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

ORDER MO-2613

Appeals MA09-248 and MA09-150

The Regional Municipality of Niagara

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This order addresses the issues raised in two appeals, which were both opened to address the access decision of the Regional Municipality of Niagara (the region)[1] in response to a request for information related to a December 2008 *C. difficile*[2] outbreak in the Niagara Health System.[3]

NATURE OF THE APPEAL:

A member of the media submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the region for access to:

> … all documents, reports, correspondence, e-mails, briefing notes and minutes pertaining to *Clostridium difficile* in the Niagara Health System since January 2007. I would like these minutes to include but not be limited to, meetings of hospital boards of directors, boards of governors, infection control committees and outbreak committees.

Following receipt of the request, the region notified five parties whose interests may be affected by disclosure of the information, pursuant to section 21(1)(a) of the *Act*. This section of the *Act* offers affected parties an opportunity to express their views respecting disclosure of responsive records that may be subject to the mandatory exemption for third party information in section 10(1) of the *Act*.[4] From the letters sent, it appears that the region notified the affected parties under section 21(1)(a) with respect to the possible application of sections 8 (law enforcement), 9(1) (relations with other governments) and 10(1) (third party information).

The region issued several consecutive decision letters upon receipt of the responses from the various affected parties. In the first decision letter, the region granted partial access to responsive records, with severances made pursuant to sections 10(1)(b) (third party information) and 14(1) (personal privacy) of the *Act*. At that time, the region noted that it had only received responses from two of the five affected parties. One of these parties, Niagara Health objected to the disclosure of any of the records identified by the region as responsive. The region advised the

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[1] Pursuant to section 5 of the *Health Protection and Promotion Act* [*HPPA*] (R.S.O. 1990, Ch. H.7), the Medical Officer of Health of the region's board of health is required to provide health programs to the public in the areas of infection and disease control, health promotion and protection, and disease and injury prevention (region's representations, page 3). It was in its public health capacity that the region received the request as an institution under the *Act*.

[2] *Clostridium difficile*, or *C. difficile*, are bacteria that can affect the large intestine, or colon, causing diarrhea, fever, and abdominal cramps. *C. difficile* can result from taking antibiotics and can also be passed from person to person. The infection is usually mild but can sometimes be more severe. It is most common in people who are taking antibiotics while in the hospital or a long-term care facility. Old age, other serious illnesses and poor overall health may increase the risk of severe disease. Source: Ministry of Health and Long-term Care website.

[3] I conducted a joint inquiry into the issues raised by the requester's appeal of the region's access decision, as well as the third party appeal of the region's decision by the Niagara Health System. For the purpose of this order, the original requester from Appeal MA09-248 will be referred to as the appellant, while the third party appellant in Appeal MA09-150 will be referred to as "Niagara Health," an abbreviation of its name.

[4] Section 21(1)(a) states that: A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,

> (a) that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information;

requester that it had sent a "decision to disclose" to Niagara Health, and was awaiting the expiry of the 30 day time limit for that party to file an appeal.

Niagara Health subsequently appealed the region's decision to disclose records, and this office opened Appeal MA09-150, a third party appeal, to address the issues.

After receiving the remaining affected parties' submissions, the region issued two further decision letters to the requester, granting partial access to records, with severances made pursuant to section 9(1)(d) (relations with other governments) of the *Act*. It appears that with respect to these two affected parties (Ontario Agency for Health Protection and Promotion [OAHPP] and Central South Infection Control Network [CSICN]), information was withheld only under section 9(1)(d), not section 10(1)(b).

The requester then appealed the region's access decisions. This office opened Appeal MA09-248, and appointed a mediator to explore resolution of the issues. The same mediator was appointed for Appeals MA09-150 and MA09-248, and mediation was pursued in both appeals concurrently.

During the course of mediation, the appellant indicated that she did not wish to pursue access to any personal information, including patient names or other identifiers. Accordingly, certain records were removed from the scope of the appeal entirely, as were the severances made to other records (pages 214-217) under section 14(1). I note here that it is possible that the personal information that had been at issue may have qualified as "personal health information" according to the definition of the term in the *Personal Health Information Protection Act, 2004*.[5] However, as the appellant is not pursuing access to this information, it is unnecessary for me to determine the issue or to review the region's claim of the personal privacy exemption in section 14(1). Regardless, access to the responsive portions of pages 214-217 remains at issue under section 10(1)(b), based on the position taken by Niagara Health in Appeal MA09-150.

The appellant also raised the possible application of the public interest override in section 16 of the *Act* during mediation as she believed that there is a compelling public interest in disclosure of the information that should override the exemptions in sections 9(1)(d) and/or 10(1)(b).

Since the appeals could not be fully resolved by mediation, they were transferred to the adjudication stage, where they were assigned to me to conduct an inquiry. I started my inquiry by sending a Notice of Inquiry outlining the facts and issues to the region, to Niagara Health and to the two other affected parties that did not consent to the disclosure of the information relating to them (OAHPP and CSICN). I received representations from all of these parties.

In its representations, Niagara Health referred to a claim of section 7(1) (advice or recommendations) with respect to one of the records. However, I did not add the possible application of section 7(1) as an issue in my inquiry because Niagara Health is not an institution under the *Act*, and I concluded that it could not claim a discretionary exemption under the *Act* in the circumstances of this appeal. I address this claim more fully as a preliminary matter, below.

[5] S.O. 2004, Chapter 3, section 2. In turn, this may have triggered the application of that statute to the personal health information, rather than the *Act*, depending on the possibility of severance. See footnote 7, below.

Niagara Health also argued in its representations that the region did not have the authority to disclose many of the records at issue because the records were "under the custody and control" of Niagara Health, not the region.

