



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

ORDER P-1038

Appeal P-9500075

Ministry of Health



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of Health (the Ministry) for access to "the 1994 reviews of the case put forward for the continuation of broader out of country provincial health coverage". The requester later indicated that the focus of his request involved the rights of "snowbirds" -- that is Canadians who vacation abroad.

The Ministry located seven records that were responsive to the request and decided to withhold six of these documents in their entirety and one in part under the following exemptions contained in the Act:

- Cabinet records - section 12(1)
- advice or recommendations - section 13(1)
- relations with other governments - sections 15(a) and (b)
- solicitor-client privilege - section 19

The Ministry also took the position that portions of Records 5 and 6 were not responsive to the request. The requester appealed the Ministry's decision to the Commissioner's office.

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from the Ministry only.

During the course of the appeal, the Ministry was asked to provide the Commissioner's office with its views on whether Record 4 should be treated as a single document or as multiple records for the purposes of section 19 of the Act. This information was tendered in the form of further representations. In these submissions, the Ministry also requested that I apply the discretionary exemptions contained in sections 15(a) and (b) of the Act to certain passages in Records 4(B) and (C). Since these exemptions were raised so late in the appeals process, I sought representations from the appellant on whether the Ministry could properly rely on these provisions. The appellant subsequently provided his views on this subject.

The seven records at issue in this appeal consist of notes, memoranda, issue sheets and a chart. These documents are described more fully in Appendix "A" which is attached to this order.

DISCUSSION:

RESPONSIVENESS OF RECORDS

In its decision letter, the Ministry indicated that almost all of Records 5 and 6 were not responsive to the appellant's request. In discussions with the appellant, the Appeals Officer described the general nature of these passages and the appellant stated that he did not wish to receive access to them. I believe, however, that had the appellant seen the actual contents of these records, he might not have come to the same conclusion.

I have independently reviewed these portions of the records. While the wording of the appellant's request could have been more precise, I have concluded that certain portions of the "non-responsive" sections of

Records 5 and 6 could be said to fall within the scope of his request. I will discuss these sections of the documents more fully when I consider the relations with government exemptions.

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

Upon receipt of the appeal, the Commissioner's office provided the Ministry with a Confirmation of Appeal notice. This notice indicated that, based on a policy issued by this office, the Ministry would have 35 days from the date of the notice (an expiry date was provided) to raise any additional discretionary exemptions not claimed in its decision letter. No additional exemptions were raised during this period.

In its initial set of representations, the Ministry indicated for the first time that it wished to rely on section 13(1) of the Act (the advice or recommendations exemption) to deny access to Record 4. By this time, the expiry date provided in the Confirmation of Appeal had passed by over three months. Subsequently, the Ministry advised the Commissioner's office that it also wished to apply sections 15(a) and (b) of the Act (relations with other governments) to a number of passages in Record 4.

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In this case, the Ministry was advised of this office's policy on the subject yet decided to rely on the section 13(1) exemption over three months after the Confirmation of Appeal was issued. Since the Ministry has failed to advance any arguments to indicate why the 35-day time limit should not apply with respect to the application of this exemption, I will not consider section 13(1) in relation to Record 4.

The Ministry has, however, made a number of specific submissions regarding its decision to rely on sections 15(a) and (b) of the Act to withhold parts of Record 4 from disclosure. The Ministry points out that the passages which it wishes to protect under these provisions are extremely sensitive in the context of Ontario's relationship with other provincial governments. It also submits that sections 15(a) and (b) constitute a unique set of discretionary exemptions. That is the case because they prohibit the Ministry from disclosing a record to which these provisions would otherwise apply without the prior approval of the Executive Council.

I have carefully considered the representations of the parties. At the outset, I would note that sections 15(a) and (b) are designed to protect the interests of outside government organizations in addition to the institution which holds the responsive records. I also acknowledge that these provisions represent somewhat unique discretionary exemptions. Based on these considerations and my view that the disclosure of the passages in Record 4 could reveal information provided to the Ministry by other governments in confidence, I have decided to consider the application of sections 15(a) and (b) despite the fact that they were raised beyond the 35-day time limit.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that the solicitor-client privilege exemption found in section 19 of the Act applies to Records 1, 2, 3, 4 and 7 in their entirety and to one sentence in Record 6. These documents variously consist of a legal memorandum, notes of several meetings, issue sheets and a chart.

Under section 19 of the Act, a Ministry may refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1 of the exemption); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2 of the exemption).

The Ministry indicates that it is relying on both branches of section 19 to exempt the entire contents of Records 1, 2, 3, 4, and 7 and the one sentence in Record 6 from disclosure.

