



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

ORDER P-1037

Appeal P-9400704

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 Ministry of Health (the Ministry) received a request for all records pertaining to the project known as “1630 Lawrence Avenue West” (the Project), except for those which originated from or were sent to the requester. The Project is a not-for-profit development containing sixteen apartments for adults with physical disabilities. The requester was particularly interested in receiving funding approval information, including those records which indicate when the funding was operationalized, and how these funds have been accounted for since that time.

The Ministry located 331 pages of records responsive to the request and granted partial access to them. Access was denied to the remaining records in full or in part on the basis of the following exemptions:

- advice or recommendations - section 13(1)
- economic and other interests- section 18(1)(e)
- proposed plans of an institution - section 18(1)(g)
- invasion of privacy - section 21(1)

Following third party notification pursuant to section 28(1) of the Act, the Ministry also denied access to an additional 63 pages on the basis of the exemption in section 17(1) of the Act. The requester appealed the Ministry’s decision.

During mediation, the appellant withdrew his appeal of the Ministry’s decision regarding the application of the exemption in section 21(1). These portions of the records are no longer at issue and should not be disclosed to the appellant.

A Notice of Inquiry was sent to the Ministry, the appellant and four affected parties. Representations were received from the Ministry, the appellant and two of the affected parties. In its representations, the Ministry indicated that it no longer relies on the application of the exemption in section 18(1)(g). As this is a discretionary exemption, I will not consider it further in this order.

In its representations, one of the affected parties consented to the disclosure of the records pertaining to it, provided this was done in a non-identifying manner. Accordingly, the portions of the records which do not identify this affected party are no longer at issue and should be disclosed to the appellant. The applicability of the exemption in section 17(1) to the identity of the affected party remains at issue in this appeal.

The records at issue consist of letters, reports and memoranda.

DISCUSSION:

THIRD PARTY INFORMATION

The records for which the Ministry claims the application of section 17 pertain to four organizations who had submitted proposals to the Ministry for the provision of support and attendant care services to disabled adults at the Project. Three of these proposals were submitted in response to a request for proposals (a RFP) issued by the Ministry in July, 1993. The fourth proposal was submitted specifically at the request of the Ministry.

In response to notification by the Ministry under section 28(1) of the Act, one organization consented to the release of the majority of records pertaining to it. As I indicated above, another organization consented to an anonymized release of the records concerning it. The records at issue consist of letters and the proposals submitted by two organizations, two pages of the proposal submitted by one organization, and identifying information relating to one organization.

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the institution and/or the affected 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 (a), (b) or (c) of section 17(1) will occur.

Part One

The Ministry and affected parties submit that the records contain commercial and financial information that they relate specifically to the business activities of the affected parties, and include budget details and financial statements. I agree, and find that the requirements of part one of the test have been met.

Part Two

In order to satisfy part two of the test, the information at issue must have been supplied by the affected parties to the Ministry, either explicitly or implicitly in confidence.

As I indicated above, the proposals, (pages 106 - 132, 194 - 197 and 241 - 264) along with covering letters (pages 104 - 105 and 239 - 240) were submitted to the Ministry in response to a RFP, and pages 41 and 42 were submitted at the request of the Ministry. I am satisfied that the information in these pages was supplied to the Ministry.

Pages 103 and 193 are letters from the Ministry to two of the affected parties, and as such were not supplied by the affected parties to the Ministry. A number of orders have determined that information

contained in a record would reveal information “supplied” by a third party, 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. These two letters are in direct response to the proposals submitted by the affected parties and, for the most part, do not reveal information which was supplied by the affected parties. Portions of these letters, however, refer back to the affected parties’ proposals. Disclosure of this information would reveal information actually supplied by the affected parties.

I have found that portions of pages 103 and 193 were not supplied by the affected parties, nor would disclosure of them reveal information which was supplied by them. Accordingly, these portions fail to meet part two of the test. As all three parts of the section 17(1) test must be satisfied, I will not consider this information further.

I will now consider whether the information contained in the proposals and covering letters, and the remaining portions of pages 103 and 193 which I found to be supplied, was supplied by the affected parties to the Ministry in confidence.