Next, I sent a modified Notice of Inquiry, along with copies of the other parties' representations, to seek submissions from the appellant. In light of the position taken by Niagara Health in its representations, I added the issue of custody or control respecting the records to the appellant's Notice of Inquiry. However, the appellant decided not to provide representations in response to the Notice of Inquiry.

RECORDS:

As outlined in the region's revised (November 23, 2009) index of records, the records remaining at issue consist of emails with attachments pertaining to the *C. diff*. outbreak, Niagara Health [System] Outbreak Committee Meeting Minutes, and Greater Niagara General Hospital [GNGH] Emergency Infection Control Meeting Minutes.[6] All page references in this decision correlate to the page numbers provided in the region's index, which relates to Appeal MA09-248.

DISCUSSION:

ARE THE RECORDS IN THE REGION'S CUSTODY OR UNDER ITS CONTROL?

This issue comes before me as a result of Niagara Health's position that the responsive records consisting of "confidential documents, minutes and/or emails" originating with the infection control committees are "under [its] custody and control" and that, accordingly, the region "does not have the authority to release these records under the [*Act*]." Consequently, the question of whether those particular responsive records are "in the custody or under the control" of the region for the purpose of section 4(1) of the *Act* is an issue that must be determined as a preliminary matter.

Section 4(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless ...

Section 4(1) of the *Act* identifies that the issue of whether or not a record is in the custody or under the control of an institution (in this case, the region) is the initial threshold for determining whether that record is subject to the *Act*. Records in the custody or under the control of the region may be excluded from the scope of the *Act* under section 52 or may be subject to a mandatory or discretionary exemption in sections 6 though 15 or section 38. However, these determinations only arise for records found to be in the region's custody or under its control under section 4(1).

[6] In this decision, organizations or agencies whose information is found in the records are referred to by their acronyms. The same style of usage will apply to committee names as required.

This office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? (Order P-120)
- What use did the creator intend to make of the record? (Orders P-120 and P-239)
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? (Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* [1999] O.J. No. 4072)
- Is the activity in question a "core", "central" or "basic" function of the institution? (Order P-912)
- Does the content of the record relate to the institution's mandate and functions? (Orders P-120, P-239 and PO-2836)
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? (Orders P-120 and P-239)
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? (Orders P-120 and P-239)
- Does the institution have a right to possession of the record? (Orders P-120 and P-239)
- Does the institution have the authority to regulate the record's content, use and disposal? (Orders P-120 and P-239)
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record? (Orders P-120 and P-239)
- How closely is the record integrated with other records held by the institution? (Orders P-120 and P-239)
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? (Order MO-1251)

Niagara Health's representations on the issue of custody or control generally follow the outline of the factors set out above. In support of its argument that the records originating with the infection control committees are solely in the custody or control of Niagara Health and that the region does not have the authority to disclose them, Niagara Health notes that as a public hospital, the Niagara Health System is not subject to the *Act*.[7]

Niagara Health submits that the records were created by a "private hospital committee" and by hospital personnel, not by employees of the region although Niagara Health acknowledges that two of the region's staff sat on the committee at Niagara Health's invitation. Further, Niagara Health submits that:

> Emails were provided to committee members and to a consultant to the committee from Niagara region … whose advice and input was sought and who it was deemed should have the information, but at no time was custody or control relinquished.

Niagara Health refers to the purpose of the records being "for internal hospital purposes only," as "a record of the committee's proceedings and decisions" and "to keep the staff member up-to-date." Niagara Health acknowledges that the records were provided to the region's committee members voluntarily but argues that the records were not provided pursuant to any mandatory, statutory or employment requirement.

Niagara Health cites Order P-239 where former Commissioner Tom Wright found that "mere possession" of records does not amount to custody for the purposes of the *Act* and that "there must be some right to deal with the records and some responsibility for their care and protection." In addition, Niagara Health submits that the following review of the factors outlined in Order P-120 establishes that the region is "not in custody or control of the committee documents":

- The committee documents were not created by an officer or employee of the [region];
- The email communications were always intended to be part of the internal email communication of the hospital committee;
- The [Niagara Health] infection control committee, while not specifically designated a committee under the *Quality of Care Information Protection Act*[8], was operating in that

[7] In October 2010, after the Niagara Health System's representations were submitted in these appeals, the Ontario government introduced legislation to bring public hospitals under the province's access to information regime. Bill 122, the *Broader Public Sector Accountability Act, 2010* contains amendments to the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to the municipal *Act*, whose provisions are under consideration in this appeal) that bring hospitals under *FIPPA* as of January 1, 2012. Personal health information is not included under the *Act* and instead remains protected by the *Personal Health Information and Protection of Privacy Act, 2004*, cited above. Personal information, *per se*, is protected under the *Act*. See section 8(4) of *PHIPA* which reads: "This *Act* does not limit a person's right of access under … section 4 of the *Municipal Freedom of Information and Protection of Privacy Act* to a record of personal health information if all the types of information referred to in subsection 4(1) are reasonably severed from the record."

[8] *Quality of Care Information Protection Act, 2004*, S.O. 2004, Ch. 3 Schedule B (*QCIPA*). Further arguments respecting the possible effect of *QCIPA* on the section 9(1)(d) exemption are reviewed in a later part of this decision.

> paradigm, and was freely and openly sharing information … with committee members and/or a consultant to the committee thus resulting in the email communications;
> - The only reason an employee of the region was in possession of the emails was strictly with respect to his or her duty as … [a] committee member and/or consultant to the committee; and
> - The employees of the … region have no authority to regulate the emails' use and disposal.

Niagara Health also relies on Order M-875, arguing that it "provides the most analogous factual matrix to the issue in this appeal" given that the requester, a member of the media, asked the London Police Services Board for information related to tips received by the London chapter of Crime Stoppers. Niagara Health submits:

> The police located the records but denied access… The essential question was whether or not police had custody or control of those records. Assistant Commissioner Glasberg reviewed Order 120 and the various factors set out therein and concluded that police did not exercise control over the records. Among those reasons that are relevant and analogous to the case before the Commissioner here are:
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> 1. the police did not create the records;
> 2. it was not the intention of Crime Stoppers that the records would be permanently retained by the police; and
> 3. the police did not have the authority to regulate the use of the records.

