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

ORDER PO-2497

Appeals PA-020278-3, PA-040078-2 and PA-040080-2

Ministry of Health and Long-Term Care

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BACKGROUND

In three related requests, the requester sought records from the Ministry of Health and Long-Term Care (the Ministry) about the Ministry's relationship with the Ontario Medical Association (OMA) and the Canadian Medical Protective Association (CMPA). The requester was specifically interested in records describing formal arrangements between the Ministry, OMA and CMPA for government reimbursement of professional liability insurance premiums paid by physicians.

The OMA is the entity that "represents the political, clinical and economic interests of the province's medical profession." According to the OMA website, practicing physicians, residents, and students enrolled in an Ontario medical school may be members. The OMA currently represents approximately 24 000 physicians.

The CMPA is an organization that provides legal defence, indemnification, risk management, educational programs and general advice to Canadian physicians. Founded in 1901, the CMPA was incorporated by federal statute in 1913. The CMPA website notes that "[it] is funded and operated on a not-for-profit basis …and its membership of more than 66,000 comprises about 95 per cent of the physicians licensed to practise in Canada."

This order disposes of the issues raised in three appeals (PA-020278-3, PA-040078-2 and PA-040080-2) that resulted from the Ministry's refusal to disclose records responsive to the requests.

NATURE OF THE APPEALS

Appeal PA-040078-2

The requester made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) as follows:

> By article 4 of the Memorandum of Understanding (MOU) dated July 20, 2000, made between the Ministry, [the CMPA] and [the OMA], a Medical Malpractice Coverage Committee (MMCC) was established.
>
> The mandate of the MMCC is in Appendix 2 to the MOU. Please advise:
>
> i. The dates on which MMCC has met, and the locations.
> ii. What recommendations have been made by MMCC.
> iii. What actions have been taken as a result of the recommendations, advice or activities of MMCC.
> iv. What has been done to carry into effect the principle stated in paragraph 4 of Appendix 2, that is, "balancing the interests concerning professional reputation with those concerning sensible management of resources available."
>
> Please note that Article 4.01 mentions Appendix 3, but it is obvious that Appendix 2 is meant.

The Ministry responded by advising the requester that the request did not furnish sufficient detail to determine whether any responsive records exist. The Ministry asked the requester to provide additional information to clarify the request and he did so. The Ministry then located one record responsive to the request and denied access to it, in full, pursuant to sections 12(1)(c), (d) and (e) (Cabinet records), and 17(1)(a), (b) and (c) (third party information) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision. In addition to appealing the Ministry's access decision with respect to the responsive record, the appellant raised the possible application of section 23 (public interest in disclosure) to the responsive record. The appellant also expressed the view that the Ministry had not addressed all parts of his request.

During mediation, the mediator requested that the Ministry conduct another search for responsive records and issue a revised decision letter. The Ministry's subsequent search identified the following additional records responsive to parts 1, 2 and 3 of the request:

- Meeting schedules and locations for 2003 and 2004; and
- MMCC meeting minutes dated April 14, 2003, July 2, 2003 and November 25, 2003

The Ministry also indicated that the record originally identified was responsive to part 4 of the request. The Ministry then issued a supplementary decision letter to the appellant denying access in full to the original record and the additional records pursuant to sections 12(1)(a), (b), (c) and/or (d) and 17(1)(a) and (b) of the *Act*.

The appellant again raised reasonableness of search as an additional issue. He stated that the original record located by the Ministry's first search is a report titled "[MMCC] Interim Report, June 2002," and that the existence of this document suggests that meetings prior to 2003 occurred and that records relating to those meetings should exist.

Further mediation was not possible and the file was moved to adjudication.

This office sent a Notice of Inquiry to the Ministry, the OMA and the CMPA, seeking the representations of these parties with respect to the application of sections 12, 17 and 23, and the search for responsive records.

The events following the issuing of this initial Notice of Inquiry in Appeal PA-040078-2 are described in the section titled "Further Developments in Appeals PA-040078-2 and PA-040080-2", which appears after the following section.

Appeal PA-040080-2

The Ministry also received the following request under the *Act* from the appellant:

I understand that the Government of Ontario, for several years, has rebated to physicians a significant portion of the fees they pay to the [CMPA], and continues to do so.

I request particulars of the program under which this is done, including existing and expired agreements, the amounts paid, and how the amounts are calculated.

Without limiting the generality of the foregoing, I request copies of:

1. The 1996 [OMA/Ministry] Agreement;
2. The [OMA/Ministry] Agreement for the term [April 1, 2000 to March 31, 2004];
3. The 5 Year memorandum of understanding (MOU), effective January 2004, negotiated in February 2003, between [the Ministry], OMA and CMPA;
4. Particulars of the "Procedure" mentioned in Article 6.02 and appendix 4 of the 2000 MOU between [the Ministry], CMPA and OMA; and
5. The report issued by the Medical Professional Liability Committee [MPLC] (formerly the Medical Malpractice Coverage Committee. The report is mentioned in a bulletin by OMA to members and is recent.

In addition, I request the total amounts paid under the program in each year since it began, showing for each year the beginning and end of the fiscal period.

Please advise also whether the government has knowledge of Ontario physicians who obtain malpractice insurance from a carrier other than CMPA, and in that case whether the government pays any part of those premiums. If so, please provide particulars of the program, similar to those requested in respect of CMPA subsidies.

Pursuant to Section 24(3) of the *Act*, this request continues to have effect for two years. With regards to documents 1, 2, 3, 4, and 5, mentioned, access is requested even if Ministry officials are of the view that they are not involved in the malpractice insurance subsidy program.

The Ministry sent a decision letter to the appellant which identified four records as responsive to the request:

1. The 1996 [OMA/Ministry] Agreement;
2. The 2000 [OMA/Ministry/CMPA] [MOU];
3. The 2004 [OMA/Ministry/CMPA] [MOU]; and

4. Annual Report from the [MPLC] to the Ministry and the Physician Services Committee [PSC].

The Ministry denied access in full to Records 1 and 3 pursuant to sections 17(1)(a), (b), and (c) of the *Act* and informed the requester that Record 2 had already been released to him in a previous appeal (PA-020278-2). The Ministry remarked that a separate decision on access to Record 4 had been made through appeal PA-040078-2, as it was the same record as the one identified as a result of the Ministry's original search in that appeal.

The Ministry also provided information responding to other parts of the request, specifically:

- That the total amounts reimbursed by the Ministry to physicians in each of the 2000/2001, 2001/2002, and 2002/2003 fiscal years was previously released to the appellant in Appeal PA-020278-2.

- That the Ministry had identified no records responsive to the part of the request relating to the government's knowledge of Ontario physicians who obtain malpractice insurance from a carrier other than CMPA, the government paying any part of those premiums, or the particulars of such a program.

- That the records are not produced on any scheduled or foreseeable dates and, therefore section 24(3) of the *Act* does not apply since it is not intended to provide ongoing access to the kind of record of which only one edition is produced, as in the present case.

The Ministry also noted that the name of the MMCC was changed to MPLC in the 2004 MOU.

I would note that while the name of that committee was formally changed in the 2004 MOU, as stated by the Ministry, the use of the name MPLC, instead of MMCC, seems to have occurred in mid-2003. Both names are used throughout this order, with an effort to apply the name in use at the time the document or record was created.

The appellant appealed the Ministry's decision based on the following:

- Reasonable Search: the [OMA/Ministry] Agreement for the term [April 1, 2000 to March 31, 2004] (part 2 of the request)

- Exemption Claim: the application of section 17(1)(a), (b) and (c) of the *Act* to exempt the 1996 [OMA/Ministry] Agreement (part 1 of the request) and the 2004 [OMA/Ministry/CMPA MOU] (part 3 of the request)

  The appellant also asserted that "even if there were exempt information in the appendix, it would be severable under section 10(2)."

- Reasonable Search: Annual Reports from MMCC

  The appellant submits that further annual reports should exist as the MMCC was established under the 2000 MOU.

- Non-answer: Amounts paid since 1986

  The decision letter refers only to totals for the last three years and fails to identify the fiscal periods.

- Non-answer: the "Procedure" mentioned in the 2000 Ministry/OMA/CMPA MOU

  The appellant indicates that this is part 4 of his request and that no responsive record is mentioned in the list of records found by the Ministry

- Compelling Public Interest: possible application of the "public interest override" at section 23 of the *Act.*

During mediation, the appellant emphasized that the record he is seeking in part 2 of this request is a two-party agreement between the Ministry and the OMA, which is a separate and distinct document from the three-party MOU that he received as the result of appeal PA-020278-2.

With regard to the document referred to as Record 4, the appellant noted that because the record is being withheld, he had no way of knowing whether it is indeed the same record located by the Ministry through its search in appeal PA-040078-2.

The mediator forwarded a copy of the appellant's appeal letter to the Ministry for review and response. There was no response from the Ministry. As it appeared that no further mediation was possible, the appellant requested that this file proceed to adjudication.

This office sent a Notice of Inquiry initially to the Ministry, the OMA and the CMPA, seeking representations on the application of sections 17 and 23, and the search for responsive records.

Further Developments in Appeals PA-040078-2 and PA-040080-2

After the initial Notices of Inquiry relating to each of these two appeals had been sent to the Ministry, OMA and CMPA, the Ministry issued a new decision letter on November 4, 2004, in which it claimed that section 65(6)3 of the *Act* applies to exclude the records at issue in both appeals from the *Act.*

Based on this new decision letter, this office sent a Supplementary Notice of Inquiry to the Ministry, the OMA and the CMPA seeking their representations on the possible application of

section 65(6), as well as certain other issues in the original Notice and the supplementary Notice on which representations had not yet been received.

The Ministry, the OMA and the CMPA all submitted representations. This office then sent a Notice of Inquiry to the appellant, along with the Ministry's representations and complete copies of the representations from the OMA and the CMPA, inviting the appellant to provide representations.

Upon receiving representations from the appellant, this office sent a Reply Notice of Inquiry to the OMA and CMPA, as well as the Ministry, enclosing a complete copy of the appellant's representations. Reply representations were provided by the Ministry and the CMPA.

The appellant was offered a final opportunity to reply to the Ministry's and CMPA's representations through a Sur-Reply Notice of Inquiry and did so.

The appellant also sent in several short letters to clarify typographical errors in earlier correspondence or to bring other matters to the adjudicator's attention, none of which were construed as requiring further reply from the other parties.

After these stages of the adjudication process in relation to Appeals PA-040078-2 and PA-040080-2 were complete, I assumed carriage of both appeals from the former adjudicator.

Additional Record

In its representations, the Ministry indicated that a renewed search at the Provider Services Branch of the Ministry had located a copy of the OMA/Ministry Agreement (for the term April 1, 2000 to March 31, 2004). The Ministry stated that it was claiming section 65(6)3 to exclude this record from the *Act* and that, in the alternative, it claimed the exemption at section 17(1) of the *Act*, relying on the same representations submitted in relation to the 1996 OMA/Ministry Interim Agreement.

A copy of this record (the "2000 OMA/Ministry Agreement") was not obtained at that time. After I assumed carriage of these appeals, however, I sought and received a copy of the 2000 OMA/Ministry Agreement from the Ministry, since it was responsive to part two of the appellant's request, as originally framed, in appeal PA-040080-2.

The numbering of the records originally identified as responsive to the appellant's request in Appeal PA-040080-2 (and as labeled in the original representations provided to this office) had the 1996 OMA/Ministry Agreement as Record 4 and the 2004 MOU as Record 5. This order reflects revised numbering of the records in that although the 1996 OMA/Ministry Agreement remains known as Record 4, I will be referring to the 2000 OMA/Ministry Agreement as Record 5 and the 2004 MOU as Record 6.

Having reviewed Record 5, the 2000 OMA/Ministry Agreement, I concluded that it would be appropriate to seek supplementary representations from the Ministry and the OMA regarding the possible application of sections 65(6), 17 and 23 of the *Act*. I sent a supplementary letter Notice of Inquiry to the Ministry and the OMA and I received representations from both the Ministry and the OMA in response.

In view of the Ministry and OMA providing representations on Record 5 which were virtually identical to those received earlier in the inquiry process in relation to Record 4, I determined that I did not need to hear from the appellant on Record 5.

This order was being prepared when, on June 13, 2006, the Ministry contacted this office and advised that it wished to withdraw the representations it had provided on Record 5 in May 2006 because it had decided to release the 2000 OMA/Ministry Agreement to the appellant. The Ministry subsequently sent this office a copy of the revised June 19, 2006 decision letter to the appellant under cover of which it had sent Record 5 to the appellant.

The appellant subsequently sent correspondence to this office in which he acknowledged receipt of the June 19, 2006 revised decision letter and a copy of the 2000 OMA/Ministry Agreement.

As previously mentioned, however, Record 4 is an Interim Agreement signed in 1996 between the OMA and Ministry, while Record 5 is an Agreement signed in 2000 by the same parties. My review of Record 4 - over which the Ministry maintains its claims of exclusion from jurisdiction or, alternatively, exemption under the *Act* - does not demonstrate an adequate or reasonable basis for distinguishing between the two records, in terms of the decision to release Record 5, but not Record 4, to the appellant.

Accordingly, and notwithstanding the Ministry's recently revised decision on Record 5 and its consequent release to the appellant, I have decided to proceed with my analysis and disposition of the 2000 OMA/Ministry Agreement in this order.

Appeal PA-020278-3

The Ministry also received the following request under the *Act* from the appellant, which pre-dated those described above under Appeals PA-040078-2 and PA-040080-2:

> I understand that the Government of Ontario rebates to physicians a significant portion of the fees they pay to the [CMPA]. I am interested in getting particulars of this program, that is, the Agreement or regulations involved and the amounts.

