

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER PO-4275-I

Appeal PA20-00066

London Health Sciences Centre

July 5, 2022

Summary: This interim order deals with an access request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to London Health Sciences Centre (LHSC) for a copy of a report written by a third-party company of engineering recommendations relating to LHSC's helipad. LHSC disclosed the report to the requester, a member of the media, in part. It withheld portions of the report, claiming the application of the mandatory exemption in section 17(1) (third party information), as well as the discretionary exemption in section 13(1) (advice or recommendations). In this interim order, the adjudicator finds that the information at issue is not exempt from disclosure under section 17(1), but that it is exempt from disclosure under section 13(1). However, she does not uphold LHSC's exercise of discretion under section 13(1) and orders it to re-exercise its discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1) and 17(1).

OVERVIEW:

[1] This interim order disposes of most of the issues raised as a result of an appeal of an access decision. London Health Sciences Centre (LHSC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a particular report authored by a named company (the affected party or the company) involving engineering recommendations for LHSC's helipad. The requester is a member of the media.

[2] The affected party is a large for-profit organization that provides aviation planning and advisory services. LHSC retained the affected party to investigate issues with its helipad following an aircraft operator's refusal to use the helipad. The affected party was also retained to provide preliminary recommendations for mitigating the issues it identified.

[3] Prior to issuing its decision, LHSC notified the company of the access request seeking its views on disclosure of the report. The company responded, objecting to disclosure, and LHSC subsequently issued its access decision to both the requester and the company, granting the requester partial access to the report. LHSC denied access to portions of the report, claiming the application of the mandatory exemptions in sections 17(1)(a), (b), (c), and (d) (third party information), as well as the discretionary exemption in section 13(1) (advice or recommendations).

[4] The requester (now the appellant) appealed LHSC's decision to the Information and Privacy Commissioner of Ontario (the IPC). The company (now the affected party) did not file an appeal with the IPC.

[5] During the mediation of the appeal, LHSC clarified that it was relying on sections 13(1) and 17(1)(a) and (b) to deny access to the information at issue. Also during mediation, the appellant narrowed the scope of the appeal to pages 5-8 of the report. The LHSC maintained its position to deny access to these portions of the report under sections 13(1) and 17(1)(a) and (b).

[6] The appeal then moved to the adjudication stage of the appeals process and I decided to conduct an inquiry under the *Act*. LHSC, the appellant and the affected party provided representations. In its representations, LHSC raised the application of the mandatory exemption in section 17(1)(c), in addition to sections 17(1)(a) and (b). The affected party indicated in its representations that it supports LHSC's position, and that it relies on correspondence that it sent to LHSC during the processing of the access request. The totality of the appellant's representations stated that the public has a right to know what options a publicly-funded hospital is considering with respect to a major part of its infrastructure.

[7] For the reasons that follow, I find that the information at issue is not exempt from disclosure under section 17(1) but that the section 13(1) exemption applies to it. However, I do not uphold LHSC's exercise of discretion and order it to re-exercise its discretion under section 13(1).

RECORD:

[8] The information at issue consists of four pages of a report prepared by the affected party entitled "Mitigation Options and Feasibility," which identifies issues with, and mitigation options for, the helipad.

ISSUES:

- A. Does the mandatory exemption at sections 17(1)(a), (b) or (c) for third party information apply to the information at issue?
- B. Does the discretionary exemption at section 13(1) apply to the information at issue?
- C. Did LHSC exercise its discretion under section 13(1)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the mandatory exemption at sections 17(1)(a), (b) or (c) for third party information apply to the information at issue?

[9] LHSC's position is that the information at issue is exempt under sections 17(1)(a), (b) or (c). While the affected party did not articulate a particular subsection of section 17(1) in its correspondence to LHSC at the time of the request, (and which it relies on in this appeal), that correspondence implies that section 17(1)(a) applies to the information at issue.

[10] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,¹ where specific harms can reasonably be expected to result from its disclosure.²

[11] Section 17(1)³ states, in part:

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

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

¹ *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.) (*Boeing Co.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ Section 17(3) provides an exception to section 17(1) when the third party consents. This is not the case in the present appeal.

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[12] For section 17(1) to apply, the party arguing against disclosure 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;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), and/or (c) of section 17(1) will occur.

Part 1 of the section 17(1) test: type of information

[13] The IPC has described the types of information (relevant to this appeal) protected under section 17(1) as follows:

Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.⁴

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.⁵ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁶

[14] Both LHSC and the affected party submit that the withheld portions of the report contain information that is highly technical and consists of commercial information. In particular, LHSC submits that the report was prepared by staff engineers of the affected party. The affected party, an engineering company, updated a survey regarding options and feasibility for using the LHSC's helipad. Further, LHSC argues that the withheld information consists of commercial information because it pertains to the agreed-upon terms of a commercial relationship between the affected party and LHSC involving engineering recommendations made by the affected party.

⁴ Order PO-2010.

⁵ Order PO-2010.

⁶ Order P-1621.

[15] Based on my review of the information at issue, I am satisfied that it consists of “technical information,” as that term has been defined by past IPC orders. In particular, I find that it consists of information prepared by professionals in the engineering field, and describes the operation and maintenance of LHSC’s helipad. As a result, I find that the first part of the three-part test in section 17(1) has been met. I also find that on my review of the record, it does not contain “commercial information” for the purposes of part one of the test because it does not relate solely to the buying, selling or exchange of merchandise or services.

[16] I will now determine whether the second part of the three-part test applies to the information at issue.

Part 2: supplied in confidence

[17] The requirement that the information has been “supplied” to LHSC reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁷ Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.⁸ The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.⁹

[18] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.¹⁰

[19] LHSC and the affected party argue that the information in the information at issue was supplied by the affected party to LHSC, was so supplied in confidence, and is not for “public consumption.” The information, LHSC submits, was supplied directly to

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

¹⁰ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

the helipad manager at LHSC and was explicitly marked as “confidential” on the first page of the report.

[20] In correspondence to LHSC during the processing of the access request, legal counsel for the affected party stated that the information in the report was provided to LHSC in strict confidence and was expected to remain confidential in order to assure the affected party’s continued relationship with LHSC.

[21] Based on the representations of LHSC and the affected party, I am satisfied and find that the information at issue was supplied to LHSC by the affected party and that it was done so with an objective expectation of the confidentiality of the record. As a result, I find that the second part of the three-part test in section 17(1) has been met.

[22] I will now determine whether part three of the three-part test has been met.

Part 3: harms

[23] Parties resisting disclosure cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the record itself and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.¹¹

[24] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.¹² However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.¹³

[25] Sections 17(1)(a) and (c) seek to protect information that could be exploited in the marketplace.¹⁴

[26] LHSC submits that the disclosure of the information will give rise to a reasonable expectation that one of all of the harms specified in sections 17(1)(a), (b) or (c) will occur.¹⁵ In support, it directly quotes arguments made by the affected party at the request stage. In that correspondence, the affected party argues that the disclosure of the information at issue could cause the following harms:

¹¹ Orders MO-2363 and PO-2435.

¹² *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

¹⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

¹⁵ LHSC also submits that the exception in section 17(3) does not apply.

- the information could easily be taken out of context, and
- irreparable harm and significant prejudice to the affected party's competitive position in the market and possible interference with its ability to secure additional work, as the content would disclose competitive information that would be beneficial to third parties.

[27] The affected party states that it supports the LHSC's position.

[28] I find that neither LHSC nor the affected party have provided sufficient evidence to demonstrate a reasonable expectation of the harms referenced in any of subsections 17(1)(a), (b) or (c). Moreover, having reviewed the information at issue in the context of the record as a whole and the surrounding circumstances, I am unable to infer any of the harms listed in section 17(1).

[29] The totality of LHSC's representations consist of the statement that the disclosure of the information at issue will give rise to a reasonable expectation that one or all of the harms specified in sections 17(1)(a), (b) or (c) will occur. LHSC offers no further explanation or detailed evidence as to how any of the harms in section 17(1) could reasonably be expected to occur. Without further evidence, I am unable to conclude that the harms in sections 17(1)(a), (b) and (c) could reasonably be expected to occur on the basis of LHSC's representations.

[30] I find that the affected party also has not provided sufficient evidence as to how the particular information at issue could give rise to a reasonable expectation that the harms in section 17(1) will occur. With respect to section 17(1)(a), the affected party has not provided evidence of how the disclosure of the record could enable competitors to exploit the affected party's information, causing significant prejudice to the affected party's competitive position in the market and possible interference with its ability to secure additional work. I find that the affected party's arguments consist of general and broad unsupported submissions, with insufficient evidence to enable me to conclude that there is a reasonable expectation that disclosure of the information would result in any interference with its contractual or other negotiations. Similarly, concerning section 17(1)(c), I find that the affected party has not provided sufficient evidence that disclosure of the information at issue could reasonably be expected to result in undue loss to it or any undue gain to any person, group, committee or financial institution or agency.¹⁶

[31] I also find that the affected party's representations do not address the harms contemplated in section 17(1)(b) at all. There are no representations before me how disclosure of the information at issue could impact the willingness of the affected party or others to provide similar information in the future.

[32] As I note above, I further find, based on my review of the information itself and

¹⁶ For similar findings, see for example Orders PO-3850, PO-4191 and PO-4216.

the surrounding circumstances, that the harms in section 17(1) cannot be inferred.

[33] In sum, I find that the third part of the three-part test in section 17(1) has not been met and the information at issue is, therefore, not exempt from disclosure under section 17(1). LHSC has also claimed the application of section 13(1) to the information at issue, which I will now consider.

Issue B: Does the discretionary exemption at section 13(1) apply to the information at issue?

[34] LHSC's position is that all of the information at issue in the record qualifies as "advice" or "recommendations" under section 13(1), which states:

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

[35] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁷

[36] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[37] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹⁸

[38] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[39] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations, or

¹⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36 (*John Doe v. Ontario (Finance)*), at para. 43.

¹⁸ See above at paras. 26 and 47.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁹

[40] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information.²⁰ Section 13(2) creates a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1). Of relevance to the circumstances to the appeal before me, section 13(2) states, in part:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

[41] The exceptions in section 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.²¹ The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain an opinion related to a decision to be made, but rather provide factual information.

[42] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.²² Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.²³

Representations

[43] LHSC submits that the information at issue contains advice or recommendations made by the affected party. In particular, LHSC's position is that the information sets out options going forward in regard to the helipad, as well as the requirements for each "mitigation" option available to LHSC. LHSC goes on to argue that the information at issue also sets out the advantages and disadvantages of each option, and that the options have not been disclosed by LHSC or made public.

[44] Further, LHSC submits that the engineering recommendations made by the affected party were based on it completing a site investigation of the helipad under day

¹⁹ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

²⁰ Order PO-3315.

²¹ *John Doe v. Ontario (Finance)*, cited above, at para. 30.

²² Order P-24.

²³ Order PO-2097.

and night operating conditions. It says, the factual material in the record is set out in a separate section entitled "Site Investigation and Obstacle Survey," which is no longer at issue in this appeal because it was disclosed. LHSC's position is that the information at issue consists of an evaluative analysis as opposed to objective or factual information.

[45] Lastly, LHSC submits that none of the exceptions in section 13(2) apply, as the record does not contain any of the information described in section 13(2), but rather consists of engineering recommendations for the LHSC's helipad, as opposed to merely factual information.

Analysis and findings

[46] I am satisfied, first, that LHSC retained the affected party as a consultant to provide an engineering report regarding LHSC's helipad. As previously stated, LHSC retained the affected party to investigate issues with its helipad following an aircraft operator's refusal to use the helipad. The affected party was also retained to provide preliminary recommendations for mitigating the issues it identified.

[47] Second, based on LHSC's representations and my review of the information itself, I find that the information at issue consists of direct "advice" given by the affected party to LHSC. This advice, I find, includes policy options in which the affected party has listed alternative courses of action, including the "pros and cons" of each option, as well as the steps that would be required to implement each of the options presented.²⁴

[48] There is a distinction between factual information and information which consists of advice (or recommendations), and the exception listed in section 13(2)(a) provides that factual information is not exempt under section 13(1). Based on my review of the information at issue, I find that section 13(2)(a) does not apply to it, because it includes an evaluative analysis of information and does not consist solely of objective or factual information.

[49] As a result of my findings above, I find that the information at issue at pages 5 through 8 of the record is exempt from disclosure under the discretionary exemption in section 13(1). I will now determine whether LHSC properly exercised its discretion.

Issue C: Did LHSC exercise its discretion under section 13(1)? If so, should the IPC uphold the exercise of discretion?

[50] The section 13(1) exemption is discretionary, and permits an institution to

²⁴ See, for example, the Supreme Court of Canada's decision in *John Doe v. Ontario (Finance)*, cited above, which noted that the records at issue presented the opinions of public servants on the advantages and the disadvantages of alternatives, or policy options. The Court held that these records were exempt from disclosure because they constituted "advice" within the meaning of section 13(1). See also Reconsideration Order PO-3470-R and Orders PO-4059 and PO-4225.

disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[51] In addition, the IPC may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations and/or it fails to take into account relevant considerations.

[52] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁵ The IPC may not, however, substitute its own discretion for that of the institution.²⁶

[53] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁷

- the purposes of the *Act*, including the principles that information should be available to the public, and exemptions from the right of access should be limited and specific,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- whether disclosure will increase public confidence in the operation of the institution,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

[54] LHSC submits that it understands and appreciates the value of the *Act* and the right of the public to have access to information. It argues in general that it considered all factors related to the release of information and made a decision to apply section 13(1) to the record. It further submits that the appellant has not provided evidence of a compelling need to obtain the information.

[55] While I have found that the information at issue is exempt from disclosure under section 13(1), I must determine whether LHSC properly exercised its discretion in

²⁵ Order MO-1573.

²⁶ See section 54(2).

²⁷ Orders P-344 and MO-1573.

withholding this information. To begin, I have no concern that the LHSC exercised its discretion in bad faith.

[56] However, I find that it has provided insufficient evidence regarding its exercise of discretion. In particular, the representations are vague and lacking in detail as to which factors it specifically considered in exercising its discretion. I am not satisfied that it exercised its discretion properly and took into account all relevant considerations.

[57] Presumably, LHSC uses its helipad to receive some of the sickest and most urgent patients. As noted above, one aircraft operator refused to use the helipad due to issues with it. In my view, in this context, LHSC should have given more consideration to transparency around the examination of these issues. In particular, relevant factors for LHSC to consider are whether there is a continuing public interest in the disclosure of the record, whether the disclosure of the record would *promote* public confidence in LHSC and whether the non-disclosure of the record would undermine public confidence in LHSC. As a result, I will order LHSC to re-exercise its discretion, taking into account these factors and any relevant factors, including the following:

- exemptions from the right of access should be limited and specific,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is an individual or an organization,
- whether disclosure will increase public confidence in the operations of LHSC,
- whether the non-disclosure of the record would undermine public confidence in LHSC,
- the age of the information, and
- the historic practice of LHSC with respect to similar information.

ORDER:

1. I uphold LHSC's finding that the discretionary exemption in section 13(1) applies to the information at issue.
2. I do not uphold LHSC's exercise of discretion under section 13(1). I order LHSC to re-exercise its discretion to consider disclosing the information at issue taking into account the factors listed above.
3. If LHSC continues to withhold the information at issue, I order it to provide the IPC and the appellant with representations about its re- exercise of discretion by **August 5, 2022.**

4. I remained seized of this matter, pending my findings regarding LHSC's re-exercise of discretion.

Original Signed By: _____

Cathy Hamilton
Adjudicator

_____ July 5, 2022