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

INTERIM ORDER MO-1865-I

Appeal MA-030326-1

City of Toronto

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BACKGROUND

During the spring and summer of 2003, the City of Toronto (the City) experienced a serious health crisis when severe acute respiratory syndrome (SARS) was detected in a number of area residents.

The City describes the crisis as follows:

> [SARS] was first recognized in Toronto in a woman who had returned from Hong Kong in late February 2003. Transmission to others resulted subsequently in an outbreak among 257 people in several Greater Toronto Area hospitals.
>
> On March 12, 2003, the World Health Organization issued a global alert regarding the mystery illness soon to be known as SARS. During [the period of March 8 to March 18, 2003], public health officials began to suspect the connection between the disease in Guangdong province, Hong Kong and Toronto. Physicians began to discover that standard protection would not prevent the spread of the disease and a number of SARS clusters developed as the disease was transmitted from patient to patient or patient to caregiver.
>
> March 13, 2003, Health Canada received notification of the Toronto clusters and began daily teleconferencing with provincial and local health officials.
>
> After implementation of province-wide public health measures, including strict infection control practices, the number of recognized cases of SARS declined substantially, and no cases were detected after April 20th.
>
> On April 30, 2003, the World Health Organization lifted a travel advisory issued on April 22, 2003 that had recommended limiting travel to Toronto.
>
> A second wave of SARS cases among patients, visitors, and health care workers occurred at a Toronto hospital 4 weeks after SARS transmission was thought to have been interrupted.
>
> From February 23, 2003, to June 7, 2003, the Ontario Ministry of Health and Long-term Care received reports of 361 SARS cases (suspect 136 [38%]; probable 225 [62%]; as of June 7, 2003, a total of 33 people (9%) had died. (Health Canada)).
>
> The economic impact of the SARS was severe and is still being felt by the City.

NATURE OF THE APPEAL:

The City received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a journalist, for all documents related to the SARS outbreak between Saturday, March 8, 2003 and Tuesday, March 18, 2003.

The requester identified log reports, emails, briefing reports and status reports as potential responsive records, as well as any individual records and specific reports created or kept by several individuals named in his request. The requester made it clear that he did not want any information that would identify SARS patients, including their names and birthdates, and asked that this type of information be severed from the records prior to disclosure.

The request included the following details:

> Toronto Public Health has told me they keep a record of a developing situation (such as SARS) but I do not know the name of the record(s). I am therefore describing the record and also requesting individual records kept by [five named public health officials]. [I will refer to these individuals as officials #1, #2, #3, #4 and #5 throughout this order.]
>
> The first report, which will be noted in a log or other report, was a notification of a possible [tuberculosis] outbreak. This came from Scarborough Grace Hospital on or about Sunday March 9, 2003. The report was made to, either [official #5] at Toronto Public Health or [official #4] at Toronto Public Health. In either case, both became involved and would have log, email, or diary records that should provide the records pursuant to my request.
>
> By Thursday, March 13, 2003, [official #3] of Toronto Public Health became involved. I request any log entries, emails or other [records] made by her.
>
> At the same time, reports were also being made in writing to [officials #1 and #2], both senior [Toronto Public Health] officials.
>
> I am asking for this information so that I may scrutinize the effectiveness of [Toronto Public Health]. There is a public interest in scrutinizing the management of the outbreak.

The City identified 197 pages of responsive records and granted partial access to some of them. The City relied on the invasion of privacy exemption in section 14 of the *Act* as the basis for denying access to all remaining information, and also identified sections 7 (advice or recommendations) and 9 (relations with other governments) as exemptions applicable to certain identified records.

The requester, now the appellant, appealed the City's decision.

During mediation, the appellant took the position that more responsive records should exist. He also claimed that the public interest override in section 16 of the *Act* should apply in the circumstances of this appeal. These two issues were added to the scope of the appeal.

Also during mediation, the City changed its position regarding pages 47, 101, 119, 123, 126 and 128 and provided copies of these records to the appellant.

Further mediation was not successful and the appeal was transferred to the adjudication stage of the appeal process.

I began my inquiry by sending a Notice of Inquiry to the City, setting out the facts and issues in the appeal and inviting written representations. These representations were shared with the appellant, and he in turn provided representations on the various issues raised in the Notice. I then invited the City to reply to the appellant's representations, which it did.

In the course of preparing its reply representations, the City located 38 additional pages of responsive records, all of which are notes made by official #3 during the time period of the appellant's request. The City issued a supplementary decision letter to the appellant, claiming that all of these new records qualify for exemption under section 14 of the *Act*. The appellant asked that the new records be added to the scope of the appeal, so I sent the City a Supplementary Notice of Inquiry and received representations relating to these records. The appellant in turn was invited to respond, which he did, and the City provided a final set of reply representations in response to the issues raised by the appellant.

RECORDS:

The records that remain at issue are described as follows:

Pages 1-17 — A "Summary of First Reported Cases of SARS to Toronto Public Health", dated May 2003. It is described as "a transcript of [a named Senior Public Health Inspector's (official #6)] handwritten notes for the period March 13 to April 4, 2003". Only the portions dealing with the timeframe of the appellant's request are included. This summary is a day-by-day narrative description of various cases and actions taken by various staff of the City's Public Health Department. Much of the information on these pages has been disclosed to the appellant. The names and other identifying information of patients has been severed and withheld under section 14, along with details regarding clinical treatment and other information about these patients and their family members gathered during the March 8-18 time period.

Page 18 — A 1-page "note to file" made by official #5 (a Manager, Communicable Diseases) regarding her actions and activities on March 9, and her interaction with others involved in the SARS crisis. Some portions of this page have been disclosed. The undisclosed parts contain names, other identifying information and clinic treatment details of patients, as well as portions of one sentence containing information about a doctor. All withheld information is denied on the basis of section 14.

Pages 19-25 A series of charts dated March 13, some with handwritten notations, prepared by a Program Manager, Communicable Diseases (official #7), reflecting clinical assessments, treatment details and other information about patients gathered during the SARS investigation. These pages are withheld in full under section 14.

Page 26 A 1-page typed note prepared by official #6, describing symptoms and treatment details for an identified SARS patient. This page is withheld in its entirety under section 14.

Page 27 Disclosed

Page 28 A 1-page note dated March 14 by official #4 (a Manager, Communicable Diseases) with content similar to Page 18. Most of this page has been disclosed, with the names and other identifying information of patients severed under section 14.

Pages 29-36 A series of Scarborough Grace Hospital records, reflecting the results of x-rays taken on various patients during the period March 10-13. These pages are withheld in full under section 14.

Pages 37-38 A 2-page typed list of "Action Items", dated March 14, prepared by official #6 and another Senior Public Health Inspector (official #8), outlining various activities to be taken as part of the SARS investigation. Most of these pages have been disclosed, with the names and other identifying information of patients and their doctors withheld under section 14.

Page 39 A 1-page memorandum from the Infectious Disease Control Co-ordinator (official #9) to her colleagues dated March 14, describing the hospital's involvement with a SARS patient during the preceding week. The name, other identifying information and treatment details of the patient have been withheld under section 14 and the rest of the record has been disclosed.

Page 40 A schematic drawing, dated March 15, prepared by official #9, depicting the relationships among identified SARS patients and their family members. This page is withheld in full under section 14.

