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

ORDER PO-2888

Appeal PA08-288

Ministry of Health and Long-Term Care

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BACKGROUND:

This request relates to records pertaining to a "post-construction operating plan" (the PCOP) with respect to Peterborough Regional Health Centre (PRHC). The following background provided by the Ministry of Health and Long-Term Care (the Ministry) is helpful in understanding the issues on appeal:

> The Ministry of Health and Long Term Care funds hospitals for both operating costs and capital costs. Frequently, however, capital funding is provided with the expectation that certain new services will be provided or that existing services will be expanded. Under the [PCOP] process, the Ministry provides additional operational funding to make it possible for a hospital to expand its services as capital projects develop.
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> The amount of funding that a hospital receives under a PCOP is determined by the combined result of parallel negotiations between the Ministry, the Local Health Integration Networks, who oversee funding for groups of hospitals, and each hospital undergoing an expansion.
>
> The Ministry's final allocations under the PCOP process reflect a wide range of considerations including: the immediate and future needs of the hospital, the health needs and characteristics of the community it serves, the needs of the other hospitals in that Local Health Integration Network. All of these considerations must be evaluated, weighed against each other and then against the demands on other hospitals and health services in the province.

NATURE OF THE APPEAL:

A journalist submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry for the following records:

> … all documents and communications related to "post-construction" plans and costs for the [PRHC], from December 2007 until present.
>
> As well any records, memos and other communication, including faxes, e-mails, e-mail attachments, briefing notes, teletexts, letters, minute of meetings and draft versions of reports.

The Ministry located records responsive to the request and issued a decision letter to the appellant that granted her partial access to them. It denied access to some of the records, either in whole or in part, pursuant to the discretionary exemptions in sections 13 (advice to government) and 18 (economic and other interests), and the mandatory exemption in section 17 (third party information) of the *Act*. It further indicated that the fee for accessing the records was $4,821.20 and provided a breakdown of the fee.

The requester (now the appellant) appealed the Ministry's decision to this office. In her appeal letter, the appellant states that she is appealing the exemptions claimed by the Ministry and the fee that it assessed for providing access to the records. She also cites the public interest override in section 23 of the *Act* and submits that there is a compelling public interest in disclosure of the records that outweighs the purpose of the exemptions.

This office assigned a mediator to assist the parties in resolving the issues in this appeal. Some of the records relate to the PRHC. Consequently, the PRHC is an affected party in this appeal. The mediator contacted the PRHC to determine if it would consent to the disclosure of some of the records to the appellant.

The PRHC agreed to the full disclosure of records 6A, 6B, 8A, A-004, A-006, A-007, A-008, B-003, B-006, B-008, C-002, and C-003, and to the partial disclosure of records 2, 3 and A-002. The Ministry subsequently disclosed these records to the appellant, in accordance with the PRHC's consent.

This appeal was not fully resolved in mediation and was moved to the adjudication stage of the appeal process. The adjudicator previously assigned to this file sent a Notice of Inquiry to the Ministry, setting out the facts and issues on appeal, and inviting it to submit representations.

In response, the Ministry re-examined the records at issue and decided to disclose the following eight additional records to the appellant in full: 1A, 1B, 5B, A-002, A-005, B-004, B-007 and C-001. In addition, it determined that Record 10 consists of 14 separate records and decided to disclose 13 of them to the appellant.

Moreover, the Ministry raised a new exemption claim for the withheld portion of one record. In particular, it claims that the withheld portion of Record B-002 is subject to the mandatory exemption in section 12 (cabinet records) of the *Act*. The Ministry also agreed to waive the fee with respect to all of the records in this appeal. Consequently, whether the fee for accessing the records should be upheld is no longer at issue.

Finally, the Ministry submitted representations to this office on the remaining issues. The previous adjudicator subsequently issued a Notice of Inquiry to the appellant and the PRHC, along with a complete copy of the Ministry's representations. The appellant was invited to submit representations on all issues in this Notice of Inquiry and to respond to the Ministry's representations. The PRHC was invited to submit representations only on sections 17 and 23 of the *Act*.

