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

ORDER PO-1813

Appeal PA-990337-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

In March of 1999, the Ministry of Health and Long-Term Care (the Ministry or MOHLTC) issued a request for pricing of cancer radiation treatment services to be provided to Ontario patients with prostate or breast cancer by clinics in the United States. A number of clinics responded. The appellant made a request to the Ministry pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to the pricing information sent by each of the responding clinics.

The Ministry denied access to all the responsive records claiming the exemptions at sections 17(1)(a) and (c) of the Act. The appellant appealed the Ministry's decision.

During the course of the appeal the appellant raised the possible application of section 23 of the Act, the so-called public interest override. The appellant also advised that the pricing information he is seeking "... could be framed as non-identifying information or lacking any commercial identity so as not to conflict with section 17 of the Freedom of Information and Protection of Privacy Act."

Mediation was not successful, and I sent a Notice of Inquiry initially to the Ministry and the six clinics that had responded to the Ministry's solicitation (the affected parties). I received representations from the Ministry and four affected parties. One affected party consented to disclose records relating to it, and I will order that these records be disclosed to the appellant.

I then sent the Notice to the appellant, along with the non-confidential portions of the representations provided by the Ministry and the three affected parties. I did not receive representations from the appellant, and he subsequently confirmed by telephone that he would not be submitting any.

THE RECORDS:

There are eleven records at issue, consisting of submissions from the five affected parties that did not consent to disclosure, Ministry responses to these submissions, and a list of the six affected parties that provided submissions.

Specifically, Records 1, 2, 3, 5 and 6 consist of the submissions made by the affected parties. These records consist of a cover letter setting out a price and the potential terms for the services provided, and a price breakdown in chart form.

Records 7, 8, 10, 11 and 12 consist of the Ministry's responses to the submissions. These records contain a cover letter setting out the agreed price, and attach the price breakdowns provided by the affected parties. The price breakdowns sent from the Ministry back to the affected parties are duplicates of the records provided by the affected parties to the Ministry.

Record 13 is the list of affected parties that provided submissions to the Ministry, including a contact name and phone number.

Records 4 and 9 are no longer at issue as these records relate to the affected party who has consented to disclosure.

PRELIMINARY ISSUE:

Responsive Records

In its representations, the Ministry argues that because Record 13 is only a list of the named facilities, it is not responsive to the appellant's request. The Ministry submits:

> The appellant has clearly indicated during mediation that **pricing information** [emphasis added by the Ministry] is the information that he is seeking and that he is not interested in pursuing identifying information. The MOHLTC submits that this raises the preliminary issue as to whether, as a result of the mediation, record number 13 is now responsive to the more limited request.
> ...
>
> ... record number 13 contains only a list of the facilities which provided submissions and contacts. The only information contained in record number 13 is identifying information.
>
> The MOHLTC submits that in light of the appellant's narrowing and focussing on pricing information during mediation, that record #13 does not fall within the scope of the appellant's language as a record remaining at issue in this appeal. There is however, no indication in the Mediator's Report that this issue was ever explored with the appellant during mediation.

The Report of Mediation issued to the Ministry and the appellant prior to the commencement of this inquiry does not state that the appellant's request was narrowed so as to remove Record 13 from the list of responsive records. The issue was not raised by either party in the time period provided by the Mediator for clarifying the contents of the Report of Mediation, and I have received nothing from the appellant to indicate or confirm that he wished to have Record 13 or the identifying information removed from the scope of the appeal. It may be that a narrowing of the scope of the appeal in this manner was discussed during mediation, with a view to possible settlement. However, as mentioned earlier, mediation in this matter was not successful, and the details of any such settlement discussions are not appropriately before me in this inquiry.

For these reasons, I find Record 13 remains at issue in this appeal.

ISSUES:

Third Party Information

The Ministry claims that the exemptions at sections 17(1)(a) and (c) apply to the records. These sections 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under section 17(1)(a) and/or (c) the Ministry and/or 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 institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

The Ontario Court of Appeal overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated 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. [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.)]

Part One: Type of information

The Ministry and one affected party submit that the records contain commercial and financial information. The Ministry states:

> The contents of the records at issue describe the services, the pricing and the volume discount submissions of each of the facilities. It is apparent from the face of the records that they contain an outline of detailed service proposals and specific unit pricing for each service. Many specifically state in the introduction to their proposal that they are responding to a request for a costing submission to provide radiation therapy for Ontario patients with breast and prostate cancers. The set of proposals (records one to six) have appended or included details on their quoted rates and discounts as well as the costing proposed for the specific treatment codes. The responses to the proposals (records seven to 12) reiterate the rates/costing proposed by each facility.

Two affected parties characterize the information in the record as trade secret information.

This Office has defined "commercial information" in past orders to mean information which relates solely to the buying, selling or exchange of merchandise or services (Order P-493).

