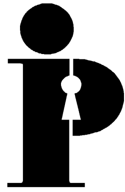

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2187

Appeal PA-030017-1, PA-020288-1, PA-020304-1, PA-020305-1, PA-020306-1, PA-020308-1, PA-020309-1, PA-020310-1, PA-020311-1, PA-020312-1, PA-020313-1, PA-020314-1, PA-020315-1, PA-020316-1, PA-020325-1, PA-020338-1, PA-020339-1, PA-020346-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information relating to diagnostic clinics assessed under the Independent Health Facilities (IHF) program:

- The names and locations of clinics that have had their licences suspended by the health ministry. I would also like a copy of the assessment reports that lead to these suspensions.

- The names and locations of clinics that have had partial licence suspensions and their assessment reports.

- The names and locations of clinics where "major clinical quality deficiencies" were detected by the College of Physicians and Surgeons of Ontario but no licensing action was taken. I would also like a copy of those assessment reports.

  I am also requesting that I receive information on any corrective action taken by said clinics.

  I am seeking information that goes back to the beginning of the Independent Health Facilities program, which started in 1990.

The Ministry issued an interim decision, estimating that there were 150 responsive records. The Ministry advised the requester that all records would likely be partially withheld under the following exemptions in the *Act*:

- sections 17(1)(a), (b) and (c)	- third party commercial information
- section 18(1)(c)	- economic and other interests of the Ministry
- section 21(1)	- invasion of privacy

In response, the requester narrowed the scope of her request to assessments undertaken in 1996 and 2001 only.

The Ministry then issued a second interim decision, reducing the estimated number of responsive records to 30. The Ministry confirmed that the same exemptions would likely apply to portions of the records.

The Ministry proceeded to notify approximately 36 IHFs (the affected parties) and obtained input from some of them on whether the records should be disclosed. Some objected to disclosure, others did not respond, and one affected party consented. After considering the various submissions, the Ministry issued a final decision, granting partial access, with severances under sections 17(1) and 21(1) of the *Act*. The Ministry decided not to rely on the section 18(1)(c) exemption it had referred to earlier.

The requester appealed the Ministry's decision to deny access. This appeal will be the subject of a separate order.

Twenty affected parties also appealed the Ministry's decision to grant access. Two affected parties subsequently withdrew their appeals (Appeals PA-020307-1 and PA-020337-1) and the Ministry agreed to disclose the relevant portions of the records at issue in these appeals to the requester.

I will deal with the remaining 18 third party appeals in this order.

Mediation did not resolve the issues in the various appeals, and the files were transferred to the adjudication stage of the appeal process.

I initially sent a Notice of Inquiry to the Ministry, the 18 affected parties and a number of employees or former employees of the various IHFs whose interests might be affected by the outcome of the appeals (the affected persons). The Notice covered all issues in the 18 third party appeals as well as the issues in the requester's appeal. The Ministry and 15 affected parties responded with representations. Representations were also received on behalf of affected persons in four appeals.

I then sent the Notice to the original requester, together with a copy of the Ministry's representations and the non-confidential portions of the affected parties representations. The requester responded with representations, which were shared with the Ministry and the affected parties. The Ministry and 16 affected parties submitted reply representations.

RECORDS:

The records consist of 36 Assessment Reports prepared for the Independent Health Facilities Program during the years 1996 and 2001. In some cases there is more than one report associated with a particular IHF. The only portions of these records at issue here are those that the Ministry decided to disclose to the requester. The portions withheld by the Ministry will be addressed in a separate order dealing with the requester's appeal.

For ease of discussion, I have numbered the various third party appeals as follows:

1 - PA-020288-1
2 - PA-020304-1
3 - PA-020305-1
4 - PA-020306-1
5 - PA-020308-1
6 - PA-020309-1
7 - PA-020310-1
8 - PA-020311-1
9 - PA-020312-1

10 - PA-020313-1
11 - PA-020314-1
12 - PA-020315-1
13 - PA-020316-1
14 - PA-020325-1
15 - PA-020338-1
16 - PA-020339-1
17 - PA-020346-1
18 - PA-030017-1

DISCUSSION:

PRELIMINARY ISSUES:

Appeals 14 and 17

The affected parties in Appeals 14 and 17 are represented by the same legal counsel, who submitted one set of representations covering both appeals.

