRIPTION
23	1	Memorandum to Director of LSB from LIS, June 8/84 Re: CML application to reinstate an SCC licence
24	1	Letter to CCIS from CML, June 20/84 Re: Licence
25	1	Letter to CML from CCIS, June 29/84 Re: Licence
26	2	Memorandum to Director of LSB and Director of LSCCL from Deputy Ministry, Ministry of Health, August 16/84 Re: public interest
27	1	Memorandum to file, August 29/84 Re: CML reactivation of SCC licence
28	2	Letter to CML from Director of LSCCL, August 29/84 Re: public interest
29	2	Letter to Director, LSB and Director, LSCCL from Beard, Winter, Gordon (for CML), September 12/84 Re: CML licence application
30	1	Memorandum to counsel, Legal Branch from LIS, September 19/84 Re: CML request for Laboratory Review Board (LRB) Hearing
31	1	Memorandum to LIS from counsel, September 24/84 Re: CML request for LRB Hearing
32	1	Memorandum to LIS from counsel, September 24/84 Re: CML request for LRB Hearing
33	1	Letter to Beard, Winter, Gordon from CCIS, September 27/84 Re: CML
34	1	Letter to Beard, Winter, Gordon from counsel, October 4/84 Re: CML (jurisdiction of Board)
35	2	Letter to Chairman of the Health Facilities Appeal Board (HFAB) from Beard, Winter, Gordon, November 12/84 Re: CML Licence application of January 12/84
36	1	Memorandum to Director, LSB from counsel, November 16/84 Re: CML (appeal of refusal to issue licence)
37	1	Letter to counsel from Beard, Winter, Gordon, December 14/84 Re: CML SCC
38	1	Memorandum to Assistant Deputy Minister from counsel, December 18/84 Re: CML and pending appeal
39	1	Letter to counsel from Committee Officer Health Boards Secretariat, December 19/84 Re: CML v. the Director of LSCCL
40	6	Memorandum to Assistant Deputy Minister from counsel, January 14/85 Re: CML; attachments LRB (CML v. the Director LSCCL)
44	1	Letter to LRB from Beard, Winter, Gordon, April 4/85 Re: Licence application, January 12/84
45	1	Duplicate of Record 44
46	1	Memorandum to LIS from counsel, April 29/85 Re: CML
47	2	Letter to Beard, Winter, Gordon from counsel, April 29/85 Re: Application

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48	1	Duplicate of Record 46
49	1	Memorandum to LIS from counsel, July 16/85 Re: LRB (CML)
50	1	Letter to LRB from Beard, Winter, Gordon, July 16/85 Re: CML SCC
51	1	Letter to LRB from counsel, July 16/85 Re: CML SCC
52	1	Duplicate of Record 49
53	1	Duplicate of Record 50
54	1	Duplicate of Record 51
55	1	Letter to Beard, Winter, Gordon from counsel, December 9/85 Re: Board's jurisdiction
56	1	Letter to Director LSB from Health Boards Secretariat, December 17/85 Re: CML SCC
57	1	Laboratory and Specimen Collection Centre Licensing Act Notice of Hearing Before LRB, date of hearing January 9/86
58	1	Record of verbal transaction CML Re: Board hearing review rescheduled to February 11 and 12/86
59	1	Memorandum to Director LSB from counsel, January 9/86 Re: LRB (CML Licence)
60	1	Letter to Legal Branch from Health Boards Secretariat, January 15/86 Re: CML v. the Director, LSCCL (confirmation of hearing)
61	1	Memorandum to director LSB and LIS from counsel, January 20/86 Re: CML LRB
62	1	Memorandum to Legal Branch from Health Boards Secretariat, January 29/86 Re: Hearing - CML v. the Director LSCCL
63	2	Letter to Health Boards Secretariat from Beard, Winter, Gordon, February 10/86 Re: CML v. the Director LSCCL
64	2	LRB - transcript of oral decision - (Board has jurisdiction in this appeal)
65	4	Handwritten notes of LRB hearing
66	2	Handwritten notes of LRB decision
68	1	Memorandum to Crown Law Office from counsel, February 13/86 Re: CML
69	3	Two letters removed from the file at LRB hearing
70	1	Action memo, February 2/86 Re: two missing letters
71	7	CML - Brief
73	2	Memorandum to Director LSB from counsel, April 16/86 Re: CML attached letter to Legal Branch from Beard, Winter, Gordon, April 11/86 Re: CML SCC

