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

ORDER PO-1802

Appeal PA-990254-1

Ministry of Health and Long-Term Care

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BACKGROUND AND NATURE OF THE APPEAL:

In January 1996, the Ministry of Health and Long-Term Care (the Ministry) announced reforms to Ontario's long-term care system, including streamlining 74 Home Care and Placement Coordination programs into 43 Community Care Access Centres (CCAC's).

According to the Ministry, the CCAC's were established as non-profit corporations which offer a single point of access for long-term care community support services and admission into publicly funded long-term care facilities. CCAC's will operate through commercial contracts with non-profit and for-profit service providers, selected through a competitive Request for Proposals process.

A transition period of three years (1996-1999) was established in order to implement a fully competitive system of CCAC's. As part of this transition, the Ministry continued to contract for some services directly through community associations, groups, hospitals, etc.

The Ministry received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of budget information for each service provider agency in the Manitoulin and Sudbury Districts which received funding from the Ministry's Long-Term Care Division during the fiscal years of 1996-97, 1997-98 and 1998-99. The records relate to funding provided by the Ministry during the transition period, and consist of a form titled "Schedule 2 - Form 3" (Form 3). The Form 3 outlines the planned level of service for a given fiscal year for 26 service provider agencies (the affected parties). Information on the form is listed in separate columns for each service provider: type of service, unit, approved expenditures, number of units, unit cost, number served and average cost/client.

The Ministry denied access to the records pursuant to sections 17(1)(a), (b) and (c) of the Act.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant narrowed the scope of his request to the following information contained on the forms:

- the name of the service provider;
- each type of service provided;
- the approved expenditure for each type of service; and
- the number of units for each type of service.

As a result, the rest of the information contained on the Form 3s no longer at issue.

I sent a Notice of Inquiry initially to the Ministry and the 26 affected parties. I received representations from the Ministry and three affected parties. One affected party consented to disclosure of its information. I have decided that it is unnecessary for me to obtain representations from the appellant.

In its representations, the Ministry states that it is willing to disclose the parts of the Form 3s containing the first three categories of the appellant's narrowed request. As far as the Ministry is concerned, only the

number of units for each service listed on the Form 3s remains at issue. However, because section 17 is a mandatory exemption intended to protect third party commercial interests, and all affected parties have not consented to the level of disclosure proposed by the Ministry, I will assess the application of this exemption claim to the four parts of the Form 3 records covered by the scope of the appellant's request as narrowed during mediation.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry claims that the records qualify for exemption pursuant to section 17(1) of the Act and two of the affected parties support this claim. Therefore, the onus is on the Ministry and the affected parties to establish the requirements of this exemption claim. Sections 17(1)(a), (b) and (c) of the Act 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 record to qualify for exemption under these sections, the appellant and the affected parties 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]

In its decision upholding my Order P-373, the Court of Appeal for Ontario commented on the meaning of the three-part test articulated above, as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. 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.

[Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.)]

Requirement One: Type of Information

The Ministry makes the following submission in support of the position that the records contain financial and commercial information:

> The contents of the records at issue describe the services, the pricing details and breakdown as well as the volume of service provided for a number of non-profit organizations. It is apparent from the face of the records that they contain details describing the service and specific unit pricing for each service. This information is apparent from the title of the columns on the spreadsheet in which the information is provided. In the for-profit business sector this information would be analogous to sales volumes, unit costs, number of customers and average cost per customer, all information which is commonly considered commercially-confidential.
>
> ...

> ... The information in the records consists of pricing information and cost breakdowns pertaining to treatment services. Thus it is the submission of the Ministry that this type of information qualifies both as commercial and financial information.

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services (Order P-493); and financial information refers to information relating to money and its use or distribution and must contain or refer to specific data such as, 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).