Counsel challenges my jurisdiction to proceed with these appeals on the basis that they were transferred to the adjudication stage prematurely. She takes issue with the fact that the assigned Mediator ended mediation and did not deal with counsel's request that the Mediator reconsider the decision to transfer the appeals to the adjudication stage. Counsel submits:

> In this case, based on the decision of the Commissioner and the conduct of the Mediator, there was a legitimate expectation that the consultation/mediation process, as embarked upon by the Commissioner, would be adopted in these appeals. A legitimate expectation arises when a public official leads persons to believe that a decision affected their rights will not be taken without some form of hearing, procedure or consultations [case law cited]
>
> In this case, despite the Commissioner's decision under s. 51 [to appoint a mediator], the Facilities were not offered an opportunity [to] participate in the consultation process. There simply was no mediation in which the Facilities could meaningfully address the issues. This is a matter which goes to the root of this Inquiry, as the consultation frames the issues on appeal and the Mediator's Report informs the decision maker and the record.
>
> In the result, the Facilities submit that the lack of consultation amounted to a fundamental defect in the adjudication process, contrary to the principles and procedures contemplated under the *Code of Procedure*, the *Act* and the principles of fairness and natural justice. Moreover, the failure to render a decision under s. 18.01 of the *Code of Procedure* also affects the fairness of the proceeding, to the extent that without reasons, the Facilities remain ignorant of the Commissioner's

> decision. The Facilities submit that the Commissioner, having adopted the *Code of Procedure* ought to follow its own established procedures for adjudication.
>
> The Facilities also submit that the Commissioner lacks jurisdiction to proceed to this Inquiry stage, as the mediation/consultation process remains outstanding. Under s. 52, the Commissioner may conduct the Inquiry only where there is no mediator to settle a matter or where there is no settlement. As the mediation process was not embarked upon, it is premature to proceed to the Inquiry stage. In the result, the Facilities submit that these appeals ought to be remitted to mediation/consultation.

I do not accept this position.

Counsel for the affected parties has mischaracterized the mediation process set out in section 51 of the *Act*. As the language of this provision makes clear, mediation is entirely an optional step in the appeal process, which can be invoked by this office at its sole discretion. The Commissioner *may authorize* a mediator to investigate the circumstances of any appeal and *to try to effect a settlement* of the matter under appeal.

While the purpose of mediation is "to try to effect a settlement", by definition mediation is a voluntary and open-ended means of dispute resolution. No particular process, form of investigation, consultation, or substantive outcome is mandated. Nor does section 51 contemplate the resolution of an appeal through mediation as a "decision". Consequently, there can be no legitimate expectation (as argued by counsel) "that a decision affecting [the affected parties'] rights will not be taken without some form of hearing, procedure or consultation". In contrast, the inquiry process under section 52 of the *Act* and, in particular, section 52(13), leads to a decision affecting the rights of the parties and requires that "any affected party … shall be given an opportunity to make representations to the Commissioner."

I also do not agree with counsel's position that the Mediator's Report is the document that frames the issues on appeal and informs the decision maker and the record. The Mediator's Report is a document prepared for the parties at the completion of mediation. It outlines the results of the investigative component of the mediation stage, and identifies any issues that have been resolved or any records removed from the scope of the appeal. However, the Mediator's Report does not determine the issues in the appeal; the adjudicator determines the issues at the inquiry/adjudication stage, after considering all of the material before him or her, including the request, the decision, the appeal letter and the Mediator's Report. The adjudicator conducts a separate inquiry in which evidence and representations are received directly from the parties in response to a Notice of Inquiry prepared by the adjudicator. The adjudicator then disposes of the issues in the appeal based on the record, which includes the request, decision, appeal letter, Notice and any evidence and representations submitted during the inquiry. It is at the inquiry stage that the rules of natural justice apply, as modified by the statute's confidentiality considerations. The same procedural fairness considerations simply do not apply at the mediation stage.

The Reconsideration provisions of section 18.01 of the *Code of Procedure*, to which counsel refers, are also not applicable to activities taking place during mediation. It is clear from the wording of the *Code* that reconsiderations are only available with respect to orders or decisions of this office made during an inquiry. No orders or decisions affecting the rights of any affected party are made during mediation, and consequently, there is no step taken in the context of mediation activities that can be the subject of reconsideration under the *Code of Procedure*.

