



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2781

Appeal PA07-369

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*, for the following:

1. A copy of the 2005-2006, 2006-2007 and 2007-2008 Hospital Annual Planning Submission to the Ministry of Health and Long-Term Care including all appendices, for the Centre for Mental Health and Addiction; and
2. A copy of the 2007-2008 Hospital Accountability Agreement including all schedules, between the Centre for Addiction and Mental Health and the Ministry of Health and Long-Term Care.

The Ministry denied access to the Hospital Annual Planning Submission for 2005-2006 and 2006-2007 pursuant to sections 12(1)(e) (cabinet records), 13 (advice to government), 17(1)(a) (third party information), and 18(1)(c) and (d) (economic and other interests) of the *Act*.

With respect to the Hospital Annual Planning Submission for 2007-2008 and the Hospital Accountability Agreement, the Ministry states that as of April 2007, hospital reporting and accounting were transferred to the Local Health Integration Network (LHIN), pursuant to the *Local Health System Integration Act*. The Ministry's decision letter indicates that these two records are "in the custody and under the control of the Toronto Central LHIN."

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

During the mediation stage of this appeal, the appellant advised the mediator that it had received a copy of the Hospital Accountability Agreement for 2007-2008 directly from the Centre for Addiction and Mental Health (CAMH). Accordingly, the Hospital Accountability Agreement for 2007-2008 is no longer at issue in this appeal.

During mediation, the mediator contacted the CAMH (the affected party) to obtain its views regarding disclosure of the information at issue. CAMH advised the mediator that the information at issue qualifies for exemption under sections 17(1)(a) and (c) of the *Act*.

The parties were unable to resolve the issues in dispute during mediation and this appeal was transferred to the adjudication stage of the appeal process. This office commenced the inquiry by sending a Notice of Inquiry to the Ministry, CAMH and the Toronto Central LHIN.

Both the Ministry and CAMH submitted representations. In addition, the Ontario Hospital Association (OHA) provided a submission in support of the position taken by CAMH. The Toronto Central LHIN advised that it would not be providing representations in this appeal.

In its representations, the Ministry acknowledges that the 2007-2008 Hospital Planning Annual Submission is in its custody and control. Accordingly, the issue as to whether the Ministry has custody or control of this records is no longer in dispute.

The Ministry's representations also advise that it is no longer relying on section 12(1)(e) or 13 to deny the Appellant access to the record at issue. The Ministry made representations on sections 17(1) and 18(1).

CAMH provided representations in support of the Ministry's position that the mandatory third party information exemption at sections 17(1)(a), (b) and (c) of the *Act* applies to the records at issue. The OHA provided representations in support of CAMH's position. Although the Ministry initially claimed only section 17(1)(a), I will consider sections 17(1)(b) and (c) in this order because they are mandatory exemptions.

This office then invited the appellant to provide representations on the issues set out in a Notice of Inquiry and to respond to any issues contained in the representations submitted by the Ministry, CAMH and the OHA. The representations of the Ministry and the OHA were provided to the appellant in full. In addition, the non-confidential portions of CAMH's representations were provided to the appellant.

The appellant submitted representations, which were provided to the Ministry and CAMH for reply. In particular, this office invited the Ministry and CAMH to respond to the appellant's representations that the public interest override at section 23 of the *Act* applies to the information at issue. The Ministry was also invited to respond to the issues set out in the "background" section of the appellant's representations, and the appellant's submission that the information at issue is not exempt under sections 17(1) and 18 of the *Act*, and that the Ministry did not properly exercise its discretion in relying on the exemption at section 18 of the *Act*.

The Ministry and CAMH provided reply representations. This office invited the appellant to respond to the Ministry's and CAMH's reply representations and she provided sur-reply representations.

This appeal was later transferred to me for completion of the adjudication process.

RECORDS:

The records at issue consist of the Hospital Annual Planning Submissions (HAPS) for 2005-2006, 2006-2007 and 2007-2008, submitted by CAMH to the Ministry.