The PRHC declined to make representations and indicated to this office that it was content to rely on those submitted by the Ministry. The appellant submitted representations in response to the Notice of Inquiry. After reviewing these submissions, the previous adjudicator decided to seek reply representations from the Ministry. The Ministry submitted representations in reply.

The file was subsequently assigned to me to complete the adjudication process.

RECORDS AT ISSUE:

There are 19 records remaining at issue in this appeal, either in whole or in part, and comprise records relating to the Hospital Submission, briefing notes, working paper, updates, e-mail response, funding and status information. The records at issue will be described more fully under the exemption headings below.

However, I note that Record 2 comprises 117 pages of related documents and tables. Severances were made to the narrative portions of 14 pages of the documents and to portions of tables contained on the remaining 46 pages. The withheld portions (two paragraphs) of pages 3, 6, 9, 12, 14, 15, 17, 18, 21 and 24 contain duplicate information. I also note that the second paragraph on page 12 was disclosed to the appellant. In my view, it would be absurd to withhold this paragraph in the other duplicate pages. I will, therefore, not consider the exemptions claimed for the second withheld paragraph duplicated on pages 3, 6, 9, 12, 14, 15, 17, 18, 21 and 24.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry claims that the mandatory exemption in section 17(1) of the *Act* applies to Records 2, 3, 4A, 4B, 4C, 9A, 9B and 9C. The Ministry does not indicate, nor does it make specific representations on which of the harms under section 17(1) would result from disclosure of these records. On the records themselves, however, the Ministry indicates that all severances were made pursuant to section 17(1)(a).

Section 17(1) states, in part:

> 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;

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].

The purpose of section 17(1) is set out in the legislative history of the *Act* found in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report). That Report discusses at length the sound policy objectives for imposing a three-part test for this exemption, including a harms test: Commercial and business information should be made available to the public in order to ensure that government is effective, even-handed and accountable in its treatment of similarly situated businesses, except to the extent that overriding concerns can be demonstrated for keeping the information confidential:

> It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequences to the firms. Exemption of all business related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory regimes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.... The ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity....
>
> Two further propositions are broadly accepted as imposing limits on the general presumption in favour of public access. The first is that disclosure should not extend to what might be referred to as the informational assets of a business... The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.
>
> ... [T]he difficulty is one of identifying the kind of information that constitute a firm's informational assets... Accordingly, we believe that the exemption should refer broadly to commercial information submitted by a business to the government, but should limit the exemption to information which could, if disclosed, reasonably be expected to significantly prejudice the competitive position of the firm in question....

> If ... an exemption were to be drafted so as to protect "any information supplied on a confidential basis", existing patterns of secrecy might be preserved on the basis of tacit or express understanding that the government would treat the information as confidential...

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 paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

I will begin with the third part of the three-part test under section 17(1).

Part Three: Harms

Introduction

To meet this part of the test, the Ministry and/or the PRHC 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 submissions

In its original submissions, the Ministry states:

> The breadth and detail of the financial information involved give rise to reasonable expectations that the hospital may be harmed by its disclosure. Such information about the hospital's financial information could affect its ability to negotiate successful[ly] with other parties.

In Reply, in the context of responding to the appellant's section 23 arguments relating to all of the exemption claims, the Ministry adds that:

> [T]he Ministry is seeking to protect certain sensitive elements of the hospital funding process. In the current climate of fiscal uncertainty, it is more important than ever that the Ministry protect the processes it has put in place to maximize the performance of Ontario's hospital system in light of limited health care dollars.

Beyond these very general statements, the Ministry indicates that the PRHC is in a better position to tender and articulate the evidence on specific harms to its interests, and indicates that it relies on the evidence submitted by the PRHC in this matter.

As I indicated above, although provided with a copy of the Ministry's representations regarding section 17(1), the PRHC declined to make representations on the application of section 17(1) to the records that pertain to it, preferring to rely on the submissions made by the Ministry.

Findings

I have reviewed the records for which section 17(1) has been claimed.