The Ministry states that although there is nothing in the RFP to indicate that information is received in confidence, the Ministry’s standard practice is to always treat proposals as confidential. I am satisfied that, in submitting their proposals to the Ministry, the affected parties would have reasonably expected that the proposals would be treated in a confidential manner. On this basis, I find that the information at issue was supplied to the Ministry implicitly in confidence. Therefore, I find that both requirements for part two of the test have been met with respect to pages 41, 42, 104 - 132, 194 - 197 and 239 - 264 and the remaining portions of pages 103 and 193.

Part Three

Pages 41 and 42

The Ministry and one affected party indicate that these two pages relate to a funding proposal the affected party prepared for another project. This proposal was submitted along with the proposal for the Project as a sample of the affected party’s work. As I indicated above, this affected party consented to the disclosure of the rest of its proposal for the Project. I am satisfied that, in the circumstances of this appeal, disclosure of these pages could reasonably be expected to result in the harms claimed. Thus all three parts of the section 17(1) test have been met with respect to this information.

Remaining pages

The Ministry submits that the overriding concern regarding disclosure of the information contained in the records is that the affected parties are in competition with one another for funding. Moreover, the Ministry argues that the integrity of the competitive process would be compromised should disclosure of this information occur before a final decision regarding a service provider is made.

The Ministry states that because a final decision has not been made about a supplier, it is reasonable to expect that negotiations and competitive positions would be compromised if one party received information

about another. However, the Ministry has provided no evidence to support this statement. The two affected parties resisting disclosure did not submit representations.

In contrast to this position, two of the four affected parties have consented to disclosure of the contents of their proposals. While this, in an of itself, is not determinative of whether a party will suffer financial harm from disclosure, it demonstrates a clearly inconsistent view to that taken by the Ministry.

Although one of the affected parties consented to the anonymized disclosure of the contents of its proposal, it did not provide any representations on its reasons for wishing anonymity. It simply indicated that its consent was conditional on this requirement. It would appear, however, that its concern is not with disclosure of the content of its proposal, or whether a competitor has access to this information.

In the absence of sufficient evidence which would permit me to conclude that disclosure of any of these records could reasonably be expected to result in one of the harms set out in this section, I find that the third part of the test has not been met. Accordingly, the remaining records do not qualify for exemption under section 17(1) of the Act.

In summary, pages 41 and 42 qualify for exemption under section 17(1) of the Act and should not be disclosed. The remaining records discussed under this section do not qualify for exemption and should be released in their entirety.

ADVICE OR RECOMMENDATIONS

The Ministry claims that the exemption in section 13(1) applies to pages 133 - 135, 146 - 154, 172, 176, 281, 284, 289, 300, 301, 303 - 310, 315 and parts of 173, 174, 280, 283, 299 and 302. Pages 302 - 304 are duplicates of pages 146 - 148, and pages 305 - 310 and 282 - 284 are duplicates of pages 149 - 154 and 172 - 174 respectively. Although my analysis and findings may only refer to the lower numbered pages, they apply equally to the duplicate pages.

Section 13(1) of the Act states that:

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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The appellant argues that the test for section 13(1) enunciated above, is prospective, and that once a decision has been made, the advice or recommendations made in the course of that decision can be disclosed without fear of offending section 13(1). I disagree with the appellant’s position.

In my view, there is nothing in the wording of section 13(1) or (2) which would lead to the appellant's interpretation of it. The purpose of the test, which was originally established in Order 118, is to limit the availability of this exemption to only that information the nature of which relates

to a suggested course of action made within the deliberative process.

Moreover, in Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making." To interpret the availability of the exemption in section 13(1) as prospective only would be contrary to the purpose of the exemption. In my view, in order to protect the "free flow" of advice or recommendations, employees must feel confident that, regardless of the ultimate decision which is made, confidentiality under which the advice or recommendations is given will be maintained.

In its representations, the Ministry indicates that a decision has not yet been made regarding the appointment of a service provider for the Project. The Ministry submits that the records at issue are written communications prepared by Long-Term Care Division staff to provide advice and recommendations to decision makers concerning the negotiation and appointment of a support and attendant care services provider, which, the Ministry points out, is directly related to its mandate.