Finally, I find counsel's claim that I lack jurisdiction to proceed to the inquiry stage of the appeal to be without merit. Section 52(1)(b) of the *Act* provides that "[t]he Commissioner may conduct an inquiry to review the head's decision if … the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected." That is precisely the situation before me in these appeals. A mediator was appointed but no settlement was effected. The *Act* does not mandate that the mediation stage of the inquiry take any particular form, involve any specified level of contact with the parties, be of a certain duration or necessarily enjoy a particular level of success. A mediator may engage in substantial investigation and negotiation efforts, or may determine based on very limited activity that further efforts would not prove fruitful. No party is entitled to insist on a specific level of mediation or to control when an appeal should proceed to adjudication. As the plain wording of section 51(1) of the *Act* indicates, the jurisdiction and authority to proceed to conduct an inquiry in the circumstances provided in paragraphs (a) and (b) lies within the Commissioner's discretion.

Accordingly, I find no defect in jurisdiction, unfairness or other error that would prevent me from proceeding with my inquiry and making my determinations in these appeals.

Appeals 8 and 15

The affected parties in Appeals 8 and 15 are also represented by the same legal counsel. Although a different set of representations was submitted by counsel for each appeal, they are highly similar in nature and I will consider them together in this inquiry.

Counsel submits that the College of Physicians and Surgeons of Ontario [CPSO] should not have released the reports it prepared for the affected parties in Appeals 8 and 15, and that this error precludes the records from being accessible under the *Act*. Counsel argues that:

> … where an issue exists concerning an institution's entitlement to certain information, it is incumbent upon [the Commissioner] to first determine whether the information in question is properly in the possession of the institution.
>
> In this regard, it is reasonable to require that for a document to be "properly" in the possession and/or control of an institution, the party whose information or documentation is in issue must have either,

> (a) provided the information/documentation to another entity that was not subject to keep the information/documentation confidential and that other entity provided the information to the institution; or
>
> (b) the party must have voluntarily provided the private/confidential information to the institution with full knowledge that he/she was dealing with a government agency. This is the same requirement for the disclosure of documents in legal proceedings. The only method of circumventing this requirement, is via a search warrant or court order.
>
> With regard to the first requirement, [the affected parties] did not provide the information to anyone except the CPSO. And the CPSO is legally obligated to keep the information confidential. Therefore, disclosure of the information to the CPSA did not vitiate [the affected parties'] entitlement to confidentiality.
>
> The second requirement that a person be aware that they are dealing with an institution when providing confidential information was also not met in this case as [the affected parties] were not advised that the assessments were for the Ministry of Health.

Counsel also takes the position that the Ministry is precluded from disclosing the reports regardless of the fact that these records are in the Ministry's possession. She argues that the Ministry is obliged to return these records to their owner, the CPSO.

Finally (and in the alternative), counsel states that the CPSO assessors collected more information than is required by the Ministry, and submits:

> As the CPSO is bound to keep confidential all information it receives or obtains from its members, any information the CPSO obtained during the assessment process beyond that required by the Ministry of Health, was to be kept completely confidential. The CPSO had no authority or authorization to disclose the additional information to the Ministry of Health.
>
> The Assessment Reports show that all of the information, save for the recommendations of changes required, is beyond what is necessary to advise the Ministry of Health of whether [the affected parties] were operating in accordance with the CPSO's Parameters and Standards. This additional information must be severed from the Reports without any disclosure.

Because the assessors' recommendations of changes required in the IHFs are summarized on the final pages of the Assessment Reports, counsel submits that only these pages are subject to possible disclosure under the *Act*.

In essence, counsel's first argument is that a record in the possession of a government institution is not subject to the *Act* where it contains information about a third party that has been collected and compiled by a second party and then passed on to the institution in breach of the second party's confidentiality and/or notification obligations to the third party. Alternatively, she submits that to the extent that the record contains more information than the government institution needed, any additional information contained in the record is not subject to the *Act*.

I do not accept these arguments.

