



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2247

Appeal PA-030210-2

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the agendas and minutes of two inter-provincial committees, the Federal/Provincial/Territorial Coordinating Committee on Genetics and Health (now known as the Co-ordinating Task Force on Genetics and Health, the CTGH) and the Interprovincial Health Insurance Agreements Coordinating Committee (the IHIACC) and its predecessor, the Co-ordinating Committee on Reciprocal Billing (the CCRB)

The Ministry located records responsive to the request and denied access to them under sections 15(a) and (b) of the *Act* (relations with other governments).

The requester, now the appellant, appealed this decision. Mediation was not successful and the matter was moved to the adjudication stage of the appeals process. I sought and received the representations of the Ministry, initially. The non-confidential portions of the Ministry's submissions were then provided to the appellant, along with a Notice of Inquiry setting out the facts and issues in the appeal. The appellant declined the opportunity to provide representations in response to the Notice.

RECORDS:

The records at issue consist of 25 documents comprising:

- CTGH records – 4 agendas and 4 sets of meeting notes for the period June 14, 2002 to March 24, 2003
- IHIACC records – 9 agendas and 8 sets of meeting minutes for the period June 20 and 21, 2001 to December 12 and 13, 2002

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

General principles

The Ministry claims the application of the discretionary exemptions in sections 15(a) and (b) to the responsive records. These sections state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
- (b) reveal information received in confidence from another government or its agencies by an institution;

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of sections 15(b) and (c) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order 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.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record “could reasonably be expected to” lead to the specified result. To meet this test, the institution 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.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to “reveal” the information received [Order P-1552].

Section 15(a): prejudice to intergovernmental relations

In order for a record to qualify for exemption under section 15(a), an institution must establish that:

1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and
2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[Reconsideration Order R-970003]

Representations of the Ministry

The Ministry makes the following general arguments in support of its position that the records are exempt under section 15(a):

The fundamental purpose of the section 15 exemption under the [Act] is to protect the confidentiality of intergovernmental discussions, and the integrity of intergovernmental relations. Issues of common interest are discussed by the federal, provincial and territorial governments at intergovernmental meetings in order to compare and develop policy in respect of such issues. The frank and open discussions that are necessary to the success of such meetings can be supported and promoted only if the confidentiality of the discussions is assured. Participants at intergovernmental meetings not only expect, but actively depend

on the confidential nature of the meetings when expressing their views or describing their government's policies on a given issue. If confidentiality is not assured, governments and their representatives will be less forthcoming at these meetings. This result would effectively undercut the very purpose and goals of such meetings.

The value and importance of the section 15 exemption in the *Act* is underscored by the unique drafting of the exemption. Although it is a discretionary exemption (A head 'may' refuse to disclose a record), unlike other discretionary exemptions (aside from section 16) the head's discretion is expressly limited. The closing words prohibit disclosure (the head 'shall not disclose') of a record that meets the conditions of section 15 'without the prior approval of the Executive Council'. Consequently, if the disclosure of the records at issue could reasonably be expected to result in one of the harms described in section 15, and the head wishes to exercise his/her discretion to disclose them, the head must first obtain Cabinet's approval.

The records at issue in this appeal relate to the meetings of two inter-provincial committees: the Federal, Provincial and Territorial Co-ordinating Committee on Genetics and Health (now known as the Co-ordinating Task Group on Genetics and Health, the 'CTGH') and the Interprovincial Health Insurance Agreements Coordinating Committee (IHIACC) formerly known as the Co-ordinating Committee on Reciprocal Billing).

The CTGH's overall objective is to assist jurisdictions across Canada in developing a comprehensive, co-ordinated framework in respect of genetic issues such as Patent Reforms, Genetic Technology, Genetic Health Human Resources, and the management of personal genetic information. It presently reports through the Advisory Committee on Information and Emerging Technologies (ACIET) to the Conference of Deputy Ministers and to Premiers, and its mandate includes providing advice to inform Deputies' decisions on the policy and practical implications of current and potential developments in genetics, and to develop and implement a cross-jurisdictional framework and strategy for genetics. To this end, it co-ordinates and exchanges information and insures linkages with relevant genetic and health bodies. It meets quarterly and its membership consists of one representative each from the federal, provincial and territorial (FPT) governments.

The IHIACC is an inter-provincial structure that oversees the application of inter-provincial health insurance agreements in accordance with the *Canada Health Act*. Decisions made by the Committee concern eligibility for health insurance coverage and reciprocal billing of insured hospital and physician services as defined under federal and provincial health insurance legislation. IHIACC members and contacts share information through regular liaison via conference calls, written communications and face-to-face meetings, with members soliciting and reflecting views of contacts on all issues. Members meet three times a year;

the meetings provide a forum for both information sharing and collaborative problem-solving.

The meetings of both committees are held in camera and the proceedings are not made available to the public.