Page 41 A 1-page document dated March 15 and titled "Health Canada Travel Referral Info", prepared by official #9. It outlines travel details of three SARS patients, and is withheld in full under section 14.

Pages 42-45 A series of "Dr. Contact Follow-up" charts outlining investigative information gathered by official #6 (Page 42) and officials #6 and #8 (Pages 43-45). Page 42 is undated, and Pages 43 and 45 are dated

March 15. These records contain identifying information of patients and their doctors and actions and activities involving these individuals during the early March period. Page 44 is blank. These pages are withheld in full under section 14.

Page 46 — An undated schematic drawing similar to Page 40, prepared by official #6. It has been withheld in full under section 14.

Page 47 — Disclosed

Pages 48-51 — A series of handwritten and typewritten "Progress Notes" made by a Public Health Nurse (official #10) regarding the treatment of a SARS patient. These pages are withheld in full under section 14.

Page 52 — A 1-page handwritten "Progress Note" made by a Public Health Nurse (official #11) regarding the treatment of a SARS patient. This page is withheld in full under section 14.

Pages 53-54 — An undated 2-page note by official #4 with content similar to Page 28. These pages are withheld in full under section 14.

Page 55 — A 1-page letter from official #10 to the doctor of a patient who was diagnosed with tuberculosis, outlining the steps that would be taken regarding the patient and the responsibilities of the doctor. The name and file number of the patient is withheld under section 14, and all other portions of this record, including a handwritten notation that the patient died of SARS, has been disclosed.

Page 56 — A "Lab Flow Sheet" prepared by official #10 outlining treatment details of a SARS patient. This page is withheld in full under section 14.

Page 57 — A Scarborough Grace Hospital record dated March 13, reflecting the results of an x-ray taken of a patient. This page is withheld in full under section 14.

Pages 58-60 — A fax cover sheet dated March 11 (which has been disclosed) and two attached clinical assessments of a SARS patient sent to the patient's doctor, prepared by official #10. The name, other identifying information and clinical assessment details on pages 59 and 60 are withheld under section 14, and the rest of the pages have been disclosed.

Pages 61-62 — A fax cover sheet, and attached letter similar to Page 55 sent by official #10 to a different doctor of a patient who was diagnosed with tuberculosis. The name of the doctor and the patient, as well as the

patient's file number, are withheld under section 14, and all other portions of the two pages have been disclosed.

Page 63 — An undated "Notification of New Active or Reactivated Tuberculosis Case" form completed by official #10 for a SARS patient. The name and other identifying information of the patient is withheld and the rest of the form has been disclosed.

Page 64 — A 1-page form titled "Contact Summary Results Of Index Case" concerning a SARS patient, prepared by official #10. The name and file number of the patient, as well as the names of the patient's family members have been withheld under section 14, as has a comment regarding one of the family members. The rest of the form has been disclosed.

Pages 65-66 — A 2-page City Public Health Department form titled "Progress Notes" with handwritten notes made by a Manager, Communicable Diseases (official #12) of activities relating to a SARS patient that took place on March 13. These pages are withheld in full under section 14.

Page 67 — A different version of Page 64, dated March 13, prepared by official #12. Unlike Page 64, Page 67 is withheld in full under section 14.

Pages 68-79 — A series of handwritten notes, dated March 13-14, made by official #12, outlining activities undertaken by her on those dates. The notes include the names and other identifying information of various SARS patients and family members, as well as the content of discussions that took place with other public health and hospital officials during this 2-day period. These pages are withheld in full under section 14.

Pages 80-88 — A fax cover sheet dated March 14, from an Environmental Health Officer, Communicable Diseases (official #13) to another official attaching a series of completed "Progress Note" forms describing interviews and other investigative steps taken by the author on March 14. The cover sheet (Page 80) has been disclosed, with the exception of the author's home telephone number, and the forms have been withheld in full under section 14.

Pages 89-92 — A series of "Contact Tracing" handwritten notes, dated March 14, made by official #12, outlining interviews and other steps taken by her on that date. The notes are similar in nature to Pages 81-88 and are withheld in full under section 14.

Pages 93-101 — Handwritten notes made by official #12 of a teleconference that took place on March 14. Pages 96, 99 and 101 have been disclosed. The names, other identifying information and clinical details of various

SARS patients on the other pages are withheld under section 14, and the rest of the notes have been disclosed. One portion of Page 100 is withheld under section 7.

Pages 102-109 A series of undated "Contract Tracing" handwritten notes made by official #12, which are similar in nature to Pages 89-92 and withheld in full under section 14.

Pages 110-133 A series of handwritten notes describing actions and activities undertaken by official #12 during the time frame covered by the appellant's request. The notes describe interviews and other investigative steps taken by official #12. The notes also reflect the content of discussions and meetings that took place with other public heath and hospital officials. Pages 119, 123, 126 and 128 as well as much of the information on the other pages have been disclosed. The undisclosed portions contain the names and other identifying information of SARS patients and their family members as well as small portions of other information, all of which is withheld under section 14. Portions of page 120 have also been withheld under section 7.

Pages 134-197 A series of handwritten notes and email messages describing actions and activities undertaken by official #2 (the Associate Medical Office of Health and Director, Communicable Disease Control), during the time frame covered by the appellant's request. The notes are similar in nature to Pages 110-133, but Pages 134-197 are withheld in their entirety under section 14. The City claims sections 7 and 9 as alternative exemption claims for Pages 134-197.

Pages 198-235 These are the 38 pages of notes identified during the course of this inquiry. They are a series of handwritten notes describing actions and activities undertaken by official #3 (the Associate Medical Office of Health, Emergency Services Unit) during the time frame covered by the appellant's request. The notes are similar in nature to Pages 110-133 and 134-197 and are withheld in their entirety under section 14.

No responsive records authored by official #1 (the Chief Medical Office of Health) were located.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The City claims section 7 of the *Act* as the basis for denying access to portions of Pages 100 and 120, and Pages 134-197 in their entirety.

General principles

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

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

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations

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

  [Orders P-1037, P-1631, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines)* v. *Ontario (Assistant Information and Privacy Commissioner)* (January 19, 2004), Toronto Doc. 433/02 (Div. Ct.), leave to appeal granted, (June 30, 2004), Doc. M30913 (C.A.)].

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

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

  [Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines).*

Representations

The City makes separate submissions for the various pages:

Page 100 — The severed words indicate the advice or recommendation with respect to an autopsy to be performed on a SARS victim. Although the severed information is brief it must be viewed in the context of the emergency that existed at the time. There was not time for detailed and lengthy consideration of advice or recommendations, decisions with respect to the life-threatening outbreak had to be made very quickly.

Page 120 — All the information on page 120 for which section 7 has been claimed relates to follow-up on the contacts that had been made on various victims and health care providers. Again, although the information it is just jotted down it still reflects advice and recommendations as well as a course of action to be followed by the health care professionals in their attempts to stop the spread of SARS. Some of the information is also personal.

Pages 134-197 — These pages consist of emails and personal notes of teleconferences and other meetings. As stated above, although these records might not contain advice or recommendations as considered in the traditional or more formal sense, they did constitute recommended courses of action in the outbreak.

