



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2244

Appeal PA-030185-1

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Health and Long-Term Care (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to files relating to a named company carrying on business as a medical laboratory (the affected party). The appellant noted that the laboratory stopped operating in 1992.

As a large number of files were located, the Ministry contacted the appellant with a view to narrowing the scope of his request. The appellant clarified the type of records he was interested in, and subsequently, the Ministry issued a decision in which it granted access to some of the records and denied access to other records, in reliance on the discretionary exemptions under sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*.

The appellant appealed the Ministry's decision to deny access to some of the records.

As mediation through this office did not result in a resolution of the issues, the appeal was referred to me for adjudication. After a review of the file, I decided to add section 17 as an issue in the appeal.

I sent the Notice of Inquiry to the Ministry and to the principals of the affected party (since the company was no longer in operation), initially, to invite their representations. I received representations from the Ministry only. These representations were shared in their entirety with the appellant, who has chosen not to provide representations.

RECORDS:

There are 18 records at issue in this appeal which consist of internal memoranda, correspondence, a briefing note and an audit report, as described in an index provided to the appellant.

On my review of the records, I note that certain minor portions of them contain information about companies that are not named in the request. These portions, which are severable from the remaining information, will be treated as not responsive to the request.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

General principles

Section 19 of the *Act* 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. In order for section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.

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].

The Supreme Court of Canada has described this privilege 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].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*]. As I find the records exempt under solicitor-client communication privilege, it is unnecessary to consider whether litigation privilege applies in this appeal.

Representations

The Ministry submits that Records 4, 7, 8, 13, 14, 17, 18 and 21 to 27 are exempt from disclosure under the solicitor-client communication privilege exemption in section 19. I have reviewed all of these records, and find that they consist of memoranda or other communications between legal counsel at the Ministry and other Ministry officials. From their contents, I am satisfied that they were made confidentially between solicitor (Ministry legal counsel) and client (Ministry officials), for the purpose of giving or seeking legal advice. I find, therefore, that they qualify for exemption under solicitor-client communication privilege.

The Ministry's decision and accompanying Index indicated that the Ministry relied on section 19 to exempt Record 38 from disclosure. The representations of the Ministry do not address whether Record 38 is covered by solicitor-client privilege. Record 38 is neither a communication to or from legal counsel for the Ministry. Rather, it consists of two pieces of correspondence. One is a letter from an official with the Ministry to legal counsel for a third party, in response to a query. The second is a faxed letter and attachments from this legal counsel, to a Ministry official. The second letter and attachments are not responsive, as they relate to companies other than the one about which the appellant seeks information and it is unnecessary therefore to deal with them here.

I find that section 19 does not apply to the first letter in Record 38, as it is not a communication made confidentially between solicitor and client for the purpose of giving or seeking legal advice.

Section 19 is a discretionary exemption. I am satisfied that the Ministry exercised its discretion appropriately in applying section 19 to exempt Records 4, 7, 8, 13, 14, 17, 18 and 21 to 27 from disclosure.

In conclusion, I find Records 4, 7, 8, 13, 14, 17, 18 and 21 to 27 exempt under section 19. Record 38 is not exempt under this provision.

ADVICE TO GOVERNMENT

The Ministry relies on section 13(1) to exempt Records 33, 35 and 37 from disclosure.

Section 13(1) states:

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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders 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-434, PO-1993, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), PO-2115]

Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. The

only arguably relevant portion of sections 13(2) and (3) to this appeal is section 13(2)(a), which provides:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;

Representations

The Ministry submits that the matters under consideration in these records required that decisions be made on specific courses of action in respect of the reinstatement of the affected party's licence under the *Laboratory and Specimen Collection Centre Licensing Act* (the *LSCCLA*) and the recovery of overpayments made by the Ministry. It is submitted that the information in the records serves the purpose of providing a suggested way of addressing the identified problems. The Ministry states that these records all contain some facts; however, if the factual portions were to be disclosed, some of the advice and/or recommendations could likely be inferred. Thus, it is submitted, the provisions of section 13(2)(a) do not apply to the records.

Analysis

In Order PO-2028, Assistant Commissioner Tom Mitchinson summarized the meaning to be given to "advice or recommendations":

A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

On my review of Record 33, I find that it does not contain advice or recommendations within the meaning of section 13(1). Record 33 is a briefing note to the Assistant Deputy Minister, Corporate Affairs (ADM), from a Ministry official. Previous orders of the Commissioner's office have found that the response sections of briefing notes and/or issue sheets often do not qualify for exemption under this section because they constitute mainly factual material which does not fall within the deliberative process of government: see Order P-1137. In this case, Record 33 outlines for the ADM the consequences of certain legal proceedings. However, it does not suggest any course of action for the ADM to either accept or reject. Rather, it informs the ADM of what actions Ministry staff will be undertaking. The content of Record 33 is in the nature of factual information, therefore, rather than advice or recommendations.