The FPT members attending these meetings engage in frank and open discussions with a clear expectation of confidentiality. If members knew that the meetings would not remain confidential, they would be less inclined to discuss matters candidly or attend at all. Therefore, disclosing these records - - which were generated under the assumption that they would in fact remain confidential - - would undercut the value of future meetings and would have a potentially negative impact on the quality of advice provided to senior government officials on issues related to the mandates of the two committees.

With respect to the application of the first part of the test under section 15(a), the Ministry submits that the relations are intergovernmental for the following reasons:

It is clear on the face of all 25 records that the relations at issue are intergovernmental because the meetings they refer to were intergovernmental and were attended by representatives of the FPT governments across Canada.

In Orders P-170 and PO-1927-I, the IPC defined “intergovernmental relations” as being the “formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiations between various levels of government”. The MOHLTC submits that this definition applies to the 25 records at issue. They all relate to formal discussions and exchanges of information regarding joint projects undertaken by FPT governments in respect of issue of common concern.

The CTGH records document the FPT governments’ work on a coordinated approach to various complex genetic health issues. Its very mandate is to implement a cross-jurisdictional framework and strategy for genetics.

Similarly, the IHIACC records reflect the views and information shared by its members regarding the application of inter-provincial health insurance agreements, and decisions about the eligibility of certain hospital and physician services for insurance coverage and reciprocal billing.

With respect to the second part of the test under section 15(a), the Ministry relies on the decisions in Orders P-1137 and PO-1891-I which held that the disclosure of the contents of certain records relating to meetings involving representations of the federal, provincial and territorial governments could reasonably be expected to prejudice intergovernmental relations under section 15(a). The Ministry submits that the same principles expressed in these decisions apply to the meeting minutes that comprise a portion of the records at issue in the present appeal. In support of this position, it relies on an explicit statement contained on page 4 of Record 2

where the confidentiality of the minutes of meetings of the CCRB “must be considered confidential material and therefore not be distributed to the general public.”

The Ministry points out that the Minutes of the meetings of both Committees are quite detailed, recording what each representative said, reported or undertook to do. Therefore, the Ministry suggests that their disclosure “would effectively reveal the actual proceedings and discussions that took place on many highly sensitive issues.” In its confidential representations, the Ministry provides some examples of the types of specific actions and issues under discussion at the meetings of these Committees and why, in its view, their disclosure could reasonably be expected to prejudice the conduct of inter-governmental relations.

With respect to the meeting agendas, the Ministry submits that:

They were generated for or relate to the formal and informal discussions and exchanges of information among the FPT governments in the context of the CTGH and IHIACC meetings. The Agenda topics themselves reflect the fact that governments are exploring the identified issues and are perhaps giving them policy consideration. Since the policy development in respect of these topics may in fact be at a very early stage, or may in the future be abandoned altogether, their disclosure in the Agendas would be premature and could, out of context, be misinterpreted. Given that one of the goals of these meetings is to provide a confidential forum for exploring and exchanging ideas and nascent policies, the disclosure of even the Agendas alone would undermine this goal.

Findings

With respect to the first part of the test under section 15(a), I have no difficulty in finding that the relations reflected in the subject matter of the records at issue are intergovernmental in nature. The records relate directly to matters involving the relationship between the Province of Ontario and its federal, provincial and territorial counterparts. The records directly address matters of common interest and concern between these entities and are, accordingly, intergovernmental in their scope.

The second part of the section 15(a) test requires that the Ministry provide “detailed and convincing evidence” in support of its argument that the disclosure of the records could reasonably be expected to result in harm to the conduct of those intergovernmental relations.

In Interim Order PO-1891-I, Senior Adjudicator David Goodis provided the following analysis of previous decisions of the Commissioner’s office respecting the application of section 15(a) to records dealing with discussions between representatives of the Province of Ontario and their federal, provincial and territorial counterparts. He stated:

In previous orders, this office has found that disclosure of records generated in the context of discussions among the federal government and/or its provincial and territorial counterparts could reasonably be expected to prejudice the conduct of intergovernmental relations within the meaning of section 15(a) of the *Act*. For

example, in Order P-1137, Assistant Commissioner Tom Mitchinson found that this exemption applied to records relating to a conference of provincial and territorial deputy ministers of health, concerning the question of financial assistance to persons infected with HIV via the blood system. In that order, the Assistant Commissioner stated:

These records consist of communications exchanged directly between Ontario and the other provinces and/or territories, as well as correspondence between these other parties which was copied to Ontario. Some of these records were created by the Ministry for internal use and incorporate the information received from the other provinces and/or territories.

As part of its submissions, the Ministry has provided an overview of the context in which the [Multi-Provincial and Territorial Assistance Plan (MPTAP)] discussions between the provinces and territories were conducted. The Ministry indicates that, from the outset, the provinces and territories were encouraged to discuss any issues in an open and candid manner. The Ministry states that these discussions and supporting documentation were shared on an explicitly confidential basis.