Record 2 contains the PCOP relating to the PRHC, and comprises 117 pages of related documents and tables. Severances were made to the narrative portions of 14 pages of the documents and to portions of tables contained on the remaining 46 pages. As I indicated above, I will only consider the application of section 17(1) to the first paragraph of the withheld portions of pages 3, 6, 9, 12, 14, 15, 17, 18, 21 and 24 (which contain duplicate information).

Record 3 contains Facility Costs tables. The portions of these tables relating to Hours (worked, benefits and total hours) have been severed.

Record 4A contains an e-mail chain of communications between the PRHC and the Ministry regarding the PCOP, as well as a briefing note prepared by the PRHC regarding the staff growth plan. This record has been withheld in its entirety

Record 4B is a table setting out the staff recruitment plan. This document has been withheld in full.

Record 4C is a table outlining physician growth summary and has also been withheld in full.

Record 9A comprises a letter and submission from the PRHC to the Ministry regarding transitional costs, dated March 2007. Record 9B provides additional information to that provided in Record 9A and is dated March 2008. Record 9C contains a table setting out the costs and timing with respect to matters addressed in Records 9A and 9B, also dated March 2008. All three of the above records have been withheld in their entirety.

According to the appellant, the new hospital opened in June 2008. Although I recognize that some of the information in the records pertains to future projections, much of the information relates to a time already passed, for example, the information contained in Records 9A, B and C. I note from my review of the records in their entirety that most of the information in the records

has been disclosed to the appellant, including financial information and information similar in nature to that which was withheld.

Neither the Ministry nor the PRHC has explained how disclosure of the records at issue could give rise to a reasonable expectation that one of the harms in sections 17(1)(a), (b) or (c) will occur. In particular, neither party has provided detailed and convincing evidence that disclosure of these records could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization (section 17(1)(a)).

Based on my own review of the records at issue in the context of reviewing the information that has already been disclosed, it is not clear to me what harm could reasonably be expected to occur as a result of the disclosure of the information contained in them. Nor do the submissions or records provide any insight with respect to how the harm contemplated in section 17(1)(a), or (b) or (c), for that matter, could reasonably be expected to arise from the disclosure of records relating to the construction of a unique public facility.

Based on my review of the information contained in these records and the paucity of information provided by the Ministry and/or the PRHC, I find that the burden of proof to establish the application of the harms in sections 17(1)(a), (b) and/or (c) has not been met in this case. Accordingly, I find that the Ministry and/or PRHC have failed to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" as required under section 17(1)(a), and as a result, the third part of the test has not been met. Since all three parts of the section 17(1) test must be met in order for the exemption to apply, I find that Records 2, 3, 4A, 4B, 4C, 9A, 9B and 9C are not exempt under section 17(1) of the *Act*.

No other exemptions have been claimed for these records, and I will order that they be disclosed to the appellant.

ADVICE TO GOVERNMENT

The Ministry claims that the discretionary exemption at section 13(1) applies, in whole or in part, to Records 6C, 8B, 10A, A-001, A-003, B-001, B-002, B-009 and C-004.

General principles

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(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair

pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

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

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

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

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

However, as the Ministry notes in its submissions, the exemption might apply in circumstances where facts and advice are so interwoven that they cannot reasonably be severed [see: Orders P-24 and PO-2725].

The Ministry's submissions

The Ministry states that the records at issue in this discussion "contain details about how Ministry staff developed proposals to allocate funds under the PCOP process." The Ministry acknowledges that the outcome of internal Ministry deliberations is publicly known, but submits

that the severed portions of the records "reveal the advice and recommendations given as an integral part of the decision-making process."

The Ministry also addresses the application of section 13(1) to each record, and I will follow that pattern in addressing this issue. The appellant's representations do not specifically address this issue.