The time period identified by the appellant is the very early stages of the outbreak when health officials were dealing with not only a frightening new illness that seemed to spread to healthcare providers despite the use of standard precautions, they were also dealing with a fearful public and an anxious media.

Thus, for example, an email and response from a doctor in Hong Kong that is forwarded by a consultant expert to City staff to inform them of the type of precautions to take, although not in the standard form, does contain advice and recommendations for a course of action in order to prevent the disease from spreading farther. The markings on the record indicate that it has been passed on to other staff to provide them with advice on how to address certain issues related to the outbreak.

The City points to order PO-2028 in support of its position that the format of a particular record is not determinative of whether it contains "advice" for the purposes of section 7:

> In reviewing records produced during the early days of the SARS outbreak, the usual format for government advice such as a policy or options paper will not be found. As the record demonstrates, staff were operating on a minute-by-minute, hour-by-hour, day-by-day review of information. Much of the discussion and decision-making took place during the course of teleconferences where advice or recommendations may be recorded in the form of a brief notation. Order PO-2028 recognizes that while the format of advice and recommendations may be frequently be standard and recognizable, in some cases it is not.
>
> The City submits that the portions of the records for which section 7 has been claimed are exactly the kind of deliberations that section 7 was enacted to protect. Persons employed in the public service must be able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.
>
> In the case of the SARS outbreak, the deliberative process of government decision making and policy making was truncated in order to respond to the crisis. The SARS crisis called for immediate action. To stop and take the time to produce the standard formal documents that would reflect the standard conception of advice or recommendations might have jeopardized the health of the very citizens the government employees were working to protect.
>
> The exemption seeks to preserve the decision maker or policy maker's ability to take actions and make decision without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)]. The City submits that to disclose the contents of the record would inhibit future decision or policymakers' ability to take action and make decisions in a crisis without the chilling effect of potential disclosure.
>
> As stated in Order PO-2028, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing "mere information", then section 7 applies.
>
> The City submits that because of the nature of the record and the requirement for a truncated process, applying this type of analysis to the records at issue is virtually impossible. These are not formal policy papers, but they do reflect the

> decision making process that section 7 was enacted to protect however briefly it is transcribed.

The appellant submits that section 7 is being applied too liberally:

> The City, it appears, would have any discussion between employees to be covered by the advice to government exemption. I obviously cannot comment on the information at issue, since I have not seen it.
>
> What I gather from the City's brief description is that, during the days of the SARS crisis, officials were continually discussing different courses of action. Ideas were bandied about. Some were followed. I would describe this as brainstorming, not the classic case of a government official providing two well thought out courses of action.
>
> In [a named newspaper's] work, and that of the ongoing SARS enquiry, it has become clear that there was a lack of leadership in the SARS crisis. I believe that examining the type of advice (who was giving it, what they were saying) will go a long way to finding out what went wrong in SARS.
>
> As to the factual information, I would ask the Commission to rigorously examine the records to determine if the information meets that test. I unfortunately, cannot do that.

Analysis and Findings

Page 100

Two words have been withheld from Page 100 under section 7. One is the name of a SARS patient, which the appellant has removed from the scope of his request; and the other is a reference to this individual's involvement with the Coroner's Office, using a word that is neutral and factual. Although the City's representations maintain that advice with respect to an autopsy can be inferred from these two words, no such inference is reasonable or even possible. The withheld information does not suggest a course of action that may be accepted or rejected by the author of the notes or anyone else. The two words are simply a factual statement regarding a SARS patient and do not qualify for exemption under section 7 of the *Act*. Because the appellant has removed the names of SARS patients from the scope of his request, only the second word should be disclosed.

Page 120

Page 120 is contained among a series of handwritten notes describing actions and activities undertaken by official #12 during the March 8-18 time period. Much of the information in these notes has already been disclosed to the appellant, with the names and other identifying information of SARS patients and certain family members withheld under section 14. It is not clear from the content of Page 120 why certain small portions have been withheld under section

7, nor are the City's representations sufficient to establish the requirements of this exemption claim. No advice or recommendations are contained in the identified portions, nor can advice or recommendations be inferred in the circumstances. It would appear to me, although this is not supported by the City's representations, that the City intended to claim section 14 but identified section 7 in error. In any event, the portions withheld under section 7 clearly do not qualify for this exemption. Because section 14 is a mandatory exemption, I will consider these portions of Page 120 in my section 14 discussion.

Pages 134-197

The City has been inconsistent in its treatment of the handwritten notes made by the various public health officials involved in the SARS crisis. In the case of official #12 (Pages 110-133), the City has undertaken a careful review of the content of the notes and disclosed large portions of them to the appellant. With the exception of Page 120, which appears to have been an error, the only exemption relied on by the City in order to withhold portions of Pages 110-133 is section 14. As far as the handwritten notes of officials #2 and #3 are concerned, the City takes a broad-brush approach, claiming that all of these records qualify for exemption under section 14, and that the notes made by official #2 also qualify for exemption under section 7 and 9 of the *Act*. The City's approach is further complicated by the fact that officials #2 and #3 are not even treated consistently. Despite the similarity in their roles and responsibilities and the fact that the content of the various notes relates to similar and in some cases overlapping information, sections 7 and 9 have not been claimed for the notes of official #3. This inconsistency erodes the credibility of the City's position, particularly as it relates to the application of sections 7 and 9.

Clearly, large portions of Pages 134-197 do not contain nor would they reveal any advice or recommendations, as those terms have been defined by this office and applied in past orders. Having carefully reviewed the contents of these pages and compared them to the notes of official #12, I find no basis on which to distinguish the two sets of notes as it relates to the application of section 7.

The City does not argue that official #12's notes could have qualified for exemption under section 7, but were disclosed through the exercise of discretion. However, even if that argument was advanced, I find that no portions of official #2's notes fall within the scope of section 7 in any event.

I concur with the City's position that the notes do not contain advice in the traditional sense. I also agree that, applying the reasoning from order PO-2028, I must look to the content and not the format of the records in order to determine whether any of them contain advice or recommendations.

Having done so, I find that no advice is either stated in or can be inferred from any of official #2's notes. For the most part, the notes consist of a handwritten chronology of actions and activities undertaken by official #2 during the early stages of the SARS crisis, including meetings with other public health officials, discussions on how to deal with the various aspects of managing the emerging crisis, and steps being taken to control the spread of the illness. In my view, most of the records contain factual information, and in some instances analytical or

evaluative information relating to the work of the crisis management team, all of which are categories of information that do not qualify for exemption under section 7.

As far as the example identified in the City's representations is concerned, it refers to an email chain comprising Pages 134 and 135. In it, a doctor from Canada sends an email on March 18 to a doctor dealing with the SARS crisis in Hong Kong, posing a number of questions. The doctor responds on the same day with answers to the questions, and the email chain is then forwarded to officials #2 and #3. Having carefully reviewed these questions and answers, in my view, they are factual in nature. The Canadian official is attempting to obtain information from her Hong Kong counterpart in order to help assess the emerging situation in Toronto. The questions are factual, as are the answers. They convey information reflecting the Hong Kong experience, but offer no advice, which, in my view, is not surprising given the timing of the communication and the fact that health care officials throughout the world were all still gathering information about the crisis and not necessarily in a position to advise each other with confidence.

