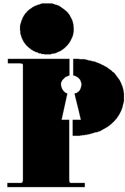

ORDER PO-2378

Appeal PA-040173-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Health and Long-Term Care (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The decision arises out of a request for access to certain funding information in relation to five independent health clinics (the affected parties). The Ministry denied access to this information, and the requester (now the appellant) appealed this decision.

During the course of mediation of the appeal, the appellant amended his request and specified that he sought access to the "overall funding for all independent health clinics that provide abortions from June 03 to June 04."

Based on the amended request, the Ministry located five records, being the summary pages of the approved budgets for five clinics for the fiscal period July 1, 2003 to June 30, 2004, and issued a new decision. In its decision, the Ministry denied access to the responsive information on these pages, relying on the mandatory exemption in section 17(1) (third party information) and the discretionary exemptions in sections 14(1)(e) and (i) (law enforcement).

As further mediation was not possible, the file was transferred to the adjudication stage of the process. Initially, a Notice of Inquiry summarizing the facts and issues in the appeal was provided to the Ministry and the affected parties, inviting them to provide representations on the appeal. The Ministry and two of the affected parties responded to the Notice. The Commissioner's office then provided the appellant with a Notice of Inquiry, along with the non-confidential portions of the Ministry's submissions and a summary of the positions taken by the two affected parties. The appellant also provided representations in response to the Notice.

RECORDS:

The information at issue consists of the summary pages of the approved budgets for five named clinics, with the detailed breakdowns of the budgets severed. What remains after the severances are the titles, including the names of the clinics, the fiscal period covered by the statements and the amounts shown as "Total Ongoing Costs" and "Monthly Payments".

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry and the affected parties argue that the remaining information contained in the records is exempt from disclosure under section 17(1), which states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The Ministry and one of the affected parties argue that the information at issue qualifies as "commercial" or "financial" information for the purposes of section 17(1). The appellant also concurs with this position. These types of information have been defined in prior orders as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have

> monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

In Order PO-1695, former Assistant Commissioner Tom Mitchinson found that the financial plans and analysis of approved expenditures of an independent health facility qualified as "financial" information within the meaning of section 17(1). On my review, this finding applies in the present appeal since the information at issue relates directly to the "total ongoing costs" incurred by each of the facilities. I further find that the information also qualifies as "commercial information" for the purpose of section 17(1) as it relates to the costs associated with the performance of the services provided by the facilities to the public.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

Again, the Ministry relies on the findings of former Assistant Commissioner Mitchinson in Order PO-1695 to support its position. In that decision, he found that:

> . . . the named facility operates under a licence issued by the Director of Independent Health Facilities. The Ministry explains that under section 24 of the *Independent Health Facilities Act* (the *IHFA*), it has authority to fund certain operating costs, and does so pursuant to an agreement negotiated with the operator. The agreement requires the operator to submit a budget proposal, which includes various operating costs. The Ministry, the operator and the landlord agree that financial information is supplied to the Ministry as part of the funding allocation process under the *IHFA*. I concur.

> Accordingly, I find that the information contained in the records was "supplied" for the purposes of section 17(1).

The Ministry submits that the information at issue relating to the total ongoing costs of the facilities was provided to it by the operators of the facilities as part of the funding allocation process. It argues that the circumstances surrounding the submission of these records is the same as the funding process described in Order PO-1695. The Ministry goes on to submit that the budget information contained in the records is submitted by the operator of the facility and is either accepted or not accepted by the Ministry. It describes this information as "the contractual manifestation of the funding process considered by the Assistant Commissioner in PO-1695."

I find that the Ministry has provided me with adequate information to support a finding that the information at issue was "supplied" to the Ministry by the affected parties within the meaning of section 17(1).

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [Order PO-2043]

The Ministry submits that the findings made by Assistant Commissioner Mitchinson in Order PO-1695 with respect to the "in confidence" aspect of part two of the test under section 17(1) are equally applicable to the information at issue in the present appeal. It argues that the affected party operators supplied the information to the Ministry with an explicit expectation of confidentiality, and relies on Article 9.3 of the Funding Agreement between the Ministry and the operator which states:

> [The Ministry] shall keep confidential information submitted by the Licensee to [the Ministry] under this agreement and information concerning the licensee in connection with the agreement, and shall disclose it only with the consent of the Licensee.

