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

ORDER PO-1721

Appeal PA-980309-1

Ministry of Health

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BACKGROUND:

In 1997, the Ministry of Health (the Ministry) and the Ontario Medical Association (the OMA) negotiated an agreement governing certain aspects of the management of Ontario's health care program (the agreement). The agreement includes the establishment of a Physician Services Committee (the PSC), which the Ministry describes as "an ongoing advisory body charged with developing a strong relationship between Ontario's physicians and the ministry".

The mandate and terms of reference of the PSC are set out in an appendix attached to the agreement. The committee consists of four members appointed by the OMA and four members appointed by the Ministry, and is chaired by a professional facilitator chosen by the parties. The PSC is intended to provide an open and structured process for regular liaison and communication between the Ministry and the medical profession. The Ministry explains:

> The PSC's terms of reference are to advise the ministry and the OMA on the changing role of physicians within the health care system, develop recommendations for enhancing quality and effectiveness of medical care in Ontario, identify efficiencies within the system, review and monitor fee-for-service utilization and recommend steps to deal with changes. The PSC also recommends patient education programs and programs to correct inappropriate patient/physician practices, reviews and resolves disagreement, reallocates increases of medical malpractice insurance subsidies, and monitors the impact of hospital restructuring.

In 1998, the PSC submitted a series of recommendations to the Ministry in response to increased utilization of the provincial medical system. The Ministry in turn presented recommendations to Cabinet in the spring of 1998, and decisions were made at that time regarding the OHIP Schedule of Benefits and certain medical coverages, one of which involved travel medicine services.

NATURE OF THE APPEAL:

The Ministry received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the following:

> All information held by the Ministry of Health, including the OHIP offices and any associated advisory panels and working groups, related to the following recommendation, "PSC recommendations for fiscal 1998-99 approved by OMA Board section e) 3. Immunizations for the purpose of travel." from the beginnings of PSC to this date, including all documents, minutes, communications (written, facsimiles, electronic mail), recordings and any other relevant material. All personal identifiers, which would be legitimately used as an exemption for release of information, may be removed.

The Ministry located 72 responsive records in three program areas: Legal Services, Negotiations Secretariat and Provider Services. Upon payment of the requested fee of $48.70, the Ministry granted access in full to three records, partial access to 14 records, and denied access to the remaining 55 records.

The following exemption claims were relied on by the Ministry as the basis for denying access to 46 of these records:

- sections 12(1)(b) and (f) - Cabinet records
- section 13(1) - advice and recommendations
- section 17(1) - third party information
- sections 18(1)(c) and (d) - economic and other interests of Ontario
- section 19 - solicitor-client privilege
- section 21(1) - personal information

The remaining 23 records were denied in full on the basis that they fell outside the scope of the Act, pursuant to section 65(6)3.

The Ministry also maintained that a great deal of information included in the records relates to topics other than travel immunization, and that these parts of the various records were not responsive to the request.

The requester, now the appellant, appealed the Ministry's decision, including the amount of the fee. He also claimed that further responsive records should exist, including:

- amounts known to OHIP or the Ministry and provided to the PSC for their deliberations which were paid for in fee-for-service, technical fees, and medication costs for Travel Medicine services;

- amounts paid for investigation and management of travel related ailments; and

- documents related to the PSC creation, mandate, membership, financial support and processes which led up to the decision making related to the Travel Medicine recommendation.

During mediation, the appellant agreed not to pursue access to those parts of records identified by the Ministry as non-responsive, as well as records or partial records exempted by the Ministry under sections 12(1)(f) and 21(1) of the Act. Consequently, Records 1A, 4A, 6A, 11A, 28A, 19B, 27B, 1C, 2C, 3C and 7C are no longer at issue in this appeal.

Also during mediation, the Ministry conducted a further search and located four additional responsive records. The Ministry claimed sections 12(1)(c) and 13(1) as the basis for denying access to these records. I will refer to them as Records 1D, 2D, 3D and 4D.

A Notice of Inquiry was sent to the Ministry, the appellant and the OMA as a party whose interests may be affected by the outcome of this appeal. Representations were received from all three parties.

RECORDS:

Sixty-two records remain at issue, either in whole or in part. I have divided them into two broad groups. Group 1 records are those that deal primarily or exclusively with the PSC's consideration of changes to travel medicine services. Group 2 records are broader in scope and deal with a series of recommendations for change that emerged from deliberations of the PSC during 1998, one of which concerns travel medicine services. None of the Group 2 records deals with travel medicine services as a primary topic, and only relatively small portions of these records are responsive to the appellant's request.