As noted in the introductory section of this order, the appellant did not provide representations for my consideration in these appeals.

Analysis and Findings

As stated previously, the courts and this office have applied a broad and liberal approach to the custody or control question because doing so is important to give proper effect to the purposes and principles of the *Act*.[9] This office has also specifically considered the issue before me in this appeal: that is, whether records that are in the possession of an institution but that originate from a body that is *not* an institution under the *Act* may be subject to access under the *Act*.

In Order P-239, former Commissioner Tom Wright reviewed the issue in relation to records originating from the Ombudsman's office that were in the possession of the Ministry of Government Services, and explained that:

> Although the Ombudsman's office is not listed among those entities which are to be considered "institutions" for the purposes of the *Act*, there is nothing in the *Act*

[9] The purposes of the *Act* are set out in section 1. See also *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), as well as Orders 120, MO-1251 and PO-2836.

> which expressly excludes from its application records which originated in the Ombudsman's office.
> Section 10(1) of the *Act* [the provincial equivalent of section 4(1)] provides as follows:
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> > Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.
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> It is my opinion that to remove information originating from non-institutions from the jurisdiction of the *Act* would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the *Act*. Therefore, it is my view that the *Act* can apply to information which originated in the Ombudsman's office which is in the custody or under the control of an institution. …

The former Commissioner then set out the factors established in Order 120 by his predecessor, Commissioner Sidney B. Linden, and noted that:

> Some of the factors listed in Order 120 are evidence of custody, some are evidence of control and some factors are evidence of both. In my opinion, there is an intended distinction between the concepts of custody and control. An institution that has control of a record may not have the record in its custody, alternatively, an institution with custody of a record may have very limited rights of control. **In order to fall under the jurisdiction of the *Act* an institution need only have custody or control of a record.** In the circumstances of this appeal I will be considering the issue of whether the institution has custody of the records [emphasis added].
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> The office of the Ombudsman has submitted that as the institution does not have the power to govern the use of the records, the records are not in the custody or under the control of the institution to the extent required to render them accessible under the *Act*. In my view, the fact that there may be limits on the institution's ability to govern the use of the records is relevant to the issue of whether the institution has control of the records, but does not preclude an institution from having custody.
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> …
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> It is the position of the office of the Ombudsman that although the institution has possession of the records, it is bare possession which does not amount to custody for the purposes of the *Act*. I agree that bare possession does not amount to custody for the purposes of the Act. In my view, there must be some right to deal with the records and some responsibility for their care and protection.

The former Commissioner then went on to review the circumstances of the appeal and concluded that the Ministry of Government Services had custody of the responsive records, as well as the attendant "right to deal with the records and some responsibility for their care and protection." In this appeal, my analysis reflects the approach taken by Commissioner Wright in Order P-239.

Accordingly, therefore, I am satisfied that infection control committee records in the possession of the region may be subject to access under the *Act*, notwithstanding the fact that they may have originated from a third party, Niagara Health, which is not an institution under the *Act*.[10] Essential to the determination in this appeal, in my view, is the finding in Order P-239 that records need only be in the *custody* of the institution for there to be a corresponding responsibility to deal with those records in accordance with the *Act*, as long as other indicia of the right to deal with those records is established.

I find further support for my approach to this issue in this appeal, including the distinction I make between the concept of custody versus control under the *Act*, in a recent Divisional Court decision upholding Assistant Commissioner Beamish's finding in Order PO-2739: *Ministry of the Attorney General v. Information and Privacy Commissioner & CBC*, 2011 ONSC 172.[11]

Returning to a consideration of the factors set out in Order 120, however, I note that Niagara Health has raised several relevant points. To begin, I accept that most of the records of concern to Niagara Health in this respect were not created by employees of the region, with the exception of a few emails. I also accept that the region's possession of the records came about only as a result of the involvement of its employees in the Niagara Health infection control and outbreak committees, and that these records represent "part of the internal email communication of the hospital committee."

On balance, however, I find that the factors weighing in favour of a finding of the region having custody of the records for the purpose of section 4(1) of the *Act* outweigh those that weigh against such a finding.

Indeed, there are a number of similarities between the circumstances of this appeal and those considered by the former Commissioner in Order P-239. First, there is no dispute that the responsive infection control committee records are in the possession of the region, and were voluntarily provided to the region's employees.

Second, I am satisfied that the region is responsible for the care and protection of its *copy* of those records and that this carries with it the authority to regulate, at the very least, the disposal of the records pursuant to any records retention schedule that may exist for the region.

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[10] See also Orders P-1001, MO-1225 and PO-2836.

[11] At issue in that case were "Offence Type Statistics by Location" contained in reports that had been prepared originally at the request of the Chief Justice of the Ontario Court of Justice for court administration purposes. With the permission of the Chief Justice, these reports were in the possession of crown attorneys and senior court staff with the Ministry of the Attorney General for planning and decision-making purposes. The Divisional Court reviewed Orders 120 and P-239 and found that the records were in the *custody* of the Ministry, notwithstanding their original creation for the Ontario Court of Justice, which is not an institution under the *Act*. The Ministry of the Attorney General was therefore required to deal with the records in accordance with the provisions of the *Act*. See also Order PO-2836.

Third, I find that the records relate to the institution's mandate and function in the sense that one of the region's core functions or responsibilities is the oversight of public health, about which the subject matter of these records is very much concerned (Order P-912). Indeed, the region's representations refer to the Medical Officer of Health's *HPPA* duties, in conjunction with Niagara Health's By-laws, leading to his or her (or a designate's) membership on the Infection Prevention and Control Committee.[12]

Fourth, as in Order P-239, I accept as relevant to the issue of custody under the *Act* the fact that the institution "responded to the request and participated in mediation implying that it had the right to deal with the records."