The Ministry advised the requester to forward his request to the Ministry's Freedom of Information (FOI) office. The requester then asked the Ministry's FOI office for the following:

> (a) A [MOU] signed by CMPA, OMA, and the Ministry. I don't know the date, but the document is mentioned in the current CMPA website.
>
> (b) The amounts paid by the Ministry under the Memorandum in the years to which it applies. I do not ask for amount paid to or for any individual. I request yearly totals. I also ask for a breakdown by specialties or regions if that information already exists.
>
> (c) Predecessor Agreements or [MOUs] for earlier time periods. My understanding is that the subsidy program for Medical Malpractice insurance began in 1986, but I am not sure of that.
>
> (d) With regard to predecessor Agreements, information similar to that mentioned in (b).
>
> (e) With regard to (b) and (c), I ask how the amounts paid are calculated. I suppose that information is in the Agreements, but if other documents are needed, I ask for those.

As the requester (now the appellant) did not receive a response from the Ministry within 30 days of his request, he appealed to this office and file PA-020278-1 was opened as a deemed refusal file. The Ministry subsequently provided the appellant with a decision letter responsive to his request and that appeal file was resolved.

In its decision letter, the Ministry granted access, in part, to records responsive to the request. The Ministry provided information responsive to part (b) of the request for the years 2000 and 2001, and advised that it does not collect data by specialty or region. The Ministry informed the appellant that the CMPA fee schedule is available on the CMPA website, where it is broken down by specialty and region. The Ministry also provided information responsive to part (e) of the request. With respect to part (e), the Ministry stated:

> Under the 1987 [Ministry]/OMA Agreement, the government agreed to subsidize physician malpractice coverage. Since 1987, the government has continued to pay the difference between the 1986 fee and the current fee.

Access was denied to the record responsive to part (a) of the request, in its entirety, pursuant to the third party information exemption found at section 17(1) of the *Act*. The Ministry also informed the appellant that records responsive to parts (c) and (d) of the request do not exist.

The appellant appealed the Ministry's decision to deny access to the MOU and also appealed the Ministry's decision that the records and agreements sought do not exist. The appellant stated his

belief that the 1987 agreement must exist based on the Ministry's response to part (e) of his request. As a result, Appeal PA-020278-2 was opened.

The appeal was not resolved through mediation. During the adjudication stage of the appeals process, the Ministry granted access to the MOU requested in part (a) of the request.

In Order PO-2213, issued on December 11, 2003, Adjudicator Donald Hale dealt with Appeal PA-020278-2 and ordered the Ministry to provide the appellant with a decision letter on access to the 1987 Agreement and the accompanying financial information. In that order, he stated:

> In my view, the request as formulated is sufficiently broad to include the 1987 Agreement and the related information outlining the total payments made pursuant to that Agreement. Based on a literal reading of the request, it is clear that the appellant was seeking access to records relating to the subsidy program for malpractice insurance which began around 1986. I find that the Ministry has applied an overly-restrictive interpretation of the request by identifying only records which pertain to a tripartite agreement between the CMPA, OMA and itself. I find that the appellant's request, particularly part (c), is drafted in such a way as to include the 1987 Agreement or MOU, regardless of the fact that it may not have included the participation of the CMPA. I note that parts (b) and (d) of the request also include records pertaining to the amounts paid by the Ministry under the 1987 Agreement.
>
> I will, accordingly, order the Ministry to provide the appellant with a decision respecting access to the 1987 Agreement, and any records relating to the payments made pursuant to that Agreement, using the date of this order as the date of the request.

The Ministry did not comply with Adjudicator Hale's order within the required statutory 30-day period.

Eventually, the Ministry issued a decision granting access to the MOU; however, the appellant wrote to the Ministry to point out that "there was no financial information, as required by the Order." In his letter, he also indicated that the financial information he is seeking is set out in paragraphs (b), (d) and (e) of his request.

On April 2, 2004, the Ministry issued a decision on access to the financial information, advising the appellant that a further search in the Operational Support Branch of the Ministry had located no responsive records. The Ministry also advised that records related to the type of payments in question are maintained by the Provider Services Branch of the Ministry and that "… no responsive records were located as retention schedules do not extend for this period of time."

The appellant appealed the Ministry's decision that responsive records do not exist. Appeal PA-020278-3 was then opened as a sole issue, reasonable search appeal file.

In his letter of appeal, the appellant stated that he is seeking "the total amounts paid by the government to subsidize physicians' medical malpractice insurance premiums in each of the years since 1987, when the subsidy program began." Since he had received total amounts for the years 1987, 2000 and 2001, the appellant is seeking total amounts for the years 1988 to 1999.

To substantiate his claim that the records he is seeking must exist, the appellant provided an excerpt from *Review of the Canadian Medical Protective Association*, a 155 page report authored by the Honourable Charles Dubin, which was released in January 1997 and contained 55 recommendations mainly related to fee setting, risk management and tort reform. The excerpt provided by the appellant includes the following quote from the then-Minister of Health, Jim Wilson:

> "We could see no justification for the 20 per cent increase in the 1996 fees."
>
> "One of the difficulties with Ontario's previous subsidy program was its lack of accountability… The CMPA raised the fees and the government was obliged to pay the increase."

The appellant contended that the Minister could not have made these statements without knowing the annual amounts up to, and including, 1995.

During mediation, the Ministry suggested that the existence of the records at issue in this appeal was also at issue in appeal PA-040080-2 and that there was, accordingly, duplication of issues between the two ongoing appeals.

The parties were not able to further resolve the issues at mediation and the file was moved to adjudication to deal with the reasonable search issue.

In reviewing the circumstances of this appeal, the former adjudicator determined that this appeal could proceed in conjunction with Appeals PA-040078-2 and PA-040080-2. I agree, and as previously mentioned, I will deal with all three appeals in this order.

A Notice of Inquiry regarding Appeal PA-020278-3 was initially sent to the Ministry and representations were received. This office then sent a Notice of Inquiry to the appellant along with a complete copy of the Ministry's representations and representations were provided by the appellant in response. When this office sent a copy of the appellant's representations to the Ministry and invited representations in reply, the Ministry provided further representations.

RECORDS:

The following records are at issue in these appeals:

Appeal PA-040078-2

1. Medical Professional Liability Committee meeting schedules and locations for 2003 and 2004;

2. Minutes from the Medical Malpractice Coverage Committee/Medical Professional Liability Committee meetings dated April 14, 2003, July 2, 2003, and November 25, 2003;

3. Medical Malpractice Coverage Committee Interim Report, June 2002;

Appeal PA-040080-2

4. 1996 OMA/Ministry Interim Agreement;

5. 2000 OMA/Ministry Agreement; and

6. 2004 OMA/Ministry/CMPA Memorandum of Understanding.

SUMMARY OF ISSUES:

The first issue to be addressed in this order is one of jurisdiction, in view of the Ministry's claim that all of the above-described records are removed from the ambit of the *Act* by the operation of section 65(6)3. The records to which the *Act* is found to apply are then addressed through my analysis and conclusions regarding the section 17 exemption for third party information claimed by the Ministry. As will be apparent, it was unnecessary for me to address section 12 (Cabinet records exemption) or section 23 (public interest in disclosure). This order concludes with a discussion, and my findings, on the issue of reasonable search.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General principles

The Ministry claims that all of the records fall within the scope of section 65(6)3, which reads:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

For section 65(6)3 to apply, the Ministry must establish that:

1. the records were collected, prepared, maintained or used by the Ministry or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Ministry has an interest.

Part 1: collected, prepared, maintained or used

The Ministry submits that all six of the records were collected, prepared, maintained and/or used by the Ministry in the context of its relationship with Ontario physicians. The Ministry further submits that as a member of the MPLC, the Ministry was directly involved in the preparation of Records 1 to 3, and in addition, collected, used and maintained them. The Ministry states that as a party to the negotiations that resulted in the creation of Records 4 to 6, and as a signatory to the agreements, the Ministry was directly involved in their preparation and has used and continues to use them.

The appellant agrees that the records were collected, prepared, maintained and/or used by the Ministry.

Having reviewed the records, I find that they were collected, prepared, maintained and used by the Ministry or on its behalf, and part 1 of the test for the application of section 65(6)3 has been met.

Part 2: meetings, consultations, discussions or communications

The Ministry submits that on their face, the records at issue were clearly prepared, used and maintained in relation to meetings. Furthermore, Record 3 (MMCC Interim Report) was prepared, maintained and used in relation to communications by the MMCC to the Physician Services Committee (PSC) to assist the PSC in discharging its mandate.

The appellant also agrees that the collection, preparation, maintenance and use of the records were in relation to meetings, consultations or communications.

I find that the collection, preparation, maintenance or use of the records was in relation to meetings, consultations and communications, and as such, part 2 of the test for the application of section 65(6)3 has been met.

Part 3: labour relations or employment-related matters in which the Ministry has an interest

Representations

The Ministry provided the following background information which it submits is important to the understanding of why the labour relations exclusion in section 65(6)3 should apply to the records at issue.

> Under the *Health Insurance Act*, residents of Ontario are entitled to coverage for medically necessary services rendered by physicians. Generally, physicians bill the Ontario Health Insurance Plan ("OHIP") for all insured physician services. OHIP is governed and managed by the General Manager of OHIP, which is part of the Ministry. OHIP pays physicians the fees established by regulation under the *Health Insurance Act*. The regulation enacts the Schedule of Benefits, which lists physician services that are insured and prescribes the fee amounts payable to physicians for those services.
>
> Although practicing physicians are not employed by the Ministry, for most physicians, the Ministry is their primary source of income; the Ministry provides compensation to physicians in Ontario under OHIP. Furthermore, in managing Ontario's health care system, OHIP operates as a business would, putting its monetary and human resources to best and most efficient and effective use. A very large part of the human resources available to deliver OHIP health services are physicians.
>
> The Ministry bargains collectively with physicians through their representative, the [OMA]. They bargain regarding physician compensation and a variety of other issues such as liability coverage. Since the Ministry and Ontario physicians are not in an employer/employee relationship, the term "collective bargaining" in this context must be understood in its broadest sense, to include negotiations with representatives of persons who are not employees. Section 12 of the *Commitment to the Future of Medicare Act* expressly authorizes the Minister of Health to enter into agreements with the OMA to provide for methods of negotiating and determining the amounts payable under OHIP for insured services provided by physicians (previously provided for under section 3 of the *Health Care Accessibility Act*). Under that Act the OMA is recognized as the sole representative of physicians in Ontario for the purposes of negotiating with the government. The *Ontario Medical Association Dues Act* provides for Rand

Formula deductions of dues from OHIP payments made to physicians and the remittal of those dues to the OMA.

From time to time, tentative agreements are renegotiated between the Ministry and the OMA, and may be put to a vote by the OMA membership before such agreements can be said to be final. In this regard, the process is similar to that between employers and employees in more conventional labour/management relationships, and these agreements can be likened to "collective agreements".

. . . . .

On December 15, 1996, the Ministry and the OMA entered into an interim agreement during the course of the labour negotiations that began in October 1996. The purpose of the interim agreement was to address pressing issues that both parties were concerned about and wanted resolved pending the completion of negotiations of a full negotiated agreement. The interim agreement deals with physician payment and service delivery issues generally; one of the issues identified in the agreement as a priority item in the continuing negotiations was medical malpractice coverage, cost and related matters.

In July 2000, the Ministry entered into a tripartite [MOU] with the OMA and the [CMPA] to deal specifically with the issue of medical malpractice coverage and costs borne by physicians. The CMPA is an organization that was incorporated in 1913 under a federal, private Act: *An Act to Incorporate the Canadian Medical Protective Association.* Its current role is to provide medical malpractice coverage to physicians throughout Canada, and it charges annual fees for this coverage. The vast majority of Ontario physicians obtain malpractice coverage through the CMPA and pay annual fees to the organization for this coverage. However, the Ministry partially reimburses physicians for this cost by paying an annual subsidy towards CMPA fees for all Ontario physicians. In other words, the reimbursement of medical malpractice fees is a form of compensation that the Ministry provides to physicians. The reimbursement of CMPA fees is one of the items negotiated between the Ministry and the OMA in the course of their negotiations.

Negotiations between the Ministry and OMA take place through a number of joint committees. The primary, umbrella joint committee is the [PSC]. The Medical Malpractice Coverage Committee (now called the [MPLC]) is a subcommittee of the PSC and, like the PSC, is composed of representatives appointed by each of the interested parties - the Ministry, the OMA and the CMPA - and a neutral facilitator. The MPLC works with the Ministry, the OMA and the CMPA to determine amongst other medical malpractice issues, the cost of medical malpractice fees for physicians, and the amount of the Ministry subsidy.

The MPLC was established under the July, 2000 tripartite agreement. Its responsibility is to promote a positive relationship amongst the parties by

> providing an open and structured process for regular communication and liaison between the Ministry and the medical profession regarding medical malpractice issues in general, and the administration of the tripartite agreement in particular. Its mandate includes reviewing and making recommendations regarding the reimbursement of medical malpractice fees.

The Ministry's May 2006 representations in relation to Record 5 add the following information about the 2000 OMA/Ministry Agreement:

> In April 2000, the Ministry and the OMA entered into the 2000-04 Agreement … The purpose of this agreement – as with all previous Physician Services Agreements – was to establish a framework to govern and manage all the various human resources issues that arise from the Ministry's relationship with physicians in Ontario. On its face, the 2000-04 Agreement is clearly a labour relations document. It deals specifically with remuneration, compensation, working conditions, work incentives and reimbursement issues, all of which can be described as 'human resources' issues.