Accordingly, while I accept that information was being gathered and reviewed on an hour-by-hour basis, and that care must be exercised in determining whether advice could be inferred from handwritten notes gathered in this time-sensitive manner, I find that no advice or recommendations are contained in or can be inferred from official #2's notes, as those terms have been defined by this office.

I also do not accept the City's position that disclosing these notes now could reasonably be expected to compromise the free and frank exchange of information among public servants in the deliberative processes of government. The notes were gathered by health care professionals during the management of a serious health crisis and I am not persuaded that concerns regarding their subsequent disclosure in response to a request under the *Act* could reasonably be expected to cause a change in record keeping practices in future similar situations. In my view, the important public health and safety considerations inherent in the proper and thorough recording of information gathered by public health professionals in the discharge of their professional responsibilities would clearly outweigh any other considerations, particularly in a health care crisis as serious as the one official #2 was involved with during March of 2003.

In summary, I find that none of the information withheld by the City under section 7 qualifies for exemption under this section of the *Act*.

RELATIONS WITH OTHER GOVERNMENTS

The City identifies section 9 of the *Act* as one basis for denying access to Pages 134-197.

General principles

Section 9(1) read:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

(a) the Government of Canada;

(b) the Government of Ontario or the government of a province or territory in Canada;

(c) the government of a foreign country or state;

(d) an agency of a government referred to in clause (a), (b) or (c);

The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912].

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].

The City submits:

> The records for which section 9 has been claimed reflect a series of teleconferences between City Public Health officials and staff of both the provincial Ministry of Health and Long Term Care and Health Canada. During these conferences, the discussions covered many issues related to the outbreak such as: symptoms, contact, involvement of other agencies, SARS cases in other areas of the country, communication, hotline, media/press conference, protection against further spread amongst the population and healthcare workers, staffing, language issues, funding, isolation, testing, strain on the system.
>
> Because of the situation in which the participants of the teleconference were operating, it is reasonable to conclude that the information was implicitly supplied in confidence. Although there is nothing on the record that indicates that the information from other governments was received in confidence, the City submits that its arguments with respect to section 7 and the nature of the records at issue and the context in which they were created must be taken into consideration.
>
> The officials who were working on this crisis were aware of the need for a free and frank flow of information in order to address the situation.

> As discussed under section 7, information was not being provided pursuant to a formal process, in ordinary circumstances the records might be a formal written record, clearly marked confidential. In the crisis, the record consists of notes of a teleconference. There still is, however, an implied stipulation of confidentiality, because of the nature of the information and the threat to public health posed by the outbreak.

The appellant submits:

> The SARS crisis has been held out (by the City and other governments) as a glowing example of cooperation between all levels of government in Canada, and governments internationally. Advice was shared routinely and publicly. For the City to hide behind this exemption is odd. The City admits there is nothing in the record to show this information was provided in confidence. The City, in its representations, relies on what I submit is conjecture. For example, they say there is "an implied stipulation of confidentiality, because of the nature of the information and the threat to public health posed by the outbreak." The City is saying, I gather, that the threat to public health means the information must be kept from the public after the fact. This, I submit, is not a valid argument and one that devalues the role of the public in the democratic process.

Analysis and Findings

As outlined in my analysis of section 7 for Pages 134-197, the City's inconsistent treatment of these records as compared to similar notes taken by officials #12 and #3 erodes the credibility of the City's position on the application of section 9 to official #2's notes. Officials #12 and #3 were involved in many of the same discussions and meetings as official #2, and portions of Pages 110-133, which have already been disclosed to the appellant, would appear to reveal information that the City is purporting to protect by claiming section 9 for Pages 134-197.

Again, even if I were to accept that the City disclosed official #12's notes through the exercise of discretion, which has not been argued, I would nonetheless find that official #2's notes do not qualify for exemption under section 9 of the *Act*.

In a narrow sense, I find that the City has failed to provide detailed and convincing evidence that the information conveyed to official #2 by representatives of the provincial and federal governments, and recorded in her notes, was provided with a reasonably held expectation that they would be treated confidentially by City public health officials. On the contrary, it would seem reasonable in the circumstances that these other public health officials would expect their municipal counterparts to use the information as deemed appropriate in their front-line management of this serious health crisis.

However, I also find that the section 9 exemption claim was not intended to protect records of this nature from disclosure under the *Act*.

The rationale for the section 9 exemption (as well as the section 15(b) equivalent found in the provincial *Freedom of Information and Protection of Privacy Act*) is discussed in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission), at pages 306-7:

> ... It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this basis from another government. Failure to do so might result in the unwillingness of other governments to supply information that would be of assistance to the government of Ontario in the conduct of public affairs. An illustration may be useful. It is possible to conceive of a situation in which environmental studies (conducted by a neighbouring province) would be of significant interest to the government of Ontario. If the government of the neighbouring province had, for reasons of its own, determined that it would not release the information to the public, it might be unwilling to share this information with the Ontario government unless it could be assured that access to the document could not be secured under the provisions of Ontario's freedom of information law. A study of this kind would not be protected under any of the other exemptions ... and accordingly, could only be protected on the basis of an exemption permitting the government of Ontario to honour such understandings of confidentiality. ....
>
> …
>
> We recommend that the freedom of information law contain a provision exempting documents whose disclosure would divulge any information or matter communicated in confidence by or on behalf of the government of another jurisdiction to the government of the province of Ontario or a person receiving a communication on behalf of the government of Ontario.

The general thrust of the provision proposed by the Williams Commission was to ensure that the governments would obtain access to records that other governments might be unwilling to provide without having a protection from disclosure. In discussing section 15 of the provincial *Act* while that statute was being debated in the Legislature, Attorney General Ian Scott stated:

> This exemption is designed to protect intergovernmental relations between the provinces or with the feds or with international organizations. In substance, when those agencies of other governments provide information to us in confidence, we will be able to say, "We are empowered to take it in confidence," and not have to say, "No, we cannot take it in confidence," and thereby run the risk that we will not get it.

In my view, the notes taken by official #2 during the early stages of managing the SARS crisis are not consistent with the policy intent of section 9 and, for this reason as well as the lack of detailed and convincing evidence, do not fall within the scope of this exemption claim.

The discussions taking place during this period, which involved federal and provincial health care professionals as well as the City's public health officials were not, in my view, "government to government" discussions. Official #2 and her colleagues were engaged in collaborative efforts to come to grips with a serious heath crisis. Discussions took place among health care officials employed by various levels of government in an effort to take advantage of the best professional expertise available. Although, in a broad sense, the individuals represented the governments that employed them, it is clear from the content of the notes made by officials #12, #2 and #3 that information was being exchanged from the perspective of health care management. Should a similar health care crisis arise in future, there is no reason to conclude that the provincial or federal health care professionals would hesitate to provide information to the City's public health officials based on concern that their comments could be accessible to the public under the *Act*. Consistent with my findings under section 7, in my view, the important public health and safety considerations inherent in the full and frank exchange of information by public health professionals in the discharge of their professional responsibilities would clearly outweigh any other considerations, particularly in a health care crisis and serious as the one involving official #2 during March of 2003.

Accordingly, I find that none of the information contained on Pages 134-197 qualifies for exemption under section 9 of the *Act*.