For a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that there exists a written or oral communication of a confidential nature between a client and a legal adviser which relates directly to seeking, formulating or giving legal advice, or that the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

For a record to qualify for exemption under Branch 2, the Ministry must establish that the document was prepared by or for Crown counsel and that the record was prepared (1) for use in giving legal advice, (2) in contemplation of litigation or (3) for use in litigation.

Record 1 consists of a series of handwritten notes taken by one of the Ministry's legal counsel which sets out the highlights of a conference call in which she participated. The Ministry indicates that this session took place in order to develop and share legal analysis respecting those parts of the Canada Health Act (the CHA) that relate to out-of-country benefits. Record 3 contains notes taken by a second Ministry lawyer of the same conference call. This document also includes two pages of related research materials that the lawyer prepared.

The Ministry submits that both Records 1 and 3 were prepared by Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. It states that, two weeks before the conference call occurred, several parties served the Attorney General with a Notice of Intent to commence a judicial review. This application dealt with the province's decision to reduce payments for out-of-country health claims.

In his letter of appeal, the appellant submits that the notes of meetings should not qualify for exemption under section 19 simply because the participants are public sector lawyers. He also believes that any discussions about reducing the scope of Medicare benefits should be subject to full public scrutiny.

I have carefully reviewed Records 1 and 3 in tandem with the representations of the parties. I find that these documents were prepared for use in giving legal advice or for use in litigation and are, therefore, exempt under Branch 2 of the section 19 exemption.

Record 2 is a memorandum from the Ministry's legal counsel to the Director of the Ministry's Health Insurance and Related Programs Branch entitled "Snowbirds - Canada Health Act Issues". Record 7 consists of a transmittal letter from legal counsel for the Ministry of the Attorney General (MAG) to legal counsel for the Ministry where the former individual encloses a briefing note which he authored. This note, which was prepared for the Attorney General, deals with changes to the regulations made under the Ontario Health Insurance Act.

I have carefully examined Records 2 and 7 in light of the representations provided by the parties. I find that both documents qualify for exemption under part 1 of the first branch of the section 19 exemption. These records constitute written communications of a confidential nature between a client and a legal advisor which are directly related to seeking, formulating or giving legal advice.

Record 6 consists of an inter-office memorandum prepared by an official of the Ministry's Provider Services Branch which sets out the highlights of a conference call involving federal and provincial officials. The Ministry has exempted one sentence on page 3 of this document under the first branch of section 19 on the basis that it would reveal legal advice provided by legal counsel to the Ministry. I agree that the Ministry is entitled to withhold this sentence (which I have highlighted in yellow) under this branch of the exemption.

Record 4 consists of three documents which are stapled together. These are (1) an inter-office memorandum from legal counsel for the Ministry to an official in the Health Insurance and Related Programs Division entitled "Revision of OOC [Out-Of-Country] Health Services Payments", (2) an issue sheet prepared by an official of the Ministry's Provider Services Branch on the same subject and (3) a chart entitled "Out-Of-Country Payment Policies Provincial Survey - March 1, 1994". For ease of reference, I will designate these documents as Records 4(A), 4(B) and 4(C), respectively.

In its representations, the Ministry indicates that Records 4(B) and (C) were provided to the Ministry's legal counsel for review and that, as a result, several modifications were made to Record 4(B). It also states that these two records "concern pending litigation" in which the province is involved. The Ministry further submits that the documents constitute a written communication of a confidential nature between a client and a legal adviser which relates directly to seeking, formulating or giving legal advice. Finally, the Ministry states that "Record 4 cannot be separated into distinct parts but rather is a single document subject to the exemption".

I have carefully reviewed these representations along with the records at issue. I find that Record 4(A) qualifies for exemption in its entirety under the first part of branch 1 of section 19 in that it constitutes a written communication of a confidential nature between a client and a legal adviser which relates directly to providing legal advice.

I find, however, that Records 4 (B) and (C) do not qualify for exemption under Branch 1 of section 19. In my view, these documents cannot reasonably be characterized as communications "which relate directly to seeking, formulating or giving legal advice". Rather, based on a careful review of these records, I find that they were prepared to provide Ministry officials with background information on the issue of health care payments for out-of-country services and to enable Ministry officials to respond to questions on the subject which could be posed by members of the legislature or the media.

On this basis, I find that the focus and objective of Records 4(B) and (C) relate to the information and communications needs of the Ministry rather than to "imminent litigation" as the Ministry suggests. In addition, there is no evidence before me to indicate that these records were created or obtained especially for a lawyer's brief for existing or contemplated litigation.

I will now consider whether Records 4(B) and (C) qualify for exemption under the second branch of section 19.