The representations submitted by the OHA provide valuable background for understanding the purpose and role of HAPS:

The HAPS is a standardized, hospital-owned planning document that is submitted to the Ministry (now LHIN) by each hospital and forms the basis for each hospital's final negotiated targets and performance indicators in the Schedules to their Accountability Agreement (now Service Accountability Agreement). HAPS focus on service planning, measurement and evaluation of hospital service and

organizational performance. More specifically, the information contained in HAPS relates to:

- The hospital's proposed budget for the year, and details of services offered including the costs of those services;
- Profit and loss data, overhead and operating costs, remuneration practices, projected salaries, financial plans, and analyses of ongoing costs; and
- Information related to potential and future labour settlements, remuneration of physicians, proposed staffing levels and mixes, bargaining strategies in relation to unions and staff, and approaches to manage employees during labour disputes.

Hospitals are responsible for submitting their HAPS to the Ministry. The Ministry has no direct role in the development or implementation of each hospital's HAPS, as the HAPS exists independently of the Accountability Agreement reached between the hospital and the Ministry/LHIN.

In addition to functioning as a planning document, the HAPS is the primary basis and foundation from which extensive and complex negotiations between the hospital and the Ministry/LHIN are initiated. As such, the HAPS is not a static document but evolves throughout the course of the negotiations between the parties.

Once negotiations have been concluded, all relevant information is incorporated into the hospital's Accountability Agreement, which is a public document...

DISCUSSION

THIRD PARTY INFORMATION

The Ministry takes the position that the exemption at section 17(1)(a) of the *Act* applies to the records at issue. CAMH has raised the application of the exemptions at section 17(1)(a) and (b), in addition to section 17(1)(a).

Sections 17(1)(a), (b) and (c) of the *Act* state:

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 the similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 CAMH submit that the records contain financial, commercial and labour relations information. These categories of information have been discussed in prior orders:

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].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

I adopt these definitions for the purposes of this appeal.

The Ministry's Representations

With respect to part one of the test set out in section 17(1), the Ministry submits that the records contain financial and labour relations information. The records reflect CAMH's revenues, expenses and budget, as well as other operational details. Given that the records refer to specific data about money, the Ministry submits that the information is considered to be financial information. The Ministry relies on Order PO-2010 in this regard.

The Ministry also submits that the records reveal staffing and volume levels, salary, benefits and top-ups and other medical staff remuneration paid by CAMH to its employees, labour accruals information and benefits accruals. Given that this information concerns the collective relationship between CAMH, as the employer, and its employees, it should be considered labour relations information. The Ministry relies on Order P-653 in this regard.

The Affected Party's Representations

CAMH submits that HAPS are standardized planning documents submitted annually by hospitals. The HAPS form the basis for each hospital's final negotiated targets and performance indicators in the Schedules to their HSAA.

CAMH submits that the HAPS constitute labour relations, financial and/or commercial information and, as a result, meets the first test for section 17(1). In its representations, CAMH provided the following examples of labour relations information included in the HAPS:

- projections of labour accruals;
- potential changes, increases and/or decreases to physician funding;
- potential changes, additions and/or closures program by program;
- potential changes, additions and/or reductions in staff level and staffing mix generally and for specific programs;
- possible future joint programs with other organizations or program transfers to external agencies;
- assumptions with respect to the magnitude of potential legal settlements with bargaining bodies; and
- assumptions as to salary and benefit increases which are yet to be negotiated.

CAMH provided specific examples of the above information in the confidential portions of their representations.

CAMH also submits that the HAPS contain financial information for the purposes of section 17, including:

- proposed budget for the upcoming year;
- projections of revenue and deficits;
- projections of overhead costs;
- projected salaries; and
- analyses of ongoing costs.

In addition, CAMH submits that the HAPS also contain commercial information for purposes of section 17, as the records include information relating to contractual agreements and negotiations between CAMH and other parties. CAMH noted that they occasionally compete with other hospitals for resources and that the HAPS, at times, contain commercially sensitive information. CAMH provided a specific example of this type of information in the confidential portions of their representations.

In its representations in support of CAMH's position, the OHA submitted that the information contained in the HAPS included the following categories:

- the hospital's proposed budget for the year, details of services offered and the costs associated with those services;
- profit and loss data, overhead and operating costs, remuneration practices, projected salaries, financial plans, and analyses of ongoing costs; and

- information relating to potential and future labour settlements, remuneration of physicians, proposed staffing levels and mixes, bargaining strategies in relations to unions and staff, and approaches to manage employees during labour disputes.

