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

ORDER PO-1875

Appeal PA-990286-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

A request was submitted to the Ministry of Health and Long-Term Care (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information regarding Community Care Access Centres (CCACs):

1. ... detailed information as to how the specific amount for each CCAC (base funding increase for 1999/00) was calculated. In particular, I am requesting a copy of the complete formula or formulas used in making the calculations and the spreadsheets which demonstrate the results of the calculations. This should be for all sources of funding, including equity funding amounts as well as recent announcements of special funding (e.g. nursing initiatives, emergency room support for the hospital sector, etc.).

2. I am also requesting information in hard copy and on diskettes from the monthly financial statistical reports submitted by each CCAC to the Ministry of Health. This report is entitled *Community Care Access Centre: 1998/99 Monthly Operating Statement and Forecast (Thousands)*. In particular, I would like the following information for each CCAC for the nine months ended on December 31, 1998:

    - Page 1, Line 22, Column A - Approved fiscal budget
    - Page 1, Line 22, Column B - Actual YTD
    - Page 1, Line 22, Column C - Projected Mar 31/99
    - Page 1, Line 22, Column D - Surplus (DEFICIT) A-C

The Ministry granted access to some responsive records, but denied access to the specific information identified in the second part of the request pursuant to section 17(1) of the *Act* (third party information).

The requester (now the appellant) appealed the Ministry's decision to deny access, and also claimed that the records provided to him regarding the first part of the request were not responsive.

During the course of this appeal, the following issues were clarified:

1. The Ministry advised the appellant that it was unable to locate funding formulas to satisfy the first part of the request. The appellant did not accept this response and appealed the Ministry's decision, and also confirmed his interest in receiving the documentation. The Ministry then changed its position and provided the appellant with access to all records responsive to the first part of his request.

2. The appellant reduced the scope of the second part of his request to the period ending March 31, 1999 instead of December 31, 1998.

3. The Ministry confirmed that it has a report submitted by 33 of the 43 existing CCACs that contains the line items responsive to the second part of the request, but not from the remaining 10 CCACs. The appellant agreed to accept comparable information from another report for these 10 CCACs.

Mediation did not succeed in resolving this appeal, so it was moved to the adjudication stage. I sent a Notice of Inquiry initially to the Ministry and the 43 CCACs, and received representations in response from the Ministry and 4 CCACs. Two of these CCACs consented to disclosure of the information related to them.

I determined that it was not necessary for me to solicit representations from the appellant before reaching my decision in this appeal.

RECORDS:

The records remaining at issue in this appeal, as described in the Notice of Inquiry, are:

1. For the 33 CCACs that submitted a report entitled *Community Care Access Centre: 1998/99 Monthly Operating Statement and Forecast (Thousands)*:

   Line 22, columns A, B, C and D for the 12 months ended on March 31, 1999 of this report.

2. For the remaining 10 CCACs:

   The two sections of the *Annual Reconciliation Report* which contain the requested information, namely: section 1. Identification; and section 2. All columns listed in Line 22 of Part A - Budget vs. Actual Expenditure and Revenue.

PRELIMINARY ISSUE:

One CCAC made the following submission:

> Section 22(a) of the *Act* provides that a head may refuse to disclose a record where "*the record or the information contained in the record has been published or is currently available to the public*". The CCAC takes the position that information regarding annual expenditures of the CCAC is already available to the public through the distribution of the document described below.
> ...

> Therefore, disclosure of the portion of the record relating to actual expenditures is already published or available to the public and disclosure may be refused pursuant to Section 22(a) of the *Act*.

This exemption was not raised by the Ministry.

The position put forward by this CCAC is inconsistent with its opposition to disclosure under section 17(1) of the *Act*. As I stated in Order P-1114, the intent of section 22(a) is to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. In determining that a record is exempt under section 22(a), an institution must first reach the conclusion that the content of the record in question is fully accessible. If the CCAC in this case takes no exception to the fact that the information at issue is already available to the public through another method, it cannot then maintain its position that disclosure of this same information in response to the appellant's request could reasonably be expected to result in any of the harms identified in section 17(1) of the *Act*.