Finally, also similar to Order P-239, I find that any limitations placed on the region's employees as regards their use of the records do not relate to the region's *custody* of the records, but rather its possible control over the records. In this context, I find Niagara Health's argument about the committee functioning as a quasi "quality of care committee" for the purposes of *QCIPA* (with corresponding confidentiality requirements) to be unpersuasive, relating as it does to the concept of, or obligations regarding, control of the records.

Moreover, in my view, Order M-875 does not assist Niagara Health in disputing the authority of the region to deal with the records under the *Act*. Although there is a superficial similarity in the facts – a media requester sought records from an institution that had been created by a non-institution – the appeal is distinguishable. Most importantly, the London Police did *not* have copies of the responsive Crime Stoppers records in their possession, nor would those records have been voluntarily provided in the normal course of operations for the two organizations, which the former Assistant Commissioner was satisfied were "independent and distinct." In that decision, the fact that the police did not possess the responsive records was crucial to the finding that the police did not have custody of the records for the purpose of the *Act*. The same cannot be said here.

In the circumstances of this appeal, therefore, I find that all of the responsive records are in the custody of the region pursuant to section 4(1) of the *Act*. As discussed above, it is sufficient that there be a finding of custody for there to be a corresponding authority and responsibility on the part of the region to deal with the records in accordance with the *Act*.

MAY THE AFFECTED PARTY CLAIM THE APPLICATION OF A DISCRETIONARY EXEMPTION NOT RELIED ON BY THE REGION?

As stated previously, Niagara Health raised (for the first time in its representations) the issue of the application of section 7(1) of the *Act* with respect to one of the emails.[13] Niagara Health submits that the part of the email of concern to it was written by an employee of the region following a teleconference involving that individual and officials from the Ministry of Health and Long-Term Care. Further, Niagara Health submits that this individual is "clearly an officer or employee" of the region, and she is providing advice or recommendations to address the *C. difficile* outbreak, not simply general guidance. Niagara Health argues that the email string at

[12] This reference appears as part of the region's submissions on the exemption in section 10(1) of the *Act*.
[13] Pages 183-186.

pages 183 to 186 constitutes advice or recommendations, is exempt in its entirety under section 7(1), and that none of the exceptions in section 7(2) apply in the circumstances.

The position taken by Niagara Health necessarily raises the question of whether an affected party (who is also, in this case, a third party appellant challenging the region's access decision) may claim the application of a discretionary exemption that was not relied on by the institution in its access decision.

In Order PO-1705, former Assistant Commissioner Tom Mitchinson addressed a situation in which an affected party raised the possible application of (additional) discretionary exemptions during the mediation stage of the appeals process. In determining that the affected party should not be permitted to claim discretionary exemptions in that appeal, he stated:

> During mediation, the third party raised the application of the sections 13(1) [the provincial equivalent to section 7(1) of the municipal *Act*] and 18(1) [the provincial equivalent to section 11 of the *Act*] discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.
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> This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:
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> > The *Act* includes a number of discretionary exemptions … which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
> >
> > The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) [the equivalent of section 14(1) of the *Act*] and 17(1) [the equivalent of section 10(1) of the *Act*] of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request

> of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
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> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

I have considered the reasons provided in Orders PO-1705 and P-1137, and I adopt this approach in my analysis of the issue in the present appeal.

In reviewing Niagara Health's position that it should be permitted to claim the discretionary exemption in section 7(1) in opposing disclosure of pages 183-186, I have considered the circumstances of the appeals before me, as well as the nature of the section 7(1) exemption.

As stated in Order P-1137, this office has an "inherent obligation to ensure the integrity of Ontario's access and privacy scheme" which, in my view, ought to include respecting the intent of the legislature to designate certain exemptions as mandatory ones and others as discretionary; i.e., at the discretion of the head of an institution. In other words, the access scheme under the *Act* expressly confers discretion upon the head of an institution to claim, or not claim, discretionary exemptions with a view to protecting its own institutional interests. In this case, the institution itself relies only on the mandatory exemptions in sections 9(1)(d) and 10(1). Further, the mandatory personal privacy exemption in section 14(1) has been removed from the scope of the appeal because the appellant is not seeking access to personal information.[14]

I accept that it ought to be only in the most unusual of cases that an affected party could raise the application of an exemption which has not been claimed by the head of an institution. In my view, this is not the most unusual of cases. In particular, there is no evidence before me to suggest that the region did not consider relevant factors or that it acted in bad faith in exercising its discretion to not claim discretionary exemptions. In reaching this conclusion, I have considered the nature of the exemption in section 7(1) of the *Act*, which is intended to provide some protection for advice or recommendations prepared for the purpose of participation in government decision-making processes.[15]

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[14] The appellant's decision to not seek personal information does require consideration (at a later point in this order) of whether certain information qualifies as "personal information" pursuant to the definition in section 2(1) of the *Act* for the purpose of severing that information from the records.

[15] See *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), page 288. See also Order MO-1865-I, where former Assistant Commissioner Tom Mitchinson rejected the City of Toronto's claim that section 7(1) applied to notes and email messages describing actions and activities undertaken by the Associate Medical Officer of Health during the SARS Crisis in 2003. The former Assistant Commissioner stated: "… For the most part, the [records] consist of a handwritten chronology of actions and activities undertaken by [the] official during the early stages of

In the circumstances, therefore, I am not persuaded that sufficiently compelling circumstances exist that would justify the extraordinary step of permitting Niagara Health, as an affected party, to claim the discretionary exemption in section 7(1) when the region has elected not to do so. Accordingly, I will not consider the possible application of section 7(1) of the *Act* to pages 183-186.

