



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2597

Appeal PA-050283-1

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

The Ministry of Health and Long-term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to all information, comments and recommendations contained in a specified report relating to a named hospital.

The Ministry initially identified two records as being responsive to the request and relied on the mandatory exemptions in sections 12(1)(b) and (c) (Cabinet records) and the discretionary exemption in section 13(1) (advice or recommendations) to deny access to them, in full.

The requester (now the appellant) appealed the Ministry's decision.

At mediation, the Ministry described the records as being a report entitled "Report to the Minister, Third-Party Hospital Review", and a covering letter. The Ministry explained that although the covering letter was initially identified as being responsive to the request, it did not specifically relate to the named hospital. The Ministry advised that as a result, the covering letter was not actually responsive to the request. After discussions with the mediator, the appellant indicated that he was not seeking access to the covering letter. Accordingly, access to the covering letter is no longer at issue in the appeal.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry, initially. The Ministry filed representations in response to the Notice. The Ministry also provided me with a confidential copy of a Cabinet submission, in support of its exemption claim. In its representations, the Ministry further clarified that it was relying on the introductory wording of the section 12(1) mandatory exemption and not the specific exemptions set out in sections 12(1)(b) and (c). The Ministry also asked that a portion of its representations not be shared due to confidentiality concerns. I then sent a Notice of Inquiry, along with a copy of the Ministry's non-confidential representations to the appellant. The appellant filed representations in response to the Notice.

RECORDS

The only record at issue in this appeal is a five page document entitled "Report to the Minister, Third-Party Hospital Review"

DISCUSSION:

CABINET RECORDS

As set out above, the Ministry takes the position that the record qualifies for exemption under the introductory wording in section 12(1).

Section 12(1) reads, in its entirety, as follows:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- (f) draft legislation or regulations.

The Introductory Wording in Section 12(1)

The use of the word "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-22, P-331 and PO-2320].

If disclosing a record that had never been placed before Cabinet or its committees would reveal the substance of the actual deliberations of Cabinet or its committees, or where its disclosure would permit the drawing of accurate inferences with respect to these deliberations, the record can be withheld [Orders P-226, P-293, P-331, P-361 and PO-2320].

The Representations of the Ministry

The Ministry explains in the non-confidential portion of its representations that:

The report [at issue] was prepared by members of the Third Party Hospital Review Team, which was comprised of consultants retained by the Ministry. The Third Party Hospital Review Team prepared reports similar to the record at issue in respect of all 158 public hospitals in Ontario. These reports were intended to inform the Ministry's multi-year hospital funding strategy. Each report contained an analysis and a funding recommendation relating to the particular hospital being examined.

The Ministry states that all the reports, including the one at issue in this appeal, were submitted to the Ministry on April 16, 2003, and that “(t)he substance of the analysis and the recommendations contained in all of these hospital-specific reports was considered by the Ministry, and served as the basis for a recommendation that was presented to Cabinet on July 31, 2003.” In support of its position that the section 12(1) mandatory exemption applied to the record, the Ministry provided me with a confidential copy of the Cabinet submission made that day.

The Representations of the Appellant

In his representations, the appellant accepts the Ministry's position that any recommendations contained in the record would “constitute ‘advice to cabinet’ and should remain confidential”. The appellant submits, however, that any factual, analytical or evaluative information or “views” that are contained in the record do not fall within the section 12(1) exemption.

The appellant submits generally that “withholding factual information does not provide an organization the opportunity to ensure that information being used to generate recommendations (whatever they may be) is accurate and complete”.

Analysis and Finding

I have considered all of the submissions of the Ministry and reviewed the confidential copy of the Cabinet submission which it provided. In my view, the Ministry has failed to establish that disclosure of the information contained in the record would reveal the substance of deliberations of the Executive Council (Cabinet) or any of its committees. The content of the record is not reproduced in any way in the confidential copy of the Cabinet submission the Ministry provided. Nor is there any evidence that the record at issue otherwise came before Cabinet or any of its committees. I am, accordingly, not satisfied that the information in the record falls within the scope of any part of section 12(1), including the introductory wording. Therefore I conclude that the section 12(1) mandatory exemption does not apply.

