



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2041

Appeals PA-010341-1 & PA-010397-1

Ministry of Health and Long-Term Care



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEALS:

First request/appeal

The appellant, a pharmacy, submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Health and Long-Term Care (the Ministry) for access to records “relating in any way to the interpretation and/or application” of sections 6(2) or 6(2)(a) of the *Ontario Drug Benefit Act (ODBA)* to the appellant, or generally.

The Ministry identified 29 records responsive to the request, and advised the appellant that it was granting partial access to 22 records, and denying access to the remaining seven. The Ministry advised that it was relying on the exemptions at sections 13 (advice to government), 17 (third party commercial information) and 19 (solicitor-client privilege) of the *Act* to deny access to records or portions of records.

The appellant then appealed the Ministry’s decision, and this office opened appeal PA-010341-1. The appellant indicated it was appealing only the Ministry’s decision to withhold portions of Record 7, and Records 20, 23 and 24 in their entirety. As a result, section 17 is not at issue in the first appeal.

Second request/appeal

Shortly before making the first appeal, the appellant made a second request to the Ministry for access to records relating to the approval (or potential approval) of the operation or use of a specific medical building for the purpose of a public hospital pursuant to section 4 of the *Public Hospitals Act (PHA)*.

The Ministry identified three records responsive to the request, and advised the appellant that it was denying access to them on the basis of the exemption at section 19 (solicitor-client privilege) of the *Act*.

The appellant then appealed the Ministry’s decision, and this office opened appeal PA-010397-1.

Inquiry Process

I sent a Notice of Inquiry setting out the issues in the appeals initially to the Ministry, which provided representations in response. I then sent the Notice of Inquiry, together with the non-confidential portions of the Ministry’s representations, to the appellant. The appellant did not submit representations.

RECORDS:

The records at issue in these appeals are described as follows:

Appeal	Record Number	Description	Ministry’s decision
First	7	Internal drug programs branch options paper dated April 2001 regarding fee rate for	Disclosed in part; portions withheld under s. 13

		hospital pharmacies	
First	20	Internal Ministry e-mails dated September 22 and 23, 1999 regarding ODB dispensing fee rate for hospital pharmacies	Withheld in full under s. 19
First	23	Internal Ministry e-mail dated November 25, 1996 asking for comments regarding reducing the ODB dispensing fee rate for hospital pharmacies	Withheld in full under s. 19
First	24	Internal Ministry e-mail from in-house counsel dated July 4, 1996 regarding the operation of pharmacies on hospital premises	Withheld in full under s. 19
Second	1	Internal Ministry e-mail from in-house counsel dated July 19, 2001 regarding the appellant	Withheld in full under s. 19
Second	2	Internal Ministry e-mail from in-house counsel to Ministry staff dated July 19, 2001 regarding the appellant	Withheld in full under s. 19
Second	3	Internal Ministry e-mail from in-house counsel to Ministry staff dated August 23, 2001 regarding hospital dispensing fees	Withheld in full under s. 19

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Introduction

The Ministry claims that all of the records at issue, except for Record 7, are exempt under section 19 of the *Act*, which reads:

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

Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining

professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

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

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

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

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

The Ministry submits:

. . . The information in these records reflects confidential communications between counsel in the Legal Services Branch of the Ministry and the [Ministry’s Drug Programs Branch (DPB)], as well as legal advice to the Public Hospital program area. This correspondence includes the seeking, formulation and provision of confidential legal advice. In addition, the three records at issue in the 2nd appeal (Records 1, 2 and 3) are also exempt from disclosure due to litigation privilege.

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Record 20 is an internal ministry e-mail communication relating to [ODBA] dispensing fee rates for hospital pharmacies. It was sent by a legal counsel from the Ministry's Legal Services Branch to the [DPB]. It is clearly legal advice as it contains statutory interpretation with respect to section 6(2)(a) [of the ODBA]. This record . . . involves written communication of a confidential nature between the client (the DPB) and legal counsel specifically for the purpose of providing legal advice.

Record 23 is an internal ministry e-mail communication asking for comments with respect to reducing the [ODBA] dispensing fee rate for pharmacies located within public hospitals. This e-mail communication was sent from the [DPB] to several legal counsel in the Ministry's Legal Services Branch in order to solicit their opinion on this matter . . . [T]his record . . . is written communication of a confidential nature between the client [the DPB] and several legal advisers within the Ministry, specifically sent for the purpose of seeking legal advice.