The following is a list of Group 1 records:

10A, 14A, 15A, 17A, 19A, 22A, 23A, 24A, 25A, 26A, 4C, 1D, 2D, 3D and 4D

DISCUSSION:

JURISDICTION

The first issue to be decided is whether section 65(6)3 applies to Records 1B-10B, 12B-18B, 20B, 22B, 24B-26B and/or 5C. All of these are Group 2 records.

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegates to continue an inquiry on the substantive issue of whether or not a record is exempt. If the requested records fall within the scope of section 65(6), it would be excluded from the scope of the Act unless it is a record described in section 65(7). Section 65(7) lists exceptions to the exclusions established in section 65(6).

Sections 65(6) and (7) read as follows:

> (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment- related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Sections 65(6) and (7) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 65(6) falls within one of the exceptions enumerated in section 65(7), then the Act applies.

The Ministry relies specifically on section 65(6)3. For a record to fall within the scope of this section, the Ministry must establish that:

1. the record was collected, prepared, maintained or used by the Ministry or on its behalf; and

2. this collection, preparation, maintenance or usage was in relation to meeting, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Ministry has an interest.

(Order P-1242)

The records subject to the Ministry's section 65(6)3 claim consist primarily of typewritten and handwritten minutes of meetings of the PSC. Only very small portions of these records, often single line references, are responsive to the appellant's request. The vast majority of the information in these records relates to other activities undertaken by the PSC which fall outside the scope of the request.

Having reviewed these records, I find that they were maintained and used by the Ministry in relation to meetings, consultations, discussions and communications, thereby satisfying the first two requirements of section 65(6)3.

As far as the third requirement is concerned, the Ministry states:

> While it must be said that physicians are not directly employed by the Ministry, it must be added that the source of their income, just as it would be if the Ministry were their employer, is the Ministry. In managing Ontario's health care system, the Ministry is operating as a business would, putting its monetary and human resources to best and most efficient and effective use. A very large part of the human resources available to deliver the services being managed by the Ministry are, naturally, physicians, members of the OMA. The current agreement between the Ministry and the OMA, under which the PSC operates, is analogous to an agreement between employers and employees arrived at through collective bargaining. The OMA is an association collectively bargaining with the Ministry to resolve issues of working conditions and remuneration for its members. From time to time, tentative agreements are renegotiated between the OMA and the Ministryand are put to a vote by the OMA membership before such agreements can be said to be final. This is another mark of similarity between employers and employees in more conventional labour/management relationships.
>
> The Ministry submits, therefore, that the work of the PSC in fulfilling the mandate established for it in the current Agreement between the Ministry and the OMA, and therefore the records it produces as a result of its ongoing work, is properly described in subsection 65(6)3.

The OMA submits:

> ... that since the PSC was created by the Agreement, the interests of the OMA in the operation and decision-making of the PSC are jointly held with the Ministry. The documents relate to "meetings, consultations, discussions or communications about labour relations". The Agreement is a contract between the Ministry of Health and the OMA, representing the economic interests of Ontario physicians. The Ministry has direct contractual and financial interests which have the capacity to affect its legal rights and obligations.

The appellant did not submit representations on the application of section 65(6)3.

The term "labour relations" appears in section 17(1) of the Act. In that context, Adjudicator Holly Big Canoe discussed the term "labour relations information" in Order P-653, and made the following statements:

> In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the **collective** relationship between the employer and its employees. [emphasis in original]

I find that Adjudicator Big Canoe's interpretation of the term is equally applicable in the context of section 65(6)3. Therefore, I find that "labour relations" for the purposes of this section is properly defined as the collective relationship between an employer and its employees.

In Order P-1545, I made the following findings regarding the interpretation of section 65(6):

> In order to qualify under any of the paragraphs of section 65(6), a record must either relate to "labour-relations or to the employment of a person", or be "about labour relations or employment related matters."
>
> Hydro [the institution in that appeal] and the affected person state quite specifically that the affected person is not an employee. The record itself includes provisions which make it clear that the contract does not create an employment relationship between Hydro and the affected person. However, Hydro submits that in carrying out his responsibilities under the contract "it could be argued that this is similar to 'employment', and the record could thus be described as related to employment matters."
>
> I do not accept Hydro's position. Section 65(6) has no application outside the employment context, and ... I find that no employment relationship exists between Hydro and the affected person. Accordingly, the record does not fall within the parameters of section 65(6) and is, therefore, subject to the Act. ...

