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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 21-1994
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INQUIRY RE: A Decision to Withhold Records of the Ministry of Health and the Ministry Responsible for Seniors

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1. Description of the Review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on July 19, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act) concerning a request for records in the custody or under the control of the Ministry of Health and the Ministry Responsible for Seniors (the Ministry). The request was made by a member of the public (the applicant).

The applicant wrote to the Ministry on February 2, 1994 to request a copy of the Ministry's records on the funding of Inglewood Private Hospital (the third party) in West Vancouver. The request sought:

1. the hospital's income and expenditure statement
2. the hospital's staffing levels and payroll
3. a summary of total patient days by type of care, and
4. an externally audited statement of return on investment.

After extending the 30-day deadline by an additional 30 days, the Ministry provided the applicant with Ministry records related to items 1-3 above, specifically: the Ministry's Continuing Care Division's Operating Budget for Inglewood Private Hospital for the 1993/94 fiscal year; the Continuing Care Division's Quarterly Financial Report for April 11, 1992 to March 27, 1993; and the Continuing Care - Staffing Analysis of Inglewood Private Hospital for the 1992/93 period. It also provides a Statement of Income for Inglewood Private Hospital for the year ended March 31, 1993.

The Ministry withheld some information from these records under section 21 of the Act, on the grounds that it was financial information provided in confidence to the Ministry and that it was in the public interest for the information to continue to be provided to the Ministry. The Ministry informed the applicant that it was unable to provide information related to item 4 above, since it had no such record in its custody.

The applicant then requested a review of the Ministry's refusal to provide him with Inglewood Private Hospital's financial information. The 90-day investigation period began on April 21, 1994, and the Office of the Information and Privacy Commissioner (the Office) issued a notice of written inquiry on June 20, 1994.

The owner/operator of Inglewood Private Hospital subsequently stated to the Office that item 4 did not exist, and the applicant and Ministry were so informed.

2. Documentation of the Inquiry Process

Under sections 56(3) and 56(4) of the Act, the Office invited written representations from: the applicant; Inglewood Private Hospital as the third party; the Ministry; and B.C. Pricare, B.C. Association of Community Care, and the Health Employers Association of B.C. as intervenors, with additional representations from the British Columbia Health Association. All parties made written representations. The third party and the intervenors made a single submission, with Janice R. Dillon and Michael Hancock of Harris & Company as counsel.

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a two-page statement of facts (the fact report), which after one amendment, was accepted by all parties as accurate for purposes of conducting the inquiry.

3. Issue under Review

The issue to be decided in this inquiry is whether the third party information withheld by the Ministry meets the three-part test set out in section 21(1) of the Act.

Under section 57(1) of the Act, at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record. Thus the burden of proof in this case rests with the Ministry.

4. The Records in Dispute

The information severed from the records consists of the amount of the third party's 1993/94 room differential and the 1992 and 1993 figures on the third party's statement of income, for which the categories alone were released without dollar amounts.

5. The Applicant's Case

It is the applicant's view, on the basis of his mother's experience in Inglewood Private Hospital, that the level of care in that facility is poor and that the majority of staff "have an indifferent and careless incompetence that works to the detriment of the patients." He suspects that "this situation is caused by the owners taking an exorbitant profit from its operation."

Because the third party received more than $2.5 million in public funds from the Ministry of Health for the fiscal year 1992/93, the applicant believes the Ministry should make public all aspects of the financial management of this operation. In his view, such disclosure should no more "harm significantly" or diminish the competitiveness of this organization than would the annual report of any publicly-held company. He believes that it is the duty of the Ministry to ensure "that public funds are not contributing to a usurious private-sector profit."

6. The Ministry's Case

The Continuing Care Division of the Ministry of Health receives confidential financial information from the Ministry's service providers as part of its contractual expectation. The Ministry states that it "may not have custody or control of records concerning an entire corporation's audited statement." It provides financial resources to such care facilities on a "global basis" and leaves it up to the facility to determine staffing levels.

The Ministry has relied on the following parts of section 21 of the Act to sever and withhold information relating to Inglewood Private Hospital's private funding:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
>
> ...
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

The Ministry believes that the information it is refusing to disclose meets each of the three tests set out above. It is financial in nature and relates to a third party and is provided in confidence, "based on a prior understanding that it would not be disclosed without the consent of the party providing the information." The Ministry submitted several documents intended to support the latter point.

