ORDER PO-2224

Appeal PA-020368-1

Ministry of Health and Long-Term Care

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:

1. 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.

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

3. 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 - 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 consented. After considering the various submissions, the Ministry issued a final decision, granting partial access, with severances under sections 17(1) and 21 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.

During mediation, the appellant raised the issue of whether the Ministry had correctly responded to her request. The Ministry subsequently clarified that it had located 36 records responsive to items 1 and 2 of the request. With respect to the remaining items listed in the request, the Ministry stated that no records exist. Because the appellant believes that additional records should exist with respect to the remaining items of her request, the reasonableness of the Ministry's search is an issue in this appeal.

The appellant also maintains that the public interest override in section 23 of the *Act* applies in the circumstances of this appeal.

Twenty affected parties also appealed the Ministry's decision to grant access, although two of them subsequently withdrew their appeals. After conducting an inquiry involving the requester, the Ministry, the remaining 18 affected parties and a number of employees or former employees of the various IHFs (the affected persons) and considering representations from all participating parties, I issued Order PO-2187 which disposed of all issues in 17 of the 18 affected party appeals. I subsequently reconsidered one appeal (PA-020310-1), for reasons provided to the relevant parties, but did not change my original decisions.

Order PO-2187 includes a separate provision relating to the 18th affected party appeal (PA-020338-1). I upheld the Ministry's decision to disclose all portions of the 1996 record in that appeal, with the exception of the name of the facility that appears twice on page 1 and once at the top of page 2 of the record. The appellant subsequently agreed that this name, which was apparently included in error, could be removed from the scope of her request. Therefore, there are no remaining issues relating to the 1996 record. As far as the 2001 record in Appeal PA-020338-1 is concerned, I dealt with portions of this record in Order PO-2187, but deferred my findings for the portions under the headings "Policies and Procedures", "Providing Quality Care", "Quality Advisor" and "Film Review" on pages 3 and 4 of the record. I will deal with these remaining portions in this order.

The Ministry has complied with Order PO-2187 and disclosed the relevant portions of the various records in all of the affected party appeals to the appellant.

All of the same parties participated in the requester's appeal.

I initiated my inquiry in the requester's appeal by sending a Notice of Inquiry to the Ministry, the 20 affected parties in the related appeals, a number of other affected parties who had not appealed the Ministry's decision to disclose portions of records relating to their facilities, and affected persons identified in the various records. The Ministry and a number of affected parties and affected persons responded with representations. I then sent the Notice to the 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 a number of 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. Certain portions of these records have been disclosed to the requester in accordance with Order PO-2187. The portions that remain at issue in this appeal are those that have been withheld by the Ministry under sections 17(1) or 21 of the *Act*.

For ease of discussion, I have numbered the various affected parties as follows:

> Affected parties 1-18 are assigned the same number used in association with their related appeals in Order PO-2187:
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> | | | |
> |---|---|---|
> | Affected party 1 | - | Appeal PA-020288-1 |
> | Affected party 2 | - | Appeal PA-020304-1 |
> | Affected party 3 | - | Appeal PA-020305-1 |
> | Affected party 4 | - | Appeal PA-020306-1 |
> | Affected party 5 | - | Appeal PA-020308-1 |
> | Affected party 6 | - | Appeal PA-020309-1 |
> | Affected party 7 | - | Appeal PA-020310-1 |
> | Affected party 8 | - | Appeal PA-020311-1 |
> | Affected party 9 | - | Appeal PA-020312-1 |
> | Affected party 10 | - | Appeal PA-020313-1 |
> | Affected party 11 | - | Appeal PA-020314-1 |
> | Affected party 12 | - | Appeal PA-020315-1 |
> | Affected party 13 | - | Appeal PA-020316-1 |
> | Affected party 14 | - | Appeal PA-020325-1 |
> | Affected party 15 | - | Appeal PA-020338-1 |
> | Affected party 16 | - | Appeal PA-020339-1 |
> | Affected party 17 | - | Appeal PA-020346-1 |
> | Affected party 18 | - | Appeal PA-030017-1 |
>
> Affected parties 19 and 20 are the two IHFs that initially appealed the Ministry's decision to disclose portions of the records relating to them, subsequently withdrew their appeals, but do not consent to disclosure of the portions of the records the Ministry decided to withhold:
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> | | | |
> |---|---|---|
> | Affected party 19 | - | Appeal PA-020307-1 |
> | Affected party 20 | - | Appeal PA-020337-1 |
>
> The remaining affected parties are the nine IHFs that did not appeal the Ministry's decision to disclose portions of the records relating to them, but did not consent to disclosure of the portions of the records the Ministry decided to withhold. They are identified as Affected parties 21 through 29.

