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

ORDER PO-1695

Appeal PA-980277-1

Ministry of Health

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NATURE OF THE APPEAL:

The Ministry of Health (the Ministry) received the following request under the Freedom of Information and Protection of Privacy Act (the Act):

> I am seeking confirmation of the following information:
>
> > That the Province of Ontario is paying for the lease on [a named independent health facility] in Toronto. Could you please provide documentation regarding the spending of government money for this independent health facility?

The requester also wanted "to learn how long this leasing arrangement has been in effect and the monthly monetary costs."

The Ministry identified five responsive records, and denied access to all of them pursuant to sections 17(1)(a), (b) and (c) of the Act. The records total five pages and consist of four "Financial Plans" covering the periods "1993/94", "1995/96", "July 1/96 to June 30/97", and "July1/97 to June 30/98"; and a one-page "Analysis of Approved Expenditures" for the period "July 1/94 to June 30/95".

The requester (now the appellant) appealed this decision.

During mediation, the appellant clarified that he was only seeking access to the "monthly monetary costs and a letter that officially confirms that there is such a lease in effect".

A Notice of Inquiry was sent to the Ministry, the appellant and the operator of the named independent health facility (the operator) as an affected party. Representations were received from all three parties.

In its representations, the Ministry raised the possible application of section 21(1) of the Act (invasion of privacy) to information contained in the records. Because section 21(1) is a mandatory exemption claim, I sent a Supplementary Notice of Inquiry to the three parties, providing them with an opportunity to make representations on this exemption. In addition, I felt that the interests of the owner of the premises occupied by the facility (the landlord) might be affected by disclosure of the records, so the landlord was added as an affected party and provided with a copy of the Supplementary Notice of Inquiry and an opportunity to provide representations on the section 17(1) issue.

The Ministry, the appellant and the landlord provided representations in response to the Supplementary Notice. The operator of the facility responded by confirming reliance on its original representations.

RECORDS:

The Ministry explains in its representations that it does not have documents that break down rental funding figures on a monthly basis, and that the only documents containing responsive information are the five

identified records. These records outline various operational costs for the facility, including rental costs. The Ministry explains that:

> The Financial Plans are appendices under the terms of the funding agreement between the Ministry and [the operator of the facility], and the Analysis of Approved Expenditures is an appendix to the reconciliation of payments and approved payments generated by the Ministry under the terms of the funding agreement.

The Ministry takes the position that the only parts of these records which are responsive to the request, as clarified through mediation, are the portions dealing with rental costs, and not other operating costs. As stated earlier in this order, and in the Notice of Inquiry, the appellant clarified his request to include " monthly monetary costs and a letter that officially confirms that there is such a lease in effect". In my view, the Ministry's interpretation of this clarification is overly narrow. Although the appellant uses the term "lease" in his request letter, he also states that he is interested in receiving "documentation regarding the spending of government money" on the facility. In my view, all funded items and the corresponding funding levels contained in the records fall within the term "monetary costs" and are responsive to the appellant's request.

Having reviewed these five records, I am satisfied that they are fully responsive to the request. The Ministry has no obligation to create a new record, such as the letter requested by the appellant, in order to respond to an access request (Orders P-1359 and P-1464).

DISCUSSION:

THIRD PARTY INFORMATION

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;

For the records to qualify for exemption under these sections, the Ministry and/or the affected parties must satisfy each part of the following three-part test:

1. the records 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]

Requirement One

"Financial information" has been defined in previous orders as information "relating to money and its use or distribution and must contain or refer to specific date." Examples include cost accounting methods, pricing practices, profit and loss data, and overhead and operating costs" (Orders P-47, P-87 and P-113).

The Ministry acknowledges that the records contain overhead and operating costs. I concur, and find that the records contain "financial information", thereby satisfying the first requirement for exemption under section 17(1).

Requirement Two

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

Supplied

The Ministry states in its representations that the named facility operates under a licence issued by the Director of Independent Health Facilities. The Ministry explains that under section 24 of the Independent Health Facilities Act (the IHFA), it has authority to fund certain operating costs, and does so pursuant to an agreement negotiated with the operator. The agreement requires the operator to submit a budget proposal, which includes various operating costs. The Ministry, the operator and the landlord agree that financial information is supplied to the Ministry as part of the funding allocation process under the IHFA. I concur.

Accordingly, I find that the information contained in the records was "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 affected parties must demonstrate that an expectation of confidentiality existed at the time the records were 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 affected party 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]

Although the appellant does not specifically address this issue, he states that if the Ontario taxpayers through the Ministry are funding lease costs for the facility, then the Ontario taxpayers should have a right to this information.

The Ministry states that all agreements entered into between the Ministry and independent health facilities since 1998 contain the following confidentiality clause:

> MOH [the Ministry of Health] confidentiality
>
> 9.3 MOH shall keep confidential information submitted by the Licensee to MOH under this agreement and information concerning the licensee in connection with this agreement, and shall disclose it only with the consent of the licensee.