The Ministry further argues that, under section 21(1)(c) of the Act, disclosure of the information in dispute could reasonably be expected to prevent further supply of similar information, and it is in the public interest to continue the supply of such information. The Continuing Care Division needs the data "to evaluate the capabilities of its contractors to provide the required care services. The Ministry submits that if this information were distributed to third parties, service providers would be reluctant to provide audited statements to the Continuing Care Division."

Although the Ministry accepts the burden of proof in this review under section 57(1) of the Act, it formally adopted the submission of the third party in this matter, Inglewood Private Hospital (except paragraphs 5-12, which deal with the section 23 argument) and asked me to consider these submissions in making a determination as to whether the Ministry has met the burden of proof.

7. The Third Party's and Intervenors' Case (the third party)

The third party's first request is that I clarify the threshold at which notice to third parties should be given by heads of public bodies under section 23 of the Act, which reads:

> 23(1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (1.2).

The third party then argues that the severed financial report provided to the applicant was in fact a blended statement for what were three separate facilities prior to June, 1993, one of which was a private pay facility operating exclusively on private funds. The argument is that the applicant only sought access to the financial records of Inglewood Private Hospital. I am urged to dismiss the request for disclosure of the financial report, since it is outside the scope of the original request, and notice has not been given to other third parties.

The third party follows the Ministry in arguing that section 21 of the Act is a mandatory exemption: "In this case, the information is financial, was supplied in confidence, there is reason to expect both that competitive and negotiating positions will be harmed, and/or the information will no longer be supplied."

The third party devoted particular attention to establishing that the information in dispute was supplied to the Ministry on an undertaking of confidence: "This undertaking of confidence can be inferred from the nature of the information provided, the context in which the information was provided, the statutory framework, and the explicit, mutual understanding of the parties." It argued that financial statements "are objectively confidential in nature, and, as such, a duty of confidence arises if they are supplied to government." The third party is a partnership pursuant to the *Company Act*, and its financial statements are not disclosed to the public. The Ministry's access to these documents is subject to the confidentiality provision in section 9 of the *Continuing Care Act.*

The third party states that around 1985 there was tremendous concern in the health care industry regarding the use which would be made of the financial information provided to the Ministry by private long term care facilities:

> The Ministry gave an assurance that this information would be kept confidential and that it would be used for internal rate setting and statistical purposes only. The Ministry undertook not to release the information to other facilities, or even to ministry staff employed at local health units. There was a very clear and definite understanding at the time of the institution of this policy that the information provided to the Ministry would not be disclosed to any third party. This understanding is still in effect.

This language essentially summarizes two affidavits that were submitted to me.

The third party added an argument, under section 21(1)(c)(i) of the Act, that disclosure of the information in dispute could reasonably be expected to "harm significantly the competitive position or interfere significantly with the negotiating position of the third party." Proposed new continuing care institutions or existing institutions with access to detailed financial information of the third party (expenditures, profit margins, and financial strengths and weaknesses) would be in a position to impact on its competitive position, as they compete for public money at the community level.

Finally, Inglewood Private Hospital is operated under certifications issued in favour of two unions. Contentious issues in negotiations among the parties usually concern benefit and pay provisions and the health care institution's ability to pay for them: "Were the Unions to have access to the financial statements of proprietary facilities, the normal balance which exists in the collective bargaining process would be

significantly disturbed." Releasing the specific net revenues of Inglewood "would result in a significant risk of impasse at the bargaining table."

8. Discussion

I regret having to state again, in another order, that the applicant has a series of concerns, however legitimate, that I cannot address, or offer redress for, under the *Freedom of Information and Protection of Privacy Act*.

Section 21

I have no difficulty accepting the argument that the information in dispute in this review is financial information and that its disclosure would harm various interests of the third party.

I have more problems with the third part of the test, that the information was supplied, implicitly or explicitly, in confidence. The Ministry submitted several documents intended to demonstrate that the information in dispute was supplied in confidence in accordance with section 21(1)(b) of the Act. These documents purport to show that "the past practice of the Ministry is to keep the severed information confidential." The documents, three letters all dated in 1988, are not very explicit about what information the Ministry of Health was willing to keep confidential, nor how the issue was resolved. I suggested, somewhat more obliquely, in a previous order (Order No. 11-1994 of June 16, 1994) that matters of this sort should be covered by confidentiality agreements, contracts, or policy statements now that the Act is in force and will soon cover hospitals and other health care facilities. I also suggest that in future, public bodies re-examine the advisability of obtaining information in confidence when drafting such documents

I am also dissatisfied with the level of proof advanced by the third party and the intervenors with respect to demonstrating that the information in dispute was supplied in confidence. I have affidavit testimony from two individuals, one of whom was employed by the Ministry around 1985, but I have no primary documentation of what should be demonstrable as a fact. If a policy existed of treating financial information as confidential, then it must be written somewhere in the Ministry. I have not seen such a record.