Clearly, the information in the approved expenditures column is financial information, since it reflects the level of funding provided by the Ministry to various service providers. Because these same service providers will be competing for business once the competitive system of CCAC's has been established, I also find that the type of service, number of units and approved expenditure information for the various service providers relates to the selling of services and qualifies as "commercial information" for the purposes of section 17(1). The names of the service providers are neither financial nor commercial information.

Accordingly, I find that the first requirement has been established for three of the four parts of the narrowed request, but not for the names of the service providers.

Requirement Two - Supplied in Confidence

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

As far as the "supplied" part of the test is concerned, the Ministry submits:

> The information contained on the form 3s has been supplied by each agency to the MOHLTC [the Ministry] for the purposes of remitting their costs for payment by the MOHLTC under service agreements. The information is placed on similar forms for ease in accounting and expenditure tracking. The MOHLTC submits that the pricing and costing details contained in these columns could only be obtained from the non-profit organizations.

The affected parties who submitted representations also state that the information was supplied to the Ministry.

The records themselves were clearly created by the Ministry, not supplied by the various service providers. However, if disclosure of a record would reveal information actually supplied by an affected party, or if disclosure would permit the drawing of accurate inferences with respect to this type of information, then the information meets the "supplied" portion of the second requirement of the section 17(1) exemption test regardless of the fact that the record itself was not supplied (see, for example, Orders P-36, P-204, P-251, P-1105 and PO-1698).

Based on the explanations provided by the Ministry, I accept that the type of service, the approved expenditure for each type of service, and the number of units for each type of service were supplied to the Ministry by the affected parties for the purposes of section 17(1). It would appear that under the transition program the Ministry reimbursed various service providers on the basis of a pre-determined formula for each particular service. It does not appear that the funding levels paid for various services was negotiated with the Ministry.

As far as the names of the service providers are concerned, I find that they were not "supplied" to the Ministry for the purposes of section 17(1). I dealt with a similar issue in Orders P-1574 and PO-1786-I, where I found that the names of entities doing business with the government would not normally be considered to have been "supplied", simply because they appear on a record. This same principle applies in the circumstances of this appeal.

As far as the confidentiality aspect of Requirement Two is concerned, the Ministry and the affected parties must demonstrate that an expectation of confidentiality existed at the time the information was submitted, 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)

The two affected parties who object to disclosure state simply that the information was provided in confidence. One of them attached an excerpt from an agreement between the affected party and the Ministry in support of its position.

The Ministry's only submissions on the issue of confidentiality are as follows:

> The information at issue has consistently been treated as commercially confidential by the MOHLTC. Because of this, the third parties have a reasonable expectation of confidentiality and it is the ministry's position that such information can only be released with the express permission of the affected parties. The ministry is aware that the IPCO has provided notice to the affected parties. The ministry also submits that the mandatory provisions in the Act requiring the Minister to not disclose such information, without express

> authorization from the affected party, and the IPCO previous related decisions would also support an implicit expectation of confidentiality by the affected parties that the pricing information they supplied would be treated as confidential.

In my view, the representations provided by the various parties resisting disclosure are not sufficient to establish a reasonably held expectation on the part of various service providers that any information provided by them in order to receive reimbursement from the Ministry under the transition program would be treated confidentially. There is no explicit indicator of confidentiality on the records themselves. In addition, the confidentiality provision contained in the agreement provided by the affected party requires the service provider to hold information **supplied by the Ministry of Health** in confidence; it does not speak to the expectation of confidentiality in the context of information supplied to the Ministry by the service provider.

The various service providers operate in an open manner in their communities, so it is not reasonable to characterize their identities and the types of service they provide as confidential information. As far as the approved expenditures and number of units of service funded by the Ministry is concerned, I am not satisfied, based on the representations provided by the Ministry and the affected parties who responded to the Notice of Inquiry, that this information was communicated to the Ministry on the basis that it was to be kept confidential, nor that it has been consistently treated in a confidential manner by the various service providers. On the contrary, in my view, it would seem more likely that the overall approved expenditure level for the various service providers under contract with the Ministry would be made available to the public as part of the normal accountability framework for public expenditures.