Under section 10(1) of the *Act*, where a record or part of a record is in the custody or under the control of a government institution the record or part of a record is subject to the right of access under the *Act*, unless an exemption under sections 12 to 22 applies, or unless the request for access is frivolous or vexatious. The Ministry, which is clearly an institution as defined in section 2, has acknowledged by answering these requests that the records are within its custody and control. Neither the Ministry nor any other party to these various related appeals argues that the records are not "properly" in the custody or under the control of the Ministry because there has been an alleged breach of some confidentiality or notification obligation, or because the Ministry is in possession of more information than it requires. Nor does the language of section 10(1) support the limitations on the right of access that counsel for these two affected parties asks me to infer [see Orders P-267, PO-2020; see also *Canada Post Corp. v. Canada (Minister of Public Works)* [1995] 2 F.C. 110 (C.A.)].

If there has been a breach by the CPSO of some confidentiality or notification obligation, as alleged by counsel, or if the CPSO has provided the Ministry with more information about the affected parties than was strictly required, these are matters to be resolved between those parties in another forum. It does not affect the proper interpretation and application of section 10(1) or the accessibility of the records under the *Act*, subject, of course, to any applicable exemptions.

THIRD PARTY INFORMATION

The Ministry decided to disclose portions of the various reports on the basis that they do not qualify for exemption under section 17(1) of the *Act*. Accordingly, the various affected parties resisting disclosure bear the onus of establishing the requirements of this exemption.

Having reviewed the various records and representations, I find that sections 17(1)(b) and (d) have no application in these appeals.

Introduction

For a record to qualify for exemption under sections 17(1)(a) or (c), the affected parties 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 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) or (c) of subsection 17(1) will occur.

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

Part 3: Harms

I have decided to deal with part 3 of the section 17(1) test first.

For part 3 to apply, the affected parties must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The harms identified in sections 17(1)(a) and (c) are:

(a) significant prejudice to the competitive position or significant interference with the contractual or other negotiations of a person, group of persons, or organization;

(c) undue loss or gain to any person, group, committee or financial institution or agency.

Having reviewed all portions of the various records the Ministry intended to disclose, I find that none of them are sufficient on their face to establish any of the sections 17(1)(a) or (c) harms.

Appeals 1, 6, 13 and 16

The affected parties in these appeals chose not to submit representations in response to the Notice of Inquiry. Clearly, absent evidence and argument from these parties, I do not have the detailed and convincing evidence of harm necessary to establish the requirements of part 3 of the section 17(1) test.

Appeal 7

The representations from this affected party do not deal with section 17(1). As a result, I do not have the necessary evidence to establish the harms component of sections 17(1)(a) and/or (c).

Appeal 4

The affected party argues that disclosing the report will unfairly damage the reputation of the IHF and its staff, since the information is dated and deficiencies have since been corrected. It also submits that patients of the IHF may not understand the nature of the deficiencies identified in the report and that this could result in harm. Having reviewed the report, I find that the affected party's representations do not apply to the portions the Ministry intends to disclose. Accordingly, the harms component of sections 17(1)(a) and/or (c) has not been established.

Appeal 3

The affected party objects to disclosure on the basis that release of the report without additional documentation regarding subsequent remedial efforts would give an unfair and unbalanced view of the IHF. Bearing in mind that I am only dealing the portions of the report the Ministry intends to disclose, I find that this affected party's representations are not sufficiently detailed and convincing to establish the harms component of sections 17(1)(a) and/or (c).

Appeal 9

The affected party makes similar arguments to the affected party in Appeal 4, pointing out that deficiencies identified in the report have been corrected. The affected party also submits that, given the small community where the IHF operates, loss of business is likely to result from disclosure, regardless of whether the IHF has corrected the identified deficiencies. Again, I am not persuaded that the potential harms identified by this affected party apply to the portions of the report the Ministry intends to disclosed, and I find that the harms component of sections 17(a) and/or (c) has not been established.

Appeal 2

This affected party also points to the subsequent corrective action taken by the IHF as the basis for the section 17(1) harms. For the same reasons as outlined above for similar records, I am not persuaded that the potential harms identified by this affected party apply to the portions of the report the Ministry intends to disclose, and I find that the harms component of sections 17(a) and/or (c) has not been established.

Appeal 18

The representations from this affected party do not deal specifically with the requirements of sections 17(1)(a) and (c), other than to state that the information contained in the report is false and inaccurate. Clearly, this is not the level of detailed and convincing evidence necessary to establish the harms component of section 17(1). This affected party also takes issue with the fact that the Notice of Inquiry was not addressed to him as the owner of the IHF in question. It is clear that the Notice was received by the IHF and that it made its way to the affected party in

time for him to submit representations. He has not been prejudiced in making representations, and I find that the statutory responsibility to notify has been properly discharged.