DISCUSSION:

BACKGROUND

The Ministry's representations include the following background information regarding CCACs, which I feel provides a useful context to the issues in this inquiry:

> In January 1996, then Minister of Health Jim Wilson announced reforms to Ontario's long-term care system, including streamlining 74 Home Care and Placement Coordination programs into 43 Community Care Access Centres (CCACs).
>
> The CCACs were established as not-for-profit corporations that offer a single point of access for long-term care community support services and admission into publicly funded long-term care facilities. CCACs are governed by independent boards that are accountable, through service agreements, to the Ministry. CCACs serve clients by assessing their needs, determining their eligibility, and buying, on their behalf, a range of services including homemaking, nursing, physiotherapy, occupational therapy, speech pathology, social work and nutrition. CCACs enter into commercial contracts with not-for-profit and commercial service providers through a request for proposal process.
>
> A transition period of three years (1996-99) was established in order to implement a fully competitive system of CCACs across the province. During this transitional period, certain measures were used, in concert with the CCACs request for proposal process, to ensure stability and continuity of client services in the long-term care community. As part of this transition, the [Ministry] continued to contract for some services directly through community associations, groups, hospitals, etc. During the transition and stabilization period the CCACs were also allowed to contract through a separate RFP process with the

community associations, groups for services. In other words the two systems operated in concert during the transition, some purchase of services by the CCAC and some direct purchase of service by the [Ministry].

THIRD PARTY INFORMATION

Introduction

Section 17(1) of the *Act* reads in part as follows:

> 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 a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the CCACs 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 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.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding my Order P-373 stated:

> 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.)]

Part one: Type of Information

The Ministry and the two CCACs resisting disclosure submit that the records contain financial information. The Ministry states:

> The contents of the records under consideration show the dollar amount of each CCACs budget and the variance of the actual expenditures from the approved budget. The Ministry submits that on the face of the records this information clearly qualifies for definition of financial information as they indicate budgetary, operating cost, and financial accounting data. In the non-profit sector information pertaining to surplus/deficit is analogous to profit or loss data.

Financial information has been defined in past orders to mean, "... information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, 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 information at issue in this appeal concerns budget estimates and actual expenditures for all CCAC's for the year ending March 31, 1999. I find that this is clearly financial information within the meaning of section 17(1) of the *Act*, and part one of the exemption test has been established.

Part two: Supplied in Confidence

In order to satisfy part two of the section 17(1) exemption claim, the parties resisting disclosure must establish first that the information was supplied to the Ministry and, if so, that it was supplied in confidence.

The Ministry and both CCACs also submit that the financial information was supplied by the CCACs. The Ministry states:

> The information contained in the Operating Statements or Reconciliation Reports has been supplied by each agency to the [Ministry] for the purposes reporting under their service agreements. The information is placed on similar forms for ease in accounting and expenditure tracking. The [Ministry] submits that the financial details contained in these documents were obtained from the non-profit CCAC organizations.

I concur.

In order to establish the confidential component of part two, the Ministry and/or the two CCACs must demonstrate that there was a reasonable expectation of confidentiality on the part of the CCACs at the time the information was provided. It is not sufficient that the CCACs had an expectation of confidentiality; this expectation must have been reasonable, and must have had an objective basis. Under section 17(1), the expectation of confidentiality can be either explicit or implicit (Order M-169).

The Ministry submits:

> The details of the information at issue has not been previously released by the Ministry therefore, the [CCACs] would have a reasonable expectation of confidentiality. Further expectation that the Ministry would treat this information in a confidential manner is derived from a confidentiality clause found in the service agreements with the CCACs. ...

One of the CCACs makes the following submissions.