DO THE RECORDS CONTAIN THIRD PARTY INFORMATION THAT IS EXEMPT UNDER SECTION 10(1)?

The region withheld records, or portions of them, pursuant to section 10(1)(b) of the *Act*. In its third party appeal, Niagara Health opposes disclosure of those same records, and also appeals the disclosure of other information that the region intended to release.[16]

In the circumstances of this appeal, and for the following reasons, I am not satisfied that section 10(1) applies to the information the region and Niagara Health seek to withhold.

The mandatory exemption in section 10(1)(b) of the *Act* states:

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

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[17] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(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 and MO-1706).

For section 10(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

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the SARS crisis, including meetings with other public health officials, discussions on how to deal with the various aspects of managing the emerging crisis, and steps being taken to control the spread of the illness. In my view, most of the records contain factual information, and in some instances analytical or evaluative information relating to the work of the crisis management team, all of which are categories of information that do not qualify for exemption under section 7 (at page 12-13)."

[16] Pages 36-72, 75-78, 82-107, 109-110, 169-182, 183-186 were withheld in part or in full by the region. In addition, Niagara Health appealed the region's decision to disclose any parts of pages 183-186 and 214-220.

[17] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.).

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 the harms specified in paragraph (b) of section 10(1) will occur.

In this case, because the region is prepared to disclose certain records, or larger portions of them, and Niagara Health objects, it is Niagara Health who bears the burden of proof to provide sufficient evidence that all the requirements of the exemption have been met, at least with respect to those additional records identified in footnote 16, above.

Representations

Both the region and Niagara Health, as the parties opposing disclosure of the records under section 10(1)(b) of the *Act*, provided detailed representations on the specific healthcare and public health context of the information at issue. These representations include a description of the duties and responsibilities of the Medical Officer of Health under the *HPPA* in matters of health promotion and protection, as well as communicable disease monitoring and reporting.

Regarding the type of information in the records, the region submits:

> The information requested contains scientific and technical information and also contains confidential patient case-specific information, as well as microbiological information that is unique to each patient. All of this information informs infection prevention and control best practices …

According to Niagara Health, the records contain both scientific and technical information in that it consists of health-related information resulting from the observation and testing of patients, as well as the monitoring and control of the outbreak through isolation. Niagara Health relies on Order MO-2004 where this office found that records related to soil and groundwater contamination contained "technical information" in the form of monitoring and testing procedures and test results. Niagara Health submits that:

> Again, taking a broad purposive approach, … the emails in question between and among professionals dealing with the outbreak and monitoring of *C. difficile* is an informational asset, and should properly be determined to be scientific and/or technical information under the *Act*.

As stated, the appellant provided no representations for my review in these appeals.

Analysis and Findings

As I understand it, the basis of the parties' opposition to disclosure under section 10(1)(b) is grounded in concerns about the specific information at issue, but also in preserving the confidentiality and effective functioning of hospital and cross-agency committee processes more

generally. However, while I accept the proposition that effective collaboration between the various institutions and organizations involved in confronting serious public health issues could be threatened by compromised information-sharing (as the parties argued would result from disclosure), establishing that the information specifically at issue in these appeals is exempt under section 10(1)(b) of the *Act* is another matter. Furthermore, as noted previously in this order, it should also be acknowledged that the legislative framework underlying the review of access to records created in a hospital environment is on the cusp of change.[18]

As currently in place, however, section 10(1) of the *Act* exists to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, the disclosure of which could be exploited by a competitor in the marketplace. The authors of the *Williams Commission Report* explained that the "basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information."[19]

The types of information that the region and Niagara Health claim are contained in the records at issue here have been interpreted in past orders to mean:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field (Order PO-2010).
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing (Order PO-2010).

From the vantage point of those definitions and the context in which the exemption for third party information exists, I conclude that the information at issue in the appeals before me does not qualify as either scientific or technical information for the purpose of section 10(1). Although Niagara Health urges me to adopt a "broad purposive approach" to the determination of whether the information fits within the definitions, this would result, in my view, in a strained interpretation of the categories that the exemption was intended to protect. Furthermore, past orders of this office, in reviewing the purpose of the section 10(1) exemption, readily acknowledge that not all information obtained from a third party has value as an informational asset.

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[18] See footnote 7, *supra*.

[19] *Public Government for Private People: the Report of the Commission on Freedom of Information and Individual Privacy 1980*, (Toronto: Queen's Printer, 1980) (the *Williams Commission Report*), which provided the foundation of the *Act*. See page 313.

Moreover, in my view, the evidence offered respecting the processes related to addressing the public health issue of *C. difficile* is not helpful in ascertaining whether the specific information that has been withheld properly qualifies under the mandatory exemption in section 10(1).[20] Under part 1 of the test for exemption under section 10(1), the evidence adduced by the parties resisting disclosure must address the specific items of information contained in the record that it claims to be exempt under section 10(1)(b). In this regard, for example, I reject the position taken by Niagara Health that the withheld information consists of microbiological information about patients of any great detail.

Rather, on my review of the withheld information, I find that it does not qualify as scientific information. Although there may be snippets of information connected to the observation and testing of patients as staff monitored the patients affected by *C. difficile*, the withheld information does not relate to observation and testing *of a specific hypothesis or conclusion undertaken by an expert in the field* of public health and/or nosocomial (hospital-acquired) infections. Indeed, mere reference to information which might otherwise be scientific is not sufficient to bring the information within the scope of the definition (Orders MO-1357, PO-1707, PO-1825 and PO-1851-F).

I am also not satisfied that the withheld information constitutes technical information, as that term is recognized under section 10(1) by this office. The information at issue does not fall into the realm of applied sciences or mechanical arts, nor is it detailed or precise information related to "the construction, operation or maintenance of a structure, process, equipment or thing."

