



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2388

Appeal PA-040077-1

Ministry of Health and Long-Term Care



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BACKGROUND:

The Ministry of Health and Long-Term Care (the Ministry) provided the following background information related to the records at issue in this appeal:

- Since the late 1970s, the Judson Street Ambulance Supply Center, part of the Emergency Health Services Branch (EHSB), has been providing a wide range of services in support of land and air ambulance services province-wide.
- It was primarily involved with the purchase of vehicle chassis directly from automobile manufacturers, then coordinating with conversion vendors to build ambulances according to legislated standards and the purchasing municipality's specifications.
- The previous government directed EHSB to close the Judson Street Ambulance Supply Centre on March 31, 2004. In the spring of 2004, the current government reviewed that decision and agreed to allow the branch to establish a different service model for the Ambulance Fleet and Equipment section.
- The Ambulance Fleet and Equipment section will continue to provide technical assistance and ambulance vehicle and equipment procurement to municipalities through the establishment of Vendor of Records contracts and a central order desk.
- EHSB continues to provide municipalities with technical assistance, and will facilitate inspection services and be responsible for the development and maintenance of vehicle and equipment standards and their compliance.

NATURE OF THE APPEAL:

The Ministry received a 14-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for information relating to the provincially run Fleet and Equipment Service for ambulances at the Judson Street Ambulance Supply Centre. Specifically, the requester sought access to the following:

- 1) Any and all consultant's reports related to Fleet and Equipment Services between 1999 and 2003.
- 2) Any and all questionnaires used by any consultants to evaluate Fleet and Equipment Services, between 1999 and 2003.
- 3) Any and all consultants fee(s) for any analysis of Fleet and Equipment Services, 1999-2003 and the name of the consultants or consulting firm(s).

- 4) Results of the survey of municipal Emergency Medical Services (EMS) directors regarding Fleet and Equipment Services, between 1999 and 2003.
- 5) Line by line budget for Fleet and Equipment Services section within the Emergency Health Services Branch, including any and all overhead costs (capital costs i.e. rent, electricity, water, heat, IT, clerical support).
- 6) Any and all new costs added to Fleet and Equipment Services between 1998 and 2003.
- 7) Any and all analysis completed for the Ministry regarding the total cost of providing Fleet and Equipment Services annually from 1999 –2003.
- 8) Minutes of the Land Ambulance Implementation Steering Committee (LAISC) related to Fleet and Equipment Services between 1999-2003.
- 9) Minutes of the Land Ambulance Purchasing Subcommittee of LAISC between 1999-2003.
- 10) Any and all analysis and/or communications concerning the rationale and the impact of the restriction on Fleet and Emergency Services to respond to tenders.
- 11) Any and all analysis outlining how the closure of Fleet and Equipment Services will meet the legislative objectives related to land ambulance transfer of seamlessness, accessibility, accountability, integration and responsiveness.
- 12) Letters from outside interested parties (for example, but not limited to the public, municipalities, and/or vendors) sent to the Ministry commenting upon the closure of the Fleet and Emergency Services.
- 13) A copy of the draft and/or final Memorandum of Agreement (or understanding) between the province and municipalities that establishes standards for Fleet and Emergency Services at the municipal level.
- 14) A copy of the Municipal information package or kit to assist the municipalities with the purchasing of Fleet and Emergency Services and equipment in anticipation of the closure of Fleet and Emergency Services.

The Ministry located eight records from municipalities in response to item 12. Access was denied in full to those records pursuant to section 15(b) (relations with other governments) of the *Act*.

In its decision letter, the Ministry also advised the following:

- A search of the Emergency Services Branch (ESB) was conducted and no records were located in response to parts 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, and 14 of the request.
- With respect to part 4, the Ministry suggested that the requester inquire at the Association of Municipal Emergency Medical Services Organization for responsive records, and provided an e-mail address.
- In response to part 8, the Ministry advised that the minutes of LAISC can be found at specific website and provided the website address to the requester.
- In response to part 13, the Ministry indicated that standards for fleet and emergency services are found at a specified web site.