The Ministry has provided me with a sample agreement which contains this clause.

Although not referred to in the Ministry's representations, the agreement also includes the following clause:

> MOH confidentiality subject to FIPPA
>
> 9.4 Paragraph 9.3 is subject to applicable legislation and regulations including the Freedom of Information and Protection of Privacy Act and regulations under that Act.

The Ministry acknowledges that most of the records at issue in this appeal pre-date the inclusion of this confidentiality clause, but submits:

> ... it has always been [the Ministry's] intent and practice to ensure the confidentiality of this type of record. Furthermore, the ministry has never shared the records at issue with any other party, nor has it ever made public any of the details of its leasing arrangements with this clinic. In this regard the ministry can be seen to have consistently treated these records as implicitly confidential. ... In effect, the inclusion of section 9.3 merely formalized the parties' prior expectations and practice.

The operator of the facility agrees with the Ministry's position, and submits:

> The information being requested is sensitive and confidential. It was provided in confidence to the Ministry of Health for the express purpose of budget negotiations. There was a reasonable, objective and implicit expectation of confidentially (sic) and privacy when this information was supplied.

In my view, the representations provided by the Ministry and the operator of the facility are sufficient to establish the confidentiality requirements of section 17(1). The operating costs were communicated by the operator of the facility to the Ministry on the basis that they were to be kept confidential, either explicitly after 1998 or implicitly in previous years; the costing information has consistently been treated confidentially by the operator; the information is not available from other sources to which the public has access; and the funding proposal was prepared by the operator of the facility for a purpose that would not entail disclosure to others.

Accordingly, I find that the second requirement for exemption under section 17(1) has been established.

Requirement Three

To discharge the burden of proof under the third part of the test, the Ministry and/or the affected parties must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in sections 17(1)(a), (b) or (c) would occur if the information was disclosed. (Order P-373)

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof

> in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]
>
> [Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

Section 17(1)(b)

None of the parties provided representations on the possible application of section 17(1)(b). I note that in order to obtain funding from the Ministry, independent health facilities are required to provide the information contained in the records pursuant the terms of the IHFA. Consequently, based on my review of the records, and in the absence of any evidence to the contrary, I find that section 17(1)(b) has no application in the circumstances of this appeal.

Section 17(1)(a)

The landlord submits that disclosure could allow competitors an unfair advantage by "releasing confidential business arrangement and terms". The landlord goes on to state:

> It would be inappropriate for any information of the lease to be released to an individual not a party to the lease agreement. The lease agreement is confidential. The business terms are confidential. From a competitive prospective, release of financial information would be injurious to [the landlord]. ... Release of lease expiry and lease renewal information would be harmful to competitive position of [the landlord].

The Ministry submits that disclosure of the funding level for rental costs paid by the Ministry "could impact any negotiations undertaken by the landlord with current or potential new tenants, who could demand a similar or reduced rent". The Ministry makes similar arguments with respect to other service providers funded as part of the operating costs for the facility.

As far as the operator of the clinic is concerned, the Ministry submits:

> [Independent health facilities] generally behave as private enterprises in competing with each other for patients and funding from the Ministry. As pointed out in the beginning of the submission these clinics are for profit business entities. Any disclosure of the details of the clinic's financial relationship with the ministry could result in competitors undermining its competitive position.

The operator of the facility's submissions focus primarily on the harms associated with section 17(1)(c). However, the operator does submit that providing financial information of this nature could be used by third parties to impede landlord-tenant negotiations.

The records at issue in this appeal are four financial plans and one document produced as part of the reconciliation of payments made by the Ministry under the terms of its funding arrangements with the facility. The lease documents themselves are not at issue, nor are any of the other contracts negotiated by the operator of the facility with its various service suppliers. Rental lease expiry or lease renewal information is also not included in the records.

Based on the representations provided by the parties, I am persuaded that disclosure of individual funding levels for various operating costs, including rent, as well as the detailed breakdown of some of these costs included in notes to the financial plans, could reasonably to be expected to prejudice significantly the competitive position of the landlord and other suppliers, and interfere significantly with the contractual or other negotiations of the landlord, the operator of the facility, and other persons, groups or individuals involved in providing services to the facility. However, I am not persuaded that disclosure of the overall funding level included in each record could reasonably be expected to result in any of the harms articulated in section 17(1)(a). Disclosure of this information would simply confirm that a funding arrangement was in place for the time period covered by each record, a fact which, in my view, has already been confirmed through the processing of the appellant's request and subsequent appeal. Disclosure would also identify the overall amount of public funds allocated by the Ministry for the operation of this particular facility, without disclosing individual funding details for rental arrangements or other operating component costs which could have an impact on the competitive position of the landlord and other suppliers.