Financial information has been defined by this Office as information relating to money and its use or distribution, which contains or refers to specific data. Examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs (Order P-493).

Trade secret information has been defined to include but is not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Order M-29)

All of the information in Records 1, 2, 3, 5 and 6 relates to the selling of cancer treatment services by the affected parties to the Ministry. Each of these records contains the cost of the treatment, the services included in the treatment package and a discount amount. These records also contain specific terms of the treatment service. I find that these records all contain commercial and financial information, as those terms have been defined by this Office.

Records 7, 8, 10, 11 and 12 contain responses by a Ministry representative to the affected parties setting out the pricing of the services and the Ministry's acceptances of the financial terms. Each Ministry response contains a cover letter setting out the agreed price and terms and attaches the price breakdown as provided by the affected parties. Similarly, I find that all of these records contain commercial and financial information.

Record 13 is a list of the affected parties together with contact names, addresses and business phone numbers for each organization. This information is not commercial or financial information. It does not deal with the selling of services or pricing practices, nor would its disclosure reveal this type of information. I also find that the information in Record 13 clearly does not qualify as a trade secret. I presume that the organizations listed in Record 13 are known as cancer care treatment facilities and, in my view, there is no economic value to the Ministry or the affected parties in this listing of names, contact personnel, addresses and business telephone numbers.

Because I have determined that Record 13 does not contain any of the various types of information contained in section 17(1), it is not necessary for me to consider the other two parts of the exemption test with respect to this record before finding that it does not qualify for exemption under sections 17(1)(a) or (c) of the Act.

Part two: Supplied in confidence

In order to satisfy part two of the test, the Ministry and the affected parties must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence.

Supplied

The Ministry submits:

> The documents numbered one to six were supplied by the facilities and completed by their representatives and submitted to the MOHLTC during the submission process. Records

> seven to 12 confirm back to those representatives the approved financial rates for those services. Thus, if the second set of records were disclosed, accurate inferences could be drawn regarding the specific proposed costs supplied by the facilities in their submissions. Because the amounts proposed by the facilities were accepted and confirmed in the MOHLTC responses, disclosure of this second set of records would "reveal" the information supplied in the first.

I agree with the Ministry's submissions on this issue. The proposals provided by the affected parties were supplied in response to the Ministry's specific request for submissions. While the second set of records (7, 8, 10, 11 and 12) were not supplied by the affected parties, they contain information and some duplicate documents which, if revealed, would disclose the information supplied in Records 1, 2, 3, 5 and 6.

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, and that this expectation was reasonable and had an objective basis (Order M-169). All factors are considered in determining whether an expectation of confidentiality is reasonable 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 person 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.

On this issue the Ministry submits that:

> ... this information was solicited from the facilities with an implicit understanding that the financial and service proposal details in their submissions would be kept confidential. The information has been treated as having a commercially-confidential and proprietary value to those facilities, and MOHLTC has never released the pricing details to other contractors or the other facilities. As noted earlier, accurate inferences could be drawn regarding the specific proposed costing of the facilities that was supplied in confidence if the second sent of records was disclosed.

All three affected parties state that they believed the information they submitted would be kept confidential. Counsel for one of the affected parties provides the following submission:

> The [named facility] states that the pricing information was solicited by the Ministry on the express understanding that the Financial and Service Proposal details submitted by the [named facility] would remain confidential. The [named facility] always understood and intended that this information would be kept confidential by the Ministry and as a matter of practice, this type of information is never released to other entities except on a confidential basis as it is regarded by the [named facility] as confidential information.

The same affected party also provides a copy of a preliminary letter that was sent in response to the request for submissions. In it, the affected party states: "I hope that your group would treat the specifics of this proposal as confidential for now."

One of the affected parties also submits that its proposal contains costs and price reductions which were a result of negotiations with provider organizations and third party payors. This affected party states that every third party payor contract it negotiated contains "confidentiality provisions which prohibit the disclosure of pricing information by either party."

Based on the representations provided by the Ministry and the various affected parties, I find that the affected parties supplied the information to the Ministry with a reasonably-held implicit expectation of confidentiality. All affected parties have treated the information in a manner that indicates concern for its protection from disclosure; the information is not otherwise available to the public; and the submissions were prepared for the purpose of confidential dealings with the Ministry which would not entail disclosure. I also accept the Ministry's submissions that the pricing information provided by each facility was not shared with the other facilities or anyone else, and that the Ministry has kept the information confidential.

Therefore, I find that Records 1, 2, 3, 5, 6, 7, 8, 10, 11 and 12 were supplied in confidence for the purposes of section 17(1).

Part three: Reasonable expectation of harm

To discharge the burden of proof under the third part of the test, the Ministry and 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 section 17(1) would occur if the information was disclosed (Order P-373).