The Appellant's Representations

The appellant submits, by way of background, that her objective in requesting the records is to obtain information about the planned "P3 (Public Private Partnerships but the name was changed to AFP by the provincial government)" to determine whether P3's result in lower health care costs to the public.

The appellant concedes that some of the information in the records is financial information and relates to labour relations, but takes the position that she cannot assess whether any of the information in the records is commercial information. However, she submits that any information relating to P3's in the records is commercial information and is subject to disclosure, as CAMH waived its right to claim an exemption, owing to the absence of specific representations regarding P3's.

Analysis and Findings

From my review of the records and the representations of the parties, I find that the records contain financial and labour relations information. With respect to labour relations information, there is information contained in the records that details the collective relationship between the employer and the employee, such as projections of labour accruals, physician funding, possible program changes, and staffing levels. With respect to financial information, the records contain information relating to the annual budget, overhead costs, revenue and deficits and patient volumes.

Accordingly, I find that all of the information for which section 17(1) is claimed meets the requirements for part 1 of the test for the application of that section.

I note that there are sections of the HAPS that contain information dealing with clinical activity and patient services at CAMH. As a stand alone section, it would not be apparent that these sections constitute financial, commercial or labour relations information. However, in reviewing these sections within the context of the entire HAPS, I am satisfied that this information is provided as part of CAMH's efforts to project its fiscal and labour relations needs into the future. As such, I find that these sections contain financial and labour relations information.

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 or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

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’s Representations

The Ministry submits that the information contained in the HAPS was supplied to the Ministry by CAMH with a reasonable expectation that it would remain confidential.

The Ministry advised that the responsibility for completing the HAPS lies with each hospital. As a result, the Ministry did not provide any of the information contained in the records, and none of the budgetary information was the result of negotiations between the Ministry and CAMH.

The Ministry also submits that the detailed financial and sensitive labour relations information contained in the records is not otherwise available to the public, nor is the purpose of preparing these records one that would entail disclosure. The Ministry states that it treats the HAPS submitted by individual hospitals as confidential information and does not share them with other hospitals, or disclose them to the public.

The Affected Party's Representations

CAMH similarly submits that the information contained in the records is not the product of any negotiation with the Ministry and is independent of the HSAA and any other agreement reached between CAMH and the Ministry/LHIN. The Ministry/LHIN requires that CAMH supply this information in advance of the Ministry/LHIN's determination of CAMH's annual funding and service mandate.

CAMH further submits that the Ministry required CAMH to submit an annual proposal for funding and services such that the context under which the HAPS was provided to the Ministry is analogous to information supplied in response to a request for proposals.

CAMH also takes the position that the information supplied to the Ministry/LHIN was provided in confidence. CAMH does not share the HAPS with the public, unions, staff, clients, vendors or community partners. Because of the sensitivity of the information contained in the HAPS, confidentiality is protected. For example, any discussions by the Board of Trustees regarding the HAPS are held *in camera*. In addition, access to the information is limited to certain staff at CAMH.

In addition, CAMH submits that, since the HAPS provides estimates and potential outcomes only, and its release would create an inaccurate and misleading picture of the facts, it is a reasonable expectation that it would remain confidential.

The OHA submits, in support of CAMH's position, that the information contained in the HAPS is supplied by hospitals to the Ministry and the Ministry has no direct role in the development or implementation of each hospital's HAPS. The HAPS is the primary basis and foundation from which negotiations between the hospital and the Ministry/LHIN are initiated.

Once negotiations between the hospitals and Ministry are concluded, all relevant information is incorporated into the hospital's Accountability Agreement, which is a public document.

The Appellant's Representations

The appellant agrees that the information was supplied to the Ministry/LHIN, but disagrees that it was supplied in confidence. The appellant submits that the:

... information was provided to maximize its access to public funds and to expose it to the lowest level of [public] scrutiny possible but in the knowledge that all of the information could be disclosed if such action were necessary to ensure accountability.