The Ministry acknowledges that physicians are not Ministry employees and submits instead that the meetings, consultations or communications were about labour relations matters. The Ministry refers to a 2003 decision of the Ontario Court of Appeal in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123.

In that case, a requester sought access to records relating to the PSC's recommendations to the OMA regarding a particular medical service. The records were used in the context of negotiations and collective bargaining between the Ministry and the OMA. The Ministry claimed that some of the records were excluded from the scope of the *Act* by virtue of section 65(6)3.

In Order PO-1721, former Assistant Commissioner Tom Mitchinson found that section 65(6) did not apply to these records. Specifically, the former Assistant Commissioner reasoned that because there was no employer-employee relationship between the Ministry and physicians, the matters in question could not be characterized as "labour relations" matters.

On judicial review, the Court of Appeal for Ontario quashed the decision, stating:

> It is common ground that physicians are not "employees" of the provincial government. In our view, however, in reaching the conclusion [he] did, the Assistant [Commissioner] read the phrase "labour relations" in s. 65(6)3 of the [*Act*] too narrowly. The phrase is not defined in that *Act*, and its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relationships; to do so would render the phrase "employment-related matters" redundant.

> The relationship between the government and physicians, and the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, fall within the phrase "labour relations", and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in s. 65(6)3 . . .

The Ministry submits:

> . . . [T]he Court of Appeal's 2003 decision is determinative of this part of the test, given the similarity of the context in which the records were created. The Court clearly accepted the Ministry's argument, as submitted in its factum, that the Ministry bargains collectively with the OMA with respect to the compensation of physicians by OHIP and a variety of other issues such as human resources matters and liability insurance. The Court agreed that even though physicians are not Ministry employees, they engage in collective bargaining of these issues, and that the OMA acts like a bargaining agent for Ontario physicians in their negotiations with the government.
>
> Since the reimbursement of CMPA fees is a component of the remuneration physicians receive from the Ministry, all records related to the MPLC's meetings relate to physician compensation issues. Records 1-3 all concern meetings, consultations and communications regarding the issue of the Ministry's reimbursement of physician's CMPA fees. Although these records contain other information, it all relates to the issue of professional liability and the management, financial and otherwise of that issue. The information in these records was prepared to assist the Ministry and the OMA in their negotiations on this issue.
>
> Similarly, record [6], the tripartite MOU, relates to, and is a record of the meetings and consultations on this issue; Schedule "A" expressly refers to these meetings. In addition, record [6] is a communication to the individuals listed in Schedule "B" about the matters contained in the MOU.
>
> . . . [T]he subsidy of CMPA fees is a labour relations matter because it is negotiated by the Ministry and the OMA in the context of their ongoing labour relationship, as described in the Background section of these representations. The subsidy is a form of remuneration that the Ministry provides to physicians in addition to the fee for service compensation provided under OHIP. It would be analogous to the negotiation and payment of some form of employee benefit by employers in a conventional employer/employee relationship. If the records at issue in this appeal related to the negotiation or payment of an employee benefit by the government, for its employees, there would be no doubt as to their characterization as related to "meetings, consultations and communications about an employment-related matter" as per ss. 65(6)3. Given that the Court of Appeal

> has determined that the relationship between the government and physicians falls within the term "labour relations", the Ministry respectfully submits that the same conclusion must apply to these records since the exclusion applies equally to records generated in the context of labour relations.
>
> As for record 4, it deals directly with issues of physician payment and service delivery - all of which are negotiated by the Ministry and the OMA. Moreover, the Schedule of Benefits attached to this record specifically prescribes amounts payable to physicians for the insured services they proved. As such, it is directly related to physician compensation. Record 4 is the result of the labour negotiation process, and in that regard, it is a "communication about labour relations matters" affecting Ontario physicians and the Ministry that pays them.

The representations received in May 2006 on Record 5 mirror the submissions outlined in the preceding paragraph in characterizing the subject matter of Record 5 as fundamental to the "ongoing labour relationship between the Ministry and Ontario physicians."

> Furthermore, the Ministry submits that to the extent that records 1, 2, 3 and [6] relate to the work of the MPLC in discharging its mandate on behalf of the Ministry and the OMA, the Court of Appeal's 2003 decision is directly on point. Some of the records at issue in PO-1721 . . . were minutes of PSC meetings. Given that records 1–3 and record [6] consist of MPLC meeting minutes and documents related to those meetings and to the MPLC's work, and that the MPLC's mandate is directly analogous to that of the PSC, the Ministry submits that these records are clearly excluded from the *Act* on the basis of the Court of Appeal's decision.

Regarding the issue of whether the Ministry "has an interest" in the labour relations matters, the Ministry states the following:

> Although the Court of Appeal's 2003 decision did not focus on the meaning of the term "interest" in the context of the records at issue in that appeal, the Court nevertheless concluded that the exclusion in ss. 65(6)3 applied to the records. Therefore, the Court tacitly acknowledged that the Ministry had an interest in the records.
>
> The Ministry respectfully submits that the nature of its interest in the five [six, including the later added Record 5] records at issue in these appeals is exactly the same as it was in respect of the records at issue in PO-1721 . . . Given the nature of the Ministry's relationship with physicians, and the fact that, in most cases, the Ministry is the primary source of physician's income, the Ministry's interest in any and all records relate to physician compensation and work related matters in general is obvious and far more significant than "mere curiosity or concern."

> The Ministry has an interest in these [six] records for a number of reasons: The nature of its relationship with the Ontario physicians, its statutory mandate under the *Health Insurance Act* and the *Commitment to the Future of Medicare Act*, its responsibility for managing and controlling OHIP and health care costs in general, its direct involvement in the creation of the records, and the financial implications for the Ministry of the negotiated issues reflected in these records.

As stated above, while the appellant admits that the records were collected, prepared, maintained or used on behalf of the Ministry in relation to meetings, consultations, discussions or communications, the appellant takes the position that these meetings, consultations, discussions or communications were not about "labour relations" or "employment related matters" and thus section 65(6)3 does not apply. The appellant states:

> The [MPLC's] mandate is in the 2000 three-party MOU, Appendix paragraph 7. It is to develop strategies for "appropriate risk management" in Ontario, "in the interest of all the parties and the public;" to review CMPA's case management methods and make recommendations "based on a principle of balancing the interests concerning professional reputation with those concerning sensible management of the resources available;" to review the calculation of CMPA's "fee requirement;" to make recommendations about tort reform initiatives; and to advise the parties about matters arising.
>
> Risk management is the organized effort to prevent risks from coming to reality. Case management is the effort, when something has gone wrong, to avoid or minimize payment. In the context of medical malpractice, these are not labour relations matters. The effort to prevent medical injury, and when it occurs, to see that public funds are used reasonably, without undue emphasis on professional reputation, is not merely a matter between the Ministry as payor and physicians as payees, but a matter of major public concern.
>
> Neither is the CMPA fee requirement, since [the] CMPA will continue to set its own fees, and the government will continue the subsidy. The 2000 three-party MOU may have resulted from discussions between the Ministry and representatives of physicians, but that does not make the work of the [MPLC] a labour relations matter. It may affect labour relations, but it is not "about labour relations".

The appellant continues his submission by distinguishing the use of "in relation to" which appears in the opening words of section 65(6) and "about", which is actually used in section 65(6)3. The appellant cites Order P-1223 where the former Assistant Commissioner, cited above, found that the preparation etc., would have to be "for the purpose of, as a result of, or substantially connected to" an activity listed in section 65(6)1, 2 or 3, for it to be "in relation to" that activity. The appellant then provides the following submission regarding the meaning of "about", as contemplated by section 65(6)3.

> "In relation to" is a broader term than "about". For a record to be "about" something, it must have that thing as it subject matter, or prime focus. This is the effect of the decisions in P-1369; PO-1772; and probably PO-2157. It is also consistent with the ordinary use of the word . . .
>
> The decision in PO-2157, at the top of page 4, appears to equate "about" with "fairly substantial," citing P-1223 and P-1369. This is not strictly accurate. Both of those decisions use "fairly substantial" as a test for "in relation to." P-1223 is decided on the first paragraph of s. 65(6), not on s. 65(6)3. In P-1369, Inquiry Officer Higgins, bottom of page 4, decides that the record is not about labour relations, basing his decision on the subject matter of the record. Similarly, in PO-2157 itself, Adjudicator Liang, when she states her conclusion in the third and fourth complete paragraphs on page 4, shows that she considers it necessary to find an intimate subject matter connection between the strike and the records there in issue before applying s. 65(6)3:
>
> > Rather than touching generally on matters of labour relations, the OPSEU strike and its impact on the delivery of services at these facilities is at the heart of the discussion in those reviews . . .
> >
> > To a large measure, in discussing the conditions under which the youth were living during the time of the strike, the reviews relate these conditions to the effects of the strike.
>
> . . . . .
>
> In *Minister of Health* v. *Mitchinson*, (2003) 178 OAC 171, the Court of Appeal decided that the work of the [PSC] … largely concerned with physician remuneration, fell within the phrase "labour relations". This was not a general statement that any activity in which physicians and government are both involved is a labour relations matter. The Ministry brief, page 4, says that [MPLC] "is a subcommittee of the PSC". The implication is that [MPLC's] work is governed by the Court of Appeal decision. The statement is not correct. [MPLC] was set up independently of the PSC by the 2000 three-party MOU, for a different purpose.

Findings

The appellant's main argument against the application of section 65(6)3 is that the mandate of the MPLC is not about labour relations matters between Ontario physicians and the Ministry. As the appellant states in his representations, "The 2000 three-party MOU may have resulted from discussions between the Ministry and representatives of physicians, but that does not make the work of [MPLC] a labour relations matter. It may affect labour relations, but it is not "about labour relations."

Based on my review of Records 1 to 3 and 6, and the representations of the parties, I do not accept the appellant's assessment of the records and the role of the MPLC relating to these records. The subject matter of the records, I conclude, is MPLC's management of matters relating to physicians' professional liability insurance coverage. While this entails risk and case management of malpractice cases, as the appellant points out, it also includes ways to educate physicians and reduce the incidence of physician error. The overall goal of the MPLC as reflected in these records is to reduce the need for professional liability coverage. Furthermore, the records also show that the MPLC and its mandate clearly relate to the Ministry's reimbursement of physicians' CMPA fees and the subsidy of the professional liability insurance plan. I agree with the Ministry's submission that the reimbursement of CMPA fees is a form of compensation to the physicians. In my opinion, it is not reasonably possible to separate the "labour relations" aspect in the records at issue from the mandate of the MPLC.

Record 4, the 1996 Interim Agreement between the OMA and the Ministry, and Record 5, the 2000 Agreement between the same two parties, are also about labour relations matters in which the Ministry has an interest. As the Ministry states in its background information, the Ministry and the OMA engage in bargaining regarding physician compensation and other issues. Based on my review of Records 4 and 5, I find that these records address issues such as physician compensation, liability coverage and other physician resource issues. As such I find that Records 4 and 5 are about labour relations matters in which the Ministry has an interest.

Section 65(6) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the *Act*.

It must be noted that all records relating to the MPLC do not automatically fall outside the application of the *Act*. However, I find that the records at issue in these appeals specifically - the MPLC's meeting schedule, minutes, interim report, the two OMA/Ministry Agreements and the 2004 MOU between the CMPA, the OMA and the Ministry - are "about" labour relations matters in which the Ministry has an interest and thereby qualify for exclusion under section 65(6)3.

As all three parts of the test for section 65(6)3 have been met, Records 1 to 6 are excluded from the operation of the *Act*, unless I find that section 65(7) applies to them.

Section 65(7): exceptions to section 65(6)

General principles

If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. The only exception that might apply in these circumstances is section 65(7)1 which states:

> This Act applies to the following records:
>
> > An agreement between an institution and a trade union.

Representations

In the appellant's representations on section 65(7)1, he submits that the exception applies to Records 4 and 6, as each of these records is an agreement between the Ministry and a trade union. The appellant was not asked for representations on Record 5, but the parties to the agreement in Record 4 are the same as the parties in Record 5.

The appellant states:

> In the 2003 decision the Court of Appeal begins by pointing out that the phrase "labour relations" is not defined in the *Act*. Then they say, "… its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of 'labour relations' to employer/employee relationships …"
>
> The term "trade union" is also not defined in the *Act*, and given the language of the Court of Appeal, is to be understood in its ordinary meaning, as an association of workers in a trade or craft to promote their interests. The Concise Oxford Dictionary, 1990, defines Trade Union as, "an organized association of workers in a trade, group of trades, *or a profession*, formed to protect and further their rights and interests." (Emphasis added).
>
> . . . . .
>
> The Ministry's submission, pp. 2-4, shows very well that OMA is a trade union in this sense, with even Rand Formula deductions authorized by law, and with a status analogous to a certified bargaining agent under the *Labour Relations Act*. OMA, paragraph 16, denies it is a trade union without saying what it thinks a trade union is. CMPA's description of itself, paragraph 16, is apt to describe a trade union, though perhaps a specialized one. Both organizations have successfully engaged in collective bargaining with the Ministry on behalf of their members. As shown by the Court of Appeal, it is irrelevant that the bargaining was not with an employer.
>
> The Ministry, page 10, paragraph 25, says that neither OMA nor CMPA is a trade union, quoting the definition in s. 1(1) of the *Labour Relations Act*. That *Act* deals expressly, and only, with the bargaining relationship between employers and employees. Section 1(1) begins, "In this Act." The definition has no application.
>
> . . . . .
>
> Comparing s. 65(6) with s. 65(7) shows what the legislature meant to do. The things mentioned in s. 65(6) are all inchoate. They are events in a process. Disclosing them could interfere with an institution carrying out its function in the process. The agreements mentioned in s. 65(7), paragraphs 1, 2 and 3, are the conclusion of the process. The s. 65(6) things are outside of the *Act*. The s. 65(7) things are subject to the *Act*. If the Ministry signs an Agreement with a trade union described in the *Labour Relations Act*, the agreement is within the *Act*. The

> Ministry's claim [is] that if it signs an agreement with an organization that comes into s. 65(6) by "analogy" the agreement is not covered by s. 65(7)1 of the *Act*. That is an absurdity, or "irrational distinction" as those words are used by Adjudicator Big Canoe in P-1560: "persons or things receiving different treatment for inadequate reasons, or for no reason at all."
>
> These words are quoted by the Adjudicator from Driedger on Construction of Statutes, third edition, Chapter 3, pages 79 and 86. The parties who want to rely on s. 65(6) and dismiss s. 65(7) are seeking a world in which there is shadow but not sunlight.