In its representations, the Ministry points out that legal counsel created Record 4(A). This matter is not in dispute. The Ministry then submits that when legal counsel attached her memorandum to Records 4(B) and (C) (along with her proposed revisions), the nature of these documents was transformed such that they were effectively re-created by legal counsel. I do not accept this argument. While it is true that legal counsel suggested that several parts of Record 4(B) be revised, I do not believe that this fact alone can serve to transform a standard type of record produced by an operating area of the Ministry into a piece of legal advice.

I also share the view expressed by Commissioner Tom Wright in Order P-227 that a record does not qualify for exemption under section 19 simply because it has been reviewed by a lawyer. Finally, I believe that the definition of the term "record" found in section 2(1) of the Act contemplates that a record will typically constitute a single document.

Based on this analysis, and given that each record can stand alone as a discrete document, I find no persuasive reason to bundle them together for the purposes of this appeal.

For the reasons outlined, therefore, I find that Records 4(B) and 4(C), being distinct documents, were not created **by** Crown counsel for the purposes of branch 2 of the section 19 exemption.

The Ministry then submits that the three records were prepared for use in giving legal advice to the Ministry. I accept this submission with respect to Record 4(A). I also acknowledge that, at the time these records were prepared, a legal action had been commenced against the provincial government.

Having made these observations, however, there is no specific evidence before me to establish that either Record 4(B) or 4(C) was prepared **for** legal counsel "for use in giving legal advice or in contemplation of or for use in litigation". Rather, based on my review of these documents, I believe that the purpose for their creation was to serve as information and communication aids to Ministry officials.

Without further evidence, I am not prepared to find that Records 4(B) and 4(C) were prepared for legal counsel for use in giving legal advice, in contemplation of litigation or for use in litigation. The result is that Branch 2 of section 19 does not apply to withhold the information contained in Records 4(B) and (C) from disclosure.

To conclude, the Ministry may apply section 19 of the Act to exempt Records 1, 2, 3, 4(A) and 7 in their entirety, as well as the sentence on page 3 of Record 6 which I have highlighted in yellow on the copy of this record to be provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

In light of the findings which I have made, it is not necessary for me to consider whether the Cabinet records or advice to government exemptions apply to Record 7.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry contends that one paragraph in Record 4(B), several passages in Record 4(C), one paragraph in Record 5 and one section of Record 6 qualify for exemption under sections 15(a) and (b) of the Act.

Sections 15(a) and (b) respectively provide that an institution may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution, or reveal information received in confidence from another government or its agency by the institution.

For a record to qualify for exemption under section 15(b), the Ministry must establish that:

- (1) the record contains information received by the Ministry in confidence from another government or its agencies; and
- (2) the disclosure of the record could give rise to a reasonable expectation that this information would be revealed.

The Ministry claims that the third paragraph on page 2 of Record 4(B) qualifies for exemption under section 15(b). I have carefully reviewed the wording of this passage which is very general in nature. I find that, if disclosed, the paragraph in question could not reasonably be expected to reveal information about the future plans of any one provincial government. On this basis, I find that the section 15(b) exemption does not apply to the passage in question.

I will now consider Record 4(C), which is a chart entitled "Out-Of-Country Payment Policies Provincial Survey - March 1, 1994". In this document, the Ministry has outlined the policies applied by various provinces to fund out-of-country medical care. The summary prepared for each province contains a section entitled "Proposals for Change". The Ministry submits that the information found in these sections is highly sensitive and that it was received from other provincial governments in confidence for the purposes of section 15(b) of the Act. The appellant, on the other hand, believes that this information is largely factual in nature. He also points out that since the records involve matters of public significance, the Ministry should disclose their contents.

I have carefully reviewed the passages in question in conjunction with the representations provided to me. Based on their contents, I find that the provinces provided this information to the Ministry with a reasonable expectation that it would be kept confidential. I also find that, if disclosed, the passages in question could reasonably be expected to reveal sensitive information about the future plans of the respective provincial governments. The result is that this information (which I have highlighted in red on the copy of the record provided to the Ministry's Freedom of Information and Privacy Coordinator) is exempt from disclosure under the Act.

Record 5 consists of a series of notes of a conference call involving officials from the Government of Ontario, the federal government and three other provincial governments. These notes were taken by an employee of the Ministry's Provider Services Branch. The purpose of this conference call was to prepare for a subsequent meeting of deputy ministers of health where the subject of out-of-country benefits was to be discussed.

Record 6 consists of an inter-office memorandum prepared by the same individual in which information about the conference call was circulated to other Ministry personnel.

Earlier in this order, I concluded that certain parts of the "non-responsive" sections of Records 5 and 6 fell within the parameters of this appeal. For greater certainty, I have circled these "newly responsive" parts of the documents in blue. I have also highlighted in green those portions of Records 5 and 6 which I have decided are not responsive to the appellant's request.

