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

# ORDER PO-2865

## Appeal PA08-299

## Ministry of Health and Long-Term Care

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## NATURE OF THE APPEAL:

The Ministry of Finance received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to the *Transparent Drug System for Patients Act 2006*, (the *TDSPA*). As the Ministry of Health and Long-Term Care (the Ministry) had a greater interest in the records, this request was transferred to it under section 25 of the *Act*. The request was for:

> (A) Provide since October 1, 2006, as part of Bill 102 - the *Transparent Drug System for Patients Act 2006*, a summary of, or copies of the periodic cheques received from the drug manufactures under pricing and listing agreements with the Ministry of Health for providing drugs under the public drug program, Bill 102.
>
> (B) Include as well aggregate monthly and yearly amounts paid in to date or projections of future payments to be made under these agreements. Include manuals, procedures, practices adopted for receiving and checking such for such payments.
>
> Provide other records released on these above subjects under [the *Act*].

The Ministry located a number of responsive records and provided access to them, in part. The Ministry issued a decision letter and denied access to portions of the records in accordance with sections 18(1)(c) and (d) (economic and other interests).

In response to a clarification letter sent to the Ministry by the requester in this appeal, the Ministry issued a follow-up letter dated November 19, 2008 that provided answers to several questions posed by the requester. The Ministry also issued a third letter dated December 15, 2008 answering a second set of questions posed by the requester.

The requester, now the appellant, appealed the Ministry's decision to deny access to the responsive records.

During mediation, the appellant removed point (B) from the scope of the appeal. However, he continued to seek access to the portions of records responsive to point (A), access to which were denied in accordance with sections 18(1)(c) and (d).

As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the process whereby an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, initially. I received representations from the Ministry. I then sent a complete copy of these representations to the appellant, along with a Notice of Inquiry. I received representations from the appellant. I then sought and received reply representations from the Ministry on the possible application of the public interest override at section 23 of the *Act*, which was raised by the appellant in his representations.

## RECORDS:

The records at issue consist of computer generated printouts summarizing invoice dates, payment dates and payment amounts for each of 47 individual drug manufacturers for the period of October 1, 2006 to April 25, 2008. The Ministry has disclosed all of the information in the records, except the amount of the quarterly payments made to it by the drug manufacturers, and the amounts that reflect any discrepancies between the monies paid to it and the value of the invoices it submitted to the manufacturers for payment. The Ministry is claiming that all of the withheld amounts are exempt under of sections 18(1)(c) and (d).

## DISCUSSION:

### ECONOMIC AND OTHER INTERESTS

I will first determine whether the discretionary exemptions at sections 18(1)(c) and (d) apply to the records.

Section 18(1) states in part:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 18(1)(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)].

**Section 18(1)(c): prejudice to economic interests**

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

**Section 18(1)(d): injury to financial interests**

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

**Representations**

The Ministry submits that the witheld information reveals the volume discount amounts, or other information that relates to the calculation of these amounts, paid by drug manufacturers to the Ministry pursuant to listing or pricing agreements for specified drugs. It states that:

> Through the Ontario Drug Benefit (ODB) Program, the Ministry provides coverage for most of the cost of over 3,300 prescription drug products for Ontarians who are eligible for benefits under the *Ontario Drug Benefit Act* (*ODBA*). Eligible persons include Ontario residents who have valid Ontario health insurance and who belong to one of the following groups:
>
> - People 65 years and over
> - Residents of long-term care homes
> - Residents of Homes for Special Care
> - People receiving professional home care services
> - People who qualify for coverage under the Trillium Drug Program (i.e. have high drug costs in relation to their income)
> - People receiving social assistance

In 2008/09, the ODB Program provided prescription drug coverage to approximately 2.4 million people in Ontario and reimbursed over 100 million claims. Government expenditures for the ODB Program for 2008/2009 amount to about $4 billion, which represents approximately 10% of total health care spending…

The *ODBA* confers authority on the Executive Officer [of the Ontario Public Drug Programs] to, among other things, administer the ODB Program; to keep, maintain, and publish the Formulary; to designate drug products as listed drug products (i.e. benefits under the ODB Program); and to negotiate pricing agreements in respect of drug products that are listed on the Formulary as benefits under the ODB Program.