Record 24 is an internal ministry e-mail communication sent from legal counsel at the Ministry's Legal Services Branch to the [DPB] and copied to other [Ministry] legal counsel . . . The purpose of this communication was to answer questions posed by the DPB with respect to legal interpretation of the Section of Regulation 201/96 made under the [ODBA]. This subsection is concerned with the dispensing fee that the Minister shall pay to a pharmacy operated in a hospital that is approved as a public hospital under the [PHA].

. . . [T]his record . . . is a written communication of a confidential nature between a legal advisor and the client which provides legal advice . . .

. . . Record 1 is an internal ministry e-mail communication from legal counsel in the Ministry's Legal Services Branch sent to the [DPB] and copied to several other legal counsel within the Legal Services Branch. This communication provides legal advice with respect to the change in the hospital pharmacy dispensing fee . . . This is a written communication of a confidential nature between legal counsel and the client [the DPB] which provides legal advice.

Record 2 is an internal e-mail communication from another legal counsel in the Ministry's Legal Services Branch who authored Record 1 . . . Record 2 was also sent to the [DPB] and copied to several other legal counsel . . .

This document is clearly offering legal advice, and furthermore, the entire text of Record 1 is included with this communication . . . It is a written communication of a confidential nature from legal counsel to legal counsel, and from legal counsel to the client, for the purpose of providing legal advice.

Record 3 is an internal e-mail communication from the same legal counsel who authored Record 1 to the legal counsel who authored Record 2. This communication was copied to several other legal counsel . . . , as well as to the client, the [DPB] . . .

In addition, this correspondence includes instructions from the client to legal counsel . . . The record is a written communication of a confidential nature between the client's legal advisor and the client. As was the case with the previously discussed records, this communication is directly related to the provision of legal advice, and in addition, refers to the formulation of legal advice.

Based on the detailed representations of the Ministry, as well as on the records themselves, I am satisfied that each of the six records at issue consists of a confidential communication between a lawyer and client made for the purpose of obtaining legal advice on the issues at hand under the *ODBA* and the *PHA*. Therefore, Records 20, 23, 24, 1, 2 and 3 qualify for exemption under the solicitor-client communication privilege aspect of section 19 of the *Act*.

ADVICE OR RECOMMENDATIONS

The Ministry claims that the withheld portions of Record 7 qualify for exemption under section 13(1) of the *Act*, which reads:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it “. . . purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making.” Put another way, the purpose of the exemption is to ensure that:

. . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Order 24; PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118; P-348; P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); P-883, upheld on judicial review in *Ontario (Minister of Consumer*

and Commercial Relations) v. Ontario (Information and Privacy Commissioner) (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.); PO-1709, above].

Record 7 is entitled “Retail Pharmacies Located in Public Hospitals”, and contains the following headings: “Issue”; “Current Status”; “Background”; “Options”; and “Recommendation”. The “Options” portion describes two options, and lists the “pros” and “cons” of each choice. The Ministry disclosed the information under the first three headings, but withheld the information under the last two.

The Ministry submits that, in the Recommendation portion, the Ministry is advised to select a particular option, and that this portion contains both advice and recommendations. The Ministry further submits that the advice or recommendations were intended “to assist the Government in its policy-making process.” In addition, the Ministry argues that disclosure of the advice or recommendations could reasonably be expected to inhibit the free flow of advice or recommendations to the government, and states in support:

. . . The matter under consideration in this record requires that a decision be made on a specific course of action. The information in this record serves the purpose of providing a suggested way of addressing the identified problem. The government requires a system where it can seek advice from civil servants, secure in the knowledge that the advice is confidential. If such advice and recommendations to the government were to be routinely disclosed, this could have a chilling effect on the day to day functioning of government. Thus, an exemption to disclosure is vital in the interests of encouraging candid proposals and discussions with respect to important matters for government decision.

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In Order P-398, Assistant Commissioner Mitchinson stated that a record that identifies an option is not exempt under Section 13(1) of the *Act* “where it does not contain any wording which would indicate whether the option is recommended or not”. He concluded “In my view, the Ministry has failed to establish the requirements for exemption under Section 13(1) of the *Act*.”