Niagara Health relied on Order MO-2004 in support of the assertion that the records contain technical information, as that term has been interpreted in the past by this office. However, I note that in that order, the evidence before Adjudicator John Swaigen entailed "explanations and descriptions of monitoring and testing procedures and test results," which he found qualified as "technical information." In my view, none of the information at issue in these appeals contains the requisite level of detail in this regard. Further, Adjudicator Swaigen also found that other information in the record was neither scientific nor technical and did not satisfy part 1 of the test for exemption.[21]

All three requirements of the test for exemption must be met before section 10(1) can apply. As I have found that none of the information at issue in these appeals satisfies the first requirement respecting the type of information that must be contained in the records, it is unnecessary for me to consider whether the second or third requirements of the test under section 10(1) are met.

Accordingly, I find that section 10(1) of the *Act* does not apply. Therefore, I dismiss Niagara Health's third party appeal. As no other exemptions have been claimed for the records withheld pursuant to section 10(1)(b), I will order that they be disclosed to the appellant.

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[20] See Orders MO-1706 and MO-1750, which include discussions of the required proof, or the "evidentiary benchmark"; including reference to the decision of former B.C. Information and Privacy Commissioner David Loukidelis in Order 01-20 (University of British Columbia).

[21] In the end result, none of the information at issue in Order MO-2004 qualified for exemption under section 10(1).

PERSONAL INFORMATION

As previously noted, the appellant advised during mediation that she did not wish to pursue access to any personal information which may be contained in the records. Further, it also appears that the appellant agreed to remove patient initials from the scope of the appeal on the same basis. In that context, it was unnecessary to engage in a full review of whether all information withheld by the region under the personal privacy exemption in section 14(1) actually qualified as "personal information" for the purpose of the definition of that term in section 2(1) of the *Act*. Only personal information can be withheld under section 14(1).

However, with respect to the emails and attachments consisting of floor plans for the affected hospital unit at pages 214-217, I note that the region had been prepared to disclose the first copy of the floor plan at page 215 with patient initials and symptom onset dates severed, at least prior to Niagara Health's third party appeal. Having found that section 10(1)(b) does not apply to pages 214-217, I have decided that I should comment on the proposed severances to page 215, which consists of a floor plan for the affected hospital unit that also contains the patient initials and symptom onset dates mentioned above.

Section 2(1) of the *Act* defines personal information as "recorded information about an identifiable individual." The paragraphs following that phrase list examples of what may qualify as personal information, including paragraph (b), an individual's medical history and (c), any identifying number, symbol or other particular assigned to the individual. I provide these examples because they appear to be the most relevant ones to consider with respect to the withheld symptom onset dates.

Importantly, however, in order to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[22]

In Order MO-1865-I, former Assistant Commissioner Tom Mitchinson considered the issues raised by a request filed by a journalist for access to certain City of Toronto public health records related to the SARS[23] crisis of 2003. There, as in the present appeals, the appellant did not seek access to "any information that would identify SARS patients, including their names and birthdates, and asked that this type of information be severed from the records prior to disclosure." However, the appellant in that case did pursue access to other information about SARS patients, such as information about symptoms and treatment, the disclosure of which the City of Toronto argued would result in individual patients being identified. Referring to the decision of the Divisional Court in upholding Order PO-1880, the former Assistant Commissioner stated that a finding of identifiability requires sufficient evidence to establish a nexus between the information and the individual. In a follow-up decision on the same matter, Order MO-1886-R, the former Assistant Commissioner also found that disclosing references to dates associated with SARS patients would not render individual SARS patients identifiable. I agree with these reasons and adopt them in my consideration of whether the *C. difficile* symptom onset dates on page 215 qualify as personal information according to the definition of that term in section 2(1) of the *Act*.

[22] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[23] SARS refers to "severe acute respiratory syndrome."

In the circumstances of the present appeal, I am prepared to accept that the combination of information items from the floor plan on page 215, such as room number, patient initials and infection onset date may reasonably be expected to result in the identification of identifiable individuals who contracted *C. difficile* during their hospital admission, if combined with other information sources that may be available. However, if patient initials are withheld, I find that it is not reasonable to expect that individuals would be identified by the date of the onset of symptoms related to their *C. difficile* infection. Accordingly, I will order the region to disclose the symptom onset dates on page 215, but not the patient initials.

WOULD DISCLOSURE REVEAL CONFIDENTIAL INFORMATION RECEIVED FROM OTHER GOVERNMENTS?

Section 9(1)(d) has been claimed to deny access to portions of pages 190-193 (affected parties: OAHPP and CSICN) and pages 209-213 (affected party: CSICN).

The relevant parts of section 9 state:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (b) the Government of Ontario or the government of a province or territory in Canada; …
>
> (d) an agency of a government referred to in clause (a), (b) or (c); …
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" (Order M-912). The focus of this exemption is to protect the interests of the supplier, and not the recipient. Therefore, the supplier's requirement of confidentiality is the one that must be met. However, some past orders of this office refer to a mutual intention of confidentiality (Order MO-1896).

In the Notice of Inquiry, I asked the relevant affected parties, the CSICN and the OAHPP, to address only the exemption in section 9(1) of the *Act* as this was the only exemption claimed in relation to information identified by the region as having originated with them.

Representations

The region submits that disclosure of the records could reasonably be expected to reveal information it received from the OAHPP and the CSICN. The region notes that it received correspondence from these two agencies through emails that the region was "cc'd" on. The

region states that the confidentiality of pages 190-193 was explicit in that a confidentiality notice was attached to this communication. It also submits that the confidentiality of the emails and attachments at pages 209-213 was implicit, given the context surrounding its creation and distribution.

Regarding the issue of consent under section 9(2), the region indicates that it sought the consent of both the OAHPP and the CSICN directly, but both affected parties declined to provide it.