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" [see Order P-373, two court decisions on judicial review of that order in 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 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

(See also Orders PO-1745 and PO-1747)

Section 17(1)(a): Prejudice to Competitive Position

One of the affected parties provided this submission on the issue of the harm:

> In negotiations with the Ontario Ministry of Health for access and availability of radiation oncology services at [named facility] to Canadian citizens in need of those services, the [named facility] negotiated the price reductions off of our charges for these services. In addition to price reductions, additional ancillary services, and pricing therefore, were also negotiated. The price reductions and ancillary service negotiations were unique to our facility and were effectuated in order that [named facility] could more effectively compete to provide this service in a mutually beneficial structure. As with many other businesses, pricing negotiations in health care between provider organizations and third party payors controlling patient referrals, involve the provider organization disclosing information and making pricing and other adjustments which could be very harmful to the competitive position of the institution if disclosed to the public. The provider organization's relationship with its other contracting third party payors will be negatively affected by the disclosure of such information, and will damage it's ability to negotiate favourable reimbursement rates and referral relations which enable the institution to recover its costs.

Another affected party provides similar submissions as follows:

> The [named facility] believes that it would suffer economic harm in that its competitive position would be adversely affected if the pricing information were disclosed. The [named facility] and the Ministry arrived at a unique pricing arrangement after specific negotiations. Thus, the disclosure of the arrangement to the requestor would jeopardize the [named facility's] negotiating position with the Ministry if other competing or potential bidders are made aware of the details. In addition, the [named facility] believes the disclosure would more broadly affect contractual negotiations with other payors in the United States and Canada, as the pricing arrangement with the Ministry is unique.

The Ministry did not make representations on this aspect of the section 17(1)(a) exemption claim.

In Order PO-1791, Adjudicator Sherry Liang reviewed this Office's past treatment of appeals where similar types of information were at issue. She stated:

> 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.

The records at issue in this appeal (with the exception of Record 13) all contain unit price information, in that the charges for providing either breast or prostate cancer treatment are set out on a per patient basis. The cost breakdowns provided by the affected parties to the Ministry contain a list of the treatment and services included in the final cost of the overall treatment package.

I recognize that cancer care treatment facilities in the United States operate in a different manner than those in Ontario. Unlike Ontario, health care treatment in the United States is not publicly funded. As a result, health care facilities must compete for business by providing the best service at the lowest price. In doing so, I assume that they negotiate with service providers and other third parties for favourable contracts to minimize their costs. In that context, I accept that the information in the records, if disclosed, could reasonably be expected to permit competitors of the affected parties to alter their prices and potentially outbid the affected parties in future competitions for cancer treatment of either Ontario or United States residents. I also agree with the affected parties that disclosure of the pricing of their third party service providers could also reasonably be expected to impact their ability to carry on its business and compete in their own markets.

Accordingly, I find that disclosure of Records 1, 2, 3, 5, 6 , 7, 8, 10, 11 and 12 could reasonably be expected to prejudice significantly the competitive position of the affected parties in their future business dealings with the Ministry and in the more typical business dealings in their own United States marketplace.

All three parts of the section 17(1)(a) exemption test have been established for Records 1, 2, 3, 5, 6, 7, 8, 10, 11 and 12. Because these records qualify for exemption under section 17(1)(a) of the Act, it is not necessary for me to consider the application of section 17(1)(c).

Public Interest in Disclosure

During the course of the appeal, the appellant raised the possible application of section 23 with respect to the section 17(1)(a) exemption claim.

Section 23 of the Act reads:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In Order P-241, former Commissioner Tom Wright commented on the burden of establishing the application of section 23. He stated as follows:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

I agree with these comments.

Section 23 was included in the Notice of Inquiry and I provided the appellant with an opportunity to submit representations on its applicability in the circumstances of this appeal. The appellant did not provided representations on this or any other issue in response to the Notice.

The Ministry provided the following submissions on the application of section 23:

> ... The MOHLTC submits that it has met its public interest accountability by releasing the total yearly expenditure for the out-of-province treatment of cancer patients. This information is also disclosed as part of the public accounts process.

I accept the Ministry's representations on this issue. Based on my independent review of the records and, in the absence of representations from the appellant on this issue, I am not persuaded that there is a compelling public interest in disclosure of the information at issue, or that any public interest that may exist would outweigh the purpose of the mandatory section 17 exemption claim.

Consequently, I find that section 23 of the Act does not apply to those records which I have found to be exempt from disclosure pursuant to section 17(1)(a).

ORDER:

1. I order the Ministry to disclose Records 4, 9 and 13 to the appellant no later than **September 11, 2000**, but no earlier than **September 5, 2000**.

2. I uphold the Ministry's decision to deny access to Records 1, 2, 3, 5, 6, 7, 8, 10, 11 and 12.

3. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant.

Original signed by: August 4, 2000 Tom Mitchinson
Assistant Commissioner