DISCUSSION:

PRELIMINARY ISSUES: Affected parties 14/17 and Affected parties 8/15

Affected parties 14 and 17 are represented by the same legal counsel, who submitted one set of representations on behalf of both parties. Affected parties 8 and 15 are also represented by the same legal counsel (different from affected parties 14/17), who submitted different but highly similar representations for each of these parties.

Each counsel raised preliminary issues, which are described in detail in Order PO-2187. I disposed of all of these issues in the previous order, so will not address them further here.

ADEQUACY OF SEARCH

As noted above, the appellant disputes the Ministry's position that all responsive records have been located. In her view, the Ministry may have incorrectly responded to the request, based on her understanding that only 30 responsive records were identified.

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the Ministry's decision; if not, I may order further searches.

It is important to note that the *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act* the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate all records responsive to the request.

Although an appellant will not always be in a position to indicate precisely which records have not been identified, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The main thrust of the appellant's position is that 36 IHFs were investigated, yet only 30 responsive records were located. The Ministry clarified this issue during mediation, pointing out that it had in fact located 36 assessment reports for IHFs who have had their licences suspended by the Ministry, and there are no records responsive to other parts of the request.

The Ministry explains in its representations that the records responsive to the appellant's request "will not necessarily reflect what is currently in existence". It points out that a facility that was suspended in 1996 may no longer exist, may have a different operator, or may be situated in a different location. The Ministry also clarifies that it does not "partially suspend" licences. Rather, it "amends a licence to remove one or more services for which the facility is licensed". As to whether there are IHFs where "major clinical quality deficiencies" were detected, the Ministry points out that this is a term used by the College of Physicians and Surgeons of Ontario (CPSO) and "not a phrase that the Ministry uses, so the Ministry cannot identify any clinics to which this term would apply". The Ministry elaborates:

> If the requester wants to know which clinics in the view of the Ministry had "major clinical quality deficiencies" but the Ministry did not take licensing action, the answer would be none. It is the Ministry's policy to take licensing action on all clinics which are found to have "major clinical quality deficiencies" in the view of the Ministry.
>
> In all cases where assessments have been done, operators are invited to work with the CPSO to correct any identified deficiencies. The CPSO provides guidance and suggestions. [The Ministry] does not take corrective action and does not work with the operator. The Ministry takes licensing action where appropriate. Once the CPSO advises the Ministry that the facility has addressed deficiencies, the Ministry will review the file and decide whether to reverse whatever action was taken.

In describing the steps taken to locate responsive records, the Ministry outlines its process for assessing the seriousness of identified deficiencies:

> Based on internal consultant advice, ministry staff code the overall level of seriousness of concerns of each report it receives from the CPSO and enters a code for each report ranging from 1 to 5 on an assessment database: 1 – no concerns to 5 – immediate threat to a patient's health, welfare, and safety resulting in amendments or suspension. A level 4 typically results in a facility having its licence amended or a proposal to suspend the facility licence, and a level 5 results in a facility having its licence amended or an immediate suspension.

In preparing to respond to the appellant's request, the Ministry explains:

> The data analyst of the Independent Health Facilities Program who inputs data and provides reports for program management conducted an electronic search for the years 1996 and 2001, as requested and a list of independent health facilities was produced where the facility and its licence amended, suspended, or where we proposed to suspend it. Each facility file identified was manually retrieved and the report photocopied and listed. The list of each facility and its corresponding report were provided to the [Ministry's Freedom of Information Office] as responsive to the request. It is not possible that records once existed but do not exist any longer as the database has recorded all assessments since the beginning of the program over an approximately 12 year period.

The appellant's representations on the search issue continue to focus the existence of 30 responsive records, despite the fact that the figure was corrected to 36 during mediation. The Ministry's representations, which were provided to the appellant during the course of this inquiry, also make it clear that 36 responsive records were identified during the course of the appeal. The appellant does not respond directly to the outline of the steps taken by the Ministry to locate responsive records.

In my view, the Ministry has provided sufficient evidence in its representations to satisfy me that it has made reasonable efforts to identify and locate all records responsive to the appellant's request. The request deals with two specific years, and the database used by the Ministry to administer the licensing program for IHFs would appear to be the logical source for identifying the type of record requested by the appellant. The appellant was provided with a description of the various search activities undertaken by the Ministry and, in my view, has not responded with any reasonable basis for concluding that additional records should exist. Accordingly, I find that the Ministry has satisfied the requirements of section 24 of the *Act* in the circumstances of this appeal.

THIRD PARTY INFORMATION

The Ministry denied access to portions of the various reports on the basis that they qualify for exemption under section 17(1) of the *Act*. The Ministry and 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 section 17(1)(d) has no application in this appeal.

Introduction

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the 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;

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), (b) or (c) of subsection 17(1) will occur.