I applied this same reasoning in determining that section 65(6)3 did not apply to the relationship between the Government of Ontario and Justices of the Peace, which also fell outside the employment context (see Orders P-1563 and P-1564).

The Ministry acknowledges in its representations that physicians are not directly employed by the Ministry, and I find that no employer/employee relationship exists between physicians and the Government of Ontario. Following the same reasoning I applied in Orders P-1545, P-1563 and P-1564, I find that the work of the PSC and the records produced by the PSC in discharging its responsibilities under the terms of the agreement between the Ministry and the OMA is not an employment-related matter for the purposes of section 65(6)3. No employer-employee relationship exists between the Government of Ontario and the members of the OMA and, in my view, it necessarily follows that the records are not "about labour relations" for the purpose of section 65(6)3 of the Act.

Therefore, I find that the meetings, consultations, discussions and/or communications reflected in Records 1B-10B, 12B-18B, 20B, 22B, 24B-26B and 5C are not about labour relations or employment-related matters in which the Ministry has an interest, and section 65(6)3 has no application to these records. Accordingly, these records are subject to the provisions of the Act, and I will include a provision in this order requiring the Ministry to issue a decision to the appellant regarding access to the small portions of these records that are responsive to his request.

CALCULATION OF THE FEE

The charging of a fee is authorized by section 57(1) of the Act and section 6 of R.R.O. 1990, Regulation 460. The provisions state, in part:

> 57(1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> ...
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> ...
>
> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> ...
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> ...

The fees charges by the Ministry are set out in its decision letter to the appellant as follows:

- $11.20 for photocopying 56 pages of records at 20 cents per page; and
- $37.50 for 1.25 hours required to prepare the records for disclosure, at the rate of $7.50 for each 15 minutes.

The appellant did not provide representations on this issue.

In its representations, the Ministry states that severances were required for 50 of the 56 pages of records disclosed to the appellant, and that this process took one minute and 20 seconds per page for a total of 1 hour and 15 minutes. The Ministry points out that this time is well under the "two minutes per page" standard established in previous orders of this office (eg. Orders P-26, P-184 and P-565).

I agree that the "two minutes per page" standard is reasonable in situations where multiple severances are required on various pages of records. As far as the records disclosed to the appellant in the present appeal are concerned, some required more severing than others, but the Ministry's estimate is well within the allowable range established in previous orders, and I find that it is reasonable in the circumstances. Therefore, I uphold the Ministry's estimate of $37.50 for preparation time.

The photocopy charges comply with Regulation 460.

Therefore, I uphold the Ministry's fee of $48.70.

CABINET RECORDS

The Ministry claims section 12(1)(b) as the basis for exempting Records 7A, 9A, 8C and 9C, and section 12(1)(c) as the basis for denying access to Records 1D, 2D, 3D and 4D.

The first four records fall under Group 2, and the second four under Group 1.

Sections 12(1)(b) and (c) of the Act read as follows:

> 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,
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

The Ministry's representations on section 12(1)(b) read as follows:

> The Ministry submits that section 12(1)(b) has been appropriately applied to Records 7A and 9A, both of which concern proposed changes to section 24 of Regulation 552 under

> the Health Insurance Act, and to Records 8C and 9C, both of which were prepared for submission, and submitted, to Cabinet, as is evident from the documents themselves.

Record 9C is a Cabinet Submission, and Record 8C is a set of presentation slides used by the Ministry to brief the Policy and Priorities Board of Cabinet. These two records clearly qualify under the introductory wording of section 12(1), in that their disclosure would reveal the substance of deliberations of Cabinet and one of its committees.

Records 7A and 9A are documents prepared by the Ministry as part of the Cabinet approval process for obtaining changes to regulations under the Health Insurance Act. It is clear from their content that these records were prepared for submission to a committee of Cabinet, and the Ministry's representations confirm that this did in fact occur. I find that Records 7A and 9A qualify under both the introductory wording of section 12(1) and under section 12(1)(b), since they both contain policy options and recommendations.

The only submission made by the Ministry on Records 1D-4D is the following statement:

> The Ministry also submits that section 12(1)(c) has been appropriately applied to Records 1D-4D, since they comprise background material for a cabinet submission.