On balance, however, I am prepared to accept the variety of arguments advanced by the Ministry, the third party, and the intervenors to the effect that the information in dispute was supplied at least implicitly in confidence to government. I acknowledge that the treatment of information received by the Ministry from continuing care facilities is subject to section 9 of the *Continuing Care Act*, which reads as follows:

> 9 A person who, in the course of carrying out his duties under this Act, obtains information, files or records that are submitted in accordance

> with a request or obligation under this Act, shall not disclose the information, files or records to any person other than for the purposes of carrying out his duties under this Act or where required by law.

But in future cases I would hope to receive more explicit proof on this matter of expectations of confidentiality. The standard contract entered into under the *Continuing Care Act* should be appropriately amended to take account of the new rules under the *Freedom of Information and Protection of Privacy Act* with respect to data protection and access to information.

I further accept that disclosure of the financial information in dispute would, to quote the language of section 21 of the Act, "result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied...." It is self-evident that continuing care facilities will resist providing sensitive financial information to the Ministry, if appropriate levels of confidentiality cannot be assured.

The Severances

It is also helpful to consider the specific information that has been severed to date. With respect to the 1993/1994 budget document of the Continuing Care Division of the Ministry, one item not released is the "room differential," which means the total sum of monies received by the third party in room differential payments. According to the Ministry, "These payments represent charges which are assessed individual patients in excess of the base level of funding provided by the Ministry of Health. The Ministry's role with respect to room differential charges consists exclusively in determining the maximum rate which can be charged by an institution. Room differential payments are paid entirely from private monies and are not included in the Ministry's rate setting process." I accept the fact that this item of information is purely a private matter of the third party and thus appropriately severed.

The Ministry has released the substance of Inglewood Private Hospital's "Continuing Care Division Operating Budget," without releasing the room differential amount (just discussed), the total operating revenue, and the operating surplus/(deficit). Under section 21 of the Act, I accept that these two latter items were properly severed, since they would reveal a private aspect of certain operations of the third party, that is, the room differential.

With respect to the third party's statement of income for the two years ended March 31, 1993, the applicant has not been given any of the dollar figures for revenue, expenses, income before amortization, amortization, and net income for those years. However, I do not believe that the applicant has a right of access to them under the Act, because it would reveal confidential financial information of the third party. In fact, even the Ministry is mainly concerned to use this financial information to establish that the continuing care facility is able to carry out its required care services under the contract.

The applicant stated in a resubmission that his basic premise is "that any profit making organization that enjoys funding from the public purse is, de facto, a public company and should be held accountable to the public with the same responsibilities to shareholders as that of any share-held company." With respect, that is not the law in this Province, nor does it square with the provisions that the legislature incorporated in section 21 of the Act for the protection of information supplied by third parties to the government under certain specified circumstances.

Other Matters

As to the burden imposed on a public body by section 23 of the Act, the responsibility of notification to third parties is quite clear. But the Act states that the judgment about the possible application of sections 21 and 22 lies with the head of the public body. The Ministry submitted that in reviewing the requested records, it came to the conclusion that the standard financial information to be disclosed would not be excepted from disclosure under section 21 of the Act; thus the obligation to notify under section 23 did not arise. Since the disclosure at issue has already taken place, I am reluctant to express an opinion on this matter in the context of the current inquiry.

The third party has argued that the financial report in dispute lies outside the scope of the applicant's original request and should be dismissed. I acknowledge that the third party has at least a bone to pick with the Ministry on this point, but I am not prepared to dismiss the applicant's request on this basis. The burden on public bodies under section 6 of the Act is "to make every reasonable effort to assist applicants," who cannot be privy to the actual financial structure, at any moment, of separate corporate entities. The applicant can hardly be blamed for getting some of what he asked for, especially since the heading on the "statement of income" is "Inglewood Private Hospital and Lodge" with no mention or qualification with respect to the separate existence of Inglewood Manor. Moreover, in June 1993 the Manor opted into the Ministry of Health program and became formally part of the Lodge. Contractors submitting financial statements to the Continuing Care Branch of the Ministry are going to have to adjust, with respect to labeling future submissions, to the new rules on openness, accountability, and confidentiality established under the *Freedom of Information and Protection of Privacy Act.*

9. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Health not to release the information in dispute to the applicant.

David H. Flaherty
Commissioner

August 15, 1994