(Orders 36, P-373, M-29 and M-37)

Harms

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

For part 3 to apply, the Ministry and/or the affected parties must demonstrate that disclosure of the records "could reasonably be expected to" lead to the specified result. To meet this test, the parties resisting disclosure 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), (b) 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;

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

Ministry's representations

The Ministry offers no evidence in support of the harms component of section 17. It states:

> … [T]he Ministry submits that the affected third parties are in a better position to provide evidence on any harms to their interests under section 17, as provided in Practice Direction 4. Therefore, the Ministry defers to the representations of the affected third parties opposing disclosure by the Ministry of the records at issue and to the probable harms as found by the Adjudicator.

In the absence of representations from the Ministry, the necessary detailed and convincing evidence required to establish the section 17(1)(b) harms is not present, and I find that this exemption has not been established.

Appellant's representations

The appellant submits:

> As in many access requests for controversial information, those opposing access inevitably argue that disclosure of the information in question could result in misuse that would lead to an unwarranted defamation of the person or institution that is the subject of the record.
>
> With respect, this argument should not hold any ground, as it would apply in any situation where contentious information is sought. If those opposing disclosure are, in fact, treated unfairly by those getting access to the information, they have civil remedies that they may pursue. (And those remedies act as a deterrent to irresponsible use of documents obtained in a request [under the *Act*]).
>
> …
>
> … [S]ome of the [IHFs] suggest that, in essence, recruitment of trained professional is difficult at best and that disclosure of the assessment reports would only compound this problem. This should not be a factor in favour of secrecy.

> As stated above [in the context of submissions concerning section 23], from the perspective of the public, clinics with quality control problems should be accountable. Equally important, however, is the principle that those professionals seeking employment in clinics in Ontario have an interest in being aware of the quality of the management and equipment in the facilities in which they are seeking to practice.

Affected parties' representations

Affected parties 1, 6, 13, 16, 19, 20, 21, 22, 24, 25, 27, 28 and 29

These affected parties chose not to submit representations in response to the Notice of Inquiry.

Affected party 7

Affected party 7's representations do not deal with the harms component of section 17(1).

Affected party 18

The representations from affected party 18 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.

Affected party 4

Affected party 4 argues that disclosing the report will unfairly damage the reputation of the IHF and its staff because 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.

Affected party 3

Affected party 3 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. This affected party attaches a copy of a letter from the Ministry indicating that, based on remedial action taken, the Ministry decided not to suspend the licence.

Affected party 9

Affected party 9 makes similar arguments to affected party 4, pointing out that deficiencies identified in the report have been corrected. This 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.

Affected party 2

Affected party 2 also points to the subsequent corrective action taken by the IHF as the basis for the section 17(1) harms.

Affected party 10

Affected party 10 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".

Affected party 11

Affected party 11's representations focus primarily on the portions of the record that have been withheld by the Ministry under section 21. The submissions on section 17(1) deal with the dated nature of the record and the corrective actions subsequently undertaken by the affected party. In this regard, affected party 11 states:

> If it were reported that compliant clinics were part of [the] process that ensured patient safety and quality care, I would not have a problem with that. I would have a problem with reporting and emphasizing deficiencies with no mention of the appropriate corrections made. This would be totally unfair.

Affected party 5

Affected party 5'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, was produced at a time when the facility was owned and operated by a different party, and is no longer applicable. This affected party also submits:

> Our concern is that the intent of section 17 will not be afforded the recognition it deserves in this case. Section 17 suggests that there are factors that must be considered out of fairness to the subject of the request for information. That determination of fairness would take into consideration the difference between deficiencies and conditions warranting suspensions.
>
> A clinic, that has met the criteria for the suspension of a license, has been determined to have conditions that were found to place the public at imminent risk. The public should indeed be warned of these facilities in a timely manner. No suspended clinic should benefit from any protection that section 17 may afford.
>
> A clinic that is cited for deficiencies is not in the same serious and negligent category as a clinic that has had a license suspended. The "deficient clinic" has

> been provided with constructive criticism in the interest of quality improvement, and given an opportunity to correct those items of concern. The notoriety and public acclamation for such a clinic, as if it were in the same category as a suspended clinic, would be indisputably unfair. The ability to discern the distinctions between minor and serious concerns of [the Ministry] inspectors would not be within the knowledge base of the general public to ascertain.

Affected party 12

Affected party 12 also points to the dated nature of the two reports at issue as the basis for harm. Both reports involving this affected party were produced in 2001. Affected party 12 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.

Affected parties 14 and 17

As noted earlier, affected parties 14 and 17 are represented by the same legal counsel. Counsel made one set of representations for both parties. 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 relating to affected party 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.

Affected parties 8 and 15

The representations provided by counsel for affected parties 8 and 15 are essentially the same. In dealing with the section 17(1)(a) and (c) harms, these two affected parties submit:

> 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, the affected parties submit:

> 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.

Affected party 23

Affected party 23 submits that disclosure would unfairly damage the reputation of the facility "since the shortcomings were rectified within one week of the notified deficiencies". The affected party also points out that the current owners did not operate the facility at the time of the CPSO inspection, compounding the potential harm that could result through reduced referrals and loss of reputation.