It should be noted that Record 33 contains information about two other companies not named in the request. As noted above, this information is not responsive to the request, and can be severed from the responsive material.

I find that most of Record 35 does not contain or reveal advice or recommendations. Record 35 consists of a cover memorandum and an attached audit report. As with Record 33, the general purpose of Record 35 is to inform, in this case, the Deputy Ministry (DM) of what actions are being taken by Ministry staff, and the factual support for those actions (in the audit report). Most of Record 33 is, therefore, in the nature of factual information. In addition, however, Record 35 includes portions containing a recommendation to the Ministry's Health Insurance Division to take certain action. I am satisfied that the portions containing the recommendation qualify for exemption under section 13(1), and that they can be readily severed from the rest of Record 35. The factual information and the recommendation are separate and distinct from one another. Further, I find nothing inappropriate in the Ministry's exercise of discretion under section 13(1) with respect to withholding these portions of Record 35.

Record 37 does not qualify for exemption under section 13(1). It consists of a letter from the Ministry to a third party, and does not disclose advice or recommendations.

In conclusion, section 13(1) does not apply to exempt Records 33, 37 and most of 35 from disclosure. I will now consider whether this information is exempt under section 17(1). I will also consider whether Record 38 is exempt under this provision.

THIRD PARTY INFORMATION

Section 17(1) states:

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; or

- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

On my review, I am satisfied that the records contain commercial and/or financial information.

Part 2: supplied in confidence

Although the information in the records is about the affected party, I am not satisfied that it was supplied by that party. Record 33 describes actions taken or to be taken by Ministry officials in connection with the affected party. Records 35 and 37 contain information generated and supplied by the Ministry’s own staff, in that they consist of or refer to the Ministry’s analysis of payments made to the affected party. Beyond this analysis, Record 35 also reveals the factual basis for the analysis, such as the dollar amounts of certain payments from the Ministry to the affected party. I am again not satisfied that this information was supplied by the affected party.

Although the Ministry asserts generally that these records meet the criteria of having been “supplied”, there is no evidence to support this assertion. Further, in the circumstances, it is reasonable to conclude that the Ministry has access to this type information in its own records.

The Ministry did not make representations on the application of section 17(1) to Record 38 and, on my review, I am satisfied that this record contains no information supplied by the affected party. Rather, it provides information from the Ministry’s own files.

In sum, I am not satisfied that the information in Records 33, 35, 37 or 38 was supplied in confidence by the affected party.

Part 3: harms

Because of my finding under Part 2, above, it is not necessary to address this element of the three-part test. Nevertheless, I will indicate that the representations before me do not establish that disclosure of the information in the records could reasonably be expected to result in one of the harms outlined in section 17(1). The Ministry has made some general assertions that disclosure of the information in Records 33, 35 and 37 would result in harm to this company's interests. However, the affected parties, who are in the best position to provide evidence of the harms in section 17(1)(a) and (c), have not provided any representations. Further, the company to which the records relate has not been in operation for over ten years. In the circumstances, I find that there is a lack of detailed and convincing evidence to support the Ministry's assertions on sections 17(1)(a) and (c).

Further, I am not satisfied that disclosure could reasonably be expected to result in the harm described in section 17(1)(b). The Ministry expresses a concern that if the information is disclosed, this would have a chilling effect on the willingness of commercial laboratories to make full disclosure to the Ministry. This, it is said, would undermine the Ministry's ability to enforce its public interest mandate under the *LSCCLA*. I do not accept this submission. Firstly, there is a lack of any detailed information to support the Ministry's assertions on this issue. Further, on my review of the *LSCCLA*, it appears that inspectors appointed under that *Act* have broad powers to gather the information they require to enforce the provisions of the statute and its regulations (see sections 3 and 16, for example). These powers are reinforced by the ability of inspectors to obtain orders from a justice of the peace to assist in the entry of premises or seizing of information. In such circumstances, even assuming (contrary to my finding above) that the affected party supplied information in the records to the Ministry, I am not convinced that disclosure of the information could reasonably result in similar information no longer being supplied to the Ministry. I am supported in this finding by the discussion in Orders P-974 and PO-2170, on similar issues.

In conclusion, I find that section 17(1) does not apply to exempt Records 33, 35, 37 and 38 from disclosure. I will order them to be disclosed, with the exception of non-responsive information and the portions I have found exempt under section 13(1).

ORDER:

1. I order the Ministry to disclose Records 33, 35, 37 and 38 to the appellant, with the exception of non-responsive portions in Records 33 and 38, and portions of Record 35 that I have found exempt under section 13(1). For greater certainty, I am sending the Ministry a copy of Records 33, 35 and 38 highlighting the portions to be withheld.

2. I order disclosure to be made by sending copies of the records ordered to be disclosed to the appellant, severed according to my directions, no later than **March 23, 2004** but not before **March 16, 2004**.
3. 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 requester pursuant to Provision 1.

Original Signed By: _____

Sherry Liang
Adjudicator

February 24, 2004 _____