The requester, now the appellant, appealed the Ministry's decision. In their letter of appeal, the appellant took the position that records responsive to parts 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, and 14 should exist. During mediation, the appellant confirmed that their appeal with respect to parts 8 and 13 of the request was withdrawn. The appellant also confirmed that they are appealing the Ministry's decision to deny access to the records responsive to part 12 of the request.

Mediation did not resolve the appeal, which was transferred to the adjudication stage. The inquiry was originally commenced by Assistant Commissioner Tom Mitchinson. On his retirement, I assumed responsibility for the appeal.

Assistant Commissioner Mitchinson began his inquiry by sending a Notice of Inquiry to the Ministry and received representations in return. He also sent a copy of the Notice of Inquiry to seven municipalities and the Association of Ontario Municipalities as they might be affected by the disclosure of the records (the affected parties). None of the affected parties chose to provide representations in response to the Notice of Inquiry.

A copy of the Notice of Inquiry, along with the representations submitted by the Ministry, was then sent to the appellant. The appellant responded with representations. In those representations the appellant submitted the following:

- [the appellant] withdraws its request related to part 4 (results of the survey of municipal Emergency Medical Services (EMS) directors regarding Fleet and Equipment Services between 1999 and 2003) and will pursue this through the provided Association's contact.
- [the appellant] also withdraws its request related to part 14. On July 9, 2004 [the appellant] received a satisfactory response to its request.

The appellant continues to assert that records should exist with respect to parts 1, 2, 3, 5, 6, 7, 9, 10, and 11 of the original request.

Also, in those representations, the appellant claimed that section 23, the “public interest override”, applied in the circumstances of this appeal. I sent a copy of the appellant’s representations to the Ministry and requested reply representations on the section 23 issue. The Ministry responded with reply representations.

RECORDS:

There are eight records at issue in this appeal responsive to part 12 of the request. These records consist of eight letters, comprising 15 pages, sent to the Ministry from outside interested parties commenting on the closure of the Fleet and Emergency Services at the Judson Street location. The Ministry has claimed section 15(b) for those records, and the appellant claims that section 23 applies to them.

Also at issue is whether the Ministry conducted a reasonable search for responsive records for parts 1, 2, 3, 5, 6, 7, 9, 10, and 11.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims that the eight records responsive to part 12 of the request are exempt from disclosure under section 15(b) of the *Act*.

General principles

Section 15(b) reads:

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

- (b) reveal information received in confidence from another government or its agencies by an institution;

and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. The purpose of section 15(b) 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 Ministry must establish that:

1. the records reveal information received from another government or its agencies;
2. the information was received by the Ministry; and
3. the information was received in confidence.

The Ministry must also 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].

Representations

The Ministry submits:

[T]hat the affected municipalities that have received a Notice of Inquiry are in the best position to address the application of section 15(b), as it relates to the issue of the confidentiality of the 8 records responsive to Part 12 of the request. The Ministry therefore relies on the municipalities’ representations in this regard.

The Ministry submits that the municipalities should be considered “another government” under section 15(b) due to their characterization under the new *Municipal Act, 2001*. Section 2 of that Act states that:

Municipalities are created by the Province of Ontario to be **responsible and accountable governments** with respect to matters within their jurisdiction.

The Ministry therefore submits that s. 15(b) applies to the records if the municipalities, in their representations, confirm that the correspondence at issue was sent to the Ministry in confidence.

The appellant submits that the Ministry has not met the requirements of section 15(b). After stating that Ontario municipalities are not “other governments” and as such the first part of the

test has not been met, the appellant goes on to submit that the Ministry has not established that the records were received in confidence:

The Ministry has not provided any evidence that the records were received in confidence. Its representations indicate that the affected Municipalities have received Notices of Inquiry and are in the best position to address the application of section 15(b).