Affected party 26

Affected party 26 submits that disclosure of the record would significantly prejudice its ability to attract staff to work at its facility, given the shortage of qualified professionals working in the field of medicine serviced by the clinic. It also points to potential harm through loss of referrals from local physicians.

Analysis and Findings

Affected parties 1, 6, 13, 16, 19, 20, 21, 22, 24, 25, 27, 28 and 29

Clearly, absent evidence and argument from these affected 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.

Affected party 7

Again, I do not have the necessary evidence to establish the harms component of sections 17(1)(a) and/or (c) as it relates to information concerning affected party 7.

Affected party 18

Clearly, affected party 18 has not provided 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.

Affected party 4

The portions of the report relating to affected party 4 withheld under section 17(1) consist of observations made by the CPSO investigator during the inspection of the IHF. They are factual in nature, and deal with policies and procedures in place at the facility; equipment and supplies used for clinic operations; de-personalized reviews of various patient files along with patient and physician survey results; and issues relating to the quality of management at the IHF. Recommendations stemming from the various observations have already been disclosed to the appellant.

Based on the representations provided by affected party 4 and my independent review of the record, I find that the harms components of sections 17(1)(a) and/or (c) have not been established. No evidence has been presented to establish that the IHF is operating in a competitive environment or that disclosure could interfere with any contractual or other negotiations. I am also not persuaded that any loss would be suffered by the IHF as a result of the disclosure of factual observations of operational details of the IHF, and clearly not any "undue" loss as required in order to satisfy the harms requirement of section 17(1)(c).

Therefore, I find that the portions of the record relating to affected party 4 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected party 3

The portions of the report relating to affected party 3 withheld under section 17(1) consist of factual observations made by CPSO on the policies and procedures at the IHF and specific equipment used by the clinic. Unlike reports for certain other affected party facilities, observations concerning patient care, quality management and certain supplies, as well as all comments and recommendations stemming from the inspection, were not exempt by the Ministry under section 17(1) and have already been disclosed to the appellant.

For reasons similar to the record relating to affected party 4, I find that the harms components of sections 17(1)(a) and/or (c) have not been established. The deficiencies identified through the inspection in 1996 were apparently remedied by affected party 3 before any licence suspension was taken by the Ministry, and I am not persuaded, based on this affected party's representations, that there is any reasonable likelihood of any of the harms under sections 17(1) or (c) resulting from the disclosure of factual information that is now more than seven years old and clearly no longer current.

Therefore, I find that the portions of the record relating to affected party 3 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected party 9

The Ministry has severed all of the "observations" sections of the report relating to affected party 9, with the exception of the section headed "Film Review - General Radiography". The observations are factual statements concerning the various standard categories comprising the 2001 reviews, including policies and procedures, equipment and supplies, quality care assessment, reporting mechanisms, quality care and quality advisor.

Again, I find that affected party 9 has failed to provide the necessary detailed and convincing evidence to establish any of the harms outlined in sections 17(1)(a) or (c). I am not persuaded that disclosure of this factual information could reasonably be expected to prejudice the competitive position of this affected party, even if it is assumed that the IHF is operating in a competitive market; nor is it reasonable to conclude that disclosure would interfere significantly with any negotiations undertaken by the IHF. Similarly, the affected party has not convinced me that it is reasonable to assume that it would suffer undue loss through the disclosure of factual observations made during the CPSO inspection. In my view, if the various deficiencies have been remedied, as affected party 9 states, this would help mitigate any of the harms envisioned by section 17(1)(a) and (c).

Therefore, I find that the portions of the record relating to affected party 9 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected party 2

The Ministry has severed the record relating to affected party 2 in a manner similar to the record relating to affected party 4 - observations of various elements of the review have been withheld and recommendations disclosed.

The record at issue here was prepared in 1996 and, as affected party 2 points out, subsequent inspections have confirmed that recommendations made at that time have since been satisfactorily implemented. That being said, I am not persuaded that disclosure of factual observations made in the course of the inspection could reasonably be expected to result in any of the harms identified in sections 17(1)(a) or (c). Similar to the report relating to affected party 9, if the various deficiencies have been remedied, this would help mitigate any of the harms envisioned by these two sections of the *Act*.

Therefore, I find that the portions of the record relating to affected party 2 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected party 10

Again, the Ministry has withheld virtually all portions of the report related to affected party 10 that fall under the various "observation" headings, and disclosed the corresponding recommendations.

The only representations provided by affected party 10 on the harms component of section 17(1) consist of the quotation referred to earlier in this order. In my view, these statements are speculative at best, and clearly do not represent the level of detailed and convincing evidence necessary to establish any of the harms under section 17(1)(a) or (c).