It argues that the information was submitted pursuant to the Funding Agreement referred to above and that a nearly-identical confidentiality clause in Order PO-1695 led to a finding that the information supplied thereunder was supplied in confidence for the purposes of section 17(1).

I agree with the position of the Ministry and find that the information at issue in this appeal was supplied by the affected parties with a reasonably-held, explicit expectation that it would be treated confidentially by the Ministry. Accordingly, I am satisfied that part two of the test under section 17(1) has been met.

Part 3: harms

To meet this part of the test, the institution and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The representations of the parties

Section 17(1)(a)

The appellant provided me with certain statistics taken from a document entitled "Tax Funding of Abortion in Canada" which purports to be "based on Statistics Canada and Library of Parliament data" describing the funding provided to clinics providing abortion services in Ontario under the *Independent Health Facilities Act*. The source of this information was not, however, stated by the appellant. He relies on the fact that information relating to "block funding" of such facilities for the period 1992-3 is included in the "Tax Funding" document to support his argument that information of this sort has been made publicly-available in the past.

The Ministry's representations respecting part three of the test under section 17(1)(a) focus on the findings made by the former Assistant Commissioner in Order PO-1695 which upheld the Ministry's decision to deny access to the disclosure of "individualized funding levels". It goes on to argue that the same principles ought to apply to the disclosure of "overall funding levels" of the clinics as well. In Order PO-1695, former Assistant Commissioner Mitchinson did not agree that the disclosure of this information could reasonably be expected to result in the harms contemplated by section 17(1). Rather, he found as follows:

> However, I am not persuaded that disclosure of the overall funding level included in each record could reasonably be expected to result in any of the harms articulated in section 17(1)(a). Disclosure of this information would simply confirm that a funding arrangement was in place for the time period covered by

> each record, a fact which, in my view, has already been confirmed through the processing of the appellant's request and subsequent appeal. Disclosure would also identify the overall amount of public funds allocated by the Ministry for the operation of this particular facility, without disclosing individual funding details for rental arrangements or other operating component costs which could have an impact on the competitive position of the landlord and other suppliers.

The Ministry argues that the distinction made in PO-1695 between itemized funding and overall funding information should not be applied in the present circumstances. The Ministry submits that:

> . . . disclosure of *overall* funding levels for clinics would prejudice the competitive positions of suppliers and interfere with the contractual obligations of suppliers and clinic operators in much the same way that the disclosure of specific funding levels would.
>
> The information contained in the Approved Budgets of the five named clinics in the present appeal supports this submission. For example, the amount listed in the Approved Budget of the most heavily funded facility for "Total Ongoing Costs" is over 3.5 times the corresponding amount listed for the least heavily funded facility. The overall funding levels set out in the Approved Budgets of each named clinic, when compared to that of the other four, can be used to infer how much each facility can budget for specific costs. This information could reasonably be expected to lead to harms recognized under section 17(1)(a) in much the same way that information about specific costs would.

The Ministry goes on to argue that in the present appeal, because the appellant is seeking overall funding information respecting more than one facility, he is not aware of the names of the specific clinics whose information is at issue. In his submissions, the appellant refutes this argument by providing the names of the clinics and the basis for his knowledge of their identities.

I adopt the reasoning behind the former Assistant Commissioner's finding from PO-1695 for the purposes of the present appeal. In my view, the disclosure of the information remaining at issue that relates only to the "overall funding levels" of the affected parties' facilities could not reasonably be expected to result in prejudice to or interference with their competitive position or contractual relationships. I find that I have not been provided with the kind of detailed and convincing evidence required to establish that the disclosure of *this* information could reasonably be expected to result in the harm contemplated by section 17(1)(a).

Section 17(1)(c)

The Ministry urges that I not follow the reasoning in Order PO-1695 with respect to the application of section 17(1)(c) to the information at issue in this appeal. In addition, the Ministry submits that:

> Any disclosure of funding levels for abortion services could lead to violent action by abortion opponents. Such violent actions would, in turn, lead to higher security and operating costs for operators, and could ultimately force the closure of clinics.