The Ministry's failure to provide any evidence on this issue suggests that the records were not received in confidence. If the Ministry cannot produce any evidence that the communications were made in confidence, it is highly unlikely that the communications were in fact received in confidence. It stands to reason that a party receiving information in confidence would be aware that the information was communicated in confidence.

In addition, it should be noted that there is evidence that the subject matter of the records was not confidential. Several municipalities, including the City of Peterborough, the County of Renfrew, the County of Perth, the County of Lennox and Addington, and the Region of Peel, have posted Minutes from committee meetings that have reported comments on the closing the Judson Street Ambulance Supply Centre on the internet. Given that these minutes were made public, it seems unlikely that the communications made to the Ministry in relation to the same subject matter were intended to be confidential.

In short, the Ministry has not established that the Part 12 records were received in confidence.

The appellant also submitted that the Ministry has failed to provide any evidence of harm that would arise from the disclosure of the records to the trust relationship necessary for governments to conduct affairs of mutual concern.

Analysis and Findings

After carefully reviewing the records and the representations of the parties, I find that there is no basis for me to conclude that disclosure of the records would reveal information that was received in confidence by the Ministry. Aside from the bare assertion that section 15(b) is applicable, the Ministry provides no basis for determining that the affected parties had any expectation of confidentiality in providing the records to the Ministry. The Ministry simply defers to the municipalities to provide such evidence. As has been noted, all of the municipalities chose not to respond to the Notice of Inquiry, and as a result, there is no evidence before me to indicate that disclosure of the record would reveal information provided in confidence. Without a detailed explanation as to the circumstances surrounding the municipalities supplying the information to the Ministry and the reasons why both parties have an expectation that the information would be held in confidence, I am not in a position to

conclude that the Ministry has met its onus under section 15(b). Having reviewed the records, there is nothing that expressly indicated that the information in the records was provided in confidence. In fact, two of the letters at issue are in the form of municipal resolutions which suggests an open and public discussion of the issue of the closure of the Judson Street facility.

Accordingly, section 15(b) does not apply to the records and should be disclosed to the appellant.

As section 15(b) does not apply to the records, I am not required to make a ruling on whether municipalities are “other governments” as contemplated by section 15(b). Additionally, it is not necessary for me to consider the application of the section 23 public interest override.

ADEQUACY OF SEARCH

General principles

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution’s decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Position of the parties

The appellant believes that records responsive to parts 1, 2, 3, 5, 6, 7, 9, and 11 of their request should exist.

In its representations, the Ministry states that it did not contact the appellant for additional clarification of the request because the appellant provided sufficient information in the original request for the Ministry to conduct a complete search of the records being sought.

The Ministry identifies the individual who conducted the searches for the records as the Senior Manager of Emergency Health Services Branch and provides an affidavit sworn by that individual attesting to those searches. The affidavit details the results of those searches and specifies that both electronic and paper files were searched and the results of those searches are listed in the “index of records”. The index lists the areas searched as “Emergency Health Services Branch (EHSB)/Judson St.”, or “EHSB/Judson St”. I interpret this to mean the offices

of the Emergency Health Services Branch and the Judson Street Ambulance Supply Centre. The Ministry also attaches an affidavit sworn by a Project Assistant in the Emergency Health Services Branch, attesting to the fact that the institution did not seek additional clarification of the request by contacting the requester but that it chose to respond literally to the request.

In response, the appellant submits:

There is a reasonable basis to believe that the requested records exist. The Ministry would have been required to prepare records similar to those requested in its deliberations on its decision to close the Judson Street Ambulance Supply Centre and to establish a different service model for the Ambulance Fleet and Equipment section.

With regard to records 1, 2, and 3; in and around February 2002 [the appellant] members were questioned at their workplace about the nature of their work, their relationship with the municipalities and vendors of record in the context of discussions about possible closure of the service. It is likely that the Ministry has a report based on these interviews.