For these reasons, I find that the information supplied to the Ministry by the various affected parties was not supplied in confidence, either explicitly or implicitly, and the second requirement for the section 17(1) exemption claim has not been established.

Requirement Three - Harms

Standard of Proof of Harm

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as several other exemptions under the Act, in relation to a wide variety of anticipated "harms". The Ontario Court of Appeal upheld my interpretation of the meaning of these words in Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner), supra. That case also involved the possible application of section 17(1). As noted in the extract from the Court's judgment, reproduced earlier in this order, the Court found that my interpretation, which required "detailed and convincing evidence" in order to establish that the harm in question "could reasonably be expected to" result from disclosure, was reasonable.

In a more recent decision, the Court of Appeal ruled on the meaning of these words in the exemptions at sections 14(1)(e) and 20 of the Act [Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560

(C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)]. These two exemptions differ from section 17(1) in that they relate to threats to a person's bodily integrity. In that decision, the Court of Appeal was considering an interpretation by the Adjudicator which required a "reasonable expectation of **probable** harm" in order to find that the harms mentioned in these exemptions "could reasonably be expected" to result from disclosure.

The Court of Appeal rejected this interpretation, stating (at paragraphs 21, 22 and 24):

> The reasonable expectation of probable harm test was developed by the Federal Court of Appeal in *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246. That case involved the interpretation of an exemption from disclosure provision in the federal freedom of information legislation. The court noted that the purpose of the federal legislation set out in s. 2 of the *Access to Information Act*, R.S.C. 1985, c. A-1, is that government information should be made available to the public and exemptions from that right of access should be limited and specific. Having regard to this legislative purpose, the court concluded at p. 255 that the phrase "could reasonably be expected to" should be interpreted as imposing a requirement of an expectation of possible rather than probable harm. See also *Re St. John Shipbuilding Ltd. v. Canada (Minster of Supply and Services)* (1990), 67 D.L.R. (4th) 315 (F.C.A.).
>
> Like s. 2 of the federal *Access to Information Act*, the purpose provision in s. 1 of the provincial *FOI* states that the right of access to information should be in accordance with the principles that information should be available to the public and that exemptions from the right of access should be limited and specific.
> ...
>
> I agree with the Divisional Court's conclusion that harm to an individual need not be probable for a government institution to successfully rely on the exemption provisions in ss. 14(1)(e) and 20 of the *FOI*. The expectation of probable harm test was developed in a context where personal safety was not in issue. *Canada Packers*, *supra*, involved the interpretation of a provision exempting disclosure of the requested information in circumstances where disclosure could reasonably be expected to result in material financial loss or interfere with contractual negotiations. The interests at stake in that case were less compelling than those of personal safety and bodily integrity.

In Orders PO-1745 and PO-1747, Senior Adjudicator David Goodis summarized the combined effect of these two rulings on exemptions other than sections 14(1)(e) and 20 of the Act as follows:

> The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". **In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from**

> **disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm"**. [emphasis added]

The Ministry submits that this interpretation is incorrect and that the decision in Minister of Labour means that the standard of "reasonable expectation of probable harm" established by Canada Packers, supra, cannot apply even to exemptions other than sections 14(1)(e) and 20. The Ministry argues this point as follows:

> In the Big Canoe case, the Court of Appeal, upholding the decision of the Divisional Court, concluded that the phrase "could reasonably be expected " required proof that the expectation of harm must be reasonable but that it need not be probable.
>
> The [Ministry] is aware that the exemptions considered by the Court in the Big Canoe case were ss. 14(1)(e) and 20 of [the Act] - endangerment to the life or safety of an individual. As a matter of statutory interpretation, however, the [Ministry] submits that the same words in a statute must be given the same meaning and different words a different meaning. This principle is known as the "presumption of consistent expression".