Therefore, I find that the portions of the record relating to affected party 10 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected party 11

The portions of the record relating to affected party 11 withheld under section 17(1) also consist of factual observations made during the CPSO inspection in 1996. For the same reasons outlined above with respect to records relating to affected parties 2 and 9, I find that none of the harms outlined in sections 17(1)(a) or (c) have been established based on the evidence and argument submitted by affected party 11.

Therefore, the portions of the record relating to affected party 11 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected party 5

There are two records relating to affected party 5, one prepared in 1996 and the other in 2001. The various recommendations made by the CPSO inspector in both instances have been disclosed and the observations, for the most part, have been withheld by the Ministry.

Affected party 5 states that disclosure would impact its competitive position, based on the size of the community it serves, and points to a perceived inequity in treating IHFs with identified deficiencies in the same way as facilities whose licenses have been suspended for more serious infractions. Having reviewed the records relating to affected party 5 as well as the other IHFs, in my view, the contents of the records themselves adequately address any perceived inequities among the various categories of clinics. Much of the withheld information is, in fact, not critical in nature and, in my view, its disclosure would serve to distinguish the various identified infractions in ways that a blanket application of section 17(1) to the observations would not. I find that disclosing the observations to accompany the already disclosed recommendations would, at least to some degree and in some instances, reduce rather than increase the likelihood of harm to the various IHFs, including affected party 5.

I am not persuaded, based on the representations provided by affected party 5 and my independent review of the withheld portions of the two reports, that any of the harms identified in section 17(1)(a) or (c) are reasonably likely to result from disclosure. Therefore, the portions

of the records relating to affected party 5 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected party 12

There are two 2001 reports relating to affected party 12, each involving a different facility. By and large, the Ministry has severed the two records in a manner that protects the various observations and discloses the recommendations, although some observations in one of the reports have been disclosed.

Affected party 12's representations focus on the harms that could result from a competitor making use of the information contained in the records, as well as the harms associated with possible misinterpretation by the public as to the relative seriousness of the various deficiencies identified in the reports, particularly since many of them may have since been remedied.

Having carefully reviewed the records, I do not accept affected party 12's position. The observations made by the CPSO inspectors are factual in nature and deal, for the most part, with polices, procedures and operational mechanisms put in place by the IHFs for the provision of various services offered by the clinics. Based on the representations provided by affected party 12, in my view, it is not reasonable to expect that disclosure of the particular type of information withheld under section 17(1) would give rise to any competitive harm to the affected party. As far as any harms associated with misinterpretation are concerned, my comments in relation to affected party 5 apply equally to the withheld information relating to affected party 12. Finally, I find that the nature of the inspection and reporting scheme set up for the administration of the IHF program is inconsistent with any reasonable expectation of harms under section 17(1)(b), as suggested by affected party 12 in his representations.

Therefore, I find that the portions of the records relating to affected party 12 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected parties 14 and 17

As with other similar records, various recommendations stemming from the CPSO inspections for facilities operated by affected parties 14 and 17 have been disclosed to the appellant, and most of the factual information listed in the reports as "observations" has been withheld under section 17(1).

Despite what I acknowledge are detailed representations on the various harms identified in sections 17(1)(a) and (c), I am not persuaded that any of these harms could reasonably be expected to occur if the withheld portions of the records are disclosed. I have reached this conclusion for a number of reasons:

- The descriptions of the policies and procedures and equipment in the records is not the type of information that could reasonably be expected to impact on the competitive position of the IHFs, even if it is assumed that they are operating in a competitive environment. In my view, the information is not "largely proprietary

in nature"; nor, based on the representations provided by the affected parties and my independent review of the records, am I persuaded that disclosing the information could permit another person or organization to "mimic or copy the mechanisms in place at the facilities" to any competitive advantage. In my view, any likelihood of competitive harm through disclosure of this information is speculative at best and not supportable from a review of the contents of the records themselves.

- I have been provided with no evidence to support the position that these two facilities are operating in a "small and highly competitive environment". Both are located in large urban centres, and it is not clear, based on the affected parties' representations, if and how competitive concerns are relevant in this regulated health service sector.

- I have been provided with no evidence or argument to establish how disclosure of the withheld information "would affect the existing relationship between the facilities and staff, technologies and prospective employees, going forward", nor can anything of this nature be inferred from the contents of the records themselves.

- As stated earlier with respect to other affected party facilities, I do not accept the argument that the public would be misled by the disclosure of information regarding defects that have subsequently been remedied. In my view, any such subsequent action undertaken by an IHF could help mitigate any false perception of ongoing problems.

- Many of the deficiencies described in the "observations" sections of the reports can reasonably be inferred from the recommendations themselves, which have already been disclosed. In addition, where no recommendations are made in a particular section of the report, it can reasonably be concluded that no deficiencies were identified, and I do not accept that disclosure of observations that commend or otherwise support the operations on an IHF could reasonably be expected to result in any of the harms outlined in sections 17(1)(a) or (c).