The price that the ODB Program pays for listed drug products is determined in accordance with the *ODBA* and Ontario Regulation 201/96 made under the *ODBA* (the "ODBA Regulation")…

The Executive Officer routinely negotiates pricing agreements with manufacturers in respect of brand products that are being proposed by the manufacturer for designation as a benefit under the ODB Program. The very purpose of these agreements ("Pricing Agreements") is to generate government cost-savings and to obtain value for money in respect of drug products that are listed as benefits under the ODB Program…

Consequently, pursuant to these agreements, the effective price paid by the Ministry under the ODB Program is lower than the published Formulary price. The Formulary price reflects what the pharmacist would pay if purchasing the listed drug from the manufacturer, and the amount that the Ministry reimburses the pharmacist for the cost of the drug. But it does not reflect the effective price of the drug for the Ministry. The listed price is reduced by virtue of a "volume discount", expressed as a percentage of the published price, paid by manufacturers to the Ministry for the drug. These volume discounts are negotiated by the Executive Officer in listing and pricing agreements with the manufacturers…

The information severed from the [records] reveals how much each manufacturer has paid the Ministry, on a quarterly basis, in accordance with the negotiated volume discount price for the manufacturer's drugs listed on the Formulary…

The volume discounts were negotiated by the Ministry and the manufacturers in complete confidence, and with an explicit expectation that the discount amount, and resulting payments made to the Ministry at each quarter, documented in these records, would remain confidential.

As such, the Ministry submits that if the [records] were disclosed, manufacturers would consider this a frank breach of their expectations, and, in the future, would

> be less likely to negotiate significant volume discounts, since they can negatively affect the manufacturer's competitive position by establishing a lower benchmark for a given drug product. Since it is obviously in the Ministry's and the government's interest to negotiate as high a volume discount amount as possible, the Ministry must promote and protect its trusted relationship with manufacturers. That trust is premised, in large measure, on maintaining the confidentiality of the volume discount amount. Without that trust, the Ministry's ability to negotiate significant savings in respect of the ODB Program is hampered. The Ministry submits that it could not realize the cost savings that could potentially be achieved if the volume discount amounts remained confidential and were not disclosed. Without those savings, the Ministry's economic interests, and the Government's financial interests will be prejudiced, and will result in higher drug costs for ODB recipients.

The Ministry enclosed letters from manufacturers who wrote to it indicating that the financial information about the listing and pricing agreements should remain confidential. They also describe the negative impact that disclosure would have on future negotiations of such agreements.

In further support of its representations, the Ministry submitted a letter from its Assistant Deputy Minister (ADM), who is also the Executive Officer of the Ontario Public Drug Programs. In this letter, the ADM affirms the information provided by the Ministry in its representations. She also states that:

> …As Executive Officer, one of my primary functions is to negotiate agreements with manufacturers regarding the Drug Benefit Price of listed drug products. Since the [public drug system reform in 2006], pricing agreements have been signed with 98% of brand name drug manufacturers…
>
> My goal is to secure the best possible price for the Government. In cases where I enter into agreements with manufacturers for a volume discount, the negotiations typically result in agreement over a price published in the Formulary and a confidential volume discount that leads to the "effective price" the Ontario Government actually pays for the drug. For example, the published Drug Benefit Price of a drug on the Formulary may be $1.00 and the confidential volume discount provided by the manufacturer is $0.50. This would mean that when a pharmacy supplies that drug to an ODB-eligible person and submits a claim to the Ministry, the Ministry would pay the pharmacy the Drug Benefit Price of $1.00, as that is the published price at which the manufacturer is required under the *ODBA* to sell the product. However, the manufacturer subsequently reimburses the Ministry $0.50 in accordance with the pricing agreement and the volume discount mechanism. As a result of the manufacturer's discount, the effective price paid by Ontario for the drug would be $0.50. Obtaining such volume discounts from manufacturers is extremely important for the Ministry and, concomitantly, for the Government of Ontario. Manufacturers are unwilling to

offer such discounts, however, without agreement from the Ministry that the discounted amount be kept confidential...

I negotiate a unique pricing agreement with each manufacturer. The discount provided to the Ministry by a given manufacturer under the terms of its pricing agreement with the Ministry is strictly confidential, even amongst manufacturers; each manufacturer knows only the terms of its own volume discount pricing arrangement with the Ministry.

