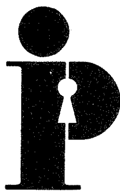

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1810

Appeal PA-990443-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry or MOHLTC) received a request from a journalist under the Freedom of Information and Protection of Privacy Act (the Act) for access to "All records relating to the agreement reached between [the family of a named individual] and the Ministry of Health and the Ministry of Long-Term Care regarding [the named individual]'s appeal to the Health Services Appeal Board."

The Ministry issued its decision to the appellant refusing to confirm or deny the existence of any records responsive to either part of the divided request, pursuant to section 21(5) of the Act.

The requester, now the appellant, appealed this decision and raised the application of the public interest override contained in section 23 of the Act.

Mediation was not successful, and I sent a Notice of Inquiry initially to the Ministry. After receiving representations, I sent the Notice to the appellant, together with the non-confidential portions of the Ministry's representations. The appellant submitted representations which were in turn shared with the Ministry. The Ministry provided additional representations in reply.

I also sent the Notice of Inquiry to the individual named in the request (the affected person), providing him with an opportunity to submit representations, which he did.

PRELIMINARY MATTERS:

Section 21(5) findings

For ease of discussion, I will state at the outset that the requirements of section 21(5) have not been established by the Ministry. There are 114 records responsive to the appellant's request. They are a six-page record entitled "Minutes of Settlement", dated May 14, 1999, as well as 113 records, consisting of handwritten and typewritten notes, letters, memoranda and draft Minutes of Settlement, and cover the period January through May 1999 (the other records).

Responsiveness of the records

In its representations, the Ministry states that portions of some of the 113 other records are not responsive to the request. These portions are contained in Records 1, 3, 4, 5, 10, 14, 15, 16, 20, 22, 50, 51, 54, 55, 61, 103 and 113. The Ministry states that these portions are not "reasonably related to the request" as discussed in Order P-880, but does not elaborate further.

I disagree with the Ministry's position. The appellant's request is for all records relating to the agreement reached by the affected person's family in the context of the withdrawal of his appeals from the Health Services Appeal Board (the HSAB). All of the information identified by the Ministry as being non-responsive is contained in responsive records which relate exclusively to discussions involving the settlement of the affected person's appeals before the HSAB. In my view, all portions of the records listed above are responsive to the request, and I will consider them in the context of this appeal.

Additional exemption claims

In its representations, the Ministry states:

> If the [Commissioner's Office] determines that the MOHLTC has improperly refused to confirm or deny the existence of the Record under s. 21(5) and further finds that disclosure would not result in an unjustified invasion of personal privacy of the Named Individual, then the MOHLTC also claims that the Record is subject to the exemptions in ss. 13(1), 18(1)(c) and 19 of [the Act].

In response to these submissions, I sent a Supplementary Notice of Inquiry to the Ministry seeking representations on the application of the sections 13(1), 18(1)(c) and 19 exemption claims. I acknowledged to the Ministry at that time that disclosure of the contents of the Supplementary Notice to the appellant, or even the existence of the Notice, could reveal the fact that records exist before the section 21(5) issue had been decided. Accordingly, the Supplementary Notice and the issues set out therein have not been provided to the appellant.

Because of the way in which I will be disposing of the issues in this appeal, it is not necessary for me to proceed further with the sections 13(1), 18(1)(c) and 19 exemption claims.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS

Personal Information

Section 21(5) only applies if it is determined that the records at issue contain personal information. Section 2(1) defines "personal information", in part, as recorded information about an identifiable individual.

The Minutes of Settlement were negotiated by the affected person and the Ministry in the context of his appeals before the HSAB. The Ministry states that this record contains information about the level of funding for required medical services, the level of professional medical care required, funding for the medical services provided, and the terms of settlement for the level of funding the affected person would receive. I concur, and find that the Minutes of Settlement clearly contains the affected person's personal information, and no-one else's.

The 113 other records consist of:

(1) handwritten notes of discussions involving Ministry counsel, outside counsel hired by the Ministry to conduct settlement negotiation with the affected person's counsel, and other Ministry program and executive staff;

(2) internal e-mail messages to and from the same Ministry counsel and staff;

(3) correspondence between two Ministry counsel regarding the potential application of the Act to the proposed settlement agreement;

(4) correspondence between outside counsel and the affected person's counsel reflecting settlement discussions;

(5) draft versions of the settlement agreement itself;

(6) one letter sent by the affected person to all Progressive Conservative Members of Provincial Parliament (MPPs) concerning his HSAB appeals (Record 59); and

(7) one letter from the affected person to the HSAB.