In addition, the appellant submits that the information that would be considered to be financial is limited to financial statements that compare actual costs to budgeted costs. These types of statements, the appellant argues, are regularly made public and cannot, therefore, be found to have been supplied in confidence.

With respect to labour relations information, the appellant submits that much of the information supplied is information CAMH has a duty to disclose to the appellant under the *Labour Relations Act*.

The appellant further submits that annual public sector salaries exceeding \$100,000 are publicly available and are not confidential.

The appellant also argues that, with respect to any information relating to P3's, the expectation of confidentiality is much reduced, as held in *Ontario Council of Hospital Unions v. Ontario (Minister of Health)* 85 O.R. (3d) 55 (Div. Ct.).

The Affected Party's Reply Representations

CAMH submits that they are not under a legal obligation to release the HAPS documentation to the Appellant in order to meet labour relations obligations. The HAPS documentation is confidential. Despite the appellant's arguments to the contrary, the case law provided by the appellant does not require an employer to discuss or reveal to unions the details of possible options that may be canvassed in upcoming decisions. CAMH agrees that once decisions are finalized, they are obligated to disclose them to their unions.

Analysis and Findings

In Order PO-2328, former Assistant Commissioner Tom Mitchinson found that information was considered to be "supplied" where it was submitted under the requirements of a statute or pursuant to reporting obligations. I adopt the approach taken by former Assistant Commissioner Mitchinson for purposes of this appeal. The submission of the HAPS by hospitals to the Ministry/LHIN is a mandatory obligation in order to commence negotiations to secure funding by the Ministry/LHIN to the applicable hospital.

In addition, based on my review of the records and on the representations of the parties, which confirm that these records were generated solely by CAMH and then provided to the Ministry, I am satisfied that these records were “supplied” to the Ministry by the CAMH for the purpose of section 17(1).

With respect to whether the information contained in the records was supplied “in confidence,” some communications give rise to an implicit expectation of confidentiality by the nature of the circumstances under which they are made. Given that the information in the records supplied to the Ministry/LHIN by CAMH was for the purpose of facilitating funding negotiations, I am satisfied that the Ministry/LHIN and CAMH would have an expectation of confidentiality regarding this information.

Futhermore, based on the representations of the Ministry and the affected parties, in which they identify their expectations that records of this nature would remain confidential, I am also satisfied that these records were supplied to the Ministry with a reasonable expectation of confidentiality. Under the circumstances, and in view of the submissions of the Ministry and CAMH about their handling of the information, set out above, I am also satisfied that this expectation had an objective basis.

Accordingly, I find that all of the information for which section 17(1) is claimed meets the requirements for part 2 of the test established by that section.

Part 3: harms

Introduction

To meet this part of the test, the institution and/or the third party 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 failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The Ministry’s Representations

The Ministry states that CAMH would be directly affected by the disclosure of the information contained in the records. Therefore, it is relying on CAMH’s representations to provide the detailed and convincing evidence of the harms that would result to CAMH from that disclosure.

The Affected Party's Representations

CAMH is relying on sections 17(1)(a), (b) and (c) to support its position that the records should not be disclosed.

In general, CAMH takes the position that the release of the information contained in the records would create an inaccurate and misleading picture of the facts. It would lead to anxiety for staff who might think that their jobs or programs are in jeopardy, thereby affecting staff morale. In addition, it would disrupt CAMH's operations, as they would have to publicly defend program closures, transfers, additions, layoffs and staff increases that might never happen. In addition, labour and community relations, as well as, client relationships would be adversely affected.

More specifically, with respect to section 17(1)(a), CAMH states:

The HAPS contain detailed information about staffing and remuneration projections as well as strategies for negotiation with labour unions and physicians in relation to that staffing and remuneration. The provision of such information (current or historic) to the parties with whom CAMH negotiates would negatively interfere with those negotiations and would seriously disadvantage CAMH in the conduct of those negotiations. It would frustrate the ability of CAMH to effectively control its own institution and negotiate to its advantage. This could result in increased costs for hospital funding.

Releasing information about potential program closures or transfers (that might not be necessary) would negatively impact our negotiations with other hospitals and community agencies that could be potentially impacted by such reductions in service at CAMH.