As noted in the appellant's representations, the Ministry submits that section 65(7) does not apply to the records at issue. The Ministry submits that Records 1, 2 and 3 are not agreements nor expense accounts and thus do not fall within section 65(7). The Ministry argues that while Records 4 and 6 (and by later reference in its May 2006 representations, Record 5) are agreements, they are not agreements between an institution and a "trade union" or an institution and its "employees" resulting from negotiations about "employment-related matters", nor agreements to end a proceeding. The Ministry goes on to state:

> Furthermore, since physicians are not "employees", the exceptions in ss. 65(7)2 and 3 also do not apply to records 4 and [6]. In particular, paragraph 3 refers to agreements "between an institution and one or more *employees* resulting from negotiations about *employment*–related matters between the institution and the employees." (emphasis added) As noted in paragraph 10 of these submissions, the exclusion in ss. 65(6)3 applies to *either* labour relations *or* employment-related matters, and in this case the Ministry submits that the "meetings, consultations and communications at issue were about labour relations matters, not employment-related matters, since the Ministry acknowledges that physicians are not Ministry employees.
>
> If the Legislature had wanted the exception in ss. 65(7)3 to apply to agreements about "labour relations matters" it would have included this alternative phrase as it appears in paragraph 3 of the exclusion in ss. 65(6), and in paragraph 2 of the exception in ss. 65(7). The Ministry respectfully submits that these additional words cannot be "read into" ss. 65(7)3 so as to extend its application to records 4 and [6].

In response to the appellant's representations regarding the definition of "trade union" which is found in section 65(7)1, the Ministry states:

> … it is more appropriate to seek an applicable definition of the term in labour or employment statues, given that ss. 65(7) specifically applies to labour and employment-related records. In this regard, it should be noted that 17 employment or labour-related provincial statutes that use the term "trade union"

> expressly define it as "a trade union defined by the *Labour Relations Act*". See, for example, the *Occupational Health and Safety Act*, the *Pension Benefits Act*, the *Pay Equity Act*, the *Back to School Act, 1998*, and the *Municipal Elections Act*. Furthermore, the *Rights of Labour Act*, which does not rely on the *Labour Relations Act* definition, nevertheless defines a "trade union" as having "among its objects the regulating of relations between employees and employers…" The critical element in all the definitions, therefore, is the employer–employee relationship. As the Ministry stated in its original submission, a trade union represents and negotiates on behalf of employees only, and physicians are not Ministry employees.

The OMA and the CMPA state that they support the Ministry's position, and submit that neither entity is a trade union or employee. The OMA submits:

> The OMA is not a "trade union" as defined in the *Labour Relations Act* which, in any event, does not apply to the OMA's activities in regard to negotiating on behalf of physicians with the Ministry. A "trade union" is defined in the *Labour Relations Act* as an "organization of employees". Furthermore, the *Labour Relations Act* does not apply to the "medical profession" and so the OMA could not be designated as a "trade union".

Findings

Records 1 to 3

Records 1 to 3 are not agreements and therefore do not fall within the scope of section 65(7)1. Accordingly, the *Act* does not apply to these records.

In light of my finding, I need not consider the exemptions claimed in reference to Records 1 to 3, namely section 12 (Cabinet records) or section 17 (third party information).

Records 4 and 5

Records 4 and 5 are clearly, on their face, agreements. The OMA and the Ministry are the only parties to those agreements.

The next question is whether the OMA can be considered a "trade union" for the purpose of section 65(7)1.

The modern rule of statutory interpretation is articulated by Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at p. 3:

> . . . [A]fter taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate

> interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.

This office, therefore, should adopt an interpretation of the phrase "trade union" that is plausible in the context of the *Act*, promotes its purposes and leads to a reasonable and just outcome.

Sullivan states (at p. 123) that to be plausible, an interpretation must be "one the words can reasonably bear." This suggests that more than one definition may be considered plausible. One way of ascertaining the "range" of plausible definitions is to refer to dictionary definitions. As Sullivan states (at p. 30):

> [Dictionaries] provide a useful starting point by indicating a range of meanings that a word is capable of bearing within a particular linguistic community. If the meaning an interpreter wishes to rely on is mentioned or included in a dictionary entry, it shows that the proposed meaning is at least plausible. If it is mentioned in numerous standard dictionaries, the evidence of plausibility is that much stronger.

I agree with the Ministry that the term "trade union" in section 65(7)1 could be given the same meaning as in the *Labour Relations Act, 1995* (or other labour and employment statutes). The *Labour Relations Act, 1995* definition (s. 1(1)) reads:

> an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

I note that the *Labour Relations Act, 1995* and other employment and labour relations statutes cited by the Ministry contain or refer to this "employment-based" definition. By contrast, the *Freedom of Information and Protection of Privacy Act,* under which I am adjudicating this appeal, contains no such definition. In my view, had the Legislature intended the *Labour Relations Act, 1995* definition to apply, it could have said so by reference to that act or by including in the *Act* a similar definition of that term.

Dictionary definitions, including those cited by the appellant, indicate that the phrase "trade union" could be interpreted more broadly in the context of section 65(7)1. The following dictionary definitions support a definition of "trade union" that is not strictly limited to the context of an employer-employee relationship:

"Trade union"

> An association of the workers in any trade or in allied trades for the protection and furtherance of their interests in regards to wages, hours, and conditions of labour ... [*Shorter Oxford English Dictionary*, p. 2340]
>
> An organized association of workers in a trade, group of trades, or a profession, formed to protect and further their rights or interests [*Concise Oxford Dictionary*, p. 1293]
>
> Labor union; one limited in membership to workmen engaged in the same trade rather than the same craft, company or industry... [*Webster's Third New International Dictionary*, p. 2422]
>
> A union composed of workers of the same or of several allied trades; a craft union [*Black's Law Dictionary*, 8th ed., p. 1568]

"Union"

> An association or league of persons or states formed for some common purpose or action. Now especially = trade union [*Shorter Oxford English Dictionary*, p. 2420]
>
> A confederation or league of independent individuals (as nations or persons) for some common end or purpose – see customs union, labor union or postal union [*Webster's Third New International Dictionary*, p. 2422]

I note that these definitions generally use words such as "workers", "persons" or "individuals" as opposed to "employees", suggesting a broader meaning than the Ministry suggests. Some of these definitions even describe the entity as an "association", precisely the word that the OMA uses to describe itself. In addition, one of the definitions makes reference to "workers" in a "profession", suggesting that a group representing physicians would fit within the term "trade union".

It is also useful to examine the French version of the *Act*. Sullivan states that both the English and the French versions of a statute are "official, original and authoritative expressions of the law" and that neither enjoys priority or paramountcy over the other (pp. 74-75).

The French version of section 65(7)1 supports a broader interpretation of "trade union". The French equivalent to "trade union" is "syndicat". The term "syndicat" is defined as follows:

> Association qui a pour objet la défense d'intérêts professionels [*Le Petit Robert: Dictionnaire de la Langue Française*, p. 2543]

This French definition may be translated to:

> An association whose purpose is to defend professional interests.

The use of the words "association" and "professional" suggests that "syndicat" is not restricted to entities that represent employees, and could apply to an organization that represents professionals, such as physicians.

In my view, the broader interpretation of "trade union" suggested by the appellant is more consistent with the equivalent term "syndicat" in the French version of the *Act*.

The plausibility of the broader interpretation is also supported by a British Columbia Labour Relations Board decision. In *Coleman v. Rentz* (July 19, 1995), B.C.L.R.B. No. B282/95, the Board stated (at paras. 96, 105):

> At common law, trade unions were treated as unincorporated associations . . .
>
> Perhaps the changing role of trade unions in our society was never more clearly stated than some twenty five years ago in the Woods Task Force Report:
>
> > Trade unions originated as voluntary, unincorporated associations of craftsmen who banded together to set rates at which they agreed to sell their services and secure job opportunities for their members. Today, many interests of trade unions are vested in the legal framework of collective bargaining, including monopoly bargaining rights . . .

In its representations, the Ministry states that it "bargains collectively" with physicians through their sole representative, the OMA. I note, furthermore, that this relationship is explicitly acknowledged in Record 5 wherein the Ministry recognizes the OMA as the representative of physicians for the purpose of negotiating future like agreements between the Ministry and members of Ontario's medical profession.

The Ministry also states that collective bargaining, in this context, must be understood "in its broadest sense." In addition, the Ministry refers to the "Rand Formula" deductions provided for by the *Ontario Medical Association Dues Act*. All of these statements bolster the view that the OMA has the essential characteristics of a trade union.

In my view, the statutory interpretation principle known as the presumption of coherence is a crucial factor to consider in assessing whether the OMA is a "trade union" in the context of sections 65(6) and (7). The presumption of coherence in statutory interpretation states:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. Parts are presumed

> to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal [Sullivan, p. 262].

Furthermore, an examination of the overall structure of sections 65(6) and (7) demonstrates that they should be read as illustrative of the presumption of coherence described in the preceding paragraph. For ease of discussion, I will set out the full text of these sections below:

> (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> (7) This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

I agree with the appellant that the things mentioned in section 65(6) are events in a process, while the things mentioned in sections 65(7)1, 2 and 3 are the conclusion of a process.

The appellant's proposed definition achieves greater internal consistency in the overall structure, by ensuring that final agreements arising from employment and labour relations matters covered by section 65(6) are also brought back into the *Act* through section 65(7).

Finally, the Ministry's proposed narrow definition of "trade union" would lead to a result that is absurd and unjust.

As previously noted, in *Minister of Health* v. *Mitchinson* [(2003) 178 OAC 171], the Court of Appeal ruled that documents generated in the context of negotiations between the Ministry and the OMA were excluded from the *Act*, since these negotiations constituted "labour relations".

It would create an absurdity to say that Ministry/OMA collective bargaining discussions are protected in the same way as, for example, those between the provincial government and OPSEU, yet agreements arising from OPSEU discussions must be subject to the *Act* while analogous OMA agreements are excluded.

The Ministry has offered no rational explanation for why the Legislature would shield agreements from the right of access in the one context, but not in the other, and I do not see one.

The broader interpretation of "trade union" in section 65(7)1 is plausible, and leads to a reasonable and just outcome in the circumstances. I find that, in the context of collective bargaining with the Ministry, the OMA is a "trade union" for the purpose of section 65(7)1 and, therefore, Records 4 and 5 fall within the scope of section 65(7)1. As a result, the *Act* applies to Records 4 and 5.

Record 6

This record, a Memorandum of Understanding, is an agreement among the Ministry, the OMA and the CMPA. For the reasons set out above, the OMA is considered a "trade union" for the purpose of section 65(7)1.

The remaining consideration is whether the fact that the CMPA is also a party to the agreement has an impact on the application of section 65(7)1.

The CMPA clearly is not a trade union and it could be argued that where a third, non-trade union, entity is a party to the agreement, section 65(7)1 cannot apply. However, I do not accept this argument.

In my view, accepting such an argument would defeat the public scrutiny purpose of section 65(7)1 for no logical reason if the simple presence of a third party negated its application. In the event that some kind of harm could result should information about the third party be disclosed,

that interest may be protected by the application of the third party information exemption at section 17 of the *Act*, as long as the requisite elements of that exemption are met.

Therefore, I find that Record 6 falls within the scope of section 65(7)1, and that the *Act* applies to this record.

Conclusion

Records 1 to 3 are excluded from the scope of the *Act* by virtue of section 65(6)3.

Records 4 to 6 are not excluded from the scope of the *Act*, due to the application of section 65(7)1.

I will now consider whether Records 4 to 6 are exempt under section 17(1).

THIRD PARTY INFORMATION

Introduction

The Ministry takes the position that section 17(1)(a), (b) and (c) of the *Act* apply to Records 4 to 6. Those three records can be described as follows:

- Record 4 is a four page (interim) agreement between the Ministry and the OMA, with two schedules.
- Record 5 is an 11 page agreement between the same parties as Record 4, with eight appendices and two letters.
- Record 6 is a five page agreement amongst the OMA, CMPA and Ministry, and includes two appendices and one table, containing actuarial data.

Section 17(1): the exemption

The relevant parts of section 17(1) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

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

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

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal refused (November 7, 2005), Doc. M32858 (C.A.)].

Although one of the central purposes of the *Act* is to shed light on the operations of government through the release of information to the public, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the Ministry, the OMA and/or the CMPA must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the Ministry 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.