These records cover the period January 15, 1999 through May 31, 1999.

The affected person is identified by name in the majority of these records and by other identifiable indicators such as "the appellant" in the context of HSAB discussions, and a member of "the family" in other contexts. In all instances it is clear that the records are about the affected person and his ongoing settlement discussions with the Ministry leading up to his HSAB appeals and the eventual execution of the Minutes of Settlement. As such, I find that all of the other records contain the personal information of the affected person and, in a few instances, also the personal information of other members of his family.

None of the records contain any personal information of the appellant.

Section 21(5)

Section 21(5) of the Act reads as follows:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 21(5), an institution is denying the requester the right to know whether a record exists, even if it does not. This section gives institutions a significant discretionary power which should be exercised only in rare cases (Order P-339).

An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. It must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested records would convey

information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy (Orders P-339 and P-808 (upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.))

Therefore, in order to substantiate a section 21(5) claim, the Ministry must provide sufficient evidence to establish that:

1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

(Order MO-1179)

I will begin with the second requirement, since if it has not been established, the Ministry is precluded from claiming section 21(5) whether or not it can establish that disclosure of any existing records would constitute an unjustified invasion of privacy.

To satisfy the second requirement, the Ministry must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the conveyed information would itself constitute an unjustified invasion of personal privacy.

The Ministry provided the following representations:

> The MOHLTC submits that, in the circumstances of this appeal, disclosure of the fact that any records exists referring to settlement negotiations would in itself convey personal information within the definition under section 2(1). Disclosure of the existence or non-existence of a record containing the requested information would reveal, at a minimum, the fact that the [affected person] decided to undertake discussions to settle his claims against the MOHLTC before the HSAB commenced by entering into a settlement agreement. ("Minutes of Settlement"). It is the position of the MOHLTC that the manner in which an individual party to litigation decides to proceed, or not to proceed, is the personal information of that individual. In this case, the withdrawal of the appeals was obviously filed with the HSAB; the fact that this was a condition of a settlement agreement resolving the appeals is not known.
>
> At a maximum, disclosure of any record would reveal the entire substance of the negotiations and the final settlement agreement itself. This is amplified by the fact

> that the media is already in receipt of knowledge relating to the nature of the HSAB hearing.

The Ministry concludes by submitting that disclosure of the existence of any document which references a settlement between the Ministry and the affected person would constitute an unjustified invasion of the personal privacy of the affected person, as it would "reveal the nature of settlement negotiations, the fact that negotiations were successful, and the terms of settlement between the parties."

The affected person's representations, which were submitted by his counsel, do not deal specifically with section 21(5). However, they state:

> I can indicate that the affected person is vehemently opposed to divulging any records, dealing, or references involving himself to any person, or persons, requesting information with respect to any of his dealings with any agency of the Government. These matters are an unjustifiable intrusion upon his privacy pursuance to s. 21 of the Act.

The appellant submits:

> For many months I covered [the affected person's] high profile battle with the Ministry of Health for 24-hour home care. ...
>
> The [affected person's] family appealed to the Community Care Access Centre for more than the 53 hours of home care a week they were allotted, but were turned down because they were already receiving the provincial maximum. That started a public battle with the Ministry of Health and Long Term Care that could have vastly changed home care in this province. [The affected person] won a landmark victory in January, 1999 when the province's Health Services Appeal Board agreed to hear the case. The precedent-setting decision made [the affected person's family] the first family in Ontario to win the right to appeal a decision made by a Community Care Access Centre.
>
> ...
>
> When [the affected person's family] suddenly dropped their case, it affected more than just themselves. It brought an end to a hope for change in the province's home care policies. I have included a story that ran in the Hamilton Spectator on May 29, 1999 that expressed the disappointment of some of these advocacy groups. It also gives explanations provided by the Ministry of Health and Long Term Care and [the affected person's] family that make it obvious some kind of settlement or deal was reached.

It is clear that the existence of the affected person's appeals with the HSAB on issues relating to funding levels provided by the Ministry for his care is a publicly known fact. When the appeals were withdrawn, the Ministry and the affected person appear to have made public statements of satisfaction with current funding levels. This was a clear reversal of position on the part of the affected person, who had made his dissatisfaction with funding levels known through the media. His dissatisfaction was also the subject of debate in the Legislative Assembly during the period leading to the appeal hearing. In my view, it is implicit in his statement of satisfaction with funding levels that a settlement of some kind had been reached, even if this amounted to an acceptance of the status quo; no other explanation is reasonable or credible in the circumstances.

Therefore, in my view, simply confirming the existence of the Minutes of Settlement would not in and of itself convey personal information about the affected person that is not already implicitly known by the appellant and others through the actions of the Ministry and the affected person in withdrawing the appeals before their scheduled HSAB hearing date. Similarly, the fact that other records would be created in the context of settlement discussions leading to the Minutes of Settlement, including the exchange of documents among various counsel, is obvious. No individual, other than the affected person, would be identified by the simple acknowledgement of the Minutes of Settlement and related records, nor is any information contained in the records either confirmed or conveyed by acknowledging their existence. In my view, any privacy interests that do exist are appropriately and adequately addressed through the application of the section 21(1) exemption claim.

Therefore, I find that the second requirement of section 21(5) of the Act has not been established. Because both requirements must be established in order for the Ministry to claim this section, it is not necessary for me to discuss the first requirement before making my finding that section 21(5) has no application in the context of this appeal. However, I will address this first requirement in detail in the section 21(1) discussion that follows.

INVASION OF PRIVACY

Section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(f) provides:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2)(3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the individual relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of

information whose disclosure does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Ministry relies on the presumed unjustified invasion provisions of sections 21(3)(a) and (f) as well as the factors favouring privacy protection listed in sections 21(2)(f) and (h) in support of its position.

These sections state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

1. *The Minutes of Settlement*

As far as the Minutes of Settlement are concerned, the Ministry submits that it falls within the scope of the section 21(3)(f) presumption. The Ministry states:

> ... the MOHLTC submits that the funding to be provided by the MOHLTC for ongoing nursing services to the [affected person] ... are properly characterized as "financial transactions" in which the individual was involved.

The Ministry relies on the findings of Commissioner Ann Cavoukian in Order P-1502 where she found that:

> ... Payment to a physician for services rendered is properly characterized as a "financial transaction". In my view, a financial transaction is a sub-component of "financial activity". As the record presents a listing of these transactions for a period of one year, I find that it describes the financial activities in which the physicians were involved.

In support of its position, the Ministry points to Order P-1631, where Senior Adjudicator David Goodis found that disclosure of records which describe financial activities regarding settlement of litigation qualified as a presumed unjustified invasion of privacy under section 21(3)(f), including where this information was contained in Minutes of Settlement.

The Ministry also argues that the record in this appeal differs from retirement package settlements which were found in Orders M-173 and M-1082 not to fall within the scope of this presumption. The Ministry submits:

> In the present case the records at issue ... Are the product of a series of communications and negotiations leading to an on-going relationship between [the affected person] and the MOHLTC. The records detail an on-going relationship after the settlement agreement, not a finite, one-time payment relationship.

The appellant does not provide representations on the applicability of section 21(3)(f).

I find the Ministry's submissions on this issue to be persuasive. By signing the Minutes of Settlement the affected person and the Ministry have entered into a contract regarding funding levels and arrangements for the affected person's care. These arrangements include a series of financial transactions which will take place during the term of the agreement, and provisions which permit the parties to review payment levels depending on certain events that may or may not transpire while the agreement is in force. I agree with the Ministry that this arrangement is distinct from the situation of a one-time severance or retirement settlement, even if paid out over a period of time, and I find that the funding arrangement covered by the Minutes of Settlement in this appeal is akin to the type of "financial transaction" described by Commissioner Cavoukian in Order P-1502. For these reasons, I find that the disclosure of the record would constitute a presumed unjustified invasion of privacy under section 21(3)(f) of the Act.

2. *The Other Records*

The Ministry makes a number of representations with respect to the many other records at issue in this appeal.

It argues that all of the records "contain indirect references to [the affected person's] medical treatment as they reference settlement negotiations pertaining to the provision of 24-hour nursing care". The Ministry submits that this brings all of the records within the scope of the section 21(3)(a) presumption. In the alternative, the Ministry submits that those records which "directly

reference either the nursing care and treatment historically received by [the affected person], or the nursing care to be received by [the affected person] under the terms of the settlement agreement" constitute "medical treatment" information and qualify under this presumption. The Ministry also argues that Record 59, which is the letter sent by the affected person to the MPPs, also fits within the scope of this presumption because it refers to the fact that he is receiving medical support and that he is disabled.

On the basis of similar arguments to those made with respect to the Minutes of Settlement, the Ministry submits that certain records which "contain reference to the level of past, current, and future funding to be provided by MOHLTC to [the affected person] pursuant to the settlement negotiations or final settlement agreement" fall within the scope of the section 21(3)(f) presumption as constituting "financial activity".

Turning to the section 21(2) factors, the Ministry submits that the records contain "highly sensitive" personal information that was provided by the affected person to the Ministry "in confidence".

As far as sections 21(2)(f) and (h) are concerned, the Ministry submits:

> For personal information to be considered "highly sensitive" the MOHLTC must establish that the disclosure of the information could cause excessive personal distress to the individual(s) named in the records. Fundamentally health information is very sensitive information about a disabled individual [Order P-673] and is inherently sensitive, as evidences by the fact that it is subject to the presumption in s. 21(3)(a) [Order P-1344].
>
> ...
>
> ... while [the affected person] initially went to the press with "his story" and claims against the MOHLTC, the particulars of the records have never been disclosed publicly, with the possible exception of record 59, which was only disclosed to a limited class of persons, namely the Members of the Progressive Conservative Caucus.

The Ministry submits that the discussions between the Ministry and the affected person leading to the successful negotiation of the Minutes of Settlement were conducted with a clear expectation of confidentiality on the part of both parties.

Regarding Record 59, the Ministry contends that its disclosure was limited and not intended to breach the confidential nature of the settlement discussions that were ongoing at that time, and points to the contents of a number of other records created before and after Record 59 which, it submits, confirm these confidentiality expectations throughout the negotiation period.

The Ministry also submits that the existence of a confidentiality clause in the Minutes of Settlement makes it reasonable for the parties to expect that neither the Minutes themselves nor "any other

record which makes reference to the settlement negotiations leading to the final settlement agreement, will be released to the public". The Ministry points to Order MO-1184 in support of this position.

The appellant's representations do not deal specifically with the requirements of sections 21(2) or (3). However, some of her submissions under section 23 raise the type of considerations reflected in section 21(2)(a). This factor favours disclosure for the purpose of subjecting the activities of the government to public scrutiny. In this regard, the appellant submits:

> I understand [the affected person's] family has a right to their privacy. But there must be some way to honour that while at the same time providing Ontarians who need 24 hour home care with some answers as to what happened and why.

The Ministry submits that section 21(2)(a) is not a relevant factor in the circumstances of this appeal. The Ministry states:

> Section 21(2)(a) has generally applied by [the Commissioner] in cases where the information at issue is financial information of elected officials [Order M-1076], government employees for submission of expense claim [Order P-721, P-735] or settlement or retirement agreements of government employees [M-441]. [The Commissioner] has stated that elected officials must have a reduced expectation of privacy [Orders M-129 and M-173]. There is no information before [the Commissioner] on which to conclude that these records represent the type of documents for which a high degree of public scrutiny is warranted, nor that this is a situation in which a private citizen should be afforded a reduced degree of privacy protection.

I accept that those records which contain specific reference to the level of nursing care received by the affected person in the past, as well as references to ongoing nursing care funding levels which formed part of the negotiation process leading to the Minutes of Settlement, are accurately characterized as relating to his "medical treatment" and fall within the scope of the section 21(3)(a) presumption. I do not accept the Ministry's position that other records that do not contain specific reference to nursing care levels similarly fall within this presumption. Each record must be assessed individually in this context and, unless specific medically-related information is contained or could reasonably be inferred from the content of a particular record, the fact that the record may have been created as a consequence of discussions relating to medical treatment is not sufficient to bring it within the scope of section 21(3)(a).

Similarly, I accept that records containing reference to actual nursing care funding levels provided in the past to the affected person, as well as funding levels discussed by the parties during the settlement negotiation process, fall within the scope of the section 21(3)(f) presumption as constituting "financial activity", for the same reasons as I found that the Minutes of Settlement does. However, records that do not contain specific information regarding existing or proposed funding

levels or other information which could reasonably lead to an accurate inference of this financial activity, do not fall within the scope of the section 21(3)(f) presumption.

As far as the section 21(2) factors are concerned, I do not accept the Ministry's position regarding section 21(2)(a). In order for this section to be a relevant consideration, two elements must be present:

1. the activities of the institution must have been publicly called into question; and

2. the disclosure of the personal information of the affected person is desirable in order to subject the activities of the institution to public scrutiny.

(Order M-1074)

The appellant has provided sufficient evidence to establish that the question of in-home nursing care funding levels, an activity which the Ministry is clearly responsible for administering, has been publicly called into question. Indeed, the affected person himself played a key role in raising public awareness of this issue through his appeals to the HSAB and his public stand on the need for changes in this area. The topic was also the subject of debate in the Legislature and public statements by both the Premier and the Minister of Long-Term Care. The local City Council in the affected person's community also debated the matter on at least one occasion, and the appellant and others have written on the subject. The personal information of the affected person is directly related to the activity which has been called into question, and I find that its disclosure is desirable in order to subject the Ministry to the public scrutiny in this regard. Although the facts and circumstances of this appeal may be dissimilar to other previous ones, as identified by the Ministry, this is not determinative. My findings in the present appeal, in any event, do not conflict with any of these previous orders. I find that section 21(2)(a) is a relevant factor favouring disclosure, which should be accorded significant weight in the circumstances.

As far as section 21(2)(f) is concerned, I find that it is also a relevant factor in the circumstances of this appeal. The records were all prepared in the context of discussions concerning funding levels for medical care. Absent evidence to the contrary, it is reasonable to conclude that financial arrangements for individualized medical care in circumstances such as those facing the affected person are inherently sensitive in nature. Although the affected person's representations in this appeal are brief, they make his position clear: he is "vehemently opposed" to disclosure of his personal information, viewing it as "an unjustifiable invasion upon his privacy". In my view, these statements support the Ministry's position that all of the records contain "highly sensitive" personal information, and that disclosure of this information could reasonably be expected to cause excessive distress to the affected person. For all records, with the exception of Record 59, I find that section 21(2)(f) is a relevant factor favouring privacy protection, which should be accorded significant weight.

There is also ample evidence before me to establish that the settlement negotiations underway during the January - May 1999 period were being conducted with expectations of confidentiality on the part of both the Ministry and the affected person. This expectation is common to discussions of this nature, and the existence of a confidentiality provision in the Minutes of Settlement supports the Ministry's position that records reflecting discussions which lead to the agreement were confidential. Again with the exception of Record 59, I find that section 21(2)(h) is also a relevant factor favouring privacy protection for all other records, and it should be accorded significant weight in these circumstances.

Record 59 is very different from the other records at issue in this appeal. It is authored by the affected person and was sent by him during the course of the settlement negotiations to all Progressive Conservative MPPs. There is no indication on the face of this record that it was to be treated confidentially. In fact, it asks MPPs to take action in response to the letter, and even includes a "c.c." to the Mayor of the affected person's local municipality, another indication that the letter was intended to receive public attention. Although I accept the Ministry's position that sending this letter during the course of confidential settlement discussions is not sufficient to alter the confidential nature of the overall relationship between the Ministry and the affected person, I find that it is not reasonable to conclude that the affected person considered Record 59 itself to be either highly sensitive or confidential. I find that no factors favouring privacy protection are present with respect to Record 59.

In determining the relative weight of the various factors under section 21(2), I find that those favouring privacy protection are stronger in the circumstances of this appeal for all records except Record 59. I have reached this conclusion for a number of reasons. First, the two factors favouring privacy protection are both weighty in the circumstances. Second, because the records do not contain the personal information of the appellant, they must be considered within the context of the mandatory section 21(1) exemption claim. This exemption is one of only three mandatory exemptions provided by the Act, and reflects one of the key purposes of the legislation, the protection of personal privacy. Third, although the records fall within the scope of section 21(2)(a), their disclosure is not the only way to subject the Ministry's administration of individual nursing care funding arrangements to public scrutiny. The existence of a settlement agreement is confirmed through this order, and other traditional avenues are available to the appellant, as a member of the media, that do not require the disclosure of highly sensitive and confidential personal medical information. Finally, it is clear from his representations that the affected person feels strongly that his personal information should not be disclosed, and I find this to be a significant consideration in the circumstances.

For all of these reasons, I find that disclosure of the information in all of the other records, with the exception of Record 59, would either constitute a presumed unjustified invasion of the privacy of the affected person under section 21(3)(a) and/or section 21(3)(f), or would constitute an unjustified invasion after balancing the various competing privacy and disclosure considerations under section 21(2).

As far as Record 59 is concerned, I find that no factors favouring privacy protection are present, and the factors favouring disclosure of this record are more compelling in the circumstances. Therefore, Record 59 does not qualify for exemption under section 21(1) of the Act and, because no other exemptions have been claimed for this record, it should be disclosed to the appellant.

PUBLIC INTEREST IN DISCLOSURE

Section 23 states:

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

General

In Order P-241, former Commissioner Tom Wright made the following comments on the burden of establishing the application of section 23, which I agree with:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner [Sidney B.] Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

In Order P-1398 (upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No.134 (note), former Inquiry Officer John Higgins made the following statements concerning the potential application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption. If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply.
>
> Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent

to which denying access to the information is consistent with the purpose of the exemption.

Is there a public interest in disclosure, and if so, is it "compelling"?

The appellant submits:

> The Ministry has claimed that there "is not even a public interest let along a compelling one" and "apart from a small sector of the public who live in the area served by the appellant's newspaper and other media outlets, the public is not even aware of the issue". I would argue nothing could be further from the truth. Health care and disability advocacy groups across this province were watching [the affected person's] case very closely. If the family had won their appeal, it would have had significant effects on home care in Ontario. The province would have had to start providing home care hours based on need instead of a maximum amount of allowed hours. It would have opened the doors for disabled, sick and elderly Ontarians who need 24 hour home care, but are not getting it from the province. As you can see the outcome would have been substantial and was being reported on by a number of media outlets including The Toronto Star - Canada's largest newspaper.

The Ministry makes the following submissions on the "public interest" component of section 23:

> Without conceding that "there has been" a public interest in this matter, the MOHLTC submits that the application of s. 23 requires that there be at least a "current" public interest in disclosure. ... It is difficult to imagine how a public interest may be "compelling" if it is a public interest at all, if the events have happened in the past and are currently removed from the public's consciousness.

The Ministry also takes the position that any public interest identified by the appellant is appropriately addressed through the vehicle of the HSAB where "the personal privacy of an individual does not have to be compromised."

The dispute between the affected person and the Ministry over the level of funding provided for his care has generated sustained public debate in the media, the Legislature and his local community. Had the affected person proceeded with his appeals to the HSAB, I have little doubt that this debate would have continued. The inclusion of a confidentiality provision in the Minutes of Settlement prevents the affected person, who was actively involved in bringing his situation into the public arena, from raising the issue publicly. However, in my view, it does not necessarily follow from this that the public interest in the matter has waned. The appellant maintains a strong interest in this matter and I am confident that she will bring this matter back into the public arena if and when any new information concerning the affected person's nursing care funding situation comes to her attention. I am satisfied that there is a public interest in obtaining additional details about the

circumstances surrounding the settlement agreement reached between the affected person and the Ministry, and how the government has dealt with funding issues in this context.

Turning now to whether this public interest is "compelling", former Adjudicator Holly Big Canoe interpreted the phrase "compelling public interest" in Order P-984, as follows:

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

Former Inquiry Officer Higgins applied this definition in Order P-1398, where he stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding Inquiry Officer Higgins' decision in Order P-1398, the Court of Appeal in Ontario (Ministry of Finance), supra, found:

> ... in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

For the purposes of this appeal, I too adopt the dictionary approach to the definition of "compelling" originally articulated by former Adjudicator Big Canoe in Order P-984.

The Ministry also contrasts the situation in the current appeal with that discussed by me in Order PO-1779 involving different facts and circumstances which, in the Ministry's view, reflect broader public interest considerations. It points out that in Order PO-1779 I established the importance of context in making a determination of whether a public interest is "compelling", and then submits:

> The MOHLTC submits that the "context" in the present case is [the affected person's] appeals before the HSAB. There is a "public interest" in an individuals' freedom to deal with such matters as s/he deems it appropriate and not be presumed to have to sublimate any privacy rights in the process, merely because the litigation involved the ministry and was not between two private litigants. The MOHLTC

> submits that this is an important contextual factor that should be taken into account when determining whether a public interest in disclosure is "compelling". ...

The administration of the Ministry's program to fund in-home nursing care has been the subject of public debate, including the particular situation involving the affected person. Various political leaders have spoken publicly on the issue, both provincially and locally, and media coverage has extended beyond the confines of the affected person's local community. Although the Ministry is correct in stating that the affected person's particular situation is part of the overall "context" in which this issue arises, in my view, the issue itself is broader. In my view, the particulars of the affected person's case raise considerations that have the potential to go beyond the facts of his individual relationship with the Ministry. They raise questions regarding funding arrangements that could have widespread implications, both financial and political. In my view, there is a "strong interest or attention" in issues involving the equitable provision of in-home nursing care funding by the Ministry. The records at issue in this appeal are directly related to this "strong interest", and the disclosure of their content would serve the purpose of informing the citizens of Ontario about the activities of the Ministry and the provincial government, and add to the information available for use by members of the public in expressing public opinion and making political choices. For these reasons, I find that there is a compelling public interest in disclosure of the personal information of the affected person contained in the records.

Does this compelling public interest clearly outweigh the purpose of the section 21 exemption?

If a compelling public interest has been established, it must then be balanced against the purpose of the particular exemption, in this case section 21. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information (Order P-1398).

The protection of personal privacy is one of the fundamental purposes of the Act. Section 1(b) of the Act states:

> The purposes of this Act are,
>
> > to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The importance of this purpose is reflected in the fact that personal information attracts the protection of one of only three mandatory exemptions in the Act, namely section 21. Clearly, there is a strong right to privacy embodied in section 21. However, this right is not absolute. Personal information can be disclosed if any of the six exceptions listed in section 21(1) are present. These exceptions include consent (section 21(1)(a)), which may not be an option in the circumstances of this appeal, and also section 21(1)(f) which covers circumstances where disclosure would not constitute an unjustified invasion of privacy. Sections 21(2), (3) and (4) outline a detailed statutory

framework for making a determination of this nature. Finally, the fact that section 21 is included with the scope of section 23 indicates a clear recognition on the part of the Legislature that the strong public policy purpose of protecting personal privacy must at times yield to more compelling public interests that outweigh this purpose.

As quoted earlier, the appellant acknowledges the affected person's right to privacy. However, in the appellant's view, there is a way of balancing this right against the need to provide other individuals in similar situations with more details as to what happened in the context of the affected person's appeals to the HSAB.

The Ministry's submissions on this aspect of section 23 include the following statements:

> The fact that an individual once entertained the media is not, in the submission of the MOHLTC, a factor that should be considered in balancing their personal privacy against disclosure pursuant to s. 23. In cases such as the present, individuals should have the right to choose when and what they will report to the media about their intimate personal details. Otherwise, once an individual is in the "public eye", they are forever at the disposal of the media - individuals' privacy interests are surely worthy of more protection than that. In this context, one fundamental aspect of the right to privacy is "the right to be left alone".
> ...
>
> The point is one of "notoriety" - that, while at one time details of an individual's personal information ... may have been in the public forum, these individuals are still entitled to assert their privacy rights to that information.
> ...

After referring to the newspaper article attached to the appellant's representations, the Ministry goes on to state:

> The Ministry submits that this recognizes that [the affected person's] family has the right to be "left alone" at this point, and that it should not be the "burden on this family" to surrender its privacy rights which, in effect, is what would happen if the MOHLTC's claim to refuse to confirm or deny the existence of records, if they exist, is not upheld.

The Ministry distinguishes the facts of the present appeals from those in Orders PO-1779 and P-984 where section 23 was found to outweigh the section 21(1) exemption claim. The Ministry states:

> In the present case, there is no suggestion that the activities of [the affected person], or any other individuals whose personal information may be contained in the records, if they exist, have been "called into dispute". This is not the case where individuals who may have been involved in some wrongdoing are attempting to "hide" or

"cloak" those activities from public scrutiny behind the veil of privacy. The MOHLTC submits that it is may be [sic] arguable that individuals in such situations should have more limited privacy rights when weighed against the public interest in disclosure. However, the appellant fails to identify with any specificity why s. 23 outweighs the purpose of the s. 21 [sic] in this particular case.

The Ministry also points to two decisions of the Federal Court of Canada under the federal Access to Information Act in support of its position that the balancing of public and privacy interests should weigh in favour of non-disclosure. In one of them, Bland v. Canada (National Capital Commission)) 4 Admin L.R. (2nd) 171, appeal allowed on other grounds, [1993] 1 F.C. 441, the Federal Court (Trial Division) considered the balancing of privacy rights of certain tenants of the National Capital Commission in the non-disclosure of their rents against the public interest in disclosure. The Ministry states:

> ... The Court referred favourably to the then Information Commissioner [of Canada]'s Report on Results of Investigation, in which she recommended that the rents be disclosed. The Commissioner set out the following considerations in this balance:
>
> > Whether it [the privacy interest] is demonstrably greater may depend on various factors. One is the degree to which the information in question is regarded as private by the community generally and by the persons concerned - whether it is treated as sensitive and highly private (like an invisible disability) or as a matter of general knowledge (like approximate weight and height).
> > ...
> >
> > The expectation of privacy is a related concern.
> > ...
> >
> > Any harm that may be done to the individuals concerned by invasion of their privacy is also a consideration. It is not necessary to show that specific harm will - or even may - be done, but an invasion of privacy will obviously be more serious if it results in harm to the one whose privacy has been invaded. Such harms could be stigma, disgrace, harassment, loss of money, employment of friends, or adverse publicity. It is not easy to predict what the effects of any invasion of privacy of information will be, so it becomes necessary to weigh not only the potential harm but the likelihood that the harms will occur.
>
> In the Bland case, the Court found that:

> ... However, the disclosure of how much residential rent a person pays to a government institution, pales into comparative insignificance when one thinks of a really serious invasion of privacy such as disclosure of a criminal record, or of marital infidelity or medical consideration for examples of matters which, along with income tax returns most folks do not want to disclosure, or to have disclosure about themselves.

> If records exist in the present case, they would contain the very type of personal information, the disclosure of which as noted in Bland would constitute a "very serious invasion of privacy". The public would generally consider such information as very sensitive and private; an expectation of privacy would be held; and serious harms could result upon disclosure. In such circumstances it is the position of the MOHLTC that any compelling public interest, if it exists, does not **clearly outweigh** the purpose of the personal privacy exemption in s. 21(5). [Ministry's emphasis]

My task is to balance the compelling public interest in disclosure of the information concerning the administration of the in-home nursing care funding program against the purpose of the personal information exemption, taking into account the particular circumstances of this appeal. In so doing, I must balance a demonstrated, current and compelling public interest in disclosure against a privacy interest that is based on findings that the personal information at issue is highly sensitive, provided in confidence, and, in many cases, relates to medical treatments and/or financial activities that attract the protection of a presumption against disclosure.

In these circumstances, I find that the balance does not favour disclosure. Although the integrity of the in-home nursing care funding program has been called into question by the appellant and others, and disclosure of the records at issue in this appeal would provide information directly related to this concern, there are other avenues of pursuit available to address these legitimate expectations for the equitable administration of this program. The appellant clearly wants more information, but, in my view, confirming the existence of the Minutes of Settlement negotiated by the Ministry and the affected person goes some way to meeting public accountability expectations in this regard, without compromising privacy. On the other side of the scales are privacy interests which, in my view, are weighty and serious. The records deal with the affected person's medical treatment, arguably one of the most sensitive categories of personal information. Although at one point in time the affected person was apparently prepared to place some of the details of his medical treatment in the public arena, he did so by choice. He has now chosen, for a variety of no-doubt complex reasons, to pull himself out of the public eye, and has submitted clearly and specifically that he is "vehemently opposed" to divulging his personal information and considers matters involving the negotiation of his settlement with the Ministry to be "an unjustified invasion upon his privacy". These are strong statements that carry considerable weight. As the Ministry points out, the activities of the affected person have not been called into dispute. He has been involved in no wrongdoing and is not attempting to hide his activities from public scrutiny on the basis of questionable or illegitimate

privacy claims. In my view, the strong objections voiced by the affected person is the most significant factor favouring privacy protection in these circumstances.

In balancing the competing interests under section 23, it is important to recognize that, in order for the section to apply, a compelling public interest must **clearly** outweigh the purpose of whatever exemption claim has been established. It is not sufficient for a compelling public interest in disclosure to be equal in weight, or to simply outweigh the purpose of the exemption claim; the balance favouring disclosure must be clear. In the case before me, the competing interests of disclosure and privacy protection are both weighty, and the parties have all made effective arguments in support of their respective positions. In the circumstances, I find that the competing interests are comparable, but I am not persuaded that the established compelling public interest in disclosure of the affected person's personal information is sufficient to **clearly** outweigh the competing interest in the protection of his privacy reflected in the section 21 exemption claim. Accordingly, I find that this is not one of the unusual cases whether the important public policy basis for the personal information exemption claim should yield to a stronger and more compelling public interest in disclosure of records.

For these reasons, I find that all of the requirements of section 23 of the Act are not satisfied, and the personal information of the affected person contained in the records should not be disclosed.

ORDER:

1. I do not uphold the Ministry's decision to refuse to confirm or deny the existence of the records.

2. I find that Record 59 does not qualify for exemption and should be disclosed to the appellant by **September 7, 2000** but not before **September 1, 2000**.

3. I find that all remaining records qualify for exemption under section 21 of the Act, and that section 23 does not apply in the circumstances of this appeal.

4. In this order, I have confirmed the existence of responsive records. I have released this order to the Ministry and the affected person in advance of the appellant in order to provide the Ministry and/or the affected person with an opportunity to examine this order and determine whether to apply for judicial review with respect to the issue of the existence of the records.

5. If I have not been served with a Notice of Application for Judicial Review with respect to the issue of the existence of the records by **August 28, 2000**, I will release this order to the appellant by **September 1, 2000**.

6. In accordance with the requirements of section 54(4) of the Act, I will give the appellant notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to the Ministry and the affected person.

7. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Tom Mitchinson
Assistant Commissioner

July 27, 2000