PERSONAL INFORMATION

The City relies on the section 14 exemption to deny access to all of the withheld records or portions of records, with the exception of the two-word phrase on Page 100 and certain identified severances on Page 120, which were denied on the basis of section 7. Because the section 14 exemption is mandatory, I will consider its potential application to all withheld portions of records, including Pages 100 and 120.

General principles

In order for a record to qualify for exemption under section 14, the records must contain "personal information", as defined in section 2(1) of the *Act*. Under this definition, personal information means recorded information about an "identifiable individual", including information relating to race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual (paragraph (a)); the individual's medical history (paragraph (b)); the address, telephone number or blood type (paragraph (c)); the views and opinions of another individual about the individual (paragraph (g)); or 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)).

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Information relating to an individual in a professional, official or business capacity does not normally qualify as personal information [Orders P-257, P-427, P-1412, P-1621]. However, this type of information may qualify as personal information if it reveals something of a personal nature about the individual [Orders P- 1409, R-980015, PO-2225].

Scope of the appellant's request: the question of identifiability

Positions of the parties

The appellant makes it clear in his request letter that he is not seeking access to the names of any SARS patients, or their "birthdates or other identifying information". He reiterates this point in his representations, where he states: "I understand that names, dates of birth, telephone numbers and other clear identifiers are personal information and should not be released".

While the appellant and the City appear to agree that certain types of personal information that might be described as information *directly* relating to SARS patients falls outside the scope of the request (e.g. names, birthdates), the parties do not appear to agree on what the appellant means by the term "other identifying information", and whether portions of the records that might not appear to contain personal information of patients could, if disclosed, lead to the identification of these individuals.

The appellant submits:

> … For example, if one of the records describes the symptoms of patients and the public health response to those symptoms, I argue that I am entitled to that information. If the patient is named, simply remove the name and any other identifying elements. I do not consider symptoms to be identifying, since SARS symptoms were similar in many patients.

The City takes a broader approach:

> The City further submits that all the severed information found in the records would be identifiable as about the individuals to whom it relates because of the extensive media coverage of the SARS outbreak, not only in the traditional media but also on a large number of SARS-related internet sites and, therefore, this information is also about identifiable individuals and falls under the definition of personal information.
>
> In most cases the information is medical in the strictest sense of the word, i.e. symptoms, treatment, in other situations, the information is about the travel or exposure and contact history of the individual.
>
> In preparation for making these submissions, the City conducted a search on the internet and found that the amount of personal information available, including names, about the victims and other individuals involved in the SARS crisis, such as health care workers is quite extensive.

> For this reason, the City submits that information that might in ordinary circumstances, be considered to have been rendered anonymous by having traditional identifiers removed, has not been anonymized in the context of the SARS outbreak.
>
> Without limiting the generality of its representations on this point, the City submits the following example of identifying information.
>
> On page 1, the severed information describes the patient symptoms and later goes on to identify this individual in relation to another case of suspected SARS. The information provided about the other individual would identify him/her to anyone familiar with the reported details of the SARS outbreak. Therefore, the City submits that although the patient's name is not used, the information is about an identifiable individual.

In response, the appellant submits:

> The City has taken an interesting approach in its representations. They say they would have released much more information if the media had not found out and published the identities of the patients. …
>
> …
>
> I strongly argue that the City cannot withhold information because I might be able to identify patients. I am not asking for the names, but I am asking for the information public health was presented with, and the course of action they adopted. I think that is key to understanding what happened during Toronto's SARS crisis.

The appellant also submits that the City has itself made public the type of information it is now seeking to withhold under section 14:

> … For example, [official #3] has been a co-author of at least three medical journal articles in Canada and the US that contain a wealth of intimate information regarding patients. Apparently, she is allowed to publish this information, while we are not (according to the City's representations).
>
> For example (from an August 19 article printed in the Canadian Medical Journal detailing the initial outbreak in Toronto. [Official #3] is a co-author):
>
> > *Case C became ill on Mar. 13 with symptoms of a myocardial infarction and was brought to the index hospital by EMS personnel. It was unknown that he had been in contact with case A on Mar. 7, and thus it was not recognized that he had SARS. As a result, he was not isolated, and other precautions were not used.*

> *He was admitted to the coronary care unit (CCU) for 3 days and then transferred to another hospital for renal dialysis. He remained in the other hospital until his death, on Mar. 29. Subsequent transmission of SARS occurred within that hospital. Case C's wife became ill on Mar. 26. At the index hospital, case C transmitted SARS to 1 patient in the emergency department, 3 emergency department staff, 1 housekeeper who worked in the emergency department while case C was there, 1 physician, 2 hospital technologists, 2 CCU patients and 7 CCU staff. One of the EMS paramedics who transported case C to the index hospital also became ill. Further transmission then occurred from ill staff at the index hospital to 6 of their family members, 1 patient, 1 medical clinic staff and 1 other nurse in the emergency department.*

As you can see from this excerpt, we learn a great deal about the condition of the patients and the hospital's response. His age and his wife's age, plus other medical information, are revealed in other medical journal articles.

The City draws a distinction between the information that official #3 has proactively disclosed and the information it seeks to protect in this appeal:

> [Official #3] states that all the information that has been published in scientific journals is either non-nominal and/or aggregate information and she would have no objections in providing the appellant with copies of all the scientific manuscripts that have been published by Toronto Public Health. On the other hand, the records at issue are her "clinical notes" that "detailed individual case information that is nominal and confidential" and that under no circumstances would she publish any of this information as "that would be a critical breach of my duty to protect the confidentiality of cases reported to public health."

Analysis and findings

Several records contain the names of SARS patients, as well as addresses, telephone numbers, birth dates and the family status of these individuals. It is clear that the appellant has removed information fitting this description (what I will refer to as "direct personal information") from the scope of his request, and I will not consider it further in this order. I have highlighted this information in pink on the copy of the records provided to the City with this order.

As far as the other portions of the records are concerned, their characterization turns on the question of identifiability.

In Order P-230, former Commissioner Tom Wright set out the basic requirements of identifiability as follows:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

This office has applied Commissioner Wright's interpretation in a number of orders. For example, in Order P-644, Adjudicator Anita Fineberg considered the Ministry of Health's policy for dealing "small cell counts". In that order the information at issue was the classification of physicians practising certain specialities who also performed electrolysis. In this regard, the Ministry made the following submissions:

> Physicians refer their patients to specialists and the fact that certain [specialists] also performed electrolysis was widely known. In addition, this information would be known to patients the specialist has treated. Therefore, these specialists can be identified in the public domain. The fact that there are so few in each speciality performing electrolysis would reveal or infer financial information about the individual specialists and must be severed under section 21 of the [equivalent to section 14 in the provincial *Freedom of Information and Protection of Privacy Act*] *Act*.

Adjudicator Fineberg concluded that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about identifiable individuals.