Appeal 10

The affected party submits: "… release of this report, either partly or in whole, could unfairly damage our clinic's reputation and personnel involved. This could also create harm in our current negotiations for much needed radiologists and services that are necessary to support this facility". Having reviewed the record, it is important to note that the Ministry has withheld significant portions under sections 17(1) and 21(1). I am not persuaded that the portions the Ministry intends to disclose could reasonably be expected to result in any of the harms outlined in sections 17(1)(a) or (c).

Appeal 11

The affected party's representations focus primarily on the portions of the record that have been withheld by the Ministry under section 21(1). The submissions on section 17(1) deal with the dated nature of the record and the corrective actions subsequently undertaken by the affected party. Large portions of the report in Appeal 11 have been withheld by the Ministry under section 17(1), and I am not persuaded by the affected party's submissions that the harms identified in sections 17(1)(a) and/or (c) have been established for the relatively small portions of the report the Ministry intends to disclose.

Appeal 5

The affected party's representations on section 17(1) focus on the fact that the community served by the IHF is small and that its new owners could suffer damage to their reputations and competitive position based on the disclosure of a report that is 8 years old and no longer applicable. Again, the vast majority of the two records at issue in Appeal 5 has been withheld by the Ministry under section 17(1) and will be addressed in the requester's appeal. I am not persuaded, based on the affected party's representations, that the relatively small portions the Ministry intends to disclose could reasonably be expected to result in any of the sections 17(1)(a) or (c) harms.

Appeal 12

This affected party also points to the dated nature of the two reports at issue in Appeal 12 as the basis for harm. Both reports in this appeal were produced in 2001. The affected party also submits that its competitors:

> … would have access to [the affected party's] trade secrets, technical as well as commercial information should the Reports be disclosed. They would then be able to reap the advantage of [the affected party's] efforts and diligence. [The affected party's] competitors would also be able to use the information in the

> Reports to unfairly tarnish [the affected party's] reputation. This would result in an undue gain being bestowed upon [the affected party's] competitors.

While arguments of this nature may be relevant in the context of the requester's appeal, they do not apply to the relatively small portions of the reports the Ministry intends to disclose. I find that the harms under section 17(1)(a) and (c) have not been established for these portions of the two records.

Appeals 14 and 17

As noted earlier, the affected parties in these two appeals are represented by the same legal counsel. Counsel made one set of representations covering the records in both appeals. The representations on the harms component of sections 17(1)(a) and (c) read as follows:

> The release of information will have a direct negative impact on the competitive position or placement of the Facilities. The information disclosed to the College [of Physicians and Surgeons], including policies, type of equipment and procedures, reveals particular business practices, as does information regarding types of studies performed in the Facilities. This information is largely proprietary in nature and is central to the manner in which the Facilities deliver care. Indeed, in [the record in Appeal 14], the assessors indicate that the information provides a "good example for other facilities".
>
> These harms are more pressing given the small and highly competitive environment in which the Facilities operate. Facility operations, procedures and staff capabilities are important elements in maintaining and delivering a competitive and effective case service.
>
> In particular, the release of this confidential information will result in an unjustified loss to Facilities at the hands of competitors, who will be at liberty to mimic or copy the mechanisms in place at these Facilities. The Facility will thereby suffer an undue loss of its competitive advantage by the dissemination of valued Facility information central to the method of care delivery. Equally, competitors will gain a competitive advantage by reaping the benefits of information and practices by other facilities, without a correlating level of attention, skill or care in their own care delivery practices. As a result, the competitors will obtain information about patient care and satisfaction which is not otherwise available in the public domain.
>
> Staff at each of the Facilities have assisted in the development of the above noted information. Its dissemination would affect the existing relationship between the Facilities and staff, technologies and prospective employees, going forward.

> Moreover, to the extent that any real or perceived deficiencies existed in the Facilities, they have now been rectified. As such, dissemination of information will result in an improper perception of the Facilities and their employees and other physicians, including referring physicians, and will also effect arrangements between the Facilities and their suppliers and vendors.
>
> The disclosure of the type of medical advice given, along with testing and studies conducted by the Facilities may also be used by a competitor to create apprehension among the Facilities' existing or potential customers, particularly given the sensitive nature of the medical procedures and the types of equipment used to conduct same. This would result in a negative impact upon the Facilities' ability to deliver services without apprehension on the part of patients.