However, [Record 7] can clearly be distinguished from the situation in Order P-398. Although Record 7 contains two options, along with descriptions of advantages and disadvantages of these options, **it is clearly stated which of the two options is recommended by the Ministry. Furthermore, this is followed by an explicit statement outlining the course of action to be taken with respect to the implementation of the option.** On the basis of this distinction, . . . the aforementioned portion of this record . . . qualifies for the Section 13(1) exemption under the *Act*.

Further evidence . . . is provided by distinguishing the situation in this Appeal from that discussed in Order P-978. In that Order, Inquiry Officer Mumtaz Jiwan stated the following:

The portion of the record which was severed consists of several options for possible responses to a given issue; however, no preferred option is identified. Several previous orders have found that if a record does not provide advice or recommendations about which alternative should be selected, section 13(1) could not apply to it. Accordingly, I find that the options do not constitute advice or recommendations and, therefore, the section 13(1) exemption does not apply . . .

. . . Unlike that situation, the alternative that the government is recommending to be selected is clearly delineated on the final page of Record 7. Therefore, because the record does provide advice and recommendations about which option should be selected, it is submitted that the aforementioned portion of the record is exempt . . .

Finally, if the IPCO does not accept the above arguments, the Ministry submits that everything in the aforementioned portion of Record 7 qualifies for exemption under Section 13(1) except from the heading line entitled "Option 1 . . ." This is based on Orders P-922 and P-529. In Order P-922, Inquiry Officer Mumtaz Jiwan stated the following:

In Order P-529, Assistant Commissioner Irwin Glasberg considered the possible application of section 13(1) to a record which set out a number of options with the advantages and disadvantages of each and the option recommended by the Ministry staff. In that order, the Assistant Commissioner found that the information under each option, i.e. the possible advantages and disadvantages of each option (excluding the headings) and the option favoured by the Ministry staff, constituted the advice and recommendations, respectively, which were intended to be protected under the legislation.

Inquiry Officer Jiwan stated "I agree with the reasoning in the above" and adopt it for the purposes of this Appeal. Applying the reasoning to Record 7 in the present Appeal, the Ministry submits that everything from the word "Options" on page 2, except for the aforementioned heading "Option 1 . . .", to the end of the recommendation paragraph on page 4, should qualify for . . . exemption . . . [Ministry's emphasis]

Without question, the portion of Record 7 entitled "Recommendation" consists of a suggested course of action that would ultimately be accepted or rejected by its recipient during the deliberative process. As such, this portion qualifies for exemption under section 13.

The next issue for me to decide is whether or not the “Options” portion of Record 7 falls within the scope of section 13, on the grounds that it either consists of advice, or could reasonably be expected to reveal advice given. Assistant Commissioner Tom Mitchinson recently addressed a similar issue in Order PO-2028, where he stated:

The severances on pages 9 and 10 are listed under the heading “Funding Options”, and include a series of “pros” and “cons” identified by Ministry staff for each option. The Ministry submits:

The “Funding Options” are advice to the decision-makers about the methods of funding the project if it is approved. The advisors are not in a position to recommend to the decision-makers how they are to decide on funding or the financing options, but the options with pros and cons are also matters that should be considered by the [Northern Ontario Heritage Funding Corporation (NOHFC)] Board as part of its decision to approve or not approve the project for funding. The immediate suggested action is for the decision-makers to consider these options in their deliberations.

The issue of whether or not “options” qualify as “advice or recommendations” for the purpose of section 13(1) has been considered in a number of previous orders. The Ministry’s representations refer to two of them: Orders P-529 and P-1037.

In Order P-529 former Assistant Commissioner Irwin Glasberg had to determine whether certain records relating to the evaluation of proposals for the delivery of bus services to the Ministry of Transportation qualified for exemption under section 13(1). Three of them contained different lists of options, and he found that only one record qualified for exemption as containing “advice”. The basis for distinguishing this one record was that, in addition to listing options, this record contained an assessment of the anticipated results or probable outcomes, and, in the circumstances, this information was found to reveal by inference a particular suggested course of action.