The OMA did not provide representations on section 17 specific to Record 4, instead choosing to adopt the representations of the CMPA, which were submitted in May 2005. However, the CMPA, not being a party to the 1996 OMA/Ministry Agreement, declined to make representations on Record 4. When I solicited representations on Record 5 in May 2006, the OMA conveyed its support for the submissions provided by the Ministry.

Part 1: type of information

The Ministry, the OMA and the CMPA contend, variously, that the definitions of trade secret, technical, commercial and/or financial information are applicable to the information in Records 4, 5 and 6. The types of information listed in section 17(1) have been described in a number of past orders as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
> (ii) is not generally known in that trade or business,
> (iii) has economic value from not being generally known, and
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Orders M-29, PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Orders P-493 and PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I adopt these definitions for the purpose of this appeal.

Representations

The Ministry submits that Records 4 and 5 contain commercial information since the purpose of the record is to establish a framework for the delivery of physician services in Ontario under which physicians exchange services for remuneration from the province. The Ministry also submits that these two records contain financial information about physician compensation for services provided and methods for establishing and calculating such compensation.

According to the Ministry, Record 6 contains trade secret, technical, financial and commercial information belonging to the CMPA. The Ministry states that the CMPA's actuarial information satisfies the definition of trade secret in Order PO-2010 because it is proprietary data belonging

to the CMPA, has value within the medical liability business, is not generally known, and is considered highly confidential by the CMPA.

In addition, the Ministry contends that Record 6 contains technical information in that "it belongs to an 'organized field of knowledge' [actuarial], is prepared by professionals [in applied actuarial sciences] and relates to a process [of fee setting]."

Finally, the Ministry submits that Record 6 contains both financial and commercial information: namely, data used to calculate CMPA fees and information relating to the buying and selling of professional liability protection services.

The CMPA submits that:

> [Record 6] constitutes 'commercial' and 'financial' information as defined in section 17(1) of the *Act* because it contains the principles and actuarial assumptions used by the CMPA to determine Members' fees.
>
> Membership fees are set annually through a review of experience with claims and costs, actuarial estimates of liabilities for the year and projected estimates of the income from investment over the period in which liabilities must be met.
>
> … the CMPA provided information on actuarial calculations used to determine the fees for professional liability protection. Through [Record 6], the parties have agreed to principles and actuarial assumptions that will govern the manner by which the fees are determined.
>
> 'Commercial information' includes information relating to the 'buying, selling or exchange of merchandise or services'. The term 'commercial information' can apply to both profit-making enterprises and non-profit organizations [Order P-943]. The actuarial assumptions are used to determine the fees paid by Members in exchange for CMPA services; therefore this information is 'commercial information'.
>
> 'Financial information' is information 'relating to money' including 'specific data' such as 'pricing practices' [P-47]. The actuarial assumptions are used by the CMPA to determine the 'price' paid by its Members; therefore the information is 'financial information'.

The OMA's representations on Record 6 echo those of the CMPA in that the position put forward is that it contains "information used by the CMPA to determine the 'price' paid by its members" and, as such, this constitutes financial information as contemplated by section 17.

The appellant's representations do not directly address any of the types of information listed in section 17(1). However, in commenting on the type of information said to be contained in

Record 6, he seeks to impugn the characterization of it as either trade secret or commercial information. On the latter point, the appellant submits that by virtue of their membership in CMPA, physicians are entitled to receive coverage and/or representation in medico-legal situations, which he suggests defines this as a membership - and not a commercial - relationship.

Findings

Having reviewed Records 4, 5, and 6 carefully, I find that these records contain both commercial and financial information, as the terms are used in section 17(1) of the *Act*.

Record 4, the 1996 OMA/Ministry Interim Agreement, establishes or, at least, acknowledges the continuation of, a commercial arrangement or "framework for the delivery of physician services in Ontario under which physicians exchange services for remuneration from the province." Record 4 contains numbers and formulae relating to the compensation of physicians, including billing thresholds, and I find that this qualifies as financial information.

The content of Record 5, the 2000 OMA/Ministry Agreement, resembles that found in Record 4. It contains commercial and financial information relating to physician compensation issues, including numbers and formulae similar to those found in Record 4, its predecessor agreement. Although many parts of the Agreement itself, and several of the accompanying appendices, do not contain numerical data or descriptions of commercial arrangements, *per se*, I am satisfied that Record 5 on the whole contains information of the kind described as commercial or financial information in section 17(1) of the *Act*.

I am also satisfied that Record 6, the 2004 tripartite MOU, contains commercial and financial information. Sections of the MOU allude to specific procedures for remuneration or compensation arrangements between the provincial government and the province's physicians, which I have already found to be commercial in nature. This record specifically provides for the CMPA's involvement as a provider of professional liability insurance. Its second appendix contains a fairly detailed description of the methodology and underlying assumptions to be followed in structuring the arrangement. The table accompanying Record 6 contains actuarial data, which I find to be financial information within the meaning of section 17(1).

In summary, I find that the requirements of Part 1 of the section 17(1) test have been established for all of the records at issue.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the Ministry, the OMA and/or CMPA must establish that the information at issue was "supplied" to the Ministry in confidence, either implicitly or explicitly.

"Supplied"

The requirement that the information be demonstrated as having been "supplied" reflects that the purpose of section 17(1) of the *Act* is to protect the informational assets of third parties (Order MO-1706). 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 [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract are normally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2453]. Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not therefore considered to be "supplied" [Orders MO-1706, PO-2371, PO-2384].

The Divisional Court recently upheld the "reasonableness" of this office's approach to this issue, finding that information in a negotiated contract had not been "supplied" to the institution in question [*Boeing v. Ontario (Ministry of Economic Development and Trade)*, above.].

Representations

In addressing the "supplied" component of part 2 of the section 17 test, the Ministry states that:

> Although the Ministry recognizes that the IPC does not consider negotiated terms of an agreement to be "supplied", the Ministry nevertheless maintains that these terms [in Records 4 and 5] do contain information originally supplied by the OMA in the context of its negotiations with the Ministry.

The Ministry also submits that Appendix 2 of Record 6, in particular, and the record as a whole, was prepared and supplied by the CMPA to the Ministry.

Neither the OMA nor the CMPA provide separate representations on the definition of "supplied" in relation to Records 4, 5 or 6. However, the CMPA, in offering representations on Record 6, states:

> The actuarial assumptions and principles contained in [Record 6] were created by the CMPA's actuaries and provided to the Ministry for the purposes of the 2004 MOU.
>
> …
>
> The MOU is not just the product of a negotiation process between the Ministry, the CMPA, and the OMA. The entire contents of Appendix 1 to [Record 6]

> [were] provided by the CMPA to the Ministry for the purposes contained in the MOU. The information appears in Appendix 1 in the same form as it was provided to the Ministry by the CMPA.

Although the CMPA refers to Appendix 1 of Record 6 in the representations, it appears likely that the intended reference is to Appendix 2.

The OMA's representations on Record 6 mirror the CMPA's in referring to the actuarial assumptions as being "provided" by the CMPA to the OMA and the Ministry. The OMA does not use the word "supplied".

The appellant did not provide representations on this first component of part 2 of the section 17 test on Records 4 or 5. In reference to the 2004 MOU, he states:

> [Record 6] is said to contain an Appendix 2, which appears to have the same function as the appendix of actuarial methodology in the 2000 MOU. If so, and unless it is very different from the first appendix, it is information generated in negotiations rather than supplied information. Appellant submits … that to the extent that the records in issue contain information, the information is generated in negotiations, rather than supplied by one party.

Analysis and Findings

Main Agreements

The question to be considered is whether one, some, or all of the records – and their various components - meet the requirements of the "supplied" component of part 2 of the test under section 17 of the *Act*.

In my analysis of the term "supplied", I considered a recent decision of Assistant Commissioner Brian Beamish. In Order PO-2435, the Assistant Commissioner adopted the view articulated in Orders MO-1706, PO-2371 and PO-2384 that in the usual course, agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied". In that appeal, Assistant Commissioner Beamish rejected the argument of the Ministry of Health and Long-Term Care that proposals submitted by potential vendors in response to government requests for proposals [RFPs], including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. The Assistant Commissioner instead characterized the government's option of accepting or rejecting a consultant's bid as a "form of negotiation" and stated:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This

> is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid … is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Smart Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

I adopt the approach taken by Assistant Commissioner Beamish in Order PO-2435 for the purposes of this appeal.

In my view, the three records at issue are all agreements which set out mutually agreed-upon terms of reference, mandates and structures for physician services in the province. A framework for settling various issues, some contentious, between the provincial government and the medical profession is established by and through these agreements, including compensation levels and models, professional liability coverage and physician supply and resource issues.

Leaving aside, for the moment, assessment of the individual schedules, appendices and other attachments to Records 4, 5 and 6, there is nothing about these three agreements which would distinguish them from the class of record referred to by the Assistant Commissioner in Order PO-2435, that is, end products of a negotiation process. Based on my own review of these records, and all of the material before me, I conclude that the information in the agreements was mutually generated as opposed to supplied. Further, based on the material before me, I am not satisfied that disclosure of any of the terms of the main agreements would reveal, or permit the drawing of accurate inferences with respect to, any information actually supplied to the Ministry by the OMA or the CMPA. I therefore find that none of these agreements meets the requirements of "supplied" as contemplated by part two of the section 17 test.

However, each of these records is accompanied by other components, such as appendices, tables, schedules and letters, and I will consider each of these individually.

Attachments to Main Agreements

Record 4 – two schedules

> Schedule 1 to Record 4 commits the Ministry (on behalf of the province) and the OMA to addressing various issues relating to physician human resources in Ontario, including oversupply, undersupply and incentives to correct both of those situations in various parts of the province. Schedule 2 establishes the mandate and terms of reference of a commission to be constituted for the purpose of establishing value for services provided by physicians.

Record 5 – eight appendices and two letters

Appendices A, C, E, and F to Record 5 set out the mandate and terms of reference for four different committees established to deal with issues ranging from professional liability coverage, to value for service and clinical practice guidelines. Appendices B and D outline figures and incentives relating to physician reimbursement. Appendix H is simply a list of facilities. The two letters establish information sharing and meeting arrangements for the parties.

Record 6 - two appendices and one table

Appendix 1 to Record 6 sets out the mandate and terms of reference of a committee charged with overseeing the operation of the agreement between the Ministry, OMA and the CMPA. Appendix 2 outlines the principals and actuarial techniques upon which the CMPA will base the fees charged to Ontario physicians for professional liability coverage.

I find that the information in the two schedules to Record 4, the eight appendices and two letters attached to Record 5 and the first appendix to Record 6 was mutually generated rather than "supplied" by the Ministry, OMA or CMPA, as was the case with the main agreements addressed above. These attachments relate to, and expand upon, the various provisions of the main agreements, which I have already found to be negotiated, and I find nothing in these attachments to justify distinguishing them otherwise.

Appendix 2 to Record 6 deserves individual mention, as it has been the focus of submissions by the Ministry, CMPA and OMA. One of the essential terms of Record 6 describes the parties' agreement that the actuarial principals and methodology, found in Appendix 2, will be used in fee setting and determining fee requirements for professional liability coverage. In my view, the wording used in the body of Record 6 to convey the intended use of this methodology indicates that although the information in Appendix 2 may have been originally provided by the CMPA, the methodology has come to represent the negotiated intention of all the parties to assure consistency in fee setting.

Furthermore, and notwithstanding the fact that the "information appears in Appendix 2 in the same form as it was provided to the Ministry by the CMPA" (as stated in the CMPA's representations), following the reasoning in Order PO-2435, the acceptance or rejection of the methodology provided by the CMPA represents a form of negotiation. For these reasons, I find that Appendix 2 does not meet the requirements of "supplied".

I now turn to a determination of whether the table accompanying Record 6 (the Table) can be considered "supplied". The Table contains actuarial data related to the CMPA fee levels. I note that the format and content of the table is specifically described in one of the provisions of Appendix 2. According to the terms of Record 6, the Table is to be prepared by the actuarial professionals retained by the CMPA on an annual basis and provided for the purposes of

carrying out the mandate of the MPLC. Although there is much about the Table that is proscribed by the terms of the main agreement (MOU) and Appendix 2, I find that the Table was not the product or subject of negotiations. It was supplied by the CMPA, as contemplated by this part of the section 17 test.

In view of the fact that I have found that no parts of Records 4 or 5 meet the requirements of "supplied", and that only the Table to Record 6 meets the "supplied" test, I need not subject all of the records to analysis under the "in confidence" component of part 2 of section 17. I will consider it for the Table only.

In Confidence

In order to satisfy the "in confidence" component of part 2, the parties resisting disclosure, in this case the Ministry, the OMA and the CMPA, must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information in the Table to Record 6 was provided. This expectation must have an objective basis [Order PO-2020].

Representations

The Ministry submits that:

> On its face, record [6] is clearly a confidential record that was considered and treated as such by the three parties. The CMPA supplied the information contained in record [6] with an express expectation of confidence.

The representations from the CMPA, which are supported by the OMA, state as follows:

> The actuarial assumptions [in the Table] provided by the CMPA to the Ministry were provided in confidence in accordance with the confidentiality provision of [Record 6], which requires that confidential information supplied to the Ministry during the term of [Record 6] be treated as confidential.
>
> In addition, members of the [MPLC] executed a Confidentiality and Non-Disclosure Agreement on August 13, 2004. The Confidentiality and Non-Disclosure Agreement requires that all information provided will not be disclosed to any individuals other than those set-out in the Agreement without the prior written approval of the parties.
>
> …
>
> All parties have consistently treated [Record 6] as a confidential document containing valuable commercial and financial information. [Record 6] has not been disclosed to the public and the public has no ability to access the document.