> The CCAC has supplied the information contained in the Record to the [Ministry] in confidence. The Record contains actual as well as budgeted and estimated financial

> information. The Record identifies the existence of a surplus or deficit. The CCAC understands that this information is required by the Ministry to make financial and operating decisions relating to the operation of CCAC's in Ontario and that is the context in which the Record has been provided to the Ministry. As such, the Record has been prepared for a purpose that would not generally entail disclosure. This Record is produced at the request of the Ministry.
>
> In the usual course, other than the information concerning expenditures of the CCAC, the information contained in the Record would only be supplied to the members of the Board of Directors of the CCAC and the Ministry. The members of the Board of Directors of the CCAC are expressly instructed to keep all financial information strictly confidential. This consistently confidential treatment of the record and information contained therein is indicative of an ongoing concern on the part of the CCAC for its protection from disclosure both before and after its communication to the Ministry.

The other CCAC submits:

> Our organization provided the records in issue to the Ministry of Health and Long-Term Care in accordance with a Service Agreement between our organization and the Ministry. The agreement imposed certain duties of confidentiality upon our organization and we expected that the Ministry would similarly respect the confidentiality of that information, subject to the provisions of [the *Act*].

Based on these submissions, I am persuaded that the CCACs had a reasonably-held implicit expectation that the financial information supplied to the Ministry as part of the funding program for CCACs throughout the province would be treated confidentially by the Ministry. The existence of the confidentiality clause in the service agreements, although apparently binding on the CCACs and not the Ministry, is nonetheless evidence which supports the position that the financial information was intended to be treated as sensitive and confidential.

Therefore, I find that part two of the section 17(1) exemption test has been established.

Part three: Reasonable Expectation of Harm

To discharge the burden of proof under the third part of the test, the parties opposing disclosure 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.).

The Ministry takes the position that this "detailed and convincing" evidentiary requirement under section 17(1) is not correct. It points to the Court of Appeal decision in *Ontario (Ministry of Labour) v. Big Canoe*, [1999] O. J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.), which established a different evidentiary standard in the context of sections 14(1)(e) and 20 of the *Act*, which deal with potential harm to personal safety and bodily integrity.

The Ministry made this exact argument in a previous appeal, which I rejected. As I pointed out in detailed reasons in Order PO-1802:

> In the *Minister of Labour* case, the Court's analysis ... 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, financialloss or interference with negotiations. The Court does not indicate that [*Canada Packers Inc. v. Canada (Minister of Agriculture*, a decision of the Federal Court of Appeal discussed earlier in this order], 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 on the Construction of Statutes*, 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'.

My reasoning in Order PO-1802 is equally applicable in the circumstances of this appeal.

Assessment of Harms

Section 17(1)(a)

The Ministry and one CCAC argue that disclosure of the information would prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the CCACs, pursuant to section 17(1)(a) of the *Act*.

The Ministry states:

> There was an explicit requirement that CCACs will be purchasing their long-term care services through competitive RFP processes. Therefore the CCACs will be negotiating with various service providers for costs of providing long-term care services. In the scheme of competitive purchase of services by the CCACs, 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 suppliers. The disclosure of the details of their budgetary surplus/deficit/variances could result in an undermining of their competitive bidding processes. The Ministry's concern is that disclosure of budgetary surplus/deficit/variance details could be detrimental to the competitive bidding processes.

One CCAC makes similar representations:

> Should disclosure of this Record be ordered, it could reasonably be expected that the competitive position of all CCAC's across Ontario would be detrimentally affected. In a sense, all CCAC's as well as other publicly funded health care services and institutions "compete" against each other for funding. The Ministry uses the information contained within the Record to make its financial and operating decisions. The CCAC understands that the formula upon which funding is determined for each CCAC is primarily based upon the population of the community to which the centre provides service. If other services and institutions or the public at large are permitted to view the surplus/deficit totals for the CCAC, this information may be used by other institutions or the public to detrimentally affect the CCAC's "competitive" position when funding allocations are being determined by the Ministry.

> In particular, if other CCAC's or the public at large become aware that one particular CCAC has a surplus, pressure may be placed upon the Ministry to re-allocate funding based upon the mere existence of that surplus. If the criteria upon which the Ministry makes its funding decisions is to place a greater emphasis upon the mere existence of a surplus, this may lead to reckless spending on the part of a CCAC simply to rid itself of the surplus in order that decisions regarding its funding are not affected.