- I find that the nature of the inspection and reporting scheme set up for the administration of the IHF program is inconsistent with any reasonable expectation of harms under section 17(1)(b), as suggested by affected parties 14 and 17 in their representations.

Therefore, I find that the portions of the records relating to affected parties 14 and 17 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected parties 8 and 15

In Order PO-2187, I outlined the different approach taken by the Ministry with respect to the various records relating to affected parties 8 and 15:

> Significant portions of these reports have been severed and withheld by the Ministry under sections 21(1) and 17(1). As far as [affected party] 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 [relating to affected party] 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 [relating to affected party] 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.

In addressing this issue, I made the following decision:

> 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 [relating to affected party] 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.

Turning to the application of the section 17(1) exemption to the portions of the various records relating to affected parties 8 and 15, while the representations provided by these two affected parties are detailed, I am not persuaded that any of the harms under sections 17(1)(a) or (c) could reasonably be expected to occur if the withheld portions of the records are disclosed. I have reached this conclusion for a number of reasons:

- The descriptions of the policies and procedures, equipment and management "techniques" in the records is not the type of information that could reasonably be expected to impact on the competitive position of the IHFs, even if it is assumed that they are operating in a competitive environment. Based on the representations provided by the affected parties and my independent review of the records, I am not persuaded that disclosure could permit another person or

organization to gain the type of knowledge that would provide any competitive advantage. In my view, any likelihood of competitive harm through disclosure of this information is speculative at best and not supportable from a review of the contents of the records themselves.

- The example used by the affected parties to support its competitive harm arguments is not persuasive. Barring evidence to the contrary, which has not been provided here, in my view, it is reasonable to assume that the type of information required in the context of answering a request for proposals for the establishment of a new facility is fundamentally different from the type of information obtained by the CPSO inspector during a quality assurance review of an existing clinic. Issues of financial viability, price, expertise, etc., that are presumably relevant in the context of a competitive selection process are not relevant in the context of the CPSO review and, accordingly, are not reflected in the records at issue in this appeal.

- In my view, the affected parties' arguments regarding doctor referrals are seemingly contradictory. The parties take the position that patients are not prepared to travel long distances for diagnostic services that can be done at a clinic that is located nearby. However, they also raise concerns that doctors in the local area will avoid referrals to the nearby clinic based on disclosure of the information in the records, despite the fact that patients are free to choose any facility not just the one identified on a doctor referral form. In my view, these two positions are difficult to reconcile.

- The affected parties acknowledge that harm resulting from a decline in local referrals "will be impossible to quantify", but that it is a "reasonable, logical conclusion given the limited means that facilities have to increase referral business". I do not accept this position as anything more than speculation on the part of the affected parties, which is questionable given the stated resistance on the part of patients to travel for diagnostic services and the freedom of choice built into the doctor referral policy.

- Many of the deficiencies described in the "observations" sections of the reports can reasonably be inferred from the recommendations themselves, which have already been disclosed. In addition, where no recommendations are made in a particular section of the report, it can reasonably be concluded that no deficiencies were identified, and I do not accept that disclosure of observations that commend or otherwise support the operations on an IHF could reasonably be expected to result in any of the harms outlined in sections 17(1)(a) or (c).

- I find that the nature of the inspection and reporting scheme set up for the administration of the IHF program is inconsistent with any reasonable expectation of harms under section 17(1)(b), as suggested by affected parties 8 and 15 in their representations.

Therefore, I find that the portions of the records relating to affected parties 8 and 15 withheld under section 17(1) do not qualify for exemption and should be disclosed.

For the same reasons, I find that the portions of the second report relating to affected party 15 under the headings "Policies and Procedures", "Providing Quality Care", "Quality Advisor" and "Film Review" on pages 3 and 4, which the Ministry intended to disclose and were not addressed in Order PO-2187, also do not qualify for exemption under section 17(1) and should be disclosed.

Affected party 23

As with other similar records, the Ministry has disclosed all of the recommendations contained in the report relating to affected party 23 and withheld the "observations" portions under section 17(1). For reasons similar to those outlined with respect to affected parties 2 and 9, I am not persuaded that disclosure of factual observations made during the course of the CPSO inspection could reasonably be expected to result in any of the harms identified in sections 17(1)(a) or (c). If the various deficiencies identified in the inspection have been remedied, in my view, this would help mitigate any of the harms envisioned by these sections, as would knowledge that the current owner was not operating the facility at the time when deficiencies were identified.

Therefore, I find that the portions of the record relating to affected party 23 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Affected party 26

The Ministry treated the record relating to affected party 26 in the same manner as the one relating to affected party 23 - disclosing all recommendations and withholding "observations" under section 17(1).