In Order P-1037, Adjudicator Cropley considered whether a record containing various options for dealing with proposals for a housing project administered by the Ministry of Health qualified for exemption. After considering the facts and argument provided in that appeal, she identified that “some of [the options] include observations about the possible consequences of implementing the particular option to which they are attached”, but rejected the section 13(1) exemption claim on the basis that no preferred option was identified and, therefore, the record did not contain “advice or recommendations”. In other words, given the particular context she was facing, Adjudicator Cropley was not persuaded that the content of the various options would reveal a suggested course of action.

Two other appeals not identified by the Ministry also provide examples of how records containing options have been treated in past orders.

In Order P-1631, Senior Adjudicator David Goodis examined records used for the purpose of obtaining directions relating to settlement discussions for litigation involving the Ministry of Natural Resources and the Ministry of the Attorney General. In finding that certain records containing “proposed options and courses of action” qualified as “advice or recommendations” for the purposes of section 13(1), he relied on the fact that the options were accompanied by “pros and cons” that could be taken into account by the decision-makers in the settlement negotiations. Senior Adjudicator Goodis determined, based on the facts and arguments presented to him in that appeal, that the consequences of implementing a particular option outlined in the “pros and cons” discussion could be interpreted as revealing a suggested course of action, and found that they qualified as “advice”.

Finally, in Order P-1034, former Adjudicator Anita Fineberg considered whether portions of a record containing options for implementing a non-tax revenue strategy qualified for exemption under section 13(1). She rejected the exemption claim, based on the fact that the options did not include any “pros and cons”; that the author of the record was not “recommending or advising the senior managers that one option should be adopted in preference to the others”; and that the options were not mutually exclusive.

What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains “advice” for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain “mere information” and what, if any, contain information that actually “advises” the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing “mere information”, then section 13(1) applies.

Applying this approach to the severed portions of pages 9 and 10, I find they do not contain “recommendations” or “advice”. The Ministry acknowledges in its representations that the role of Ministry staff in providing support to NOHFC does not extend to “recommending a particular course of action to be followed”. In my view, the description of each option itself is “mere information”. The description simply states the various factual components of the option broken down into various pre-determined categories. It contains no information that could be said to “advise” the NOHFC in making its decision on funding, nor, in

my view, would disclosure allow one to accurately infer any advice given. The “pros and cons” description that accompanies each option also do not contain any explicit advice. There is no statement recommending that NOHFC chose a particular option and no explicit indication as to which option is preferred by the authors of the Evaluation Report.

The next question is whether disclosure of these portions would allow one to accurately infer any advice given. When considered as a whole and in the context of the roles played by Ministry staff in providing support to the NOHFC and the Board of that organization as a decision-making body for Northern Ontario project funding, I find that disclosure of the “pros and cons” for the various options would not permit accurate inferences to be drawn as to the nature of any advice implicitly contained in these portions of the record. In my view, in comparing the various “pros and cons” it would not be reasonable to infer a suggested course of action by Ministry staff, which will ultimately be accepted or rejected by the Board during the deliberative process. Accordingly, I find that the “pros and cons” portions of pages 9 and 10 do not consist of or allow one to accurately infer any advice or recommendations. Therefore, section 13(1) of the *Act* does not apply.

I agree with the Assistant Commissioner’s approach and, applying it to these circumstances, I find that the “Options” portion of the record does not contain any advice or recommendations. The description of each option, and the “pros” and “cons”, are “mere information”, and cannot be said to “advise” the Ministry in making its decision under the *ODBA*.

Further, I am not satisfied that disclosure of this information would allow one to accurately infer any advice given. I find that it would not be reasonable to infer a suggested course of action by Ministry staff, which will ultimately be accepted or rejected by the Ministry during the deliberative process, from the “Options” portion of the record, in the absence of the “Recommendation” section. Accordingly, section 13(1) of the *Act* does not apply to the “Options” portion of Record 7.

ORDER:

1. In the first appeal, I uphold the Ministry’s decision to withhold from the appellant Records 20, 23, 24 in their entirety, and the “Recommendation” portion of Record 7.
2. In the first appeal, I do not uphold the Ministry’s decision to withhold from the appellant the “Options” portion of Record 7.
3. In the second appeal, I uphold the Ministry’s decision to withhold from the appellant Records 1, 2 and 3 in their entirety.

4. I order the Ministry to disclose to the appellant the "Options" portion of Record 7 no later than **September 24, 2002**.

Original Signed By: _____
David Goodis
Senior Adjudicator

_____ September 10, 2002