In responding to the representations of the Ministry and the CMPA on the confidentiality of Record 6, the appellant states:

> [The CMPA]… relies on a non-disclosure provision in the 2004 MOU and a non-disclosure agreement dated Aug. 13, 2004. Since even the text of these non-disclosure agreements is not disclosed, it is not possible to comment on what they say. It is hard to see how they would bear on records generated before their date…

Analysis and Findings

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case must be considered, including whether the information was:

- communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the Ministry;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [Order PO-2043].

In Order PO-2453, Adjudicator Catherine Corban considered the application of section 17(1) to a request for a quotation submitted to the Ministry of Natural Resources for air services in and out of a provincial park. Adjudicator Corban referred to several past orders of this office that have found that the inclusion of a notice provision in the record that identifies the *Act* applying to the information is important evidence in determining the "in confidence" component of part 2 of the test. When a notice provision is present, the onus has been found to rest on the individual bidders to identify the parts of their quotation that contain information they wish to remain in confidence [Orders M-845 and MO-1861].

Adjudicator Steven Faughnan, in dealing with attachments to a contract between the Ontario Science Centre and a third party for exhibit development and design in Order PO-2371, had this to say about the determination of confidentiality based on the existence and wording of the notice provision in that contract which specifically referred to the application of the *Act*:

> The contractual provision itself recognizes that disclosure of the services set out in the attachments to the contract is a possibility, and that confidentiality is by no means assured. Section 21.1 of the contract allows the Science Centre, not the affected party, to control the dissemination of information it asserts it wishes to

> protect. Thus the Science Centre, not the affected party, is in control of the confidentiality of the services and confidential information, subject to the terms of the *Act* (which can, of course, require disclosure).

Adjudicator Faughnan went on to state that neither the Science Centre nor the affected party had offered evidence sufficient for him to find that the undisclosed information had been supplied in confidence.

I adopt the reasoning in Orders PO-2371 and PO-2453 regarding "in confidence" for the purposes of this appeal.

One of the terms contained in Record 6 expressly contemplates that confidential information may be required to be disclosed under the *Act*. In fact, the notice provision in Record 6 is a clearly worded statement regarding the disclosure of information supplied or provided pursuant to the formation of the MOU. The parties may have entered into the 2004 MOU with the desire to protect the confidentiality of information said to be commercially sensitive, but they were, in my view, given express notice that the Ministry could be obligated under the operation of the *Act* to disclose it despite any agreement between them seeking to protect its confidentiality.

The predecessor agreement to Record 6, the 2000 MOU signed by the Ministry, OMA and CMPA, is not a record at issue in these appeals. However, I am aware, as I believe are all of the parties to this appeal, that it was published in the OMA's *Ontario Medical Review* in the July-August 2000 issue [see http://www.oma.org/pcomm/OMR/jul00.htm]. In reviewing the 2000 MOU, I note that it contains no such notice provision, but is otherwise very similar to Record 6, including the presence of actuarial data appearing in table form with essentially the same features as the Table at issue here. In my view, the inclusion of the notice provision in the 2004 MOU suggests that the signatories turned their minds to the possible release of the record, including information the parties may view as confidential, through an inquiry under the *Act*.

It also stands to reason that the OMA's publication of the predecessor MOU in its members' magazine and on-line - with actuarial data in essentially the same format and composition as this Table - would highlight the possibility of disclosure arising from other circumstances, including publication by another party. There is no evidence before me to establish that the CMPA, out of concern for the confidentiality of the actuarial information, took any additional steps before signing the 2004 MOU to further identify, isolate or safeguard that information. Looking at the Table itself, I see no indication on the face of it that it was submitted in confidence.

Furthermore, I do not accord significant weight to the CMPA's submission with regard to the effect of MPLC members executing a confidentiality and non-disclosure agreement on August 13, 2004. It is the reasonableness of the expectation of confidentiality held by the parties at the time the 2004 MOU was signed that is relevant to my determination. I am paraphrasing the appellant's submission on this point in saying that it is difficult to see how the August 2004 non-disclosure agreement has any bearing on a record generated before that date.

Nor do I see how such a non-disclosure agreement could purport to exclude information held by the Ministry from the operation of the *Act*. Neither the access regime nor the oversight role of this office established by the *Act* can be qualified, neutralized or contracted out of by such an agreement.

The factors reviewed above weigh against a finding of there being a reasonable basis for the expectation of confidentiality and for that reason, I am not persuaded that the CMPA had a reasonable expectation of confidentiality as regards the Table to Record 6. Accordingly, I find that it was not "supplied in confidence" for the purposes of part 2 of the test under section 17(1).

Given that all parts of the section 17(1) test must be met for me to uphold the exemption claim, the fact that part 2 has not been made out by the Ministry, OMA or CMPA is sufficient for me to find that section 17 does not apply at all in the circumstances of these appeals.

However, for the sake of completeness, I will also consider whether any of the information in the three records at issue meets part 3 of the test, which addresses the reasonable expectation of harm resulting from disclosure of the information.

Part 3: harms

General Principles

To meet this part of the test, the parties resisting disclosure (in this case, the Ministry, the CMPA and the OMA) must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

All three paragraphs of section 17(1) have been cited by the parties opposing disclosure of the records. As previously noted, this mandatory exemption will apply to certain types of information:

> … where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

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

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

Representations

As previously observed, the OMA offered no specific submissions on Record 4 as it had adopted the position of the CMPA on section 17 and the CMPA provided no representations on the Interim Agreement because it was not a party to it. The OMA also adopted the Ministry's position on Record 5 as its own and expressed support for the CMPA's submissions on Record 6.

In reference to section 17(1)(a), the Ministry submits that the release of Records 4 and 5 would significantly and negatively interfere with its future contractual negotiations with the OMA since these negotiations are highly sensitive.

The Ministry suggests that prejudice to the CMPA's competitive position could result from disclosure of Record 6, stating that:

> If [the CMPA's] actuarial data are made public, its competitors could use it to the CMPA's competitive disadvantage. If, in the future, private insurance companies decided to provide services to physicians and thus compete with the CMPA in the provision of legal defence services to physicians, their access to and use of this information could result in prejudice to the CMPA's competitive position vis à vis the Ministry and physicians.

Moving to section 17(1)(b), the Ministry submits that the CMPA will not continue to supply information, including actuarial information, if confidentiality is not assured. The Ministry says that this was expressly discussed at MPLC's regular meetings and led to the development of certain terms in Record 6 relating to safeguarding the confidentiality of that committee's business.

Citing the reference to the public interest in paragraph (b), the Ministry suggests that the public interest is best served by open discourse between it, the OMA and the CMPA because that discourse contributes to the quality of information developed by the MPLC. The Ministry adds that:

> The information itself, when in the hands of the OMA, CMPA and Ministry, has a valuable public benefit. The MPLC is charged with monitoring and reporting on medical liability issues in Ontario. The bodies that it reports to under the MOU all share an interest, with the people of Ontario as a whole, in reducing the cost of medical liability.

…

> The Ministry's interest in reducing the cost of medical liability deserves more attention, as it is directly aligned with the public interest in ensuring that the MPLC continue[s] to supply information to the Ministry. Since the Ministry subsidizes the CMPA fees of Ontario physicians, this cost comes out of the [public] treasury. It is therefore in the [public] interest for information that is collected and created for the purpose of limiting the cost of medical liability in Ontario, to continue to be submitted. Only a guarantee of confidentiality will ensure this result.

As to the application of section 17(1)(c), the Ministry submits that disclosure of Appendix 2 of Record 6 (the actuarial methodology) would lead to undue gain to private insurance companies since:

> … these companies would then have access to this highly detailed technical and trade secret information without having to expend the time and resources necessary to develop such information independently… [T]hey could take free and unfair advantage of the CMPA's proprietary information, even if they are not currently in direct competition with the CMPA…"

In its representations, the CMPA echoes these concerns and provides elaboration on the harms forecast to its competitive position, undue loss to CMPA and undue gain to insurance companies.

> The Government of Ontario's reimbursement of medical malpractice coverage is not limited to reimbursement of CMPA fees… Insurance companies seeking to cater to doctors, and thus compete with the CMPA, in the provision of legal defence services to doctors would benefit from obtaining the actuarial data the CMPA uses to calculate its fees.
>
> The disclosure of the methods and information would permit competitors to, at no cost, take advantage of the knowledge that the CMPA has gained at great cost. Disclosure of the actuarial methods and data contained in [Record 6] … would prejudice the CMPA's competitive position and cause undue loss by:
>
> > Enabling competitors to avoid considerable expenditures of personnel and financial resources in designing actuarial methodologies and protocols… and
> >
> > Enabling competitors through the cost savings achieved, to market their insurance products at a lower price, thereby securing additional market share at the expense of the CMPA.

Reiterating the Ministry's suggestion that release of Record 6 will jeopardize the CMPA's willingness to share information, the CMPA submits:

> [If] the CMPA believes information it provides to the Ministry cannot be protected from public disclosure, the CMPA will not continue to provide information [such as the actuarial assumptions] to the Ministry. Maintaining the confidentiality of the CMPA's proprietary information will serve to continue the free flow of information between the CMPA, the Ministry and the OMA.
>
> Disclosure would severely limit the collaboration between the Ministry and the CMPA with respect to fees charged by the CMPA for professional liability protection.

The crux of the appellant's submission is that the parties resisting disclosure have failed to discharge the burden of proof under section 17(1) by establishing a reasonable expectation of harm. He states:

> The Ministry and affected parties say, without evidence, that disclosure would result in some or all of the listed harms. The Court of Appeal, and a number of IPC Orders, have said that "detailed and convincing evidence" is required. There is an objective test. The 2000 MOU, signed by the Ministry and both affected parties, was published in the Ontario Medical Review, July-August 2000, issue. A copy is attached. Ontario Medical Review, though published by OMA, is not circulated only among doctors or OMA members. It is freely available to the public, and back copies are kept in many public libraries.
>
> …
>
> This was 'disclosure worldwide' … The MOU contains, among other things, Appendix 1, titled Actuarial Methodology and Underlying Assumptions Used in Fee Setting and Determination of Fee Requirements. The Appendix is in three pages, and detailed. It seems to correspond to Appendix 2 in [Record 6], as described in the Ministry submission… If the concern expressed was realistic, or reasonable, these parties would be able to demonstrate factually that harm actually occurred.

The appellant also referred to the now-public nature of the predecessor agreement to Record 5, which followed (and formalized) the Interim OMA/Ministry Agreement that is Record 4 in these appeals:

> The 1997 [OMA/Ministry] Agreement is a public document. It has been public since April, 2001, when it was included in the unsealed Divisional Court Record in the application for judicial review of Order PO-1721. The court file shows that all parties, including the Ministry and OMA, cooperated in obtaining a judge's

> order sealing other documents. There is no evidence of an attempt to get a similar order for the 1997 Agreement. The Ministry and OMA either saw no harm to them in making it public, or did not consider they had the grounds on which a judge would make a sealing order. In Appeals [PA-040078-2 and PA-040080-2], [the] OMA and the Ministry agree about the desire for secrecy of the 1996 Agreement. Their position seems to be that they would be exposed to harm from disclosure of an agreement that was in effect for five months, but not from a final agreement that continued for three years.

To supplement his position that the Ministry, OMA and CMPA have not offered detailed and convincing evidence of harm in relation to section 17(1)(b), the appellant states that:

> … the submissions of all three parties show that, notwithstanding the publication of the 2000 MOU in July of 2000, a free flow of information, and negotiations, has continued among them to the present. The claim that 'similar information would no longer be supplied' assumes that both OMA and CMPA would refuse to cooperate with the Ministry only to make a point, and to the detriment of physicians who are their members, and the public.

In reference to the harms forecast under section 17(1)(a), the appellant submits:

> CMPA is a monopoly… The monopoly position is effectively guaranteed by the government subsidy. When CMPA raises its fees, the government pays the increase… OMA is also a monopoly. As pointed out by the Ministry, it is by statute the sole representative of physicians in Ontario for bargaining with government, and it has the benefit, by statute, of Rand Formula deductions. Neither CMPA, nor OMA, has a 'competitive position' for the purpose of paragraph (a) of s. 17(1). They have no competitors.
>
> … It may be that if the public knew more, it would not be satisfied with the negotiating process or the results. That is not the kind of harm that the Act is intended to prevent.

In reply, the CMPA refuted the suggestion that it is a "monopoly" and provided a copy of OHIP Bulletin 4422, dated June 2, 2005. The CMPA states:

> The Malpractice Premium Reimbursement Program administered by the Ministry of Health and Long Term Care provides physicians may receive reimbursement for malpractice insurance from an insurance company by demonstrating proof of payment to the Ministry.

In sur-reply, the appellant clarified his position by stating that his point was that a "monopoly position exists because CMPA provides services that a commercial insurer, needing to show a profit, could not provide."

Analysis and Findings

In order to satisfy part 3 of the section 17(1) test, the parties resisting disclosure must provide detailed and convincing evidence of harm flowing from disclosure of a record. In *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* [(1998) 41 O.R. (3d) 464], the Court of Appeal for Ontario, in upholding former Assistant Commissioner Tom Mitchinson's Order P-373, described the standard of proof for part 3 of section 17:

> … the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm.

In Order PO-2435, Assistant Commissioner Beamish canvassed this office's approach to evaluating harms under section 17 of the *Act*. In that appeal, a request had been made for consultants' contracts with the Ministry of Health and Long-Term Care through the Smart Systems for Health Agency [SSHA].

> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

Assistant Commissioner Beamish acknowledged the concerns expressed by the Ministry and SSHA that disclosure of specific pricing or financial information paid by government to a consultant or other contactor may in some circumstances lead to the harms contemplated by sections 17(1)(a)(b) or (c), but found that in the circumstances of that appeal, a reasonable expectation of harm resulting had not been established.

The Assistant Commissioner also distinguished between disclosure of financial arrangements with the government while the competitive process was still underway and disclosing the financial details of contracts that had already been signed:

> The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

Assistant Commissioner Beamish's harms analysis in Order PO-2435 is instructive and, in my view, equally applicable in the circumstances of these appeals.

The representations provided to me by the Ministry, OMA and CMPA forecast certain negative consequences resulting from the disclosure of Records 4, 5 and 6, which are said to amount to harm. On the whole, however, these submissions are characterized by a lack of particularity as to those projected harms and, in my view, amount to no more than speculation of possible harm. What follows are my reasons for concluding that the evidence does not reach the requisite level of "detailed and convincing" to establish a reasonable expectation of harm under this part of the section 17(1) test.

The Ministry states that the release of Records 4 and 5 would significantly and negatively interfere with future contractual negotiations with the OMA since these negotiations are highly sensitive. However, the way, or ways, in which future contractual negotiations between the OMA and Ministry could be harmed by disclosure of Records 4 and 5 is not elaborated upon under the section 17(1)(a) arguments nor is there additional detail provided to shed light on the supposition that the OMA/Ministry relationship is so sensitive that the forecast harms are otherwise obvious. In saying this, I am mindful of Assistant Commissioner Beamish's comment in Order PO-2435 that harms cannot be substantiated by submissions that essentially repeat the words of the *Act*.

A great deal of emphasis was placed on prejudice to the competitive position and undue loss to the CMPA with the disclosure of Record 6. In seeking to correct an earlier stated misapprehension of the appellant that all physicians must obtain liability coverage through CMPA, the CMPA clarified that physicians may also obtain liability insurance coverage through other insurers and still be reimbursed by the province. The CMPA referred to OHIP Bulletin 4422 to substantiate this fact. It would appear to be implicit in this clarification that because physicians *can* seek insurance coverage through an alternate provider, it is somehow evident that harm of the type contemplated by sections 17(1)(a) or (c) would be caused to the CMPA's competitive position by the release of Record 6, particularly the actuarial methodology and data.

The Ministry propounds a similar view that the CMPA's competitors, equipped with the actuarial data, could use it to CMPA's "competitive disadvantage".

I reject these arguments. The mandatory exemption for confidential third party information was never intended to be wielded as a shield to protect third parties from competition in the market place, but rather, from a reasonable expectation of *significant* prejudice to their competitive position. I could accept for the sake of argument that some negative market-share consequences to the CMPA could follow with the release of Record 6. However, I am not persuaded by the evidence that the potential for this harm is sufficiently linked with the disclosure of Record 6 to constitute significant prejudice or undue loss as those terms are contemplated by paragraphs (a) and (c) of section 17(1), or to trigger the protection of the *Act*.

The required reasonableness of the expectation of harm regarding the release of Record 6 is further diminished, in my view, by the lack of available evidence that disclosure of the 2000 tripartite MOU through publication and its availability on-line has resulted in actual harm. The CMPA noted, quite correctly, that the 2000 MOU is not at issue in this appeal and suggested that the appellant's reference to it in his representations is irrelevant.

However, I note that the appellant's reference to the document is to make the point that the Ministry, the OMA and the CMPA should have been able to cite real harms resulting from the release of that document into the public domain, but have not done so and, by analogy, this reflects on the availability of the harms argument for Record 6, its replacement MOU.

It is true that the appellant has not reviewed Record 6 and so may only speculate on its contents when comparing it to the 2000 MOU. However, I have had the benefit of considering both documents as have the parties who are, in Appeal PA-040080-2, resisting the release of the former and, on my review of both, the appellant's speculation is not unfounded.

Indeed, the persuasiveness of the harms arguments put forth by the Ministry, OMA and CMPA on all three paragraphs of section 17(1) is seriously compromised by the fact that agreements between the very same parties have been published and are available to the public.

Referring to the assertion that disclosure of the actuarial data and methodology in Record 6 would result in similar information no longer being supplied to the Ministry by the CMPA where it is in the public interest that it continue to be, as in section 17(1)(b), both the CMPA and the Ministry indicated that if "the CMPA believes information it provides to the Ministry cannot be protected from public disclosure, the CMPA will not continue to provide information [such as the actuarial assumptions] to the Ministry." This assertion is put to the test by the fact that one of the parties resisting disclosure, the OMA, made the predecessor agreement to Record 6 publicly available. As I observed under my analysis of part 2 of section 17, essential aspects of the methodology and format are not only comparable, but strikingly similar in content in both documents; none of the Ministry, CMPA or OMA has been able to point to any breakdown in the relationship between them as a consequence of the publication of the 2000 MOU in the July/August 2000 issue of the *Ontario Medical Review*.

I also do not accept the suggestion that the inability of the Ministry to warrant confidentiality of the information at issue means the CMPA would no longer provide such information and that this, in turn, would work against the interests of Ontarians. Rather, if the CMPA chose not to provide this information, there is nothing to stop the Ministry from seeking alternate arrangements for professional liability coverage since it is, after all, holding the purse strings, on behalf of the public.

In the course of my own research, I located the agreement between the Ministry and the OMA which follows Record 5 chronologically and, by extension, Record 4 as well. It is referred to as the 2004 Physician Services Framework Agreement, and covers the term from 2004 to 2008. The May 2006 edition of the *Ontario Medical Review*, viewable by the public on the OMA website [see http://www.oma.org/pcomm/OMR/may/06maintoc.htm], contains an article titled "Physician Services Committee Progress Report," which directs readers to an online publication of the 2004-2008 Agreement, including appendices and related explanatory documents. The 2004 Physician Services Framework Agreement is made accessible to the approximately 24,000 physicians who are members of the OMA by inputting their membership number and a password consisting of their birth date. It is arguable, therefore, that this document, which appears to be the replacement agreement for Record 5, has essentially been made available to the public. In my view, the publication of the 2004-2008 Agreement to the OMA website significantly detracts from the plausibility of the harms forecast by the Ministry and the OMA with the release of Records 4 and 5 under this inquiry, since there is no evidence before me to suggest that the concern expressed by the Ministry and OMA in resisting the disclosure of Records 4 and 5 has led either of those parties to take steps to similarly safeguard the 2004-2008 Agreement from review by members of the public.

My consideration of part 3 of the test under section 17(1) has led me to conclude that I do not have before me the requisite detailed and convincing evidence to support a finding that the disclosure of the records at issue could reasonably be expected to lead to harms of the nature suggested by the Ministry, the CMPA or the OMA. Therefore, I find that the mandatory section 17(1) exemption does not apply to Records 4, 5 and 6 and I will order their release.

In view of this finding, it is not necessary for me to consider the possible application of the public interest override found at section 23 of the *Act* to Records 4, 5 and 6.

It remains, however, for me to consider the issue of reasonable search in relation to Appeals PA-020278-3 and PA-040080-2 and I will proceed with that analysis.

REASONABLE SEARCH

The appellant asserts that additional records responsive to his requests in Appeals PA-020278-3 and PA-040080-2 exist but have not yet been located by the Ministry.

General Principles

In appeals involving a claim that responsive records exist, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*, the text of which reads, in part, as follows:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose. …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered. Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records that are responsive to the request.

The *Act* does not require the Ministry to prove with absolute certainty that responsive records do not exist. However, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Original Requests - Appeals PA-020278-3 and PA-040080-2

Given the complexity and interrelatedness of the three requests and resulting appeals, I am reproducing excerpts from the appellant's original requests in the two appeals for which reasonable search is raised. Following the excerpts, there is a short summary of what the appellant suggests remains unidentified and subject to the claim that the Ministry did not conduct a reasonable search.

Appeal PA-020278-3

> I understand that the Government of Ontario rebates to physicians a significant portion of the fees they pay to the [CMPA]. I am interested in getting particulars of this program, that is, the Agreement or regulations involved and the amounts. …
>
> (b) The amounts paid by the Ministry under the Memorandum in the years to which it applies. I do not ask for amounts paid to or for any individual. I request yearly totals. I also ask for a breakdown by specialties or regions if that information already exists. …
>
> (d) With regard to predecessor Agreements, information similar to that mentioned in (b)
>
> (e) With regard to (b) and (c) [predecessor Agreements or MOUs], I ask how the amounts paid are calculated. I suppose that information is in the Agreements, but if other documents are needed, I ask for those.

Appeal PA-040080-2

> I understand that the Government of Ontario, for several years, has rebated to physicians a significant portion of the fees they pay to the [CMPA], and continues to do so.
>
> I request particulars of the program under which this is done, including existing and expired agreements, the amounts paid, and how the amounts are calculated.
>
> Without limiting the generality of the foregoing, I request copies of:
>
> …
>
> 4. Particulars of the "Procedure" mentioned in Article 6.02 and appendix 4 of the 2000 MOU between [the Ministry], CMPA and OMA**.**
> 5. The report issued by the [MMCC, now the MPLC] ... The report is mentioned in a bulletin by OMA to members and is recent.
>
> In addition, I request the total amounts paid under the program in each year since it began, showing for each year the beginning and end of the fiscal period.
>
> Please advise also whether the government has knowledge of Ontario physicians who obtain malpractice insurance from a carrier other than CMPA, and in that case whether the government pays any part of those premiums. If so, please provide particulars of the program, similar to those requested in respect of CMPA subsidies.

In both appeals (PA-020278-3 and PA-040080-2), it appears that whether the Ministry conducted a reasonable search remains an issue with respect to financial information (totals) relating to professional liability insurance reimbursement by the Ministry for parts of the time period since the creation of this arrangement. This time period extends from 1986 to 2004, representing the year the professional liability fee reimbursement program started (according to part (c) of the appellant's request in PA-020278-3, not excerpted above), up to and including the final year of the 2000 CMPA/OMA/CMPA MOU, as described in part (a) of the request in Appeal PA-020278-3, also not reproduced above.

Also remaining at issue under reasonable search is information about the "Procedure" referred to in part 4 of the request in Appeal PA-040080-2, the MPLC report referred to in part 5, and information about Ministry reimbursement of fees paid for professional liability insurance coverage obtained from a source other than the CMPA, according to the appellant.

Finally, both requests outlined above refer to "predecessor" or "existing or expired" agreements relating to reimbursement of physicians by the provincial government for fees paid to the CMPA or, as with the request in Appeal PA-040080-2, other professional liability insurers, and the appellant challenges the Ministry's search for these other agreements.

Representations

In describing his request for financial information under these requests, the appellant states that the decision letter he received in Appeal PA-040080-2 provides totals only for "the last three years" and fails to identify the fiscal periods. The figures cited in the Ministry's March 2004 representations are: 2000-01: $69,348,004; 2001-02: $69,138,959; and 2002-03: $108,218,000.

Referring to a comment made by former Finance Minister Jim Wilson about the apparent 20% increase in fees paid to the CMPA, the appellant submits that this comment must have been based on knowledge of the dollar figure of the fees in, at least, 1995.

The appellant notes that the Ministry never responded to the part of the request relating to "the total subsidy amounts in the years before 2000". However, the appellant provided an article from the *Globe & Mail* newspaper dating from February 2000, which cites premiums paid to the CMPA for the previous five years, as well as the year 2000. For the years 1995 to 2000, the amounts are: 1995 - $43 million; 1996 - $52 million; 1997 - $57 million; 1998 - $60 million; 1999 - $66 million; and 2000 - $73 million. The Government of Ontario is cited as the source of the information.

Regarding the Ministry's search for "existing and expired" or "predecessor" agreements relating to professional liability insurance coverage, the appellant focuses on the wording of his requests, which he asserts have been improperly edited by the Ministry, with the effect of misstating, or even inappropriately, narrowing them. He mentions the portion of his request in PA-040080-2:

> The Ministry begins by misstating the request. They leave out the first two paragraphs, and the words, "Without limiting the generality of the foregoing", all of which are quoted in the Notice of Inquiry, so it looks like a request only for 5 named documents. I have commented on that before, but they persist.

The appellant also challenges the reasonableness of the Ministry's search efforts by pointing to the existence of several records in the public domain, which he says are responsive to his requests, but which the Ministry's search did not locate. As an example, the appellant refers to the 1997 OMA/Ministry Agreement, which follows (and replaces) Record 4 and is the predecessor agreement to Record 5, and which he found while conducting his own search of a Divisional Court public record of proceedings in another matter involving this office and the Ministry of Health and Long-Term Care [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.): Tab 28A Court of Appeal Volume 2 record of proceedings; and Tab 21A of Divisional Court public record of proceedings].

The appellant submits that the presence of the 1997 OMA/Ministry Agreement in the court file casts a shadow on the reasonableness of the Ministry's search since the Ministry did not mention (or disclose) this record in spite of his request referring to "existing and expired agreements."