These four records are each one-page in length, and deal with travel immunization. The Ministry's decision letter and representations do not provide a specific context for these records, but it would appear from their content, date references included in the records, and the exemption claim relied on by the Ministry, that they are background materials used during the process of discussing various health care utilization issues put forward by the Ministry in the spring of 1998. It is unclear from the records themselves or the representations provided by the Ministry whether any of these records were actually submitted to Cabinet or any of its committees.

Previous orders of this Office have held that section 12(1)(c) is prospective in nature (Orders P-60, P-323 and P-1623). The use of the present tense in this section restricts it application to situations where Cabinet, or its committees, has not yet made and implemented a decision. Decisions on changes to travel medicine coverage were made by Cabinet in 1998 and have been implemented. Therefore, I find that section 12(1)(c) does not apply to Records 1D-4D.

I have also reviewed these four records to determine if they qualify for exemption under the introductory wording of section 12(1). It has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1). The Ministry's brief representations provide no assistance in making this determination.
Records 1D-4D contain factual information regarding the issue of travel immunization and the basis for calculating proposed savings through alteration in coverage for this medical service. Record 2A, which has been disclosed by the Ministry to the appellant, includes the savings figure. I have been provided with no

evidence that these facts and/or calculations formed part of the deliberations of Cabinet or its committees. The savings figure itself has been disclosed, and I am unable to conclude that the basis for the calculation of the savings figure would reveal or would enable the drawing of accurate inferences with respect to any deliberations of Cabinet on this issue. Therefore, I find that Records 1D-4D do not qualify for exemption under section 12(1).

SOLICITOR-CLIENT PRIVILEGE

The following records have been exempted by the Ministry under section 19 of the Act:

Group 1 - 10A, 14A, 15A, 17A, 19A, 22A, 23A, 24A, 25A, 26A and 4C

Group 2 - 8A, 9A, 12A, 13A, 14A, 16A, 18A, 20A, 21A, 27A, and 29A through 35A

I have already found that Record 9A qualifies for exemption under section 12(1) and will not consider it further.

The section 19 exemption states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order P-1342]

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
>
> [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

The Ministry states that all of these records, with the exception of Record 4C, were located in the Ministry's Legal Services Branch, and that they were prepared by or for Crown counsel for use in giving legal advice to the client program area in the Ministry and qualify under solicitor-client communication privilege.

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (see Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

All of the records relate to communications regarding proposed regulatory changes to the Health Insurance Act and the OHIP Schedule of Benefits.

Records 10A, 15A, 17A, 19A, 25A, 30A, 33A and 34A are all memoranda from Ministry staff or Legislative Counsel to Ministry counsel seeking advice respecting various aspects of the proposed changes. Records 12A, 13A, 14A, 24A, 26A and 29A are memoranda and Records 20A, 21A, 22A and 23A are "e-mails", all of which are from Ministry counsel to Ministry staff or Legislative Counsel providing legal advice in response to the request for direction. Record 8A contains draft proposed revisions to the OHIP Schedule of Benefits dealing with travel medicine services. The Ministry explains that this draft was provided to Ministry counsel for review and legal advice. Record 4C is a briefing note which has been

partially disclosed to the appellant. A discrete section of this record contains legal advice to the Minister of Health from Ministry counsel, and this is the only information severed from the record.

I find that these records are confidential written communications between Ministry officials and legal counsel, and are directly related to the seeking, formulating or provision of legal advice. Therefore, I find that they are subject to solicitor-client communication privilege and qualify for exemption under section 19 of the Act.

The Ministry states that Records 16A, 18A, 31A, 32A and 35A consist of handwritten notes created by Ministry counsel for use and reference in providing legal advice regarding the above-noted proposed amendments. I accept that these records consist of notes prepared by counsel in the context of their work on the proposed amendments. In Order P-1409, former Adjudicator John Higgins found that handwritten notes are often prepared for use in giving legal advice at a later time, and if this is established, they qualify for exemption under section 19. In my view, in order to fit within this category there must be an established relationship between the notes and their potential subsequent use in providing legal advice, either from the contents of the notes themselves or through representations provided by the Ministry. I find that the notes contained in Records 16A, 18A, 31A, 32A and 35A contain information directly related to the provision of confidential legal advice in other records which qualify for exemption under section 19. There is a clear relationship between the content of the notes and the issues/advice discussed in these other records, and I find the handwritten notes also qualify for exemption under section 19. I also find that these notes are accurately characterized as working papers which relate directly to the formulating and giving of legal advice, as outlined in Susan Hoisery Ltd.