Releasing information about projected capital investments and technological investments would negatively impact our ability to negotiate favourable rates with vendors.

...

The information included in the HAPS are estimates, assumptions and projections and do not accurately reflect the hospital's actual budget and programs for the year. It is more than reasonable to expect that disclosure of this incomplete information would misdirect the requester and the public, leading to action by the requester or other interested party. Such action would only serve to interfere with highly sensitive negotiations between those parties or others and CAMH.

CAMH provided specific examples of the above information in the confidential portions of their representations.

With respect to section 17(1)(b), CAMH submits that if the HAPS are made public, CAMH will be reluctant to supply the Ministry/LHIN with such detailed information in the future knowing the complications that could result. CAMH states:

CAMH would reconsider how candid we will be in our submissions. We would not be able to provide some information we currently supply to the Ministry/LHIN for fear of the labour relations and public relations problems the premature release of that information would cause.

It is essential that hospitals like CAMH are able to provide confidential scenario planning and projections to our funder. It is in the public interest that CAMH be able to set out in writing a wide range of options in order to initiate full and frank discussion about how the health care system will be served and the costs of providing that service.

With respect to section 17(1)(c), CAMH submits that the release of the information in the HAPS would provide a competitive advantage to unions, physicians and vendors, particularly in the negotiation of future contracts and remuneration. In addition, CAMH submits:

In some cases and in order to achieve a balanced budget, CAMH projects cuts to specific programs or services if we do not receive additional funding. It would be irresponsible for those projections to be made public without context and without final decision making about whether they will remain open. There could be significant unnecessary anxiety experienced by our clients/patients, our staff and our community partners that the programs, services or staff levels will be reduced or that they are vulnerable to future reductions.

Again, CAMH provided specific examples of the above information in the confidential portions of their representations.

In support of this position, the OHA submits that, as the HAPS is a planning document containing detailed information about staffing and remunerations projections, as well as strategies for negotiations with labour unions, the disclosure of this information would compromise CAMH's ability to negotiate to its advantage.

In addition, the OHA submits that the disclosure of the information contained in the HAPS may compromise the unqualified flow of information from CAMH to the Ministry/LHIN.

The OHA further submits that they are concerned that the release of the HAPS document will have a significant detrimental impact on the health system as a whole. In this regard, the OHA states:

The public release of hospital planning information may hamper the ability of all 158 hospitals to continue their negotiations and communications with the Ministry

and/or LHIN with respect to annual planning in an effective manner. Public disclosure of this planning document would undermine the intent of the HAPS to assist in scenario planning and future forecasting at the hospital, local and provincial levels, as well as serving as the critical foundation for negotiations towards a final Accountability Agreement.

In addition ... the information included in the HAPS are estimates, assumptions and projections that do not accurately reflect the hospital's actual budget and programs for the year.

The OHA concludes that the release of the information contained in the HAPS could have a prejudicial effect on negotiations by all hospitals with labour unions and community partners related to the future transfers of programs and services.

The Appellant's Representations

The appellant disagrees that any harm will be produced that could reasonably be expected to satisfy the factors listed in section 17(1)(a), (b) and (c). With respect to section 17(1)(a) and (c), the appellant submits that CAMH has current collective agreements with all of its unions until March of 2009 and is, therefore, immune from any pressures to increase compensation for this period.

The appellant states that hospitals, including CAMH, bargain centrally with their unions. Therefore, disclosure of the information in the HAPS, relating only to CAMH, will not enable any union to enhance its bargaining position at the "central provincial table." In order for that advantage to be gained, a union would have to secure HAPS information from a significant number of hospitals in Ontario.

In addition, the appellant submits that the labour relations data from the 2005-2006 HAPS should be disclosed for two reasons; first, the information is now stale, as bargaining has been concluded for the period up to March 2009; and, second, the appellant wishes to know the actual contents, so that future requests for disclosure and appeals can be addressed with the knowledge of what type of information is contained in the HAPS.