It is the position of the Ministry that disclosure of such information could reasonably be expected to inhibit any further co-operative ventures among the provinces and territories, not only with respect to MPTAP, but also with respect to other issues requiring national cooperation and consultation . . .

All of the provinces and territories which submitted representations support the Ministry's characterization of the discussions and negotiations leading to the development of the MPTAP, their expectations of confidentiality with respect to communications provided to Ontario and their concerns about the reasonable expectation of prejudice to their relationships with Ontario that could occur upon disclosure of the records.

Senior Adjudicator Goodis then went on to discuss the application of the section 15(a) exemption by Assistant Commissioner Mitchinson in Order P-1137 to records relating to a provincial/territorial ministers' meeting on social services issues. In that decision, the Assistant Commissioner found:

In support of its position with respect to both sections 15(a) and (b), the Ministry's representations provide an overview of the context in which discussions between provinces and territories are conducted at P/T Ministers' Meetings. The Ministry indicates that disclosure of the type of records which are at issue in this appeal would call into question long standing practices and

understandings reached among the provinces and territories concerning meetings, exchange of information, preparation of common briefing notes, and exchange of documents. The Ministry states that supporting documentation prepared for P/T Ministers' Meetings is always shared on a confidential basis. According to the Ministry, if the records at issue in this appeal are disclosed, this would severely prejudice relations with other provincial and territorial governments and inhibit Ontario's ability to participate in future interprovincial/territorial meetings and exchanges of information and documents.

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The Ministry's representations point out that all of the records concern relations between the Ontario government and its provincial, territorial and federal counterparts. I agree, and find that the first requirement of the section 15(a) exemption claim has been established.

The Ministry also submits that the process of P/T Ministers' Meetings has allowed the development of practices that encourage interprovincial/territorial co-operation and information-sharing which benefits all participants. According to the Ministry, the understandings and practices have helped to generate a sense of confidence and trust among provincial and territorial officials and Ministers which has gone beyond the P/T Ministers' Meetings themselves, and resulted in the opening of channels of communication which operate throughout the year.

The Ministry has provided detailed representations regarding the context of each record and reasons why it feels that prejudice to the conduct of intergovernmental relations would result from disclosure. Having reviewed these representations and the records, I find that the Ministry has provided sufficient evidence to establish that disclosure of the exempt portions of Records 18, 19, 22, 30 and 40, and all of Records 21, 28, 29, 31, 32, 34, 40, 44, 45, 50 and 51 could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations. Therefore, I find that these records qualify for exemption under section 15(a) of the *Act*.

Senior Adjudicator Goodis concluded his discussion of section 15(a) as follows:

Based on the approach taken to section 15(a) in similar circumstances in these earlier orders, as well as the representations of the Ministry and the records themselves, I am satisfied that disclosure of the vast majority of the records at issue under section 15 could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario. In my view, the Ministry has provided detailed and convincing evidence to establish a reasonable expectation of probable harm, under section 15(a), to the conduct of relations between the Government of Ontario and the federal government and the other provinces and territories participating in discussions concerning amendments to the hate crime provisions of the *Criminal Code*. I am satisfied that disclosure of

these records could reasonably be expected to inhibit any further co-operative ventures among the federal, provincial and territorial governments with respect to these and other issues requiring national cooperation and consultation.

I adopt the approach outlined by the Assistant Commissioner and the Senior Adjudicator in these earlier decisions for the purposes of the present appeal. In my view, the Ministry has provided me with the kind of detailed and convincing evidence required to establish that the disclosure of the information contained in the records could reasonably be expected to result in prejudice to the conduct of intergovernmental relations by the Province of Ontario. The records reflect confidential discussions on sensitive matters involving health care issues of concern to all FPT governments. I find that the disclosure of this information could reasonably be expected to prejudice the ability of the Government of Ontario to effectively participate in these discussions. As a result, I find that the records are exempt from disclosure under section 15(a).

The Ministry has provided me with its rationale for exercising its discretion to not seek the approval of Cabinet. It notes that the approval of Cabinet is only required under section 15 if the Ministry had decided to exercise its discretion to disclose the records. As it has not done so in the present case, there was no need to seek Cabinet's approval.

The Ministry has also provided me with an explanation of the factors that it considered in deciding not to exercise its discretion in favour of the disclosure of the records. Based on my review of those submissions, I am satisfied that the Ministry exercised its discretion properly and I will not disturb it on appeal.

Because of the manner in which I have addressed the application of section 15(a) to the records, it is not necessary for me to determine if they are also exempt under section 15(b).

ORDER:

I uphold the Ministry's decision to deny access to the records.

Original signed by: _____
Donald Hale
Adjudicator

February 27, 2004 _____