The representations provided by the CSICN in response to the Notice of Inquiry do not specifically address the exemption in section 9(1)(d) of the *Act*. Instead, the CSICN provides context for the sharing of information created in the public health infection control context, and alludes to parts of the test for exemption under section 10(1), including the type of information, the confidentiality of the information and concerns about harms to inter-agency infection control collaboration with disclosure of the information.

On the subject of confidentiality, the CSICN submits:

> Prevention and control of antibiotic resistant organisms [such as *C. difficile*] is an infection control issue that crosses all healthcare sectors and requires close collaboration between agencies to prevent transmission. … The maintenance of confidentiality of these consultations is critical to the honest and accurate sharing of information …
>
> There is an implicit understanding that this information is used only for the purposes of infection prevention and control within the acute care facility, and is not for general distribution. …
>
> It is imperative that the hospital and the CSICN maintain a professional relationship for the sharing of infection prevention and control information. Collaboration enhances the sharing of information essential for public safety and for consistency of best practices.

In addition, the CSICN's response to the initial notification by the region at the request stage addresses the exemption, stating that the record is exempt because it is a confidential communication between the CSICN as an agency of the Government of Ontario and the region. As to the content of the record itself, the CSICN explains:

> CSICN was requested by the Niagara Health System to assist with outbreak management at the Greater Niagara General Hospital (GNGH). As part of the response to that request, an audit was performed on two inpatient units by CSICN, Niagara Public Health and the Infection Control Team at GNGH. CSICN completed the report and circulated it to Niagara Health System and Niagara Public Health. The communication with all parties is clearly marked confidential and was intended to inform the management of the outbreak and to initiate a series of confidential communications with the recipients.

> … The information shared with CSICN by [Niagara Health] during the audit was provided in confidence with the sole purpose of managing the outbreak …
>
> CSICN does not consent to disclosure of any part of the record.

The OAHPP's response to the notification of the request by the region addresses the test for exemption under section 9(1)(d) and mirrors the submissions of the CSICN. To begin, the OAHPP notes that the record is a confidential communication between the OAHPP, as an agency of the Government of Ontario, and the region. The OAHPP states that the initiating message in the record (pages 190-193) was sent by the Director of Infectious Diseases Prevention and Control at OAHPP for the purpose of setting up an Infection Control Response Team (ICRT) visit and assessment at the GNGH. According to the OAHPP,

> This first communication is clearly marked confidential and is intended to initiate a series of confidential communications with its recipients and others to whom it is sent in the context of the intended ICRT work.
>
> [An identified CSICN staff] had performed an outbreak review of two NHS units. Her reply to [the Director] provided factual context and suggested actions until an ICRT could be engaged. The content of this message is clearly intended only for [the Director] and the other listed recipients, all of whom are involved in ICRT work.
>
> [A named individual physician's] response speaks to next steps and timing constraints and is similarly intended only for its named recipients.
>
> Both of these communications fall squarely in the ambit of ICRT work and are intended to be confidential as replies and follow-up to [the Director's] initial confidential message.
>
> Subsequently, [the identified CSICN staff] forwarded the [email] string containing the three messages to [the region's manager of infectious disease program] … This simple forwarding … was a confidential communication between [the identified CSICN staff] in her ICRT capacity and context, which is the work and direct responsibility of an agency of the Government of Ontario (the OAHPP) to [the identified manager at the region] …

The OAHPP claims, apparently in the alternative, that the information in the records is exempt on the basis that it was created in a "quality of care" context, as that term is understood in *QCIPA*. Specifically, the OAHPP submits that:

> … the records at issue in this appeal are records that were collected and prepared by OAHPP's Infection Control Response Team (ICRT) for a hospital quality of care committee in carrying out a hospital's functions under the [*QCIPA*]. …

The OAHPP's representations then outline the fact situation in this case, starting with the request for the assistance of an ICRT to provide "rapid on-site assistance with outbreak investigation and management." The OAHPP describes the composition of the ICRT and the preparation of a final outbreak report, including recommendations, which is provided to the hospital and its various "quality improvement" committees, including the designated Quality of Care Committee at Niagara Health. Accordingly,

> It is the OAHPP's position that the email communications at issue in this appeal, as well as working papers, reports and other records were collected and prepared by OAHPP's ICRT for a hospital's quality of care committee in carrying out its functions under the *QCIPA*. …
>
> It is only through this open, frank discussion between members of the ICRT, the local MOH and the hospital staff that critical information is shared and discussed. The *QCIPA* contemplated that all proceedings and records of quality improvement activities undertaken by or for the Quality Improvement Committee be treated as confidential. It is essential that this information not be disclosed to ensure and encourage participation on quality of care reviews … To disclose this information would introduce a chilling effect on health care professionals who would then be reluctant to provide critical information.

OAHPP explains that it could not consent to disclosure of the records under section 9(2) because in responding to the outbreak at Niagara Health, its ICRT staff created, collected or prepared the responsive information, which met the definition of "quality of care information" in section 2(a) of *QCIPA*. OAHPP submits that *QCIPA* does not permit disclosure of information prepared for a quality of care committee, except in the limited circumstances outlined in section 4(1) of that statute.

Analysis and Findings

As stated previously, the purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" (Order M-912). Indeed, it has been said that the purpose of this exemption is to allow institutions to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern.[24] In my view, the public health infection control and outbreak management context in which the records were created in this appeal and the content of the records themselves support a finding that section 9(1)(d) of the *Act* applies.

To uphold the region's decision to withhold these two records under section 9(1)(d), I must be satisfied by the evidence that disclosure could reasonably be expected to reveal information received from one of the governments, agencies or organizations listed in the section; and second, that the information was received by the institution in confidence (Orders MO-1581, MO-1896 and MO-2314).