The appellant states that the Ministry has not responded to the part of the request asking about the 'procedure' mentioned in Article 6.02 and Appendix 4 of the 2000 three-party MOU," but notes that:

> [i]n Article 6.02 of the 2000 MOU, the Procedure is for reimbursement of physicians, and was to be established 'prior to December 1st, 2000". The doctors would not have waited four years to get their money. There must be other documents. …
>
> There have to be records. A responsible agency would not spend this kind of money without keeping records. There had to be records in order to apply the increase formula in Article 3.01 [of the 1997 OMA/Ministry Agreement]. It is a matter of looking in the right place or asking the right people.
>
> Two documents have come to light that show the Ministry has not made a Reasonable Search, or has not been forthcoming. They are the 1997 Agreement … and the Ministry bulletin at Tab 2 of the CMPA brief of June 1, 2005 [*2004 Malpractice Premium Reimbursement Program – Option C*: Bulletin Number 4422, issued by the Ministry to physicians, hospitals, clinics and laboratories, dated June 2, 2005]. Both those documents give evidence that there are more.

The appellant further submits that the indirect confirmation (through the CMPA's inclusion of OHIP Bulletin 4422 in their representations) that physicians may claim reimbursement for professional liability coverage fees paid to a private insurance company impugns the

reasonableness of the search by the Ministry. The appellant then sets out the excerpt from his December 29, 2003 request letter in Appeal PA-040080-2, as outlined in the preceding section of this order and then quotes from the March 11, 2004 response which states, in part, "The Ministry does not have any records responsive to this portion of the request." The appellant submits that this is evidence that the Ministry has not been forthcoming in responding to his requests.

In asserting that additional annual reports from the MPLC (to the Ministry and Physician Services Committee) should exist (other than the 2002 Interim Report, identified as Record 3 in this appeal), the appellant refers to the establishment of the MPLC under the 2000 MOU. He asserts that the existence of Record 3 suggests that meetings prior to 2003 occurred and that records relating to those meetings should exist. He states:

> For the Committee to produce a report in 2002, there had to be meetings between July, 2000, when it was set up, and June, 2002.
>
> Paragraph 12 of the [Ministry staff member's] affidavit says any documents other than those identified 'would have been destroyed by paper shredding after any MPLC meetings as these documents did not constitute part of the Ministry's file". This is not an answer as to minutes of meetings of the MMCC [now MPLC] before June, 2002.
>
> It also does not take into account Section 1(a) and 10(1) of the *Act*, which mention information "under the control" of an institution. The MMCC's minutes are somewhere. The Ministry was an equal participant in its meetings. The affidavit shows that no effort was made to contact MMCC officials, at least one-third of whom were also Ministry officials [pursuant to the terms of reference for the Committee under the MOU].

Enclosed with the Ministry's representations in Appeal PA-040080-2 was an affidavit sworn by a Senior Manager of the Assistive Devices Program of the Operational Support Branch of the Ministry. The staff member quotes the five records outlined in the appellant's request, as reproduced in full at page three of this order. No reference is made to the text preceding or following. She then states:

> I conducted a search of both the electronic and hard copy files pertaining to Request A-2003-00096 [Appeal PA-040080-2] including any records about the OMA/[Ministry] Agreement, MMCC or Memorandums of Understanding in the offices of the Operational Support Branch at: 11th Floor, Hepburn Block, 80 Grosvenor Street, Toronto and 7th floor, 5700 Yonge Street, Toronto.
>
> I did not contact anyone else in the conduct of this search since any records concerning [PA-040080-2] would be in one of these two offices of the Operational Support Branch.

> The Ministry chose to respond by sending a letter dated March 11, 2004 to the requester identifying the following four documents as responsive to the request:
>
> i) The 1996 OMA/[Ministry] Agreement;
> ii) The 2000 OMA/[Ministry] CMPA [MOU];
> iii) The 2004 OMA/[Ministry] CMPA [MOU];
> iv) Annual Report from the [MPLC] to the Ministry and the PSC.
>
> …
>
> I have conducted a thorough search of the offices of the Operational Support Branch and to the best of my knowledge, there are no additional records that are responsive to [Appeal PA-040080-2] other than the ones previously identified in the Ministry's decision letter to the requester of March 11, 2004.
>
> Any documents other than the ones previously identified to the requester would have been destroyed by paper shredding as this is not part of the Ministry's file.
>
> With respect to the total amount of monies paid to the program in each year, the Ontario government has subsidized medical malpractice fees since 1987 when the [CMPA]… fees increased in order to fully fund the reserves needed for physician protection. In 1987, the government agreed to pay one-half of the CMPA fee increase from 1986 to 1987 and the other half of the fee increase as a foregone increase to the Schedule of Benefits for physicians...

The Ministry stated that since 2000, the CMPA has split the professional liability fee subsidy into three regions: Ontario, Quebec and the rest of Canada. The Ministry indicates that the Provider Services Branch conducted a search for the related payment records and only three relevant records were found, which are for the 2000-01, 2001-02, and 2002-03 fiscal years, which were previously released through Appeal PA-020278-2.

In relation to the aspect of the request for particulars of the procedure mentioned in Article 6.02 and appendix 4 of the 2000 MOU, the Ministry indicates that Appendix 2 of Record 6 sets out the particulars requested and reasserts the claim of sections 65(6)3 and/or 17(1) of the *Act*.

On the matter of existing, expired or other agreements, the Ministry, in reply representations, provides a partial quotation of the appellant's request in Appeal PA-020278-3 and claims that "[t]here was never any request for the 1997 agreement."

The Ministry provided an explanation for why only one annual report (Record 3, the 2002 Interim Report) of the MMCC/MPLC was found, submitting that it is the MPLC facilitator's responsibility to prepare such reports and since there was a vacancy in that role from October 2003 to April 2004, no reports were prepared.

Analysis and Findings

I wish to preface my findings under this heading by acknowledging the length of time lapsed since the initial request in Appeal PA-020278-3 and the obvious overlap between all three of these appeals.

These circumstances may have had an impact on the lack of clarity surrounding what is, or was, being sought by the appellant. Based on my review, however, it would seem that the Ministry's efforts to assist the appellant in narrowing and/or clarifying his requests, as required by the *Act* to best carry out the statute's purposes and mandate, were not entirely successful.

As set out in the introduction to this issue, section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records.

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

The actual text of the appellant's request in Appeal PA-040080-2 offers a useful context for my consideration and I have reproduced the relevant excerpt below:

> I understand that the Government of Ontario, for several years, has rebated to physicians a significant portion of the fees they pay to the [CMPA], and continues to do so.
>
> I request particulars of the program under which this is done, including existing and expired agreements, the amounts paid, and how the amounts are calculated.
>
> Without limiting the generality of the foregoing, I request copies of…
>
> 2. The [OMA/Ministry] Agreement for the term May 1, 2000 to April 30, 2004

I accept the appellant's contention that the Ministry has, on several occasions, misquoted his requests. In my view, the Ministry's editing of the requests may have served to sidetrack its search efforts. For example, although the Ministry seems to have contacted the appellant in an attempt to clarify the scope of his requests, the Ministry does not appear to have acted upon the clarification provided. It would seem, rather that the Ministry unilaterally limited the scope of the requests, choosing not to heed certain phrases in the request (leading to Appeal PA-040080-2) such as "existing and expired agreements" and "without limiting the generality of the foregoing."

It was clear on the face of the requests that the appellant was interested in any and all agreements relating to the reimbursement of professional liability insurance coverage fees by the provincial

government. That the Ministry chose to excise the wording which would have promoted a search for "any and all agreements" effectively limited the scope to the specific five records referred to in the appellant's request in Appeal PA-040080-2. No explanation for this approach seems to have been provided to the appellant and, in my opinion, there was no justification for it.

On the question of amounts paid by the Ministry to the CMPA for reimbursement of professional liability insurance fees, I have figures from a variety of sources and with a variety of terms applied to them. Questions of consistency in terminology arise based on the use of terms such as "fee" versus "subsidy" and "premium", etc. I have different dollar figures for the same year, which leads me to question whether the appellant's request of the Ministry to confirm the start and finish of the fiscal years was addressed. None of the correspondence from the Ministry before me clarified the point although I note that the appellant on more than one occasion requested that the Ministry clarify it.

Indeed, it would seem that the Ministry could have been more forthcoming in clarifying the start and finish of the fiscal years; a comparison of the figure provided by the Ministry to the appellant for the 2000-2001 year does not seem to match that stated in a *Globe and Mail* article from the year 2000 provided to me by the appellant, which cites the provincial government as the source. I note that the Ministry informed the appellant that the figure was $69,348,004 while the *Globe and Mail* article offers a figure of $73 million.

Thus it appears from my review of the circumstances that the Ministry was able to provide figures about CMPA premium reimbursement for publication in a major national newspaper in 2000, but then was subsequently unable to respond to the appellant's access request for the same information in 2002 and 2004.

Furthermore, during the course of my inquiry into these appeals, an article appeared in the *Toronto Star* which featured a bar graph showing the amounts paid to the CMPA by the Ministry for professional liability insurance coverage for the years 1996 to 2005, along with projected payments for 2006 and 2007, 2006 CMPA fees for selected practice areas, and data relating to the outcome of legal actions against physicians for the years 1995-2004. The source of the information is cited as the CMPA. While the format of the bar graph does not give exact amounts, the accompanying article provides some additional detail, specifying the amounts paid in certain years, as follows: $12 million in 1986; $52 million in 1996; $162 million in 2005; $185 million in 2006; and $210 million in 2007. A note under the bar graph states that the projections for 2006 and 2007 are based on the "2004-2008 agreement", which I am satisfied is Record 6 in this appeal, the 2004 tripartite MOU.

While I acknowledge and appreciate that the requests in the present appeals pre-date the *Toronto Star* article referenced above, its publication suggests that if CMPA was in a position to provide this data relating to provincial government payment to offset CMPA fees for insurance coverage, it could reasonably be inferred that the Ministry would be in possession of the same information. The appellant's submission on this point bears repeating: "There have to be records. A responsible agency would not spend this kind of money without keeping records." I agree. The

appellant need not have been relegated to the realm of speculation on these totals, through his own review of related records, agreements and newspaper sources.

Accordingly, I find that the Ministry has not conducted a reasonable search for the records documenting the amounts paid to the CMPA for the years subject to the appellant's request: 1986 to 2004, with exception of the years 2000-2001, 2001-2002, and 2002-2003.

Similarly, it appears that the appellant only became aware through reading representations from the CMPA submitted in the course of this inquiry that the provincial government did, in fact, reimburse physicians who obtain professional liability coverage through alternate insurers. The CMPA, in seeking to dispel the appellant's notion that it enjoyed a monopoly in providing professional liability coverage, referred to OHIP Bulletin 4422 and submitted a copy with its representations. Ministry staff from the Malpractice Premium Reimbursement Program informed a staff member from this office that the Ministry has reimbursed physicians for alternate insurance coverage since 1996. I have been offered no satisfactory explanation for why Ministry staff could not have located records similar to, even pre-dating, Bulletin 4422 and provided them to the appellant. I find that the Ministry has not conducted a reasonable search for the records relating to reimbursement for professional liability premiums paid to alternate insurers.

The final object of interest to the appellant is additional reports from the MMCC/MPLC to the Ministry and the Physician Services Committee. The MMCC came into existence in 2000 through the MOU signed by the Ministry, CMPA and OMA and was continued as the MPLC under the 2004 MOU (Record 6). In describing the search conducted pursuant to the appellant's requests, the Ministry explains that no records other than Record 3 (the 2002 Interim Report) were identified because there was no MPLC facilitator, whose responsibility it was to prepare reports, between October 2003 and April 2004. The Ministry also claims that any minutes that may have been prepared would have been destroyed.

However, I have difficulty accepting the explanation provided by the Ministry which is simply that such records are not part of its files. As the appellant suggests, it might have been expected that Ministry staff would contact the Ministry representatives on the MMCC about what documentation was prepared consequent to its meetings. There is no evidence this was done.

Conversely, if there were records and these were destroyed, I have not been provided with adequate detail about record maintenance or retention policies and practices to consider the explanation in that context. As the appellant suggests, it is difficult to contemplate that records relating to financial arrangements of such significant import for the Ministry and the structures within which these arrangements are made would not be generated and/or maintained. In summary, I am not persuaded that the Ministry conducted a reasonable search for records originating from the MMCC.

While the *Act* does not require the Ministry to prove with absolute certainty that records or further records do not exist, in order to properly discharge its obligations under the *Act*, it is

incumbent upon the Ministry to proffer sufficient evidence to satisfy me that reasonable efforts have been made to identify and locate records responsive to the requests. In my view, the appellant has provided "sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record," as required by section 24 of the *Act*.

Through a series of unfortunate events, the Ministry seems to have misquoted or, at least, misapprehended the appellant's requests. The end result is the same: aspects of the appellant's requests were unreasonably narrowed by Ministry staff and others were not afforded a reasonable search. Accordingly, I will order the Ministry to conduct a new search for records as specified in the order provisions below.

ORDER:

1. I uphold the Ministry's decision to deny the appellant access to Records 1, 2 and 3.

2. I order the Ministry to release Records 4 and 6 in their entirety by sending a copy to the appellant **no later than September 25, 2006.** In view of the fact that the Ministry has already released Record 5 to the appellant, it need not do so again as a consequence of this order.

3. I order the Ministry to conduct a new search for records relating to:

    a. yearly totals paid by the Ministry to the CMPA;
    b. the program or arrangement under which the Ministry reimburses physicians for premiums paid to insurers other than the CMPA;
    c. MMCC/MPLC minutes and/or reports for the years 2000-2004;
    d. any and all agreements relating to the reimbursement of professional liability insurance coverage fees by the provincial government;

    and to provide the appellant with a decision in accordance with the provisions of the *Act*, treating the date of this order as the date of the request, without recourse to a time extension. I further order the Ministry to provide me with a copy of its decision when it sends the decision to the appellant.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records sent to the appellant in accordance with paragraph 2.

August 21, 2006

Daphne Loukidelis
Adjudicator