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74	2	Memorandum to LIS from counsel, May 15/86 Re: CML SCC attached letter to Legal Branch from Beard, Winter, Gordon, May 5/86 Re: CML SCC
75	1	Letter to Beard, Winter, Gordon from counsel, May 15/86 Re: CML SCC
76	4	Letter to Minister of Health from CML, June 25/87 Re: Licence
79	1	Memorandum to LIS from counsel, August 31/87 Re: CML - Action Request - Minister's Action Request
80	2	Letter to CML from MPP (setting a date for the hearing)
81	1	Letter to Director of LSB and Director of LSCCL from CML, December 2/87 Re: SCC
82	1	Memorandum to LIS from Institutional Operations Branch, December 9/87 Re: Memorandum dated November 17/87 Laboratory Services
83	1	Action memo - Prepare short brief
86	2	Letter to CML from Director LSB and Director of LSCCL, November 23/87 Re: SCC Licence
87	1	Letter to Minister of Health from Shibley, Righton & McCutcheon, August 14/87 Re: CML
88	1	Letter to Shibley, Righton & McCutcheon from MPP Re: Licence
89	1	Letter to Director of LSB and Director of LSCCL from CML, October 23/87 Re: Licence
90	1	Memorandum to Institutional Operations Branch from LIS, November 17/87 Re: Laboratory Services
91	3	Memorandum to Assistant Deputy Minister Community Health & Laboratory Services Branch from LIS, January 15/88 Re: CML SCC Licence attached, Briefing notes Re: CML SCC Licence, January 12/88
92	5	Synopsis of Review of Laboratory utilization and referral patterns regarding application to establish a SCC -CML SCC Licence
93	2	Memorandum to Director, LSB and Director, LSCCL from Minister of Health, April 5/88
94	2	Letter to CML from Director, LSB and director, LSCCL, May 11/88
95	2	Letter to Assistant Deputy Minister Community Health from Shibley, Righton & McCutcheon, May 25/88 Re: Licence
96	2	Letter to Health Boards Secretariat from Shibley, Righton & McCutcheon, May 30/88 Re: SCC (appeal decision of LSB and request hearing before LRB)
97	2	Letter to LIS from CML, June 8/88 Re: Licence
100	1	Letter to LIS from CML, June 2/88 Re: Application for Licence to operate SCC
101	1	Letter to CML from LSCCL, June 16/88 Re: SCC Licence

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102	2	Letter to Legal Services Branch MOH from Health Boards Secretariat, June 23/88 Re: CML v. the Director, LSCCL (date of hearing)
103	2	Memorandum to Director, LSB from counsel, August 10/88 Re: CML (request for hearing before the Board)
104	4	Memorandum to Minister of Health from Assistant Deputy Minister Community Health Re: Licence application to relocate CML SCC Licence, attached Synopsis of review of Laboratory utilization and referral patterns
105	2	Memorandum to LIS from Project Co-ordinator, August 15/88 Re: Laboratory Services - CML application to relocate
107	2	Memorandum to Director, LSB and Director, LSCCL, September 7/88 Re: Minister of Health
108	2	Letter to CML from Director, LSB and Director LSCCL, September 26/88 Re: SCC (public interest)
110	1	Record of verbal transaction October 6/88 Re: LRB Hearing re CML
113	1	Letter to Legal Services Branch MOH from Health Boards Secretariat, December 15/88 Re: CML v. the Director, LSCCL
114	1	Laboratory and Specimen Collection Centre Licensing Act - Notice of Preliminary Hearing before the LRB (January 30/89)
115	1	Letter to Assistant Deputy Minister from CML, January 10/89 Re: December 12/88 meeting
116	1	Memorandum to LIS from Project Co-ordinator, January 17/89
117	2	Memorandum to Director, LSB and Director LSCCL from Minister of Health (public interest)
118	8	Memorandum to Assistant Deputy Minister Community Health from LSB, January 9/89 Re: CML application, attached memorandum duplicate of Record 104
119	2	Letter to CML from Director, LSB and Director, LSCCL, January 19/89 Re: SCC (application approved in principle)