[24] Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.). See also Orders PO-1927-I, PO-2569, PO-2647 and PO-2666.

To begin, I accept the evidence of the OAHPP and the CSICN that they are agencies of the Ontario government, falling as they do under the authority of the Ministry of Health and Long-term Care. More particularly, as one of the Regional Infection Control Networks, the CSICN is a part of the OAHPP, which is itself an agency of the Government of Ontario. In the circumstances, therefore, I am satisfied that the OAHPP and the CSICN are each an "agency" of the provincial government for the purpose of the first part of the test for exemption under section 9(1)(d) of the *Act*.

The next question for me to address is whether the information was "received in confidence" by the region. As stated, this office has previously held that for information to "have been received in confidence" there must be an expectation of confidentiality on the part of the supplier and the receiver of the information (Orders MO-1896 and MO-2314). In the very specific circumstances of this appeal, along with the evidence of the parties opposing disclosure of pages 190-193 and 209-213, I am persuaded that there was an expectation of confidentiality regarding the exchange of the information at issue on the part of the OAHPP and the CSICN, as well as the "cc'd" recipient, the region's manager of infectious disease programs.

The considerations applicable to the determination of whether an expectation of confidentiality is reasonable were initially articulated in the context of this office's orders on section 10(1) of the *Act*. However, this office has held that these considerations are equally applicable to the determination of whether information was received in confidence under section 9 (Orders MO-1896 and MO-2314). In Order MO-2314, Senior Adjudicator John Higgins outlined the following considerations for determining whether an expectation of confidentiality is based on reasonable and objective grounds:

- the nature of the information;
- whether the information was prepared for a purpose that would entail disclosure;
- whether the information was communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- whether the institution receiving the information agreed explicitly or implicitly to accept it on the basis that it was confidential and that it was to be kept confidential;
- whether the government agency that supplied the information treated it consistently in a manner that indicates a concern for its protection from disclosure prior to communicating it to the institution;
- whether the institution that received the information treated it consistently in a manner that indicates a concern for its protection from disclosure after receiving it; and
- whether the information was otherwise disclosed or available from sources to which the public has access, either before or after the government or government agency provided it to the institution.

Regarding the last bullet point, above, general information that is factual in nature and already available to the public may not fall under this exemption (see Order PO-2054-I). However, it is also the case that the nature of the information and the context in which it was created may be

adequate to establish a reasonable expectation of confidentiality, whether or not there was an explicit indication of it.

From my review of the records, I agree with the parties' submission that pages 190-193 were expressly sent in confidence by the original senders and that the provision of this email exchange carried with it the same expectation of the maintaining of its confidentiality. Regarding pages 209-213, there is nothing on the face of it to mark or "flag it" as confidential. However, in my view, the nature of the information as well as the sensitive infection control context in which it was created are sufficient to satisfy me that its confidentiality is implicit.

Further, on review of the factors outlined in Order MO-2314, above, I am also satisfied that the records were not created for a purpose that would entail disclosure to the public, generally, and that the records were subsequently treated in a manner that indicated a concern for its protection from disclosure after receiving it.

In summary, the evidence before me from the region, the OAHPP and the CSICN is adequate to demonstrate that disclosure of the records at issue under section 9(1)(d) could reasonably be expected to reveal information the region received in confidence from agencies of the Government of Ontario. Accordingly, I find that the records, or portions of records, withheld on this basis are exempt from disclosure under section 9(1)(d) of the *Act*.

As I have found that the records are exempt under section 9(1)(d), I will now briefly turn to consider the issue of consent under section 9(2). Based on the evidence provided by the region and the two affected parties, I am satisfied that the region made appropriate inquiries with the OAHPP and the CSICN to determine if consent to the disclosure of the relevant records could be obtained. As both the OAHPP and the CSICN declined to provide the requisite consent, the region could not disclose the records. In these circumstances, it is not necessary for me to comment on the OAHPP's arguments respecting the impossibility of providing consent under section 9(2) of the *Act* due to the operation of *QCIPA*. Therefore, I uphold the decision of the region to deny access under section 9(1)(d).

PUBLIC INTEREST OVERRIDE

As stated above, during mediation, the appellant (in Appeal MA09-248) raised the possible application of section 16 of the *Act* to override the exemptions claimed by the region to deny access to the records. Section 16 is commonly referred to as the public interest override, and states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In this appeal, where the claim of section 9(1)(d) to exempt certain records from disclosure has been upheld, the public interest override could be applied to – in effect – reverse the exemption and would result in disclosure of those particular records. For section 16 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.

The *Act* is silent as to who bears the burden of proof in respect of section 16. It is typically understood that the appellant must establish the basis for the application of the public interest override; however, the onus is not absolute because the appellant will not have had the benefit of reviewing the requested records before making submissions in support of the contention that section 16 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant (Order P-244).

However, in its appeal of the region's access decision, the appellant did not provide representations on any of the issues before me for determination. This means that I have been presented with no evidence that would support a finding that there is a compelling public interest in disclosure of the records that would outweigh the purpose of the exemption in section 9(1)(d). Accordingly, I find that section 16 does not apply.

ORDER:

1. I uphold the region's decision to deny access under section 9(1)(d) to the withheld information on pages 190-193 and 290-213.

2. I do not uphold the region's decision to deny access to records under section 10(1), and I order the region to disclose those records to the appellant by **May 17, 2011** but not before **May 12, 2011**.

3. I also dismiss Niagara Health's third party appeal of the denial of access under section 10(1).

4. I order the region to disclose the symptom onset dates on page 215, as I find they do not qualify as personal information according to the definition in section 2(1) of the *Act*.

5. In order to verify compliance with this order, I reserve the right to require the region to provide me with a copy of the records disclosed to the appellant pursuant to provisions 2 and 4.

Original signed by: April 12, 2011
Daphne Loukidelis
Adjudicator