I note that the original index provided by the Ministry indicates that Records 6C, 8B, 10A, A-001, B-001, B-002 and B-009 were originally withheld in full. However, in its submissions, and the index it provided with the submissions, the Ministry indicates that these records are to be withheld in part. The severances made on the copies of these records that were provided to this office, however, do not reflect partial disclosure. The Ministry's submissions on these records, set out below, in some cases do not provide a great deal of assistance in determining which portion of these records it is now prepared to disclose and which portions it would like withheld. Even where the Ministry has identified certain pages, the exact information at issue is not clear. Accordingly, I have reviewed all of the records in their entirety in order to determine whether section 13(1) should apply to them in whole or in part.

Record 6C

According to the Ministry, this record consists of a draft briefing note, an attached draft letter and a covering e-mail. In its submissions, the Ministry notes that much of the briefing note contains factual material, which it will disclose. The Ministry's submissions do not address the covering e-mail. The Ministry states further:

> [S]ection 13(1) applies to the portions of the briefing note, which clearly suggest future action to be taken, or which directly reference advice given elsewhere in the note. Likewise … section 13(1) applies to the attached draft letter for two reasons. First, the letter reveals the substance of the advice given in the briefing note. Second, the letter as a whole represents a course of action being proposed to the Minister.

Covering e-mail

Having reviewed this record, I find that the covering e-mail is directional in nature and does not contain any advice or recommendations. Accordingly, I find that section 13(1) does not apply to exempt it from disclosure.

Briefing note

I accept the Ministry's submissions that portions of the briefing note contain specific recommendations. This information is found in three places:

- the second paragraph under the final bullet point on the first page of the briefing note;
- the three paragraphs under the heading Recommendation on page two of the briefing note; and

- the second and third bullet points under the identified heading on the third page.

For greater certainty, I will highlight the portion of this record that is exempt on the copy of the records that I send to the Ministry with this order.

I am not persuaded that disclosure of the remaining information in this record would reveal advice or recommendations within the deliberative process of government decision-making and policy-making. The remaining portions of the briefing note contain factual information. The letter and its attachments that have been provided to this office post-date the date on the covering e-mail, even though the e-mail refers to a draft. The letter is signed by a Ministry employee and a sign-back form from the recipient is also signed and dated. It is clear that the letter was intended to be, and was in fact, sent out to the recipient. Moreover, I note that some of the information contained in the letter has already been disclosed by the Ministry in its index of records.

Letter

I do not accept the Ministry's argument that the letter must be exempt under section 13(1) because it reveals the advice that has been given. Applying the Ministry's reasoning, any letter prepared for senior staff or ministerial signature would be exempt under the section 13(1) exemption; clearly not the intention of the legislature in enacting this exemption. 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. Even if any advice might have been given in the drafting of a letter, disclosure of the final decision would not reveal the specific advice. Accordingly, I find that the letter is not exempt under section 13(1) of the *Act*.

Record 8B

This record is an e-mail chain that contains internal communications between Ministry staff. On the copy of the severed record provided to this office, only the four bullet points on the first page are highlighted by the Ministry, with reference made to section 13(1). In its representations, the Ministry states that section 13(1) applies only to, "the portions of this record which directly reference recommendations made, or recommendations about to be made in a briefing note." The Ministry submits that, "this record reveals advice in respect of the possible allocations of Ministry funds…"

After reviewing this record, I find that only a small amount of the highlighted portion of it contains or would reveal advice or recommendations within the meaning of section 13(1). The remaining portions of the highlighted information contain factual information. Although the remaining portions of this record consist of communications among Ministry staff, they are of

either a directional or administrative nature or consist of communications relating to the approval process and the checks and balances in place within that process. As noted in Order P-94:

> [S]ection 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the *Act* stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the *Act*. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

On this basis, I find that on the first page of this record, only one sentence and a portion of another sentence qualify for exemption under section 13(1). For greater certainty, I will highlight the portion of this record that is exempt on the copy of the records that I send to the Ministry with this order.