Based on the representations provided by affected party 26 and my independent review of the record, in my view, I do not have the type of detailed and convincing evidence required to establish any of the harms under sections 17(1)(a) or (c). The affected party's position that disclosure of factual information regarding the operation of the facility would prejudice its ability to attract professional staff is speculative at best and not supported by the content of the record itself. As far as the potential loss of referrals is concerned, I am not persuaded that this is reasonably likely to occur, for the same reasons outlined in my discussion of the records relating to affected parties 8 and 15.

Therefore, I find that the portions of the record relating to affected party 26 withheld under section 17(1) do not qualify for exemption and should be disclosed.

Summary of section 17(1) findings

In summary, I find that the part 3 harms under sections 17(1) have not been established for any portions of various reports withheld by the Ministry under this exemption. Because all three parts of the test must be established in order for a record to qualify for exemption, I find that

section 17(1) of the *Act* does not apply in the circumstances of this appeal. I make the same finding with respect to the portions of the one record in Appeal PA-020338-I not covered by Order PO-2187.

PERSONAL INFORMATION

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 educational or medical 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)].

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.

In Order PO-2187, I made findings that narrow the discussion of "personal information" in this inquiry:

> 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 [in Reconsideration Order R-980015].
>
> 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 complying with Order PO-2187, the Ministry has disclosed the names of various IHF employees to the appellant. The only information remaining for consideration in this inquiry is restricted to the names of these employees in association with other information, including:

- accreditation and professional development courses taken by various employees;
- comments associated with identifiable employees made by CPSO inspectors during the course of inspections; and
- one comment repeated in a number of instances in records relating to an affected person associated with affected party 7 regarding that individual's heath status.

Representations

Ministry's representations

Although the Ministry claims that portions of the various records qualify for exemption under section 21, it does not address the requirements of the definition of "personal information" in section 2(1) in its representations, nor the personal/professional distinction outlined in the Notice of Inquiry. The only representations on the definition of "personal information" provided by the Ministry consists 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*.

Appellant's representations

The appellant's representations do not deal specifically with the definition of "personal information".

Affected parties' representations

A number of affected parties and notified affected persons provided representations on the personal information/invasion of privacy issues outlined in the Notice of Inquiry.

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, affected persons argue that information gathered in the employment context is nonetheless "personal information". 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.

Analysis and Findings

Portions of a number of records have been severed by the Ministry on the basis that they contain information about patients whose files were examined by the CPSO during the course of the inspections. I have carefully reviewed these portions and am satisfied that no individual patient can reasonably be identified through the disclosure of this information, which has been carefully anonymized by the CPSO inspectors. Therefore, these portions of the various records do not contain "personal information" and cannot qualify for exemption under section 21 of the *Act*.

As far as the other information withheld under section 21 is concerned, in my view, it was clearly gathered in a professional rather than a personal context. As such, unless it can be established that the nature of the information is about any of the identified employees in a personal capacity, it would not satisfy the requirements of the definition of "personal information" for the same reasons as other information about these employees did not qualify for exemption in Order PO-2187.

Paragraph (b) of the definition of "personal information" states that "information relating to the education … of [an] individual" falls within the scope of the definition. A number of records include specific reference to the educational history of certain employees. While I recognize that information of this nature is frequently known by patients and others, and is in fact often included on business cards, letterhead and other documentation, I find that it technically falls within the scope of paragraph (b) and qualifies as "personal information". Other withheld portions deal with the absence of required educational and professional training, and I find that these portions are not accurately characterized as "employment history" and do not fall within the scope of paragraph (b).

Portions of a number of records make reference to the discharge of professional responsibilities by identifiable employees, and the CPSO inspector's assessment of these activities. I find that this information falls outside the scope of the definition of "personal information". In each instance, the inspector is making a professional assessment of professional activity. The views or options are not personal in nature and do not relate to the employee in a personal capacity. Neither the inspector nor the Ministry is in a position to take action on the basis of the observations or recommendations in the reports in any way that could impact the employment status of the individual employee and, in my view, information associated with employees in this context falls within the scope of "professional capacity" information described by Adjudicator Hale in Reconsideration Order R-980015.

The records relating to affected party 7 contain information about the health status of an identifiable employee. Paragraph (b) of the definition of "personal information" states that "information relating to the … medical … history of [an] individual" falls within the scope of the definition. I find that the references to the health status of this employee fall within the scope of paragraph (b) and qualify as "personal information". This information does not relate to the discharge of the employee's professional responsibilities, is not otherwise related to the content of the reports, and clearly relates to this individual in a personal capacity.

Summary of section 2(1) findings

In summary, I find that the information about the health status of an identifiable employee that appears in the records relating to affected party 7, as well as the portions of certain records describing the education history of various employees, qualifies as the "personal information" of these individuals. I further find that information about patients is not identifiable and therefore does not fall within the scope of "personal information", nor does information concerning the assessment of professional activities by the CPSO inspectors gathered during the course of various inspection activities.