I have reviewed the "newly responsive" portions of Records 5 and 6 and find that they are generically similar to the other "responsive" information found in these two documents. With a view towards disposing of all of the issues raised in this appeal, I will also consider whether these "newly responsive" portions are subject to the section 15 exemptions.

In its representations, the Ministry indicates that the information contained in those portions of Records 5 and 6 which it considers to be responsive to the request was provided to the Ministry either by the federal or other provincial governments. It also points out that, during the conference call, contentious matters were discussed and that information from the parties was both provided and received in confidence. Then the Ministry states that, unless there is an understanding that such discussions are confidential, government officials will be unable to share information and negotiate freely.

In reviewing these two records, I find that their contents (with several minor exceptions) document exchanges between officials of the various governments present which deal with a sensitive and controversial issue. I also find that, given the subject matter of the conference call, it can be inferred that each participant held a reasonable expectation that any information which he or she communicated would be received in confidence both by the Ministry and the other government organizations. Finally, I conclude that, if disclosed, these portions of the records could reasonably be expected to reveal the information in question.

On this basis, I find that the Ministry has established that section 15(b) applies to the majority of the information for which this exemption has been claimed. I also find that this exemption applies to almost all

of the information in those portions of Records 5 and 6 which the Ministry had previously considered to be non-responsive to the request. I find, however, that the disclosure of certain factual information found on page 1 of Record 5 and on pages 1 to 4 of Record 6 would not reveal information received in confidence under section 15(b) of the Act.

I must now determine whether section 15(a) of the Act applies to exempt from disclosure those portions of Records 4(B), 5 and 6 which are not subject to the section 15(b) exemption. In order for section 15(a) to apply, the Ministry must establish that the relations which it seeks to protect are intergovernmental (that is relations between an institution and another government or its agencies) and that the disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of these relations.

I have carefully considered the passages from the three records at issue. I find that their contents are either very general in nature or contain factual information such that their disclosure could not give rise to a reasonable expectation of prejudice to intergovernmental relations. On this basis, the information in question does not qualify for exemption under section 15(a) of the Act and must be disclosed to the appellant.

For ease of reference, I have highlighted the portions of Records 4(C), 5 and 6 which qualify for exemption under section 15(b) of the Act in red in the copy of the records to be provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 1, 2, 3, 4(A) and 7 in their entirety and to the those portions of Records 4(C), 5 and 6 which I have **highlighted** in yellow, red and green on the copy of these records which I have provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose to the appellant Record 4(B) in its entirety as well as the portions of Records 4(C), 5 and 6 which I have **not highlighted** in either yellow, red or green within fifteen (15) days of the date of this order.
3. In order to verify compliance with this order, I reserve the right to require that the Ministry provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2 of this order.

Original signed by: _____

Irwin Glasberg

Assistant Commissioner

November 2, 1995

APPENDIX "A"
INDEX OF RECORDS AT ISSUE

RECORD NUMBER (S)	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION
1	Handwritten notes taken by legal counsel for the Ministry of a conference call held on August 29, 1994 respecting the application of various provisions of the <u>CHA</u>	19	Withheld
2	Memorandum dated September 8, 1994 from legal counsel for the Ministry to the Director of the Ministry's Health Insurance and Related Programs Branch entitled "Snowbirds - <u>Canada Health Insurance Act</u> Issues"	19	Withheld
3	Notes to file made by legal counsel for the Ministry entitled " <u>Canada Health Act</u> Interpretation Issues"	19	Withheld
4(A)	Inter-office memorandum dated October 26, 1994 from legal counsel for the Ministry to the Senior Assistant to the Assistant Deputy Minister Health Insurance and Related Programs Division entitled "Revision of OOC Health Services Payments"	19	Withheld
4(B)	Issue sheet dated October 21, 1994 prepared by an official of the Ministry's Provider Services Branch entitled "Revision of Out-Of-Country Health Services Payment Policy"	15(a) and (b) and 19	Disclosed
4(C)	Chart entitled "Out-Of-Country Payment Policies Provincial Survey - March 1, 1994"	15(a) and (b) and 19	Disclosed in part
5	Notes taken by an employee of the Ministry's Provider Services Branch of a conference call involving officials from the Government of Ontario, the federal government and three other provincial governments	15(a) and (b)	Disclosed in part
6	Inter-office memorandum dated August 31, 1994 prepared by the Ministry official referred to in Record 5 in which notes of this conference call were circulated to other Ministry personnel	15(a) and (b) and 19	Disclosed in part
7	Transmittal letter dated August 26, 1994 from legal counsel for the MAG to legal counsel for the Ministry where the former individual enclosed a briefing note that he authored on the subject of changes to the regulations under the <u>Ontario Health Insurance Act</u>	12(1)(e), 13(1) and 19	Withheld