Record 27A is a memo from one member of the Ministry's Legal Services Branch to other counsel within that same Branch. Its contents set out the issues which were considered by counsel and the advice she provided to Ministry staff in regards to those issues. In my view, although Records 27A and 4C do not represent a direct communication between a solicitor and a client, I find that their disclosure would reveal confidential legal advice, and are part of the "continuum of communications" between solicitor and client outlined in Balabel. Therefore, I find that these two records also qualify for exemption under section 19 (Orders PO-1663 and MO-1205).

ADVICE OR RECOMMENDATIONS

The only records remaining at issue for which the Ministry has claimed section 13(1) are Records 1D, 2D, 3D and 4D. All four are Group 1 records.

Section 13(1) of the Act 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.

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders that advice or 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. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1).

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".

The only representations provided by the Ministry on the application of section 13(1) to the above-noted records state as follows:

> ... Records 1D-4D, are recommendations from civil servants prepared for cabinet submissions.
>
> The Ministry submits that the advice of civil servants is self-evident in all these documents and that the advice was intended to contribute to further deliberation among senior Ministry officials, as well as the Minister and members of Cabinet. For these reasons, the discretionary exemption provided by section 13(1) has been properly applied.

As stated earlier, Records 1D-4D consist of factual information regarding the issue of travel immunization and the basis for calculating proposed savings through alterations in coverage for this medical service. The final paragraph of Record 1D identifies an unresolved issue, and includes considerations which need to be addressed by the Ministry in resolving this issue. I find that this paragraph contains "advice" for the purpose of section 13(1). With the exception of this one paragraph, no advice or recommendations are contained in these records, and I do not accept the Ministry's submission that advice or recommendations is "self-evident".

Therefore, I find that Records 1D, 2D, 3D and 4D, with the exception of the final paragraph of Record 1D which contains advice of a public servant, contain facts and no suggested course of action, and do not satisfy the requirements for exemption under section 13(1). No other discretionary exemptions have been claimed for these records and no mandatory exemptions apply. Therefore, they should be disclosed to the appellant.

THIRD PARTY INFORMATION

The Ministry submits that Records 5A and 28B qualify for exemption pursuant to section 17(1) of the Act. Although the Ministry included Record 11B among the group of records subject to section 65(6), it would appear that this was in error. The administrative cover page and exemption notations made on Record 11B by the Ministry refer to section 17(1) rather than section 65(6), and the content of this record is very similar in nature to Records 5A and 28B. The OMA also points out in its representations that Record 11B should have been included within the scope of the section 17(1) exemption claim. For these reasons I have decided to include Record 11B in the section 17(1) discussion.

All three of these records fall under Group 2 and are identified as "OMA Fax Network Membership Updates". Only parts of these records are responsive to the appellant's request.

For the records to qualify for exemption under sections 17(1)(a), (b) or (c), the parties resisting disclosure 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 Ministry 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]

Sections 17(1)(a), (b) and (c) state:

> 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;

Requirement One

The Ministry submits that:

> ... the responsive portions of these records consist of OMA financial/labour relations information communicated to its members via the OMA Fax Network Membership Update ...

The OMA submits that:

> The documents reveal information that is financial and which relates to labour relations. The information concerns the collective relationship between the physicians of Ontario and the Ministry of Health. As financial information, the data relates to money and its use or distribution and contains specific data.

The appellant did not provide representations on this issue.

For the same reasons outlined in my discussion of section 65(6)3, I find that no employer/employee relationship exists between the physicians of the province and the Government of Ontario, and it necessarily follows that the records do not contain labour relations information (Orders P-653, P-1545, P-1563 and P-1564).

"Financial information" refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of financial information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs (Orders P-47, P-87, P-113, P-228, P-295 and P-394).

The responsive parts of Records 5A and 11B contain reference to the overall savings figure attributable to the various recommendations of the PSC. I find that this figure qualifies as "financial information".