Pages 133 - 135 contain a number of questions and answers which the Ministry states set out the criteria for evaluating a service provider's ability to deliver the required services. In my view, these pages do not set out any advice or recommended course of action. Rather, they are a reflection of analysis employed by staff in determining whether or not the proposal of a potential service provider has met the Ministry's requirements. Moreover, there must be evidence of some type of communication of information from one person to another in order for that information to qualify as "advice" or "recommendations" (Order M-616). There is nothing on the face of these pages, nor in the Ministry's representations to indicate that this record was intended to be, or was in fact, communicated to another individual. Accordingly, these pages do not qualify for exemption under section 13(1).

Pages 146 - 148 (duplicate pages 302 - 304) contain a memorandum to the Manager of Program Development from the Program Supervisor in which the Supervisor outlines his comparative review of two proposals. I find that part of page 146 and the "Recommendation" section on page 148 contain passages which provide advice or set out a recommended course of action to be accepted or rejected, and these passages qualify for exemption under section 13(1). Although the remaining portions of these pages contain the Supervisor's views on general issues, this does not constitute advice within the meaning of section 13(1).

Pages 149 - 151 and 152 - 154 (duplicate pages 305 - 307 and 308 - 310) consist of two memoranda to file. Both memoranda relate to a review of a proposal and whether or not it meets the requirements of the Ministry. In my view, these pages do not contain any information which qualifies as "advice" or "recommendations" and therefore, these records do not qualify under section 13(1).

Pages 172 - 174 and 176 are four pages of a five-page memorandum to file (pages 282 - 284 are duplicates of pages 172 - 174) regarding the progress of talks regarding services at the Project. This

memorandum reflects actions that were taken by the author concerning issues relating to the proposed service providers. In my view, page 172 does not contain any information which qualifies as “advice” or “recommendations” and therefore, this record does not qualify under section 13(1).

Portions of pages 173 and 174 and page 176 consist of several options for possible approaches to take in dealing with the Project. There is no indication on the face of the record that these options were prepared for any particular individual, and the Ministry does not specifically address this record in its representations. The options consist of alternative courses of action, some of which include observations about the possible consequences of implementing the particular option to which they are attached. However, no preferred option is identified.

The Ministry indicates that the records contain analysis, options and advice generated by Ministry staff during negotiations conducted between July 1993 and June 1994 regarding a service provider. The Ministry submits that these records show the available options which Ministry staff would be prepared to recommend for approval by senior decision makers.

In Order P-529, Assistant Commissioner Irwin Glasberg considered the possible application of section 13(1) to a record which set out a number of options, as well as possible outcomes relating to each. Because the record did not provide advice or recommendations about which alternative should be selected, the Assistant Commissioner found that section 13(1) could not apply to it.

I agree with this reasoning and adopt it for the purposes of this appeal. In the circumstances of this appeal, I find that neither the options themselves, nor the observations about possible consequences associated with particular options, constitute advice or recommendations. Accordingly, despite the fact that the information in these pages relates to the Ministry’s legislated mandate, and sets out alternative courses of action, I find that its disclosure would not reveal advice or recommendations as required by section 13(1). Therefore this exemption does not apply to the undisclosed portions of pages 173 and 174, and page 176.

Pages 280 and 281 consist of the last two pages of a briefing note of the Ministry of Community and Social Services (MCSS). Part of page 280 and all of page 281 contain the “Response” section of the briefing note. Within the response section, several options are set out, as well as possible outcomes relating to each. My analysis regarding pages 173, 174 and 176 similarly applies to this information.

Moreover, previous orders of the Commissioner have considered the possible application of section 13(1) to issue sheets and briefing notes (Orders P-771 and P-946). In Order P-771, Assistant Commissioner Irwin Glasberg found that the contents of the response sections of issue sheets in that appeal were purely factual in nature and did not contain information relating to a suggested course of action which might be accepted or rejected as part of the deliberative process. He concluded that the exemption in section 13(1) was not applicable.

I agree with the approach taken by Assistant Commissioner Glasberg and adopt it for the purposes of this appeal. The contents of the “Response” section on pages 280 and 281 are similarly purely factual in nature, and I find that it does not contain any information which relates to a suggested course of action which might

be accepted or rejected as part of the decision-making process in this case. The result is that section 13(1) does not apply to exempt these pages from disclosure.