The appellant also submits that CAMH has a duty, under the *Labour Relations Act* to disclose the "details of options it is considering even where no decision has been made." Therefore, the appellant argues, the information in the HAPS cannot be considered to be confidential, nor can its disclosure result in harm.

Furthermore, the service and morale disruptions caused by discussing plans in advance of decisions being made is a "normal consequence" of operating in the public sector and cannot, therefore, be considered as producing "harm" for purposes of the *Act*. The appellant asserts that the loss of morale is even greater when stakeholders, including unions and its members, are "denied" access to potential plans until they are finally decided upon. The appellant also argues

that CAMH, as a public hospital, must be transparent and accountable. Consequently, if other public authorities, such as school boards and public transit authorities can operate without harm even when potential cutbacks are publicly discussed, then hospitals should be able to operate in a similar fashion, without triggering the type of harm the *Act* contemplates.

The appellant also submits that she should have access to the records at issue, given her role as a union representative and her activities as an employee of CAMH.

With respect to section 17(1)(b), the appellant submits that this is not a case where CAMH is voluntarily supplying information that it has discretion not to supply. This is a case where CAMH is seeking funds from the Ministry/LHIN and can, therefore, reasonably expect to supply whatever information is requested by the Ministry/LHIN. The appellant provided a copy of the HAPS guidelines, put out by the Ministry/LHIN. The guidelines impose financial penalties to hospitals who fail to submit a timely and complete HAPS.

The Affected Party's Reply Representations

In its reply representations, CAMH reiterates that public access to the HAPS information could unduly advantage vendors, resulting in undue loss for CAMH and gain for the parties with whom they negotiate.

CAMH states:

... CAMH does not have collective agreements with OPSEU yet. We are currently under local negotiations. Therefore, the statement that all unions are running under agreements until March 2009 is not correct and CAMH's arguments with respect to undue harm to CAMH and benefit for unions to have access to our HAPS documentation still stand.

Allowing the public to have access to our HAPS documentation will not result in an engaged and informed staff and public. Granting access to preliminary information to be negotiated with the Ministry is not the way to ensure our stakeholders are able to provide input into CAMH decision about its strategic directions, programming and staffing.

CAMH also submits that they are concerned, not with disclosing individual past salaries, but with disclosing forecasted wage rate increases, which would prejudice CAMH's negotiating position.

In addition, CAMH submits that the appellant's suggestion that this is a one-time request for access to historic HAPS information relating to one hospital is incorrect. CAMH's position is that the release of the HAPS information will set a precedent and could entitle any member of the public to have access to the confidential labour relations, financial and commercial information included in the documentation of any public hospital in Ontario.

With respect to section 17(1)(b), CAMH agrees that submitting HAPS documentation to the Ministry/LHIN is mandatory. However, if this information was disclosed to the public, they would be forced to reconsider the detail with which they are able to articulate their issues in the narrative sections of the documentation for the reasons described in their representations.

Analysis and Findings

I have carefully reviewed the representations of the parties and the records remaining at issue in this appeal.

As previously noted, the records in this appeal are copies of the 2005-2006, 2006-2007 and 2007-2008 HAPS prepared by CAMH and provided to the Ministry of Health and Long-Term Care.

Based on my consideration of the representations of the parties, as well as a careful review of the records, I am satisfied that CAMH has provided sufficient evidence to meet the harm described in section 17(1)(a). Past orders of this office have found that it is reasonable to expect that disclosure of labour relations information that would be used in upcoming discussions and negotiations with employees would result in harm. Based on a careful review of the representations, I am satisfied that CAMH has provided the detailed and convincing evidence to demonstrate how harm could result from disclosure of portions of the information contained in the records. Specifically, I am satisfied that it would be reasonable to expect that disclosure of any information relating to labour relations and potential program changes would interfere significantly with pending collective agreement negotiations, and with future negotiations with non-unionized employees. Even disclosure of labour relations information, which the Appellant considers to be “stale” would create a reasonable expectation of harm, as it provides insight into CAMH’s current strategies and positions.