…Manufacturers do not want their pricing agreements with the Ministry to be made publicly available. It is my understanding that this is to avoid jeopardizing their bargaining position vis-à-vis other purchasers and third party payers with whom they may be engaged in price negotiations, either concurrently or in the future…

I have negotiated agreements with manufacturers for volume discounts that reduce the price of drugs by up to 45%. Such negotiations and agreements would not be possible if manufacturers were not given a promise of strict confidentiality in respect of the terms of these agreements, and particularly the pricing provisions of these agreements that reflect or reveal volume discount information…

Any reluctance on the part of manufacturers to enter into flexible negotiations over the pricing of their drug products is detrimental to Ontarians, both as ODB recipients and as taxpayers. In terms of ODB recipients, this would mean the Government will be less able to continue to provide access to current and new drugs; and for all Ontarians, this would mean that more tax dollars will be spent on higher drug costs. Drug Programs as a whole would lose potential savings which would no longer be available for reinvestment in the system.

The disclosure of confidential volume discount information could [also] reasonably be expected to also have a detrimental effect on Ontario's competitive position.

Due to the size of its market share, Ontario has, historically, been able to secure better prices from manufacturers than smaller provinces. However, this competitive advantage would be lost if Ontario were the only province in Canada required to disclose confidential pricing information. This is because the confidential pricing information, in and of itself, has inherent value for drug manufacturers because it reveals their proprietary information and, in particular, sets a benchmark for the price of a drug product. If that information is disclosed, it would have a direct, negative impact on the manufacturer's ability to negotiate higher prices with other provinces or the private sector purchasers, and potentially other countries. Manufacturers refuse to make their pricing information publicly available precisely because doing so would effectively undermine their ability to negotiate a higher price for drug products from other potential purchasers. They

> do not want to be "tied" to the same price for all other purchasers of their products.
>
> Although manufacturers are currently keen to negotiate with Ontario because of the large size of Ontario's drug market, they may be less willing to negotiate pricing arrangements that are advantageous to Ontario for fear that the arrangement will be used by other potential buyers as a discount standard or achievable price goal. In other words, knowing that their pricing discounts will be made public will discourage manufacturers from negotiating large volume discounts when dealing with Ontario.

The appellant submits that:

> There is no competitive issue in releasing drug payments, nor does their release prejudice the province's economic and financial interests…
>
> Why …is it possible that the appellant received the total aggregate amount of drug company payments from the pricing and listing agreements if there is such a total apprehension to providing the breakdown of such payments.
>
> And how do those payments stack up against the Ministry's undocumented claims in their representations for 2007-08 of about $260 million saved in drug prices?
>
> Those drug company payments are [from previous access requests]: either $75,639,199 in 2007… and $135,089,296.13 for 2008…
>
> [S]imply because there could be embarrassment or possibly negative publicity with the specific release of the payments data is insufficient grounds to claim such a blanket exemption for the further drug payment data sought. And such payments and drug pricing from figures provided to date will escalate.
>
> The Ministry also has released the 47 names of each drug companies making such "reimbursement" payments to it. Has that hurt the Ontario government economically or financially? Or even the drug companies? There is no evidence submitted of that…
>
> In three cases [in the disclosed portions of the records] it is disclosed those companies made no payments. The Ministry believes it can be transparent in these cases but not when drug companies made payments, their payments are claimed as secret…
>
> The data sought in this appeal is only summary data of drug company payments and does not reveal how the agreements are arrived at or the details of such agreements or the payments broken down per drug product covered under the agreements - just very basic summarized payment data. Governments operate

> with public scrutiny where value for money and proper arms-length disclosable financial arrangements are a necessity…
>
> The Ministry wants excessive secrecy but can hardly claim releasing this set of summary information has to be seen in light of other more detailed data sought about the agreements.

In reply, the Ministry submits that:

> [O]ne of the principles set out in paragraph 4 of section 0.1 of the *Ontario Drug Benefit Act*, R.S.O. 1990, c. 0.10 ("*ODBA*") is that, "The public drug system aims to consistently achieve value-for-money and ensure the best use of resources at every level of the system". In striving to maintain such a public drug system in difficult economic times, the Executive Officer takes her authority to negotiate pricing agreements with manufacturers very seriously…
>
> The lost savings [incurred by disclosure of the information at issue in the records] would be prejudicial to the economic interests of the Ministry, the financial interests of the Government of Ontario and, ultimately, Ontario taxpayers, in that the Government of Ontario would