Despite what I acknowledge are detailed representations on the various harms identified in sections 17(1)(a) and (c), in my view, I am not persuaded that they apply to the portions of the reports the Ministry intends to disclose. As with a number of records at issue in this inquiry, significant portions have been severed and withheld by the Ministry under sections 21(1) and 17(1). In the case of the records at issue in Appeals 14 and 17, all portions under the headings "Facilities, Equipment and Supplies", "Policies and Procedures", "Requesting and Reporting Mechanisms", "Providing Quality Care", "Quality Advisor", "Quality Control", "Examinations Observed", "Film Review", "General Ultrasound", "Fluoroscopic Equipment" (Appeal 17) and "General Radiography" have been withheld by the Ministry under section 17(1), with the exception of various recommendations associated with each of these heading. The Ministry is also prepared to disclose small portions under the headings "Mammography Review" and "Fluoroscopy" and the section headed "Summary of Observations and Recommendations" in Appeal 14.

In my view, based on the representations provided by counsel in these appeals, disclosing the non-exempt portions of the reports in Appeals 14 and 17 could not reasonably be expected to result in the types of section 17(1)(a) and (c) harms described by the affected parties. Different considerations may apply in the context of the requester's appeal, where the submissions of the affected parties are more directly related to the content of the exempt portions of the reports, but I find that the affected parties have not established a reasonable expectation of harms under sections 17(1)(a) or (c) for the relatively small portions of the reports the Ministry intends to disclose.

Appeals 8 and 15

The representations provided by counsel for the two affected parties in these appeals are essentially the same. In dealing with the section 17(1)(a) and (c) harms, counsel submits:

> The success of a medical facility that is 100% dependent upon physician referrals and is paid primarily via OHIP, is highly dependent upon the policies, procedures and equipment used in the facility. Whether a facility is able to centralize its

> administration, utilize specialized management techniques to minimize staffing needs, consolidate reporting of patient test results, etc., effects the ultimate success of a facility. What would appear as subtle differences between facilities, is in fact the basis of financial success or loss.

Counsel describes a recent selection process used by the Ministry to grant licences for MRI and CT scan services as an example of how the various policies, procedures, equipment and costing, if known by others, could seriously undermine the affected parties' competitive position in this context.

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

> All diagnostic imaging and nuclear medicine facilities rely almost exclusively on physician referrals for their business. As physicians generally refer patients that require such testing to facilities that are in close geographic proximity to the physician's office, a facility's only real means of increasing its business is to solicit referrals from physicians in the area. Such solicitation is most effective if the facility is able to differentiate itself from other nearby facilities.
>
> The disclosure of the confidential portions of [the affected parties'] Assessment Reports will provide other facilities with the means to solicit away referral sources from [the affected parties].
>
> The potential economic harm is significant as [the affected parties'] referral source is, as stated above, limited to the physicians in the area. Hence, even if only one physician were to stop referring patients to the facility, significant losses would be suffered.
>
> …
>
> The possibility that [the affected parties] will suffer harm if the information is disclosed is not simply speculation, but a reasonable, logical conclusion given the limited means that facilities have to increase referral business.

Again, similar to Appeals 14 and 17, while the representations provided by counsel are detailed, they do not convince me that any of the harms outlined in sections 17(1)(a) and (c) would occur if the portions of the reports the Ministry intends to disclose are released.

Significant portions of these reports have been severed and withheld by the Ministry under sections 21(1) and 17(1). As far as Appeal 8 is concerned, all portions under the headings "Facilities, Equipment and Supplies", "Policies and Procedures", "Requesting and Reporting Mechanisms", "Care Program" and "Quality Management Program" have been withheld by the Ministry under section 17(1), other than the various recommendations associated with each heading. The Ministry is also prepared to disclose the section headed "Summary". Similar

severances have been made by the Ministry for one of the records in Appeal 15. All portions under the headings "Facilities, Equipment and Supplies", "Policies and Procedures", "Requesting and Reporting Mechanisms" and "Providing Quality Care" have been withheld by the Ministry under section 17(1), other than the various recommendations associated with each heading. The Ministry is also prepared to disclose the section headed "Summary, Conclusions and Recommendations".