Record 10A

As I noted earlier, the Ministry determined that Record 10 actually consists of 14 separate records and it decided to disclose 13 of them to the appellant. The Ministry indicates that Record 10A (which comprises the first 18 pages of Record 10) consists of a briefing note and some accompanying e-mails. Similar to its submissions regarding Record 6C, the Ministry notes that much of the briefing note contains factual material, which it will disclose. The Ministry continues to claim that section 13(1) applies to e-mails, "that show internal deliberations over various proposed actions." The Ministry makes specific reference to information on a number of pages of this record. In particular, the Ministry states that: page 12, "demonstrates [that] a particular course of action is being proposed as a suitable strategy for upcoming discussions"; page 14 contains a passage "that reveals the substance of certain recommendations made by others"; and pages 16 – 18 in their entirety constitute advice as these pages, "show a chart consisting of specific recommendations on how to approach a series of problems with some accompanying explanations."

Having reviewed the first 18 pages of Record 10, I am not persuaded that any of the information contained therein qualifies as advice or recommendations within the meaning of section 13(1). In my view, the analysis in Order 94, referred to above, is similarly applicable to this record. I find that Record 10A contains communications regarding the funding process and factual background information. If anything, this information is, in part, in the nature of the analytical process staff undertook in addressing the funding issue, but falls far short of being advisory in nature. In Order PO-1993, I addressed the Ministry of Transportation's argument that the scoring of technical components in proposals for road construction contracts represent the judgment of the scorer for the purpose of making a recommendation as follows:

> 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.

In my view, the principal underlying the above reasoning is similarly applicable to any kind of analytical or evaluative work undertaken by staff in a policy-related matter. I find that the information in Record 10A is more akin to providing the factual basis upon which any advice or recommendations would be developed, and therefore, does not qualify for protection under section 13(1) of the *Act*.

Record A-001

This record contains a number of e-mails plus attachments. According to the Ministry, these e-mails "deal with how to respond to a question from the Minister." The Ministry submits that although the question itself deals with factual matter, certain portions of the discussion regarding how to answer the question reveal advice or recommendations. In particular, the Ministry refers to pages 7 and 8 of the record, and states that they reveal how to respond to matters in a way that complies with the proper communication protocols. In addition, the Ministry claims that pages 10 and 15 of this record "contain a single sentence that alludes to advice given in the past."

One of the attachments in this e-mail chain is a duplicate of the letter that is at issue in Record 6C, except that the sign-back form has not been signed. The e-mail chain contains communications relating to the letter. I find that the communications are administrative, factual or directive in nature, or contain mere observations and opinions; but are not advisory in nature. Accordingly, I find that Record A-001 does not qualify for exemption under section 13(1) of the *Act*.

Record A-003

The Ministry states that this record is "an e-mail chain that shows the deliberations of Ministry staff over how certain funding should be allocated." The Ministry has withheld this record in full on the basis that the e-mails "either display identifiable advice or recommendations, or allow for accurate inferences about the nature of that advice." The Ministry adds that the record contains financial charts "which show estimates that incorporate hypothetical amounts of

additional funding that might be allocated to the hospital." The Ministry submits that this information constitutes the "reasons behind the course of action which is being proposed…"

I do not agree with the Ministry's characterization of this record. This record contains forecasting and accounting discussions relating to the funding process. Much of it pertains to actions taken with some references to budgeting. I find that the communications are in the nature of information sharing and keeping upper levels aware of funding allocations that have already been made or proposed. In my view, the reasoning in Order P-94 is relevant to the information at issue in this record. I do not find the information in Record A-003 to be advisory in nature, and section 13(1) does not apply to it.

Record B-001

The Ministry indicates that this record contains an e-mail chain "suggesting ways in which funding might be allocated, and therefore constituting a recommendation…" The Ministry makes similar submissions as those made for Record A-003. The Ministry also notes that this record does contain some actual data, but submits that it is so intertwined with the recommendations that it is not severable.

After reviewing this record, I find that my comments regarding Record A-003 are equally applicable. In my view, the communications in this record are in the nature of information sharing and keeping upper levels aware of funding allocations that have already been made or proposed. Although the communications appear to indicate that approval is being sought prior to the referral of information, it appears that these communications relate to the approval process and the checks and balances in place within that process, and in my view, disclosure will not reveal any advice or recommendations. Therefore, I find that section 13(1) does not apply to it.