Section 17(1)(c)

Because of the nature of the medical services provided by the facility, the operator submits that disclosure of the records would supply anti-choice extremists with information that could be used to advance their cause and could increase the likelihood of harassment of operators and employees of facilities, and their families. The operator also submits that disclosure of the financial information could be used to harass and threaten the landlord.

The Ministry points out that disclosure of any information could incite militant groups to take violent actions against the facility, and submits that recent events involving this type of facility point to the need for a cautious approach in disclosing records relating to their operation.

The appellant's representations focus on public accountability for the costs of operating these facilities. He states:

> Any taxpayer should have the right to this information because the funds to pay for the lease on this health facility come out of his pocket or her purse.

Based on my independent review of the contents of the records and the submissions of the Ministry and the operator of the facility, I accept that disclosure of the detailed breakdown of funding arrangements and information concerning specific aspects of the operation of the facility could reasonably be expected to result in undue loss to the operator of the facility and its employees. I agree with the Ministry that a cautious approach in disclosing records relating to the operation of this and similar facilities should be followed. However, I am not persuaded that disclosure of the overall funding levels could reasonably be expected to result in any of the harms outlined in section 17(1)(c). The name of the facility is known to the appellant and others, and disclosing the overall funding level would provide no new or additional identifying information. Funding of this and other independent health facilities is permitted by the IHFA, and it is public knowledge that operating costs for independent health facilities are funded by the Ministry. While I accept the need to be cautious and prudent in dealing with the disclosure of information concerning facilities providing abortion services, it does not necessarily follow that disclosure of any and all information relating to these businesses could reasonably be expected to result in the harms described in section 17(1)(a). In the particular circumstances of this appeal, I find that the legitimate security concerns associated with disclosure of information can be accommodated through the severance of all portions of these records with the exception of the overall funding level for the operating costs of the facility.

Therefore, I find that all portions of the records, with the exception of the overall funding levels relating to the facility, qualify for exemption under sections 17(1)(a) and (c) of the Act. As far as the overall funding levels are concerned, I find that the representations provided by the Ministry, the operator of the facility, and the landlord, are not sufficient to establish a reasonable expectation of one or more of the harms outlined in these two sections, and this information does not qualify for exemption under section 17(1). I will provide the Ministry with a highlighted version of the records which identifies the portions that do not qualify for exemption.

PERSONAL INFORMATION/INVASION OF PRIVACY

As noted earlier, the Ministry raised the possible application of section 21(1) of the Act to the information contained in the records. This section exempts personal information, as defined in section 2(1), if it can be established that disclosure would be an unjustified invasion of privacy. Although the facility is operated by a corporation, the Ministry expressed the view that the corporation was closely identified with an individual, and that the information could qualify as this individual's personal information.

I put this issue to the parties in the Supplementary Notice of Inquiry. None of the other parties to the appeal, including the operator of the facility, responded to this issue.

The question of whether information which outwardly pertains to a business and may be categorized as relating to an identifiable individual has been canvassed in a number of previous orders issued by the Commissioner's Office. In Order 16, former Commissioner Sidney B. Linden made the following general statement:

> The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear.

However, Commissioner Linden went on to state in Order 113 that:

> It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

The Ministry identifies a number of examples where this Office has found the exceptional circumstances identified in Order 113 to be present (Orders P-364, P-515, M-277 and P-705).

The operator of the facility was provided with a Notice of Inquiry, as well as a Supplementary Notice of Inquiry which specifically raised the personal information issue. Neither the original representations submitted by the operator, nor the operator's response to the Supplementary Notice substantiate or support the Ministry's position on this issue. The records clearly relate to a corporate entity, and the operator's representations are signed by a representative of the company other than the individual identified by the Ministry. Commissioner Linden's statements in Order 113 create an exception to the norm, and only have application in specific factual circumstances. Based on the representations, or lack thereof, I am not persuaded that the present appeal is one such exceptional circumstance.

I would also point out that as a result of my finding under section 17(1), only a very small portion of each record will be disclosed to the appellant. None of the disclosed information on its face meets the requirements of the definition of personal information contained in section 2(1) of the Act

Therefore, I find that the portions of records which I have found do not qualify for exemption under section 17(1) do not contain personal information, and section 21(1) of the Act is not applicable in the circumstances of this appeal.

ORDER:

1 I order the Ministry to disclose the portions of the records containing information relating to the overall funding levels of the named facility. I have attached a highlighted copy of the records with the Ministry's copy of this order, which identifies the portions that **should be** disclosed. Disclosure is to be made to the appellant by **August 18, 1999,** but not before **August 13, 1999**.

2.. I uphold the Ministry's decision to deny access to the remaining portions of the records.

3. In order to verify compliance with the provisions 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 1.

Original signed by: July 13, 1999
Tom Mitchinson
Assistant Commissioner