The Ministry takes a slightly different approach for the second report in Appeal 15. All of the portions under the headings "Facilities, Equipment and Supplies" and "Requesting and Reporting Mechanisms" have been withheld under section 17(1), other than the various recommendations associated with these headings. However, for the observations noted under the headings "Policies and Procedures", "Providing Quality Care", "Quality Advisor" and "Film Review" the Ministry has not claimed an exemption despite the fact that they contain information highly similar in nature to other records where section 17(1) has been claimed.

With the exception of the portions of the second report in Appeal 15 just described, I am not persuaded that any of these non-exempt portions of the reports in Appeals 8 and 15 could reasonably be expected to result in the types of section 17(1)(a) and/or (c) harms described by the affected parties. Different considerations may apply in the context of the requester's appeal, where the submissions of the affected parties are more directly related to the content of the exempt portions of the reports, but I find that the affected parties have not established a reasonable expectation of harms under sections 17(1)(a) or (c) for the relatively small portions of the reports the Ministry intends to disclose.

In order to ensure consistency in the application of section 17(1) to all of the various reports at issue in these appeals, I have decided to defer considering the application of sections 17(1)(a) and (c) for the portions of the second report in Appeal 15 under the headings "Policies and Procedures", "Providing Quality Care", "Quality Advisor" and "Film Review" on pages 3 and 4 of this record. I will deal with them in my order in the requester's appeal.

In summary, I find that the part 3 harms under sections 17(1)(a) and/or (c) have not been established for any portions of various reports in the various appeals that the Ministry intends to disclose (with the exception of the portions of the second report in Appeal 15 under the headings "Policies and Procedures", "Providing Quality Care", "Quality Advisor" and "Film Review" on pages 3 and 4 of this record). Because all three parts of the test must be established in order for a record to qualify for exemption, I find that sections 17(1)(a) and (c) of the *Act* do not apply in the circumstances of these appeals.

PERSONAL INFORMATION/INVASION OF PRIVACY

The Ministry responded to the requester by denying access to certain portions of the various reports on the basis that they qualified for exemption under section 21(1). Those portions are not at issue in this inquiry, but will be addressed in my separate order dealing with the requester's appeal.

The Ministry also decided to disclose portions of the various reports on the basis that they do not qualify for exemption under section 21(1) of the *Act*. The various affected parties and affected persons resisting disclosure bear the onus of establishing the requirements of this exemption.

Introduction

The section 21(1) personal privacy exemption applies only to information that qualifies as personal information. "Personal information" is defined in section 2(1) of the *Act* to mean recorded information about an identifiable individual, including an individual's employment history [paragraph (b)], the views or opinions of another individual about the individual [paragraph g], and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

In deciding to release portions of the reports (other than those portions withheld on the basis of section 17(1)), the Ministry must have concluded one of two things: (1) that these portions do not include "personal information"; or (2) they do include "personal information", but disclosing it would not constitute an unjustified invasion of privacy. In its decision letters and representations during this inquiry the Ministry does not provide a clear indication of its position on this issue. However, because none of the employees or former employees identified by name in the various reports was notified by the Ministry, as required under section 28(1)(b) of the *Act*, I presume the Ministry concluded that the portions being released do not contain "personal information".

Once the appeals reached the inquiry stage, I decided to notify the various individuals identified in the reports. Some of these affected persons provided representations.

Personal vs. Professional Capacity

Previous decisions of this office have drawn a distinction between an individual's personal and professional capacity, and found that information associated with a person in his or her professional capacity is not considered to be "about the individual" within the meaning of the definition of "personal information" in section 2(1) [Orders P-257, P-427, P-1412, P-1621].

In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of our approach to the issue. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg* v. *Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385. In applying the principles described in his order, Adjudicator Hale came to the following conclusion:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them

> but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

The Ministry was asked for its position on the impact of Reconsideration Order R-980015 on the various third party appeals, but it declined to do so. The Ministry's only representations on the "personal information" issue consist of the following statement:

> It is assumed, but not asserted, for the purposes of making these submissions that the information at issue is, indeed, "personal information" as defined in section 2(1) of the *Act*.

The affected persons who responded to the Notice take the position that the reports contain their personal information and that disclosing it would represent an unjustified invasion of their privacy. In some instances (eg. Appeal 11) it is clear that the representations relate to portions of the record withheld by the Ministry. However, in several other cases is not clear from the representations whether the affected persons are distinguishing between the information exempted by the Ministry under section 21(1) or the information the Ministry intended to disclose.