ADVICE OR RECOMMENDATIONS

The Ministry has also claimed that the record is exempt under the discretionary exemption in section 13(1) of the *Act*.

Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 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 [Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“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-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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 PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order 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.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564].

The Exceptions in Section 13(2) of the Act

Section 13(2) provides a number of mandatory exceptions to the application of the section 13(1) discretionary exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1). Section 13(2)(a) provides that, despite section 13(1), a head shall not refuse under subsection (1) to disclose a record that contains factual material.

The Representations of the Ministry

With respect to the application of the section 13(1) discretionary exemption, the Ministry submits that:

The record was prepared by members of the Third Party Hospital Review Team, which was comprised of ministry staff and consultants that were retained by the Ministry.

The review contained in the record culminates in the recommendation found in the table under heading "L" at the end of the record. The content under this heading clearly recommends that the Minister of Health and Long-Term Care fund the named hospital in a certain manner. Therefore the Ministry submits that this recommendation is, in and of itself, exempt under section 13(1) of the *Act*.

The Ministry also submits that the disclosure of the remainder of the record would allow for accurate inferences to be made about the substance of the recommendation, as the analysis in the record, which culminates in the summary analysis under heading "K", clearly points toward the recommendation that is made under heading "L". Disclosure of the analysis would be tantamount to the disclosure of the actual recommendation.

The Ministry submits, therefore, that the record is exempt in its entirety under section 13(1). The Ministry submits that none of the exceptions in section 13(2) apply.

The appellant's representations do not address the possible application of section 13(1) to the record, nor do they discuss the section 13(2) exceptions.

Analysis and Findings

Although section L of the record contains a recommendation for allocation of funds, which would fall within the scope of section 13(1), the balance of the record consists of scores or assessments of the hospital that is the subject of the review.

In my view, the information contained in the record is similar to the "scoring sheets" reviewed by Adjudicator Cropley in Order PO-1993 which was upheld on judicial review in *Ontario (Minister of Transportation) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563. In that appeal, Adjudicator Cropley decided whether records used by the Ministry of Transportation as part of the Consultant Evaluation Process, in which staff evaluated and assigned scores for each consultant, qualified for exemption under section 13(1). She found that they did not, and stated:

I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed. Broadly viewed, the Ministry's approach could be taken to mean that every time a government employee expresses an opinion on a policy-related matter, or sets pen to paper, the resultant work is intended to form part of that employee's recommendations or advice to senior staff on any issue.

As I noted above, the purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations **within the deliberative process**. The importance of protecting this type of information is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice within the deliberative process of government decision-making and policy-making. Ultimately, it is the recipient of the advice or recommendations who will make the decision and thus be held accountable for it.

...

According to the Ministry, its evaluators are "Ministry staff with the requisite education and knowledge of the construction industry needed to evaluate the

consultants' proposals". In conducting their review of the proposals submitted to the Ministry pursuant to RFP's, these individuals are, as I noted above, establishing the factual basis upon which advice and/or recommendations may ultimately be made. Moreover, in this case, the entire exercise may be even further removed from the deliberative process through its very design.

I adopt the approach taken by Adjudicator Cropley in PO-1993 as set out in the excerpt reproduced above.

In my view, notwithstanding the submission of the Ministry that the analysis in the record clearly leads to the recommendation in section L, I find that except for section L itself, the record does not contain information which suggests a course of action that will ultimately be accepted or rejected by the person being advised. Rather, it contains the factual basis and scoring upon which advice and/or recommendations may ultimately be made. Accordingly, I find that the information contained in the record, other than that found in section L, does not qualify as "advice or recommendations" for the purpose of section 13(1) of the *Act*.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 13(1) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the withheld information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

In the circumstances of this appeal, I conclude that the exercise of discretion by the Ministry to withhold the information that I have not ordered to be disclosed from section L of the report was appropriate, given the circumstances and nature of the information.

ORDER:

1. I uphold the decision of the Ministry to withhold the information in section L of the five page document entitled "Report to the Minister, Third-Party Hospital Review".

2. I order the Ministry to disclose the balance of the record to the appellant by sending him a copy by **August 31, 2007** but not before **August 27, 2007**.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the appellant.

Original Signed By: _____

Steven Faughnan
Adjudicator

July 25, 2007 _____