The Ministry then quotes the description of this presumption from Driedger on the Construction of Statutes (3d), (Toronto: Butterworths, 1994), at p. 163:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings.

The Ministry cites two Supreme Court of Canada decisions applying this principle, R. v. Zeolowski (1989), 61 D.L.R. (4th) 725 and Thomson v. Canada (Minister of Agriculture) (1992), 89 D.L.R. (4th) 218. I have reviewed these decisions, both of which cite the principle as a reason for giving a consistent meaning to an expression that appears more than once in a statute. I note that both cases deal with situations where there was no basis upon which to conclude that the presumption did not apply.

The Ministry concludes its submissions on this point as follows:

> The phrase "could reasonably be expected to" is found in the exemptions in ss. 14(1), 15, 16, 17, 18(1)(c), (d) and (g), 20 and 21.1 of [the Act]. Based on the above principle of statutory interpretation, as interpreted and applied by the Supreme Court of Canada, the [Ministry] submits that the phrase must have the same meaning whenever it appears in the legislation. As a matter of statutory interpretation, one cannot have a result where a phrase, which appears nine times in a single piece of legislation, is afforded a different interpretation wherever it appears. In all cases, the phrase is meant to articulate the standard of proof required to be provided by the institution claiming the application of the exemption. If the

> legislature had intended that this requirement vary depending upon the consequences of disclosure, different language could have and would have been used.
>
> Accordingly, it is the submission of the [Ministry] that it need only establish that the expectation of harm should the requested information be disclosed be reasonable, not that it be probable.

The foundation of the Ministry's argument is a presumption of statutory interpretation. However, as confirmed later in the Driedger text, supra, like most presumptions in law, this presumption can be "discounted", or rebutted. The author states (at p. 167):

> One problem with the presumption of consistent expression is that it does not necessarily reflect the realities of legislative drafting. Much legislation is lengthy and complicated; there is not always time for careful editing. ...
>
> A second problem with the presumption, as pointed out by Côté, is that it conflicts to some extent with the contextual principle in interpretation, which emphasizes that its meaning is dependent on context. Identical words may not have identical meanings once they are placed in different contexts and used for different purposes. This is particularly true of general or abstract words.

In the Minister of Labour case, the Court's analysis (excerpted above) emphasizes the contrast between the subject matter of the exemptions at sections 14(1)(e) and 20, with their focus on personal safety and bodily integrity, and exemptions focussed on, for example, financial loss or interference with negotiations. The Court does not indicate that Canada Packers, supra, which involved the latter type of exemption, is wrongly decided, nor that it would be unreasonable to apply this standard to exemptions other than sections 14(1)(e) and 20. Rather, the Court states on a number of occasions that the pecuniary harms at issue in Canada Packers were "less compelling" than those dealt with in sections 14(1)(e) and 20, and that for this reason, a different and less onerous standard should apply to these two exemption claims.

It is inherent in the Court's reasoning that the legislative objective embodied in the exemptions it was considering justified a different interpretation of "could reasonably be expected to" than the "reasonable expectation of probable harm" that had been established for other exemptions. For this reason, I have concluded that the Court's analysis provides a basis for rebutting the presumption of consistent expression. In my view, the Court's interpretation is an example of the exception to the presumption as discussed in Driedger, supra, because the context and purpose of sections 14(1)(e) and 20, and their emphasis on threats to personal safety and bodily integrity, indicate that it would be appropriate to apply a different standard to those exemptions, in contrast to exemptions relating to the "less compelling" harm of possible "financial loss", one of the harms dealt with in section 17(1). Accordingly, I do not accept the Ministry's argument on this point.

Therefore, I find that in the context of section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof, in this case the Ministry and the affected parties, must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm'.

Assessment of Harms

Only the Ministry has provided representations on the "harms"portion of the section 17(1) test.