Record B-002

The Ministry indicates that this record is similar to the above two records, but that it can be distinguished because the factual elements are more easily separated from the recommendations. Accordingly, the Ministry states that section 13(1) applies only to the portions that contain express recommendations.

My findings for the above two records are applicable to this record. I find that it contains factual information and communications that relate to information sharing as opposed to advising or recommending a specific course of action that can be accepted or rejected during the deliberative process. Accordingly, I find that Record B-002 is not exempt under section 13(1).

Record B-009

The Ministry describes this record as a series of e-mails between staff as the Ministry prepared a response to an inquiry from a newspaper. The Ministry submits that the first page of this record should be withheld under section 13(1) on the basis that the two e-mails contained therein suggest how the Ministry should draft its response. The Ministry submits further that, "even if the last email may contain the ultimate response that was passed on to the newspaper, the

surrounding words and overall context would allow a reader to reliably infer the advice that was given in the previous email…"

Although the Ministry has correctly characterized the two e-mails at issue in this record, I am not persuaded that all of the information on the first page is exempt. I accept the Ministry's argument that the first e-mail in the chain contains a recommendation made by a staff member as to how to respond to a query from the media. The Ministry's position regarding the e-mail response from a senior staff member is similar to the position it took regarding the letter at issue in Record 6C. My findings with respect to the letter in Record 6C are similarly applicable to the final e-mail response in Record B-009. This e-mail reflects the decision already taken following a consideration of the suggested response provided by a staff member. I find that the suggested response qualifies for exemption under section 13(1). However, the response provided by the senior staff member reflects a decision, and in my view, its disclosure would not reveal the specific advice or recommendations given. Moreover, this response was clearly intended to be forwarded to a member of the public. Accordingly, this portion of the record is not exempt under section 13(1). After reviewing the remaining portions of this record, I find that they do not contain any advice or recommendations and are also not exempt.

I will highlight the portion of this record that is exempt on the copy of the records that I send to the Ministry with this order.

Record C-004

This record also contains a series of e-mails. The Ministry states that each one "offers a suggested course of action regarding how the Ministry should allocate funds, and when the funding allocation should be announced." The Ministry states further that a spreadsheet attached to the e-mails "forms an integral part of this discussion because it directly illustrates proposed funding amounts and timelines." The Ministry submits that the factual information in the record cannot be severed from the advice as they are inextricably linked. Therefore, the Ministry claims that this record is exempt under section 13(1) in its entirety.

My comments regarding some of the other records discussed above are similarly applicable to the information contained in Record C-004. As I stated with respect to Record B-001, "the communications in this record are in the nature of information sharing and keeping upper levels aware of funding allocations that have already been made or proposed. Although the communications appear to indicate that approval is being sought prior to the referral of information, it appears that these communications relate to the approval process and the checks and balances in place within that process, and in my view, disclosure will not reveal any advice or recommendations." Accordingly, I find that section 13(1) does not apply to Record C-004.

CABINET RECORD

As I noted above, the Ministry claimed that Record B-002 qualifies for exemption under section 12(1) for the first time in its representations. The Ministry does not indicate whether it relies on any of the subsections under section 12(1) or whether it relies on the introductory wording of this section. Section 12(1) states:

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.

Any record that would reveal the substance of deliberations of 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 the Executive council, ie. 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].

In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations [Order PO-2320].

The Ministry's only submissions on this issue state:

> The Ministry submits that the portion of record B-002 that is severed under section 12(1) of the *Act* is exempt from disclosure because disclosure of the severed portion of this record would reveal the substance of deliberations of the Executive Council and its committees. As such, the Ministry submits that this portion of the record is exempt from disclosure under the mandatory exemption at section 12(1) of the *Act*.