Because the invasion of privacy exemption in section 21 of the *Act* only applies to "personal information", all portions of records that do not contain "personal information" cannot qualify for exemption and should be disclosed.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21 of the Act prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The only exception with potential application in the circumstances of this appeal is section 21(1)(f), which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(3) list the types of information the disclosure of which is presumed to constitute an unjustified invasion of privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Two of the presumptions are relevant in the context of this appeal. Section 21(3)(a) states that disclosing information that constitutes the "medical history" of an individual is a presumed unjustified invasion of that person's privacy; and section 21(3)(d) identifies a corresponding presumption for the disclosure of an individual's "employment history".

I find that all of the information that qualifies as "personal information" also falls within the scope of either of the two presumptions. None of the exceptions in section 21(4) are relevant in the context of this appeal and I am precluded from taking into account any factors under section 21(2) that might favour disclosure. Therefore, subject to my discussion of section 23, I find that the portions of the various records containing the "employment history" of various IHF employees, and the portions of the records relating to affected party 7 that contain the "medical history" of the identifiable employee, qualify for exemption under section 21 of the *Act*.

PUBLIC INTEREST OVERRIDE

The appellant submits that the "public interest override" in section 23 of the *Act* applies in this case. Section 23 reads as follows:

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

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption (see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)). In Order P-1398, Adjudicator John Higgins stated:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the

> extent to which denying access to the information is consistent with the purpose of the exemption.

Is there a public interest in disclosure, and if so, is it "compelling"?

The Divisional Court has provided guidance in determining whether a "compelling public interest" exists in a given case. In *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), the Court noted that, in assessing the issue of "compelling public interest", it is necessary to "… take into account the public interest in protecting the confidentiality …" of the information. In this part of my analysis, I must therefore consider both the existence of any compelling public interest in disclosing the records and any public interest in keeping them confidential.

Representations

The appellant submits:

> The information contained in the records is, in our submission, a classic example of the type of information that requires disclosure because it is in the public interest to do so. As we understand it, the records reveal the results of investigations made on numerous medical clinics in Ontario where deficiencies were noted. In some cases, the deficiencies resulted in a suspension of the facility's licence. In some cases they did not. This basis, it is critical that the public in Ontario be aware of:
>
> a. Which facilities have had deficiencies noted?
>
> b. Why did some of those deficiencies not result in suspensions of licenses?
>
> c. What remedial steps, if any, were taken by the facilities to address the deficiencies? And
>
> d. Given the apparent inconsistent sanctions that were imposed on the clinics in question, what level of diligence is being exercised by those at the Ministry (including agents of the Ministry) in carrying out their role in protecting the public from deficient clinics?
>
> Clearly, it is bad policy to shield non-compliance clinics from public scrutiny.

The Ministry takes the position that the appellant has not established a public interest in disclosure or, alternatively, any public interest that does exist is not compelling, as required by section 23. The Ministry relies on Order P-984, where Adjudicator Holly Big Canoe discusses the term "compelling":

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

Several affected parties made representations on section 23 but, for the most part, they do not deal with the personal information under consideration here.

Analysis and Findings

As a result of my findings in this order and in Order PO-2187, the appellant will be provided with access to the vast majority of the records falling within the scope of her request. The only portions qualifying for exemption under section 21 are small sections of some records that outline the educational history of certain IHF employees, and specific information about the health status of one particular employee that does not directly relate to the rest of the reports in which this information is contained.

Having carefully considered the appellant's representations, I am not persuaded that she has established a compelling public interest in disclosure of the specific personal information being considered under section 23 in this appeal. In my view, any public interest considerations that may exist are adequately addressed through the disclosure of the portions of the various records that I have determined do not qualify for exemption under sections 17(1) or 21.

Therefore, I find that section 23 does not apply to the portions of records that qualify for exemption under section 21 of the *Act*.

ORDER:

1. I uphold the Ministry's decision to deny access to the medical history of one identified individual contained in the records relating to affected party 7; and information relating to the educational history of a number of identified individuals contained in records relating to affected parties 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 24, 25, and 29. I have attached a highlighted version of the various records covered by this provision with the copy of this order sent to the Ministry, identifying the portions that qualify for exemption and should **not** be disclosed. The highlighted version of the one record relating to affected party 15 also identifies the names on pages 1 and 2 that have been removed from the scope of the request by the appellant and should not be disclosed.

2. I order the Ministry to disclose all of the remaining records at issue in Appeal PA-020368 to the appellant by **February 27, 2004** but not before **February 20, 2004**.

3. I order the Ministry to disclose all of the remaining records at issue in Appeal PA-020338-1 not covered by Order PO-2187 to the requester/appellant by **February 27, 2004** but not before **February 20, 2004**.

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 appellant pursuant to Provisions 2 and 3, upon request.

January 9, 2004

Tom Mitchinson
Assistant Commissioner