Further, I am satisfied that the HAPS must be considered in their totality in terms of the harms that might result from disclosure of information contained in them. It may not be readily apparent how the disclosure of some individual portions of the HAPS will lead to the harm set out in section 17(1)(a). However, I find that the disclosure of these portions, particularly when combined with the other information in the records and available elsewhere, will impact on CAMH’s labour relations negotiations. For example, the disclosure of detailed financial forecasts and projections for future years may place CAMH at a disadvantage when involved in labour relations negotiations.

Finally, I note that CAMH has provided confidential representations, referring to specific examples within the HAPS, that satisfy me that disclosure of the HAPS could reasonably result in the harm set out in section 17(1)(a).

Given my finding with regard to section 17(1)(a), it is not necessary for me to consider the applicability of sections 17(1)(b) and (c) of the *Act*. However, with respect to section 17(1)(b), I do not agree that CAMH has demonstrated that they would reduce the amount or type of

information supplied to the Ministry/LHIN in future should the records be released. The information provided to the Ministry/LHIN is mandatory, and it is in CAMH's best interests to continue to be forthcoming with the Ministry/LHIN, as they are in a close and long-standing relationship that is unlikely to be jeopardized in the future, as the Ministry/LHIN is the main source of CAMH's funding.

Similarly, I am not satisfied that the harms contemplated by section 17(1)(c) are applicable in this appeal. This exemption is applicable where a third party can demonstrate that disclosure of the information will result in undue loss to that party and undue gain to the party's competitor. CAMH has not provided clear and direct evidence of this type of harm. I do not see two businesses competing for a government contract as comparable to hospitals seeking funding from the Ministry/LHIN.

Lastly, with respect to the appellant's view that, because of her status, she ought to have access to the records requested, I adopt the approach taken by Adjudicator Frank DeVries in Order PO-2710. Adjudicator DeVries states:

... [P]revious orders of this office have recognized that the identity of a requester is not determinative of the issues to be decided at inquiry. In general, these orders have found that disclosure under the *Act* is disclosure to the world (See: Order M-96, upheld on judicial review in *Ontario Secondary School Teachers' Federation, District 39 v. Wellington County Board of Education et al.* (20 December 1994), Toronto 407/93 (Ont. Div. Ct.), leave to appeal refused (16 October 1995), Doc. M15357 (C.A.)). I have not been provided with evidence to support the view that the Appellant was the intended recipient of the records at issue, and any particular right that the Appellant asserts he has to the information contained in the records is a determination to be made in another venue. My obligation is to review the harms set out under the *Act*.

Therefore, the appellant's position that records should be disclosed to her either under the *Labour Relations Act* or because of her union and employment activities is not relevant to this appeal. As set out above, my obligation is to decide whether the records should be disclosed under the *Act*.

In summary, I find that disclosure of the HAPS meets the requirements of the three-part test under section 17(1) and the records at issue are, therefore, exempt from disclosure under section 17(1)(a) of the *Act*.

Given this finding, it is not necessary for me to consider the Ministry's position that the disclosure of the HAPS is exempt pursuant to section 18(1)(d) of the *Act*.

PUBLIC INTEREST OVERRIDE

The appellant has submitted that there is a significant public interest in the disclosure of the HAPS. As a result, I will now consider the application of section 23 of the *Act* to the records at issue.

An exemption from disclosure of a record under section 17 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as Arousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [see Order P-1398].

The Appellant’s Representations

The appellant bases her public interest submissions on the fact that the public directly accesses the public health care system on an ongoing basis. This raises the issue of the sustainability of health care in light of increasing costs and limits on public revenues due to significant cuts in taxes.

The appellant focuses on the role of “P3s” in the health care sector in support of her position that there is a public interest in the disclosure of the HAPS. The appellant states that it is “crucial” that more transparency be shed on the costs associated with P3s, as the health care system is threatened due to unsustainable cost increases, and the public’s concern regarding the cost and quality of the effectiveness of P3s must be satisfied.

The appellant states:

The problem for government is that if it borrows the money itself [for capital spending in the health care sector], it has to issue financial statements showing not just the annual repayment obligations of principal and interest, it has to show the full amount of the loan as a current obligation. When the government uses the private partner to raise the money, the government only has to show on its books the current annual repayment obligation.