Page 289 is an interoffice memorandum from the Acting Executive Director of Long-Term Care to the Assistant Deputy Ministry on action to take regarding one of the affected parties. I find that this page constitutes advice or recommendations in the sense that a course of action is recommended.

Accordingly, this page qualifies for exemption under section 13(1).

Pages 299 and 315 and the top portion of page 300 consist of interoffice memoranda between MCSS and the Ministry. In my view, these memoranda do not contain any information which qualifies as “advice” or “recommendations”. Accordingly, pages 299, 315 and the top portion of page 300 do not qualify for exemption under section 13(1). The remainder of page 300 and page 301, however, consist of a draft letter to one of the proposed service providers. I find that this draft constitutes a suggested course of action and thus qualifies for exemption under section 13(1).

To summarize, I have found that pages 289 and 301, in their entirety, and parts of pages 146 and 148 (duplicate pages 302 and 304) and page 300, qualify for exemption under section 13(1). In the case of pages which are exempt in part, I have highlighted the exempt passages on the copies of these records which are being sent to the Ministry’s Freedom of Information and Privacy Co-ordinator with a copy of this order.

ECONOMIC AND OTHER INTERESTS

The Ministry claims that the exemption in section 18(1)(e) applies to pages 133 - 135, 146 - 154, 172, 176, 281, 284, 289, 300, 301, 303 - 310, 315 and parts of 173, 174, 280, 283, 299 and 302. I have already found that pages 289 and 301 and parts of pages 146, 148 (duplicate pages 302 and 304), and 300 are exempt under section 13(1). In this analysis, I will not consider the information I have previously exempted.

Order P-219 established that in order to qualify for exemption under subsection 18(1)(e), the Ministry must satisfy all four parts of the following test:

1. the record must contain positions, plans, procedures, criteria or instructions; and
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and
3. the negotiations must be carried on currently, or will be carried on in the future; and
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

In its representations, the Ministry states that its decision to exempt the information at issue under this section is based on the fact that negotiations undertaken to select a service provider are not completed. The Ministry submits that disclosure of this information at this time would jeopardize its position in these negotiations.

The Ministry indicates that, in general, the records contain analysis, options and advice created by staff during negotiations. Specifically, pages 133 - 135 contain the criteria established for evaluating an acceptable provider, and page 299 pertains to consultations between the Ministry and another ministry concerning divergent positions on service providers. A number of other pages serve as progress reports which track the Ministry's position and options in the negotiations.

The appellant indicates in his representations that the timing of the negotiations is key to the application of subsection 18(1)(e) to the information in the records. He refers to Order 141, in which former Commissioner Sidney B. Linden states that:

Because subsections 18(1)(e) and (f) contemplate on-going or future events, a severance containing information about a past event such as a “**failed negotiation**” could not possibly qualify for exemption under either of these provisions.

The appellant indicates that negotiations between the company which provided the housing for the Project and the Ministry regarding one of the affected parties qualify as “failed negotiations”. The appellant argues that any records which relate to this aspect of these negotiations should not be protected under section 18.

Further, the appellant argues that the exemption in section 18(1)(e) is prospective in nature. He indicates that since the information he seeks relates to a financial commitment which has already been made it does not qualify for exemption under this section.

Despite the information provided by the parties in their representations, the status of the negotiations between the Ministry and all of the potential service providers for the Project is not completely clear. However, neither the Ministry's representations, nor the records themselves set out any basis for me to conclude that any of the information contained in the records was or is intended to be applied to these negotiations. I find, therefore, that the second part of the test has not been met and none of the records qualify for exemption under section 18(1)(e).

ORDER:

1. I uphold the Ministry's decision to withhold pages 289 and 301 and the portions of pages 146, 148 (duplicate pages 302 and 304), and 300 which are highlighted on the copies of those records being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose the remaining pages to the appellant within thirty-five (35) days of the date of this order but not before the thirtieth (30th) day after the date of this order.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the pages which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

November 2, 1995

Laurel Cropley

Inquiry Officer