I have reviewed Record B-002. It is noteworthy that the Ministry initially withheld this record in its entirety, which is reflected on the copy of the record provided to this office. Although the Ministry refers to a certain "portion of the record," it has not identified the specific portion it intends to claim the section 12(1) exemption for. I might surmise that a question asked by the Minister is the intended portion, but find that there is nothing on the face of the record to indicate that the question and/or response was prepared and/or viewed or considered by Cabinet. The Ministry's submissions regarding this issue are very sparse and fail to establish that Cabinet deliberated on the issue or that disclosure of this record would reveal the subject matter of any deliberations of Cabinet relating to the matter raised by the Minister's question. Consequently, I find that the Ministry has failed to discharge its onus regarding the application of the introductory wording of section 12(1) or any of the other subsection noted above, and conclude that the exemption does not apply.

ECONOMIC AND OTHER INTERESTS

The Ministry claims that section 18(1)(d) applies to Records 5A and 7.

Section 18(1)(d) states:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

The purpose of section 18 is to protect certain economic interests of institutions. The *Williams Commission Report* explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario," section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

The evidence provided by the Ministry regarding Records 5A and 7 is somewhat confusing. Although the Ministry's submissions clearly make reference to its claim that the exemption at section 18(1)(d) applies, the index that it includes with its representations indicates that these two records were disclosed during mediation. The complete submission of the Ministry on this issue consists of the following statement:

> The Ministry submits that section 18(1)(d) of the *Act* applies to records 5A and 7 because disclosure of these records could reasonably be expected to be injurious to the Government's financial interests and its ability to manage the economy of Ontario.

In my view, a reiteration of the words of the exemption falls far short of providing "detailed and convincing" evidence to establish a "reasonable expectation of harm." Similar to my observations above, I note that the information contained in Records 5A and 7 is of a similar nature to other information that has been disclosed to the appellant. As I found above, the records do not provide any insight with respect to how the harm contemplated in section 18(1)(d) could reasonably be expected to occur should they be disclosed. Based on the evidence before me, I find that the Ministry has failed to satisfy the burden of proof that these two records fall within the section 18(1)(d) exemption, and it does not apply. As no other exemptions have been claimed for Records 5A and 7, they should be disclosed to the appellant.

PUBLIC INTEREST OVERRIDE

The appellant argues that there is a compelling public interest in the disclosure of the records. She states:

> There is a compelling public interest to release records currently being withheld, as it will fill some of the gaps in information from the third party [PRHC].
>
> The gaps pertain to how PRHC plans to grow services, attract staff and erase its deficit. The hospital has provided contradictory information over the last two years…

> [My request] was filed because vague information was being provided by the hospital about plans for the new hospital, which opened June 9, 2008. The plan has also, and still is to this day, never been publicly released.
>
> One main issue is the hospital's assertion that as it "grows" its services it would erase its deficit, which has been a problem for the last 10 years.

The appellant also refers to a number of newspaper articles regarding these issues as evidence of the public interest in disclosure of the records.

General principles

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I found above that only small portions of three records are exempt under section 13(1) of the *Act*, and will only consider whether the public interest override applies to those severances.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-

disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [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.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Finding

Having reviewed the exempt portions of Records 6C, 8B and B-009, and the appellant's representations, I find that the public interest override found in section 23 does not operate to override the portions of these records which I have found qualify for exemption under section

13(1). The withheld information in Record B-009 reflects the advice provided by a public servant. I have ordered that the senior staff's decision in that regard be disclosed. Moreover, the Ministry's decision disclosed the vast majority of the records to the appellant, and through this Order, the appellant will receive all but a few minor pieces of information. In my view, the public interest has been met by the disclosures already made and those ordered released.

Accordingly, I am not persuaded that any public interest in the disclosure of the withheld portions of Records 6C, 8B and B-009 is sufficiently compelling to override the exemption, and I find that section 23 does not apply.

ORDER:

1. I uphold the Ministry's decision to withhold the information that I have highlighted in yellow on the copies of Records 6C, 8B and B-009 that I have attached to the copy of this order.

2. I order the Ministry to disclose the remaining information in the records to the appellant by **June 22, 2010** but not before **June 17, 2010**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records that have been disclosed to the appellant.

Original signed by: May 18, 2010
Laurel Cropley
Adjudicator