Records 5, 6, and 7 would have formed the basis of the financial assessment of the implications of the decisions to change the business model for the services provided at the Judson Street Ambulance Supply Centre. [The appellant] requested both the specific and general costs of the running of Fleet and Equipment services. It is difficult to imagine that the decision to change the nature of the service would have been taken without a financial analysis.

Record 9 relates to a joint committee meeting between the Ministry and the affected municipalities. The Minutes of this meeting (or meetings) should be available through the Ministry.

Employees at the Judson Street Ambulance Supply Centre were directed to stop bidding on tenders from municipalities in 2003. Analysis or communications about the impact of this decision would likely have been completed. At the very least there would have been records indicating that this decision was taken. As such, it is reasonable to believe that record 10 exists.

Record 11 would have formed the basis of the analysis to close Fleet and Equipment Services at the Judson Street Center. The provision of ambulance services follows strict legislative and regulatory regimes. It is therefore likely that an analysis of the impact of the download was conducted and is in the possession of the Ministry.

The Ministry did not make a reasonable effort to identify and locate the requested records. The affidavit of [Senior Manager, Emergency Health Services Branch]

indicates that only the Emergency Health Services Branch was searched. Given the likelihood of the existence of the requested records, the Ministry should have broadened its search when the relevant documents could not be located at the Emergency Health Services Branch. It should have searched the offices of the Minister, the Deputy Minister and the Assistant Deputy Minister, and it should have examined the Management Board Secretariat's records of the budgeting process. Thus, the Ministry's restriction of its search to the Emergency Health Services branch was not reasonable. [The appellant] therefore requests that the Commission order the Ministry to conduct another search for the requested records and that search should include all Ministry locations where the requested records might reasonably be located.

I find that the appellant's representations present a reasonable basis for concluding that additional records responsive to the request might exist. I have reviewed the Ministry's representations regarding their search for the responsive records and the supporting affidavits. In my view, I have not been provided with sufficient explanation from the Ministry as to why the scope of the Ministry's search was not more expansive. There is no explanation as to why other Ministry branches were not considered when searches for responsive records were conducted. The process of government decision-making, when dealing with the closure of a program or facility, is not generally confined to the Ministry branch with operational responsibility. It is unreasonable to conclude that the decision to close the Judson Street facility was made only by staff of the EHSB office or the facility itself and that records would only exist at either of those locations. It is also not reasonable to conclude that a decision was made to close the Judson Street facility without the benefit of financial, policy or legal analyses and the corresponding creation of records. Decisions of this nature would be made as part of the ongoing financial and business planning cycles of the Ministry, and as such, would have resulted in the creation of records of some nature.

While I accept that the Ministry's search at EHSB's offices and the Judson Street facility did not find any records other than those that are discussed above, I have concluded that the Ministry's search was far too narrow in scope, and should have included other Ministry branches that were involved in budgeting and operational decision-making. As such, I find that the Ministry has not made sufficient efforts to identify and locate all responsive records.

Accordingly, I will order the Ministry to conduct a further search for responsive records, in accordance with the terms of this Order outlined below.

ORDER:

1. I order the Ministry to disclose the records by **May 30, 2005**.
2. I order the Ministry to conduct additional searches for the responsive records within its custody or under its control, in accordance with its statutory responsibilities and advise the appellant of the result of this further search by **May 30, 2005**. These searches should

include all relevant files in any the various branches of the Ministry which could reasonably be expected to have records responsive to the appellant's request, including but not limited to, the Deputy Minister's office and Ministry branches responsible for financial, policy and business planning, the Ministry's legal services branch and field operations.

3. In the event that additional records are located, I order the Ministry to provide the appellant with an access decision regarding those records in accordance with sections 26, 28 and 29 of the *Act*, considering the date of this order as the date of the request and without recourse to a time extension under section 27.
4. To verify compliance with Provisions 2 and 3, I order the Ministry to provide me with a copy of any decision or notice provided to the appellant or any records disclosed pursuant to those provisions.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ April 27, 2005