In Order PO-1695, the former Assistant Commissioner found that the disclosure of overall funding information would not result in the disclosure of information that ought to be protected under section 17(1), particularly as the appellant was familiar with the name of the facility whose information was contained in the records. In the present appeal, as noted above, the appellant is also aware of the names of the operators.

Again, based on the submissions of the Ministry and the affected parties, I am not satisfied that the disclosure of the overall funding information that remains at issue in this appeal could reasonably be expected to result in undue loss or gain to any person, group or agency, as contemplated by section 17(1)(c). I find that I have not been provided with the kind of detailed and convincing evidence required to make such a finding and the exemption in section 17(1)(c) does not, accordingly, apply to the information remaining at issue.

LAW ENFORCEMENT

The Ministry claims that the information remaining at issue in the appeal is exempt from disclosure under the discretionary exemptions in sections 14(1)(e) and (i), which read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", 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 [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Sections 14(1)(e) and (i): life or physical safety and security of a building

A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003]. The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

The Ministry argues that the disclosure of the information at issue could reasonably be expected to endanger the life or physical safety of operators, their employees and their patients (section 14(1)(e)) and the security of the clinic buildings themselves (section 14(1)(i)). It submits that, as was the case in Order M-1499, the disclosure of the information in the records "could lead to harassment and violence by extreme anti-abortion activists. This extremist action could compromise the security of clinic grounds, and could endanger the life or physical safety of clinic operators, employees and patients."

The Ministry urges me to follow the reasoning in Order M-1499 by virtue of the fact that the disclosure of the overall costs incurred by each clinic, including their names, could reasonably be expected to thereby identify "the relative number of abortion procedures performed at individual facilities, and by simply putting more information about the provision of abortion services by particular facilities into the public domain." It suggests that the disclosure of "any abortion-

related information into the public domain could be used by extremists as a tool for inciting violence against clinic operators and their employees."

I accept the position of the Ministry that the disclosure of the financial information at issue in the appeal, particularly when linked to the names of each of the clinics, could reasonably be expected to give rise to the harms contemplated by section 14(1)(e). I specifically find that the Ministry has provided me with sufficient evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In my view, the link between the identity of the clinic and the overall funding information gives rise to a reasonable basis for concern about the life or physical safety of the clinics' operators, staff and patients. I find that the Ministry has provided me with sufficient evidence to demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated, in the circumstances of this appeal.

Finally, the Ministry has included submissions in which it suggests that the disclosure of the information to the appellant could reasonably be expected to result in harm to the organization that he represents. I do not accept these arguments on the basis that the possible harms to the appellant and his organization as described by the Ministry are, in my view, too remote and do not logically flow from the disclosure of the information.

Accordingly, I find that the disclosure of all of the information at issue in this appeal, when taken together, could reasonably be expected to result in the harms contemplated by section 14(1)(e). This is not the case, however, when the financial information contained in the remaining portions of the records, namely the line item from the Approved Budget documents for each of the facilities that is entitled "Total Ongoing Costs" or "Total On-going and One-Time Costs" is disclosed without any other identifying information attached to it. In my view, disclosing these discrete portions of the records, which only identify the total costs of each of the facilities, could not reasonably be expected to result in the harms contemplated by sections 14(1)(e) or (i).

I will, therefore, order the Ministry to disclose to the appellant the line item entitled "Total Ongoing Costs" or Total On-going and One-Time Costs" and the dollar figure attached to it without any of the other information on the page. The remaining undisclosed information in the records is exempt from disclosure under section 14(1)(e) and (i).

Enclosed with the copy of this order provided to the Ministry is a highlighted copy of the records indicating those portions that are to be disclosed to the appellant. To be clear, those portions of the records that are **not** highlighted should not be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose to the appellant those portions of the records that are highlighted on the copies provided to it with this order by **April 29, 2005** but not before **April 25, 2005**.

2. I uphold the Ministry's decision to deny access to the remaining portions of the records.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: March 22, 2005
Donald Hale
Adjudicator