The remaining responsive parts of Records 5A and 11B and all responsive parts of Record 28B contain no specific financial information. They simply outline a series of recommendations which were approved by the OMA Board of Directors with respect to the provision of medical services, including travel services. Although these recommendations were made in the context of changes to the OHIP Schedule of Benefits, the portions which are responsive to the appellant's request do not relate to money and its use, nor do they refer to specific data. In my view, the responsive information in these records is too remotely connected to the actual financial component of the Schedule to be characterized as "financial information" for the purposes of section 17(1).

I have also considered the other types of information listed under this part of the test and find that none of them applies. Therefore, I find that only the overall savings figure contained in Records 5A and 11B satisfies the first requirement for exemption under section 17(1).

Requirement Two

In order to satisfy the second requirement, the Ministry and/or the OMA must show that the information was **supplied** to the Ministry, either implicitly or explicitly **in confidence**.

Supplied

Both the Ministry and the OMA submit that these records were supplied to the Ministry by the OMA as part of the agreement with the PSC. I accept this position and find that the records were "supplied" for the purposes of section 17(1).

In Confidence

In order to establish that the records were supplied either explicitly or implicitly in confidence, the Ministry and/or the OMA must demonstrate that an expectation of confidentiality existed at the time the record was submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the OMA prior to being communicated to the Ministry.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

The Ministry simply states that the records "were supplied in confidence to the Ministry via the PSC".

The affected party submits that:

> Documents 5A, 11B and 28B are confidential OMA Fax Network Membership Updates that are sent by the OMA to its physician members only. The Fax Updates are not provided to the general public and are sent to OMA members so that they can keep abreast of relevant developments, particularly in regard to services that have been delisted from OHIP Schedule of Benefits.
> ...

> ... Since the OMA created and provided records 5A, 11B and 28B to the Ministry in accordance with its obligations under the Agreement, the OMA reasonably expected that this information would remain confidential and would not be released unless the OMA specifically consented to.

None of these records contain any explicit reference to confidentiality. Records 11B and 28B contain the words "Please Post" in large bold letters at the top of the record, and Record 28B encourages recipients of the Update to post its content in prominent areas, such as the medical staff lounge. Records 5A and 11B, which are dated in the spring of 1998, also state that additional information about the contents would be published within a very short period of time in an issue of the Ontario Medical Review, and Record 28B confirms that this did occur in April 1998. These are strong indicators that the information was not submitted in confidence.

I am not persuaded, based on the representations of the parties and the contents of the records themselves, that they were supplied to the Ministry with a reasonably-held expectation that they would be treated as confidential documents. Therefore, I find that the second requirement for exemption under section 17(1) has not been established.

As stated earlier, all three parts of the test must be established in order for a record to qualify for exemption under section 17(1). I have determined that the requirements of the first and/or second parts of the test have not been established for Records 5A, 11B and 28B and, therefore, I find that they do not qualify for exemption under section 17(1). No other discretionary exemptions have been claimed for these records and no mandatory exemptions apply. Therefore, the responsive parts of these records should be disclosed to the appellant. I will attach a highlighted version of these records with the copy of this order sent to the Ministry's Freedom of Information and Privacy Co-ordinator which identifies the portions that should not be disclosed.

ECONOMIC AND OTHER INTERESTS

The Ministry claims section 18(1)(c) and (d) as the basis for exempting three lines of information on pages 1-2 of Record 3A and page 1 of Record 6C. Both are Group 2 records. Portions of these records have been disclosed to the appellant, and the rest consist of non-responsive information. According to the Ministry, Record 6C is an earlier version of Record 3A.

Sections 18(1)(c) and (d) reads as follows:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

Similarly, to establish a valid exemption claim under section 18(1)(d), the Ministry must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

The Ministry's arguments on the application of sections 18(1)(c) and (d) are the same. It submits that disclosure of the severed information, which includes an assumption made by the Ministry, could lead to the drawing of inaccurate inferences by members of the public, which could prejudice the relationship between the OMA and the Ministry.

The representations provided by the Ministry do not persuade me that disclosure of the three lines of information at issue could reasonably be expected to result in any of the harms described in sections 18(1)(c) or (d). The Ministry has provided no details of the financial or economic implications of disclosure. The information relates to the financial projections for the 1998-99 fiscal year, and I am not persuaded in the circumstances that data that is 18 months old and relates to a past fiscal year could reasonably be expected to prejudice the economic interests or competitive position, or be injurious to the financial interests of the Ministry or the Government of Ontario.