In another appeal (Order P-1137), however, which again dealt with the Ministry of Health's "small cell count" policy, Adjudicator Fineberg took a different approach to the issue:

> In Order P-230, Commissioner Tom Wright stated:
>
> > If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.
>
> Based on the submissions of the Ministry and adopting the test set out above, I concluded in Order P-644 that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals. Accordingly, I concluded that the information at issue was personal information [emphasis in original].
>
> In this appeal, the Ministry argues that the numbers constitute personal information solely on the basis that they are in groups of less than five. Unlike the information provided in Order P-644, the Ministry has not indicated how disclosure of the fact that there was one haemophiliac in a particular province

> who contracted HIV and who made a claim could possibly result in the identification of that individual. For example, for one of the provinces, the number of haemophiliac HIV infected individuals is the same as the number of such individuals who have filed a claim against the province. This number has been disclosed because it is greater than five.
>
> In my view, disclosure of the information in Record 135 could not lead to a reasonable expectation that the individuals could be identified. Accordingly, I find that this document does not contain the personal information of any identifiable individuals. Therefore, section 21 [of the provincial *Act*] has no application. Record 135 should be disclosed to the appellant in its entirety.

In Order P-1389, Adjudicator Donald Hale dealt with another appeal involving the Ministry of Health. In that case the information at issue consisted of the total billing amounts relating to the ten highest billing general practitioners in Toronto. In considering the Ministry of Health's representations on the issue of whether the requested information was about "identifiable individuals", Adjudicator Hale stated:

> The Ministry further submits that there is a strong possibility that there exists some external information in the public domain or in the general practitioner community which could be linked to the information at issue to make a connection between a particular billing amount in the record and the practitioner associated with that billing.
>
> …
>
> In my view, the Ministry's arguments rely on the unproven possibility that there **may** exist a belief or knowledge of the type described. I have not been provided with any substantive evidence that information exists outside the Ministry which could be used to connect the dollar amounts to specific doctors. The scenario described by the Ministry is, in my view, too hypothetical and remote to persuade me that individual practitioners could actually be identified from the dollar amounts contained in the record. I find, therefore, that the information at issue is not about an **identifiable** individual and does not, therefore, meet the definition of "personal information" contained in section 2(1) of the *Act* [emphasis in original].

[See also Order PO-2087]

The Divisional Court has also considered the issue of "identifiability" as it applies to the definition of personal information. In its review upholding Order PO-1880, the Divisional Court stated that in order to establish that information is identifiable, an institution must provide submissions establishing a nexus connecting the record, or any other information, with an individual. In the Court's view, any connection between a record and an individual, in the absence of evidence, is "merely speculative" [see *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2001), 154 O.A.C. 97 (Div. Ct.), upheld by the Court of Appeal [2002] O.J. No. 4300 (C.A.)].

The Divisional Court elaborates:

> The test [in Order P-230] then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the records. See Order P-316 and Order P-651.

Applying the reasoning from these past orders and the direction of the Court, I find that if the City can establish that disclosing what it describes as "clinical tests, symptoms or treatment details, information about travel, or about exposure and contact history of a SARS patient", even when the names, addresses and other direct personal information of these patients have been severed, could reasonably be expected to identify these patients, when combined with information from sources otherwise available, then the information is "identifiable". Information that meets this description is excluded from the scope of the appellant's request as "other identifying information".

Having carefully reviewed the various records in this appeal, I make the following findings:

1. Only a relatively small proportion of records contain information relating to clinical tests, symptoms or the treatment of the specific SARS patients whose direct personal information has been withheld. While, for the most part, the City has not provided the appellant with records or portions of records outlining symptom and treatment details for these patients, some details have been released (e.g. reference to clinical status of patient and certain treatment details on Page 18; reference to symptoms on Page 3; reference to test results on Page 4). Given the particular circumstances in which the records in this appeal were created, and because it is acknowledged by both parties that information about these early SARS patients is available from other public sources, I find that disclosing specific clinical test results, symptoms and treatment details of these patients (other than the type of information the City has already disclosed to the appellant), even when direct personal identifiers have been removed, could reasonably be expected to identify the patients. As such, in my view, these clinical test results, symptoms and treatment details of specific SARS patients is accurately described as "other identifying information" and therefore falls outside the scope of the appellant's request.

2. Other records contain treatment details or symptoms relating to SARS generally or to patients who are not otherwise identified directly in the records. I find that there is insufficient evidence to establish a nexus connecting this information to any specific SARS patient, and therefore disclosing the portions of records containing this type of information would not identify any individual and these portions fall within the scope of the appellant's request.

3. References to SARS patient identification numbers could reasonably be expected to reveal the identity of the individual patients. As such, in my view, these numbers are accurately described as "other identifying information" and therefore fall outside the scope of the appellant's request.

4. One SARS patient travelled to the United States during the early days of the crisis, and a number of records make reference to these travel details. This information is widely known, and although travel details have been withheld in a number of instances in this appeal, in other cases (e.g. Page 8) the fact that the patient travelled to this location is included among the portions of records already disclosed to the appellant. In the circumstances, I am not prepared to accept that disclosing the same or similar related information in other records could reasonably be expected to render this patient identifiable for the purposes of this appeal.

5. The only other travel-related information consists of information concerning an early-stage SARS patient and family member, and the possible linkage between their travel history and the introduction of SARS into Canada. This information is widely known, and although it has been withheld in a number of instances in this appeal, in other cases (e.g. Page 7) the fact that the patient travelled to this location is included among the portions of records already disclosed to the appellant. In the circumstances, I am not prepared to accept that disclosing the same or similar related information in other records could reasonably be expected to render this patient identifiable for the purposes of this appeal.

6. Some records contain contact tracking histories relating to certain SARS patients. I have already determined that the direct personal information of the various patients that is reflected in the histories could reasonably be expected to identify these patients and therefore falls outside the scope of the appellant's request. This would include the names of the patients themselves, as well as the family relationship between the patients and other individuals contacted by public health officials during the time period of the appellant's request. Unlike other information at issue in this appeal such as symptoms and treatment of specific SARS patients, there is no evidence to suggest that contact tracking activities undertaken by public health officials is otherwise publicly available and, once the direct personal information has been severed from these records, I am not persuaded that there is a reasonable basis for concluding that the remaining information would identify any SARS patients. Accordingly, I find that these contact histories, severed to remove direct personal information of SARS patients, falls within the scope of the appellant's request.

7. Many withheld records, particularly those recorded by officials #2, #3 and #12, relate to their activities in managing the early days of the SARS crisis. These handwritten notes (and in a few instances email messages) deal with issues such as worldwide reporting on the SARS crisis; community outreach efforts; communications issues, including establishing a SARS Hotline; media relations;

> and co-ordinating efforts among various public bodies responsible for administering the health crisis. With some notable exceptions, such as instances where case-specific status reports on identified SARS patients are reflected in the notes, the notes make no reference to individual SARS patients, nor do I find it reasonable to conclude that disclosing these notes could lead to the identification of any patients. Therefore, all of the information that fits this description falls within the scope of the appellant's request.

In summary, for the reasons outlined above, I find that the information described in paragraphs 1 and 3, and the described information in paragraph 7, satisfies the test of identifiability and therefore qualifies as "other identifying information", which the appellant has removed from the scope of his request. I have highlighted this information in pink on the copy of the records provided to the City with this order.