The private partner however also doesn't have all the capital for the project. It too has to borrow. It is universally understood that governments can borrow capital less expensively than the private corporate sector. Clearly the government cannot justify using a private partner if it is going to cost more. The government therefore has claimed that due to private sector entrepreneurial expertise and the ability to shift cost overruns and penalties for missed deadlines to the private sector, that using P3s will result in health care being delivered as competently and at a lower price than if the government borrowed the money itself. The only difference between the financing plans of the previous and new governments is that the old government plan had the private sector as building owner while the current government plan has the private sector only as the mortgage holder.

...

In order to satisfy public concern about the cost and quality effectiveness of P3s, the government has publicly committed to be fully transparent on the costs and efficiencies of such projects. This commitment to transparency has not been kept. The decision of the institution to refuse to disclose the HAPS is part of its unwillingness to keep that commitment.

...

The Institution is funding a P3 with this third party. The absence of any mention of this P3 in the submissions of any of the other parties to this appeal underlines the absence of transparency and is in our respectful submission evidence of bad faith.

Elsewhere in her representations, the appellant makes further submissions about public accountability:

The exemption was not intended to permit corporations (even public hospitals) to make commitments, using public dollars, sheltered from public accountability, nor to prevent the public from assessing whether cost effective means are being used to deliver health care. In order for the public to have an opportunity to have effective intervention in efforts to safeguard the value for money to be received

for public health dollars, the information must be disclosed before binding commitments have been entered into by the third party.

The Ministry's Reply Representations

The Ministry submits that, while they agree with the appellant that sustainability of health care is a matter of public interest, a similar interest does not exist with respect to the information contained in these specific records. The records contain detailed financial and labour relations information relating to the technical aspects of CAMH's operations. These technical details have not been the focus of public debate and, therefore, disclosure would not serve the "purpose of informing the citizenry about the activities of their government" [Order PO-1806].

The Affected Party's Reply Representations

CAMH submits that the appellant's arguments relating to information about P3s is irrelevant, as this appeal is not about that information. Specifically, CAMH submits that:

- CAMH's participation in P3 arrangements and related documentation is separate and apart from the HAPS for the three years requested by the appellant;
- The HAPS do not include any information with respect to P3s; and
- Public access to the HAPS will not further illuminate the public on the cost and quality of the effectiveness of P3s in the health care sector.

Finally, CAMH states that the HAPS documentation is not the appropriate vehicle through which CAMH should communicate with the public and key stakeholders about their strategic, financial and program plans. Members of the public have access to the following information:

- CAMH's annual report that outlines initiatives and future endeavours;
- CAMH's mission, vision and values, and strategic plan;
- Information about CAMH's redevelopment;
- Financial statements and other financial information are available at the annual general meeting, which is open to the public; and
- The Hospital Service Accountability Agreement, which set out the actual commitments CAMH had made with the Ministry/LHIN.

Analysis and Findings

I have already found that records are exempt from disclosure under section 17(1)(a) of the *Act*. I must consider whether there is a compelling public interest in disclosure of the record at issue that clearly outweighs the purpose of the section 17(1)(a) exemption.

As noted above, two requirements must be met to establish that the public interest override in section 23 of the *Act* applies to those portions of the record at issue withheld by the Ministry:

- there must be a compelling public interest in disclosure of the record; and
- this interest must clearly outweigh the purpose of the exemption.

The appellant bases her position that a compelling public interest exists on the need for public scrutiny of public private partnerships, or P3s. I have carefully reviewed the HAPS and I confirm that the HAPS contain no reference to P3s or private sector funding. In this regard, I concur with the submissions of CAMH that the HAPS make no reference to P3s and, as a result, their disclosure will provide no assistance to the public in evaluating the effectiveness of P3s in the health care sector.

In addition, past orders of this office have found that a compelling public interest does not exist where significant information is disclosed, which is adequate to address any public interest considerations. With respect to this appeal, I note that the Hospital Accountability Agreement sets out the amount and allocation of funding between the Ministry/LHIN and hospitals in Ontario, and is publicly available. Therefore an accessible record already exists, which informs the citizenry about the activities of the government vis a vis hospital funding.

Therefore, I find that the public interest override is not applicable to the records at issue in this appeal.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ April 29, 2009