Accordingly, I find that the undisclosed parts of pages 1-2 of Record 3A and page 1 of Record 6C do not qualify for exemption under section sections 18(1)(c) and (d). No other discretionary exemptions have been claimed for these records and no mandatory exemptions apply. Therefore, these pages should be disclosed to the appellant. The remaining undisclosed parts of these records are not responsive to the appellant's request and should not be disclosed.

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministryto prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

In his letter of appeal, the appellant outlined his reasons for believing that additional responsive records should exist. He pointed to statements included in disclosed records as indicators of additional records.

In his representations, the appellant provides the following further arguments:

> Nowhere in the documentation from the [Ministry] have they indicated that a complete and comprehensive search for relevant records from the [PSC] was conducted. The PSC is co-chaired by a representative of the [Ministry], and at least in this way is supported by public funds, and should be considered as information accessible under the legislation.
> ...
>
> Statements of fact contained in the PSC recommendations for fiscal year 1998-99, and of subsequent statements of economic impact of these recommendations related to travel medicine and immunization must be supported by hard data held by the [Ministry] or one of its agents such as OHIP offices or PSC, or at least an administrative decision must have been made approving release of these statements if not supported by fact.

In my view, any records responsive to those described by the appellant above, if they exist, would clearly be responsive to the appellant's request.

The Ministry's representations on this issue are as follows:

> As noted in the IPCO's Notice of Inquiry, searches were conducted in response to the appellant's request in three program areas of the Ministry: Legal Services Branch, Operational Support Branch (formerly Negotiations Secretariat) and Provider Services Branch. These are the only areas of the Ministry where records such as those requested reside. The searches were carried out in all three branches by experienced staff members with intimate knowledge of the subject matter of the request. The Ministry is confident that all responsive records have been located.

Based on the Ministry's representations, the scope of the appellant's request and the circumstances of this appeal, I find that the search by the Ministry for **all** records relating to the appellant's request was not reasonable. The Ministry has simply re-iterated what was provided to the appellant in the original decision letter. Given the additional details provided by the appellant during the course of this appeal, and reflected in the Notice of Inquiry, the Ministry's response is inadequate. The Ministry has not addressed the issues identified by the appellant, and its representations do not satisfy me that its search activities were adequate.

Therefore, I will include a provision in this order requiring the Ministry to conduct further searches for all responsive records. The Ministry will be required to provide the appellant and me with a detailed outline of these additional search activities. If additional responsive records are identified, the Ministry will be required to include these records in an access decision within the time frame set out in the order provisions.

ORDER:

1. I order the Ministry to issue a decision letter to the appellant, in accordance with the provisions of sections 26, 28 and 29 of the Act, regarding access to Records 1B-10B, 12B-18B, 20B, 22B, 24B-26B and 5C, treating the date of this order as the date of the request.

2. I order the Ministry to conduct further searches for additional responsive records. These searches should include, but are not restricted to: (1) amounts known to OHIP or the Ministry and provided to the PSC for their deliberations which were paid for in fee-for-service, technical fees, and medication costs for travel medicine services; (2) amounts paid for investigation and management of travel related ailments; and (3) documents related to the PSC creation, mandate, membership, financial support and processes which led up to the decision making related to the travel medicine recommendation. I order the Ministry to communicate the results of this search to the appellant by sending him a letter summarizing the search results on or before **November 1, 1999**.

3. If additional responsive records are located, I order the Ministry to issue an access decision concerning those records in accordance with sections 26, 28 and 29 of the Act, treating the date of this order as the date of the request.

4. I order the Ministry to provide me with a copy of the decision letters referred to in Provisions 1, 2 and 3 by sending them to my attention c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

5 I order the Ministry to disclose Records 2D, 3D and 4D in their entirety; all undisclosed parts of pages 1-2 of Record 3A and page 1 of Record 6C; all responsive parts of Records 5A, 11B and 28B; and Record 1D, subject to the severance of the final paragraph. Disclosure of these records must be made by the Ministry to the appellant by **November 23, 1999** but not before **November 18, 1999**. I have attached a highlighted version of Records 5A, 11B and 28B with the copy of this order sent to the Ministry's Freedom of Information and Privacy Co-ordinator which identifies the parts that should **not** be disclosed.

6. I uphold the Ministry's decision to deny access to the remainder of the records.

7. In order to verify compliance with Provision 5 of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 5.

Original signed by: October 18, 1999
Tom Mitchinson
Assistant Commissioner