In the absence of representations from the affected parties, I must look to the submissions from the Ministry in order to determine whether there is detailed and convincing evidence to support the conclusion that the disclosure of information supplied by the affected parties could reasonably be expected to lead to one or more of the harms described in section 17(1).

The gist of the Ministry's submissions on section 17(1)(a) is that disclosure of pricing and costing information would prejudice the competitive position of the affected persons as participants in the competitive system of CCAC's currently being implemented. The Ministry states:

> ... In the scheme of competitive purchase of services by the CCAC's, the community agencies and organizations are competing with each other for funding. In this regard the service providers are no different from any other private enterprise competing for business. The disclosure of the details of their pricing and costing structure could result in competitors undermining their positions in the CCAC's.

As far as section 17(1)(c) is concerned, the Ministry submits:

> ... disclosure of the costing and pricing details could undermine the structure of the competitive bidding processes. As noted earlier if a competitor were aware of the cost structure of others, it would could [sic] have an impact on others pricing quotation proposals and present and unfair advantage. In addition, if the CCAC, as the new purchaser of services were aware of the details of the MOHLTC's purchase agreements it could give an unfair negotiating advantage to the new CCAC purchase arrangements.

Some examples provided by the Ministry in support of its position relate to categories of information (eg. average cost per client) that the appellant removed from the scope of his request during mediation. I also assume that the Ministry's representations on this issue do not apply to the names of the various service providers, the types of services and the approved expenditure levels, which the Ministry has agreed to disclose.

I do not agree with the Ministry that disclosure of the number of units of various services provided by the affected parties "could reasonable be expected to" result in the alleged harms. I have reached this conclusion for a number of reasons. First, the information at issue in this appeal was supplied to the

Ministry as part of a direct service arrangement, not through a competitive bidding process. The competitive nature of the upcoming CCAC service delivery system renders the pricing information under the current model of limited value in assessing harm in the context of any future bidding process. Second, all of the Ministry's arguments focus on events that might occur under the new CCAC service delivery model and can only be considered speculative. Third, I have no information before me from any of the affected parties which speaks to the issue of the specific types of harms that could occur if the records are disclosed.

In Order PO-1791, Adjudicator Sherry Liang made the following findings in a similar situation where there was a paucity of evidence on the issue of harm to an affected party's competitive position:

> A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records: Orders P-166, P-610 and M-250. Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.
>
> In general, therefore, there are many cases where the exemption described in section 17(1)(a) has been applied to information which is similar to that at issue here. The difficulty with the case before me, however, lies with the scarcity of evidence on the specifics of this affected party's circumstances. I am left without any guidance, for example, as to whether unit pricing information is viewed as commercially-valuable information in the particular industry in which this affected party operates. As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a), (b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.
>
> In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case. (See also Order MO-1312).

Similarly, in the present appeal, I find that I have not been provided with the kind of "detailed and convincing" evidence required for me to find that the information that remains at issue is exempt under either sections 17(1)(a) or (c). Specifically, the Ministry and the affected parties have failed to explain in a

detailed and convincing manner how disclosure of the information could reasonably be expected to result in harm to the competitive position of the affected parties or result in undue loss or gain to any party. The Ministry's representations make no reference to the harms associated with section 17(1)(b). I presume that this exemption claim has been withdrawn. In any event, there is no evidence before me to establish the requirements of any section 17(1)(b)-type harm.

Therefore, I find that the records do not qualify for exemptions under sections 17(1)(a), (b) and (c) of the Act.

ORDER:

1. I order the Ministry to disclose the portions of all Form 3 records covered by the scope of the appellant's narrowed request to the appellant, by sending him a copy by **August 14, 2000** but not before **August 9, 2000**. I have attached a sample record with the copy of this order sent to the Ministry's Freedom of Information Co-ordinator which highlights the portions of the records that should be disclosed.

2. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the requester pursuant to Provision 1.

Original signed by: July 10, 2000
Tom Mitchinson
Assistant Commissioner