In some instances, affected persons argue that information gathered in the employment context is nonetheless "personal information". For example, the affected party in Appeal 5 submits:

> … the attachment of the employee's name to a specific employment activity followed by a critique of the employee's work constitutes evaluations and recommendations **about the individual** rather than **by the individual** names, within the meaning of [section 21(3)(g)] [affected party's emphasis]

One affected party argues that disclosing certain portions of the reports could reveal the identities of patients or clients of the IHF. Another submits that the report of its facility contains inaccurate facts and unfounded criticism of one of its employees. One other affected party points out that certain individuals identified in the report no longer work for the IHF, and questions whether adequate steps have been taken to notify these individuals.

Having carefully reviewed all portions of the reports the Ministry intends to disclose, I find that any portions dealing with named individuals fall within the scope of "professional" rather than "personal" information, as defined by Adjudicator Hale.

Some individuals are identified by name as the professionals undertaking the assessments on behalf of the CPSO. Clearly, there is no personal connotation to the information about these individuals, who are identified exclusively in their professional roles and responsibilities.

The information concerning named employees is, for the most part, a description of the positions held by these various individuals at the time the assessments were conducted, and the professional responsibilities discharged by them on behalf of the IHF employer. Although the staff members are identified by name, in my view, the information associated with their names is not about them in any personal sense, but about their positions and job functions.

Therefore, I find that no "personal information" is contained in any portions of the various reports the Ministry intends to disclose. Because the section 21(1) exemption can only apply to "personal information", as defined in section 2(1), this exemption has no application in these appeals.

In summary, I find that the portions of the various reports the Ministry intends to disclose, with the exception of certain parts of the second report in Appeal 15 previously described, do not qualify for exemption and should be disclosed to the original requester.

At the beginning of this order I indicated that one affected party consented to disclose its information to the requester when notified by the Ministry at the request stage, and two affected parties withdrew their appeals during mediation. It is not clear to me whether the Ministry has provided the requester with the relevant portions of these reports to the requester, so I will include an order provision requiring disclosure.

ORDER:

1. I order the Ministry to disclose to the requester (or re-disclose as the case may be) all portions of the following records, other than the portions withheld by the Ministry in the context of the requester's appeal:

   - records relating to Independent Health Facilities that did not object to disclosure at the request stage

   - records in Appeals PA-020307-1 and PA-020337-1

   Disclosure under this provision is to be made by **October 27, 2003**.

2. I uphold the Ministry's decision to disclose all portions of records covered by the following appeals (other than the portions withheld by the Ministry in the context of the requester's appeal):

   PA-020288-1
   PA-020304-1

PA-020305-1
PA-020306-1
PA-020308-1
PA-020309-1
PA-020310-1
PA-020311-1
PA-020312-1
PA-020313-1
PA-020314-1
PA-020315-1
PA-020316-1
PA-020325-1
PA-020339-1
PA-020346-1
PA-030017-1

Accordingly, I order the Ministry to disclose all records covered by this provision to the requester by **November 18, 2003**, but not before **November 12, 2003**.

3. I uphold the Ministry's decision to disclose all portions of the record dated 1996 in Appeal PA-020338-1, with the exception of the name of the facility that appears twice on page 1 and once at the top of page two of the record. I further uphold the Ministry's decision to disclose all portions of the record dated 2001 in Appeal PA-020338-1, with the exception of the portions under the headings "Policies and Procedures", "Providing Quality Care", "Quality Advisor" and "Film Review" on pages 3 and 4 of this record. I order the Ministry to disclose these portions of the two records to the requester by **November 18, 2003**, but not before **November 12, 2003**. This order provision does not apply to any portions of the records withheld by the Ministry in the context of the requester's appeal.

I remain seized of Appeal PA-020338-1 in order to deal with the name of the facility that appears twice on page 1 and once at the top of page two of the record dated 1996, and the portions of the record dated 2001 under the headings "Policies and Procedures", "Providing Quality Care", "Quality Advisor" and "Film Review" on pages 3 and 4 of this record.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with copies of the records disclosed to the requester pursuant to Provisions 1, 2 and/or 3.

Original signed by: October 10, 2003
Tom Mitchinson
Assistant Commissioner