As noted earlier, two CCACs consented to the disclosure of information relating to them. One of them states:

> In response to the inquiry concerning our opinions, we do not have any difficulty with the release of the requested information about the [CCAC] in the monthly operating statements and forecast "1998-1999 or 1999-2000". Most of this information is contained in our Annual Report and in fact much more detailed information is provided to the general public.

The other consenting CCAC submits:

> The audited Financial Statements of the [CCAC], March 31, 1999, include the data appearing on Line 22 of the 1998/99 Monthly Operating Statement and Forecast. Because the audited Financial Statements of the Corporation are public documents, it is our position that the interests of the [CCAC] would not be adversely affected by the disclosure of the records.

These statements suggest to me that not all CCACs share the view that their competitive or negotiating positions would be detrimentally affected by the disclosure of the specific information at issue in this appeal. These submissions also suggest that the relatively small amount of financial information sought by the appellant, at least in the case of some CCACs, is already available to the public through other means.

Based on the representations provided by the parties resisting disclosure, I am not convinced that disclosing the financial information to the appellant could reasonably be expected to result in any of the type of harms outlined in section 17(1)(a). The information sought by the appellant is limited and specific. It does not include any details regarding the operation of the CCACs, the type or nature of services or operational arrangements put in place by these organizations, or the individual salary or benefit levels of their employees. The information is limited to the overall funding level provided by the Ministry to each CCAC, and a reconciliation between the budgeted and actual expenditures incurred by each organization over the time period of the subsidy. Any future potential harm in the negotiation of service or other arrangements by CCACs is purely speculative and, in my view, not reasonably supported by the nature of the specific financial information of interest to the appellant.

Therefore, I find that the Ministry and the two CCACs resisting disclosure have not established the harms requirement of section 17(1)(a) of the *Act*.

Section 17(1)(b)

The Ministry's representations do not address section 17(1)(b).

However, the two CCACs resisting disclosure both claim that disclosure of the financial information would result in this type of information no longer being supplied to the Ministry. One CCAC states:

> Should disclosure of the Record be ordered, it could reasonably be expected that the Ministry may have some difficulty obtaining this information from CCAC's in Ontario in the future. It is noted that, according to the Notice of Inquiry, ten (10) CCAC's have not provided the report to the Ministry from which the Record is excerpted. By ordering disclosure, compliance with the requirement to report this information may be more difficult to obtain. The CCAC notes that, in current practice, there is no penalty enforced by the Ministry for the failure to provide this information.

I do not accept this position. The information at issue in this appeal is supplied to the Ministry under the terms of a service agreement which requires the CCACs to submit various financial and other information as a condition of funding. Should the information not be provided, the Ministry would no doubt have an obligation to pursue it as a matter of sound public administration, and the non-compliance with reporting requirements would presumably have a negative impact on future funding decisions. It is also significant to note that the Ministry made no representations in support of this exemption claim.

Therefore, I find that the section 17(1)(b) harm has not been established.

Section 17(1)(c)

None of the parties resisting disclosure have provided any evidence in support of the harm under section 17(1)(c) and, in the absence of this evidence, I find that this section has no application in the context of this appeal.

In summary, I find that the third part of the test for exemption under section 17(1) of the *Act* has not been established, and the records do not qualify for exemption.

ORDER:

1. I order the Ministry to provide the appellant with the following records:

- For the 33 CCACs that submitted a report entitled *Community Care Access Centre: 1998/99 Monthly Operation Statement and Forecast (Thousands)*, Line 22, columns A, B, C and D for the 12 months ended on March 31, 1999.

- For the 10 CCACs that have not submitted the above report, the two sections of the *Annual Reconciliation Report*, specifically: section 1. Identification; and section 2. All columns listed in Line 22 of Part A - Budget vs. Actual Expenditure and Revenue.

These disclosures are to be made by the Ministry by **April 4, 2001**, but not before **March 30, 2001**.

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

Original signed by: February 28, 2001
Tom Mitchinson
Assistant Commissioner