Information about doctors and other officials

Positions of the parties

The City claims that the names of staff and other professionals who had contact with SARS patients qualifies as the "personal information" of these individuals:

> In severing the documents, the City has disclosed to the appellant the names of staff and other professionals except where they have been identified as having been in contact with a confirmed or potential case of SARS.
>
> The City submits that when the individual by virtue of his/her exposure to the virus goes from being an attending professional to another potential case of SARS, the individual's information appears in the record by virtue of his/her personal, not professional capacity.
>
> This approach was applied by [the Assistant Commissioner] recently in Order PO-2224. In that order, the records relating to an individual who was an employee were found to contain information about the health status of an identifiable employee as set out in paragraph (b) of the definition of personal information. Paragraph (b) states that "information relating to the …medical … history of [an] individual" falls within the scope of the definition.
>
> The order found that the information did not relate to the discharge of the employee's professional responsibilities, and clearly related to the individual in a personal capacity.

The appellant disagrees, and submits:

> The City contends that information relating to an official who comes in contact with a SARS case is medical information, because the official becomes a person at risk of having the virus. They use the example of a doctor or nurse coming in

> contact with a SARS case as an example of something that would be exempt from release because the information would now be "medical". I submit this is wrong. This is exactly the type of information that has to be released if I am to scrutinize the level of precautions taken by professionals.

Analysis and findings

Previous decisions of this office have drawn a distinction between an individual's personal and professional capacity. As stated earlier in this order, information associated with a person in a professional capacity is not generally 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 this office's 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.

I followed this approach in Order PO-2187, which involved the names of individuals employed in various Independent Health Facilities (IHFs) assessed by the Ministry of Health and Long-Term Care:

> 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 [in the provincial *Act*] can only apply to "personal information", as defined in section 2(1), this exemption has no application in these appeals.

The Ministry of Health complied with Order PO-2187 and disclosed the names of the various employees. Some issues from the appeals that led to Order PO-2187 were not addressed in that order, but were subsequently dealt with in Order PO-2224. The City relied on this second order in support of its position in this appeal.

A small number of records at issue in Order PO-2224 contained a comment about one of the IHF employees that related to his health status. Unlike the other records that did not contain "personal information" for reasons discussed in Orders PO-2187 and PO-2224, I made the following findings concerning the health status comment:

> 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.

The ways in which professional and employment-related information were treated in Orders PO-2187 and PO-2224 is instructive in determining whether the information of professional staff and health care officials qualifies as "personal information" in this appeal.

For the most part, I find that the names and other related information such as the addresses and business phone numbers of physicians relates to their professional responsibilities and does not qualify as "personal information". Although these individuals are identified by name, in my view, the information associated with their names is not "about" them in any personal sense, but about their professional or employment-related job functions, similar to the staff members whose information did not qualify as "personal information" in Order PO-2187. I do not accept the City's position that "when the individual by virtue of his/her exposure to the virus goes from being an attending professional to another potential case of SARS, the individual's information appears in the record by virtue of his/her personal, not professional capacity". While I accept that information can change its nature depending on the context in which it appears, I am not persuaded that the mere fact that a health care professional is identified as having in some way

come in touch with a SARS patient is sufficient to change what is inherently a professional relationship into one that has somehow acquired a personal dimension. In my view, more evidence is required in order to establish this change in status, and the City has failed to provide it for most of the professional staff identified in the records here.

That being said, the records themselves do provide evidence that some health care professionals themselves became victims of the disease. One physician in particular, whose name and other identifying information appears in a number of records, clearly became a SARS patient during the time period of the appellant's request and, in my view, information about this physician qualifies as her "personal information". Some records also contain information that, if disclosed, could identify this physician, and I find this information meets the test of identifiability for the same reasons as outlined earlier in this order for other SARS patients.

In a few instances (e.g. Page 46), there are indications on the face of the records that a health care professional is characterized as symptomatic. Although there is nothing to indicate that these individuals became SARS patients, erring on the side of caution, I find that the description of these individuals as symptomatic is "personal" not "professional", and therefore meets the test of identifiability.

In summary, I find that the names and other identifying information of City staff and other health care professionals appearing in the records is information about them in a professional capacity and does not fall within the scope of the definition of "personal information". Information that fits this description falls within the scope of the appellant's request.

On the other hand, information that would directly or indirectly identify health care professionals as persons who themselves became patients or displayed symptoms of SARS, as evidenced by the content of the records themselves, is properly considered to be information about these individuals in a personal rather than a professional capacity. This type of information meets the requirements of identifiability, for the same reasons as other SARS patients, and falls outside the scope of the appellant's request. I have highlighted this information in green on the copy of the records provided to the City with this order.

All other information

Some records identify the home, pager and cell telephone numbers of City staff and other identifiable individuals. The appellant's request cannot reasonably be interpreted as including this type of information, and I find that it falls outside the scope of his request. I have highlighted this information in green on the copy of the records provided to the City with the order.

Certain information on pages 85-88 describes volunteer activities undertaken by certain individuals that are identified in the contact tracing activities of official #12. The appellant's request cannot reasonably be interpreted as including this type of information, and I find that it falls outside the scope of his request. I have highlighted this information in green on the copy of the records provided to the City with the order.

The names, addresses and phone numbers of citizens calling the SARS hotline are identified in the notes of official #2 (e.g. Pages 31 and 32). The appellant's request cannot reasonably be interpreted as including this type of information, and I find that it falls outside the scope of his request. I have highlighted this information in green on the copy of the records provided to the City with the order.

Certain records identify the employers of three different SARS patients. In the case of two patients, this information has been withheld; but in the other instance it has already been provided to the appellant (e.g. Page 112). In this latter case, it is not reasonable for me to withhold the same employment-related information where it appears elsewhere in the records. However, in the other two cases, I find that disclosing this employment-related information could reasonably be expected to identify the patients themselves, and I find it is excluded from the scope of the appellant's request for the same reasons as other information that meets the requirements of identifiability. In the case of one patient, information about co-workers should also be withheld for the same reasons. I have highlighted this information in green on the copy of the records provided to the City with this order.

Once the identifying information has been removed from the various records on the basis that it falls outside the scope of the appellant's request, I find that none of the remaining information meets the definition of "personal information". The remaining information consists primarily of an outline of the activities undertaken by City public health officials in gathering information, sharing it with other colleagues, and attempting to understand the breadth and complexity of the emerging health care crisis and how to manage it. The appellant has removed all identifiable information that could reasonably be described as clinical from the scope of his request. The information that remains, which was gathered and recorded by public health officials charged with managing the crisis rather than providing direct medical care to patients, is for the most part non-identifiable, and because the appellant has agreed to remove any identifiable information from the scope of this appeal, the remaining records can be disclosed without raising privacy concerns.

Because only "personal information" can qualify for exemption under section 14 of the *Act*, and because I have determined that no "personal information" is contained in any of the records that fall within the scope of the appellant's request, section 14 has no application in the circumstances of this appeal.

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 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the searches carried out were 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 an 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 [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.

Positions of the parties

In its representations, the City points out that it did not contact the requester or narrow the scope of the request because it was specific in terms of:

- Time frame of the records requested (March 8 to March 18, 2003);
- Individuals from whom records were requested (officials #1-#5); and
- The nature of the requested records (records of the developing SARS situation as well as individual records of the five named officials; reports, log entries, e-mail, diary records).

The City states that it did not paraphrase the request, but provided a copy to the Freedom of Information contact person in the Public Health Department, who in turn directed department staff to search for records in the files of the five identified officials and their support staff.

The City identifies nine public health officials who were contacted in this context, including the five officials named in the appellant's request, and states that "staff conducted searches in their offices as well as personal diaries; consulted with employees in Public Health and searched all areas where responsive records would have been kept."

The City also points out that follow-up searches were undertaken during mediation, but no additional records were located.

In response, the appellant submits:

> The high number of exemptions and severances make it difficult to determine if a proper search has been done. Very few of the records released have any heading or description. For example, I see no notes made by the Chief Medical Officer of Health, or at least none that are identified. If may be that a proper search was done, but that none of the substantive information was released. The only substantive document released is a summary that was mysteriously prepared by a junior official. I have not been told why it was prepared, or what it was based on. My belief is that it was prepared based on notes provides by the very official who should have turned over their original information.

> As the City notes in its representations, a requestor will rarely be able to point out which records have not been identified for release. I am in that position. What I ask [the Commissioner's office] to do is look carefully at the records that have been withheld and determine if the people I noted as holding records (e.g. [officials #1 and #2] etc.) have provided emails, day planner notes, computer notes etc. If they have not, I suggest they be asked to provide information. The City has no right to hold back information because it is embarrassing.

The City addresses the search issue in its reply representations, and submits:

> The appellant has asked for records generated in the very early weeks of the SARS crisis. A report on the performance of Toronto Public Health after the outbreak, if one exists, would not be identified in a search for records focusing on the time frame identified by the appellant. Some of the appellant's representations relate to the second outbreak of SARS which does not fall under the time period of his request.

The City also makes reference to the interim report of the Campbell Commission, which is looking into events associated with the SARS crisis, and submits:

> Although the responsive records do indicate that there was communication between hospitals and Toronto Public Health, the findings of the Campbell Commission may explain why the type or volume of records that the appellant anticipated do not exist, particularly for the time frame identified in his request.
>
> The City submits, and the Campbell Interim Report supports the City's original submissions, that during the time period covered by the request, City employees were working to identify and then contain the outbreak.

The City states that, after reviewing the appellant's representations, it again contacted the Public Health department, asking for a further search of its record holdings. It was in this context that the notes made by official #3 were identified and incorporated into this appeal.

Analysis and findings

The time frame of the appellant's request is clear. He also makes efforts to identify the type of records he is seeking: log reports, emails, briefing reports, status reports, and other documents related to the SARS crisis. However, quite understandably, the appellant is not in a position to describe precisely what records would be responsive to his request, since he has no knowledge of record-keeping practices in the City's Public Health department, nor does he know all of the public health officials who would have been involved with the SARS crisis at that time. He has some information, but as he makes clear in his request:

> Toronto Public Health has told me they keep a record of a developing situation (such as SARS) but I do not know the name of the record(s). I am therefore

> describing the record and also requesting individual records kept by [officials #1-#5].

On the basis of the wording of the request, the City concluded that it did not need to contact the appellant to clarify precisely what types of records he was looking for, or to ensure that all public health officials involved with the SARS crisis had been identified. In my view, the City's decision to proceed without contacting the appellant was not reasonable in the circumstances, and was not in compliance with the requirements of section 17(2), which states:

> If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

The wording of the appellant's request makes it clear that he has a general sense of the type of records he is looking for, and some idea of which public health officials would likely have been involved in documenting the SARS crisis during the time period of his request. However, it is reasonable to conclude from the wording of the request that the appellant is, in essence, looking for whatever records were produced during the narrow time period by whoever was involved. A situation such as this points to the need for clarification, and the City failed to do so.

What is clear to me now, having had the benefit of representations from both parties and a careful review of the various records, is that there are some gaps in the record gathering process that have not been adequately explained. For example:

- Although the City submits that official #1 "provided records" during the search process, no such records are included.

- Officials #4 and #5 are both identified by name in the appellant's request and both hold the title of Manager, Communicable Diseases, yet only one record authored by official #5 and four records authored by official #4 are included among the records identified as responsive to the request. Official #12, on the other hand, who holds the same position, produced 59 pages of responsive records. It is not clear why the City did not locate more records prepared by officials #4 and #5.

- In addition to the five officials named in the appellant's request, only a relatively small number of other public heath employees provided responsive records. There are eight other employees; two are Senior Public Health Inspectors, two are Public Health Nurses, one is an Environmental Health Officer, Communicable Diseases, one is an Infectious Disease Control Co-ordinator, one is a Program Manager, Communicable Diseases, and the other is a Manager, Communicable Diseases (official #12). With the exception of official #12, and perhaps official #6 and #13, very few records were produced by these officials in response to the various search activities. The City's representations also do not confirm that these were the only public health officials involved with the SARS crisis at that time.

For these reasons, I am not satisfied that the various searches undertaken by the City were reasonable. I will include a provision in this order requiring additional searches as well as an affidavit from the City's Chief Medical Officer of Health attesting to the various search activities.

In light of my findings under sections 7, 9 and 14, it is not necessary for me to deal with the public interest arguments put forward by the appellant.

INTERIM ORDER:

1. I uphold the City's decision not to disclose information that falls outside of the appellant's request. This information appears on portions of Pages 1-26, 28-43, 45-46, 48-71, 73-78, 80-92, 94-95, 97-98, 100, 102-108, 110-118, 120-122, 124-125, 127, 129-133, 139-141, 143, 151-152, 158-162, 165, 168-170, 175, 179-181, 183-184, 189, 192-195, 198-218, 220-223, 225-235. I have provided a highlighted version of these pages with the copy of this interim order sent to the City which identified the portions that should **not** be disclosed.

2. I order the City to disclose Pages 27, 44, 47, 72, 79, 93, 96, 99, 101, 109, 119, 123, 126, 128, 134-138, 142, 144-150, 153-157, 163-164, 166-167, 171-174, 176-178, 182, 185-188, 190-191, 196-197, 219, 224 and the remaining portions of Pages 1-26, 28-43, 45-46, 48-71, 73-78, 80-92, 94-95, 97-98, 100, 102-108, 110-118, 120-122, 124-125, 127, 129-133, 139-141, 143, 151-152, 158-162, 165, 168-170, 175, 179-181, 183-184, 189, 192-195, 198-218, 220-223, 225-235, not covered by Provision 1, to the appellant by **December 7, 2004**.

3. I order the City to conduct additional searches for responsive records, and to provide me with an affidavit sworn by the City's Chief Medical Officer of Health attesting to the various search activities. The affidavit shall include, but not be limited to:

   (a) the searches undertaken for all types of records held by officials #1 - #5 identified in the appellant's request;

   (b) the identification of all officials of the City's Public Health Department who were in any way involved in the SARS crisis, together with their job titles and the roles they performed during the time period of the appellant's request;

   (c) The searches undertaken for all types of records held by all officials identified in paragraph (b).

4. If, as a result of the further searches, the City identifies any records responsive to the request, I order the City to provide a decision letter to the appellant regarding access to these records in accordance with the requirements of section 19 of the *Act* by **December 7, 2004,** without recourse to a time extension.

5. The affidavit referred to in Provision 3 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario M4W 1A8. The affidavit will be shared with the appellant unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is sent out in IPC *Practice Direction 7*.

6. I remain seized of these matters with respect to compliance with the interim order and any other outstanding issues arising from this appeal.

Original signed by: November 16, 2004
Tom Mitchinson
Assistant Commissioner