

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4293-F

Appeal PA20-00066

London Health Sciences Centre

August 26, 2022

**Summary:** This final order deals with whether London Health Sciences Centre (LHSC) properly re-exercised its discretion in withholding portions of a third party report under section 13(1) (advice or recommendations) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In this final order, the adjudicator upholds LHSC's re-exercise of discretion and dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1) and 54(2).

### OVERVIEW:

[1] This final order disposes of the remaining issue in this appeal, which is London Health Sciences Centre's (LHSC's) re-exercise of discretion in withholding portions of an engineering report authored by a third party company (the company). On July 5 2022, I issued Interim Order PO-4275-I, which was the result of an appeal of an access decision LHSC made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to this report involving engineering recommendations for LHSC's helipad. The appellant is a member of the media.

[2] The company is a large for-profit organization that provides aviation planning and advisory services. LHSC retained the company<sup>1</sup> to investigate issues with its helipad

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<sup>1</sup> Referred to as the affected party in Interim Order PO-4275-I.

following an aircraft operator's refusal to use the helipad. The company was also retained to provide preliminary recommendations for mitigating the issues it identified.

[3] LHSC granted access to portions of the report, but denied access to other portions, 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) to it.

[4] The requester (now the appellant) appealed LHSC's decision to the Information and Privacy Commissioner of Ontario (the IPC). At the conclusion of the mediation of the appeal, the information at issue consisted of four pages of the report entitled "Mitigation Options and Feasibility," which identified issues with, and mitigation options for, the helipad.

[5] 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 company provided representations. In its representations, LHSC continued to rely on sections 13(1) and 17(1) to deny access to the information at issue.<sup>2</sup> The company indicated in its representations that it supports LHSC's position, and that it relied 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.

[6] In Interim Order PO-4275-I, I found that the information at issue was not exempt from disclosure under section 17(1) but that the section 13(1) exemption applied to it. However, I did not uphold LHSC's exercise of discretion and ordered it to re-exercise its discretion under section 13(1) and to provide representations to the IPC on its re-exercise of discretion.

[7] In reaching the conclusions I did in Interim Order PO-4275-I, I found that LHSC had provided insufficient evidence regarding its exercise of discretion. In particular, I found that its representations were vague and lacking in detail as to which factors it specifically considered in exercising its discretion. I was not satisfied that LHSC exercised its discretion properly and took into account all relevant considerations.

[8] I noted that one aircraft operator refused to use the helipad due to issues with it. I found that LHSC should have given more consideration to transparency around the examination of these issues. In particular, I found that relevant factors for LHSC to have considered were whether there is a continuing public interest in the disclosure of the information at issue, whether the disclosure of the information at issue would *promote* public confidence in LHSC, and whether the non-disclosure of the information at issue would undermine public confidence in LHSC. As a result, I ordered LHSC to re-exercise its discretion, taking into account these factors and any relevant factors,

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<sup>2</sup> The company did not file an appeal with the IPC.

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.

[9] In response to Interim Order PO-4275-I, I received representations from LHSC on its re-exercise of discretion. I provided the appellant with a copy of these representations and provided her with the opportunity to respond to them. The appellant provided representations to the IPC.

[10] For the reasons that follow, I uphold LHSC's re-exercise of discretion and dismiss the appeal.

## **DISCUSSION:**

[11] The sole issue is whether LHSC properly re-exercised its discretion in deciding to withhold portions of the report under section 13(1) of the *Act*.

[12] The section 13(1) exemption is discretionary, and permits an institution to 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. 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, or it fails to take into account relevant considerations.

[13] In either case, an IPC adjudicator may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>3</sup> I may not, however, substitute my own discretion for that of the institution.<sup>4</sup>

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<sup>3</sup> Order MO-1573.

<sup>4</sup> See section 54(2).

## **Representations**

[14] LHSC submits that it properly re-exercised its discretion in good faith, taking the following factors into consideration.

### ***The exemption from the right of access should be limited and specific***

[15] LHSC submits that it considered the principle that information should be accessible to the public and that exemptions from the right of access should be limited and specific. LHSC states that it severed information that is exempt in a reasonable way so that portions of the report have been disclosed to the appellant, including all other factual and background information contained in the report.

### ***The interests the exemption seeks to protect***

[16] LHSC submits that the importance of receiving candid advice and recommendations from the company weighed strongly in favour of its decision not to disclose the information at issue. In addition, LHSC submits that during the processing of the access request, the company advised LHSC that it provided the information in confidence to it. LHSC argues that disclosing the information at issue, which consists of direct advice given by the company to it, would create a real and significant risk that the company, or any other consultants engaged by it, will not provide candid advice or recommendations to LHSC in the future.

[17] LHSC also advises that the same company has been retained to provide advice about a second LHSC helipad, and is in the midst of strategic planning with respect to its overall air transport operations at both sites. LHSC's position is that as part of this process, it is important for it to be able to rely on the company's advice in order to make informed decisions about the safety and maintenance of both its heliports in a manner that best serves the interests of its patients.

### ***The requester is an organization***

[18] LHSC submits that the appellant is a media organization, and that it would have been inclined to disclose the information at issue to the appellant had it contained the appellant's personal information, which it did not.

### ***Public confidence in LHSC***

[19] LHSC acknowledges that there was significant public interest in ensuring that the helipad was functioning safely and effectively, especially given the initial refusal of an aircraft operator to use the helipad. LHSC submits that the information which was disclosed to the appellant provided the public with factual and background information about certain safety concerns that the aircraft operator raised and that LHSC has been addressing. This disclosed information, LHSC argues, is relevant to the public's understanding and assessment of the aircraft operator's refusal to use the helipad, and

also demonstrates that LHSC considered the issue and engaged the company to investigate and address any safety concerns.

[20] LHSC goes on to submit that it sees no compelling reason why the withheld specific and technical advice would now promote greater public confidence in it, beyond what has already been demonstrated through the previously disclosed information. The release of the information at issue, LHSC submits, would not materially add to the public conversation about the safe use of its helipad.

[21] Concerning whether the non-disclosure of the information at issue is likely to call into question public confidence in it, LHSC states that since the aircraft operator's refusal to use the helipad, it has received safety approvals from Nav Canada and Transport Canada which confirm that the helipad is currently safe for landing. LHSC also submits that Nav Canada makes information about authorized helipad facilities publicly available through its Canada Flight Supplement.

### ***Age of the information***

[22] LHSC submits that the information at issue is less than three years old and that the passage of time has not lessened LHSC's deliberative decision-making process because it is still engaged in discussions with the aircraft operator, which centre around the advice and mitigation options presented in the report. LHSC states that it is in the process of determining whether and how it might implement these mitigation options, which may require obtaining further advice from the company and possibly other external consultants.

### ***The historic practice of LHSC***

[23] LHSC's submits that it considers each access request on a case-by-case basis, stating:

LHSC does not frequently receive requests to disclose information which contains advice or recommendations that have been provided to it by its employees or external consultants. In response to the two requests that LHSC has received for similar information over the past five years, LHSC withheld the records on the basis of section 13(1) because there was no compelling public interest which weighed in favour of disclosure. LHSC has taken a similar position in this appeal. After considering the factors outlined above (particularly the interests that the section 13(1) exemption seeks to protect and the fact that disclosure would not increase public confidence in LHSC), LHSC has determined that it should not exercise its discretion to disclose the information at issue in this appeal.

[24] For the first time in this inquiry, the appellant submits that the public interest override in section 23 applies to the information that I found to be exempt under section 13(1), and that LHSC could have disclosed the mitigation options in the report

while still upholding its responsibility to guard commercially sensitive or proprietary information provided by company. For example, the hospital could have redacted cost estimates for the mitigation options contained in the report while still disclosing the various alternatives proposed by the company.

[25] The appellant goes on to argue that the initial media story about the closure of the helipad attracted significant public interest and that a subsequent freedom of information request for LHSC's staff emails on the subject uncovered shocked reactions from many, including in LHSC's transplant unit. The appellant further argues that while the report may contain advice or recommendations subject to the exemption in section 13(1), preventing the disclosure of the mitigation options and feasibility section of the report shields LHSC from accountability and prevents the public from engaging on this compelling issue. The appellant's position is that the public must know what LHSC's final decision is regarding the helipad and how it arrived at its conclusion.

[26] The appellant states:

LHSC contends that releasing information provided by outside contractors would undermine its ability to attain candid advice in the future. This perceived chilling effect is not a compelling reason for LHSC to issue a blanket redaction over reports prepared by outside entities in matters of compelling public interest, such as the future of hospital infrastructure.

### **Analysis and findings**

[27] As previously stated, an IPC adjudicator may send a matter back to the institution for an exercise of discretion based on proper considerations.<sup>5</sup> I may not, however, substitute my own discretion for that of the institution.<sup>6</sup> In Interim Order PO-4275-I, I specifically ordered LHSC to consider whether there is a continuing public interest in the disclosure of the information at issue, whether the disclosure of the information at issue would promote public confidence in LHSC, whether the non-disclosure of the information at issue would undermine public confidence in LHSC, and any other relevant factors.

[28] Based on LHSC's representations, I am satisfied that it properly re-exercised its discretion because it took into account relevant considerations, including the considerations set out in Interim Order PO-4275-I, and did not take into account irrelevant considerations. I am satisfied that LHSC considered if disclosure of the information at issue would promote public confidence in it, and I am satisfied with its explanation that the non-disclosure of the information at issue would not undermine public confidence in it. I find that in re-exercising its discretion, LHSC took into consideration the purposes of the *Act*, including the principle that exemptions from the right of access should be limited and specific, and that it also considered the purpose of

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<sup>5</sup> Order MO-1573.

<sup>6</sup> See section 54(2).

section 13(1), which is to promote the free and frank provision of advice or recommendations made by employees or third parties to institutions. I also note that LHSC has disclosed some of portions of the report to the appellant, and withheld only that information which I found to be exempt from disclosure under section 13(1). I further find that LHSC re-exercised its discretion neither in bad faith nor for an improper purpose.

[29] The appellant did not raise the possible application of the public interest override in section 23 of the *Act* until this late stage in the inquiry. Section 23 of the *Act*, the “public interest override,” provides for the disclosure of records that would otherwise be exempt under another section of the *Act*, such as section 13(1).

[30] Interim Order PO-4275-I is a final decision<sup>7</sup> about whether the information at issue is exempt and it is not now possible for the appellant to argue that section 23 ought to apply to override that exemption. The possible application of section 23 has no bearing on my determination of whether the LHSC properly exercised its discretion.

[31] To the extent that the appellant argues that the LHSC ought to have taken into account the public interest in disclosure of the information that is exempt under section 13(1), as discussed above, I am satisfied that it has.

[32] Consequently, for all of these reasons, I uphold LHSC’s re-exercise of discretion under section 13(1) in withholding the portions of the report that I found to be exempt from disclosure under section 13(1).

**ORDER:**

I uphold LHSC’s re-exercise of discretion and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

\_\_\_\_\_ August 26, 2022

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<sup>7</sup> *Chandler v. Alberta Assn. of Architects (1989)*, 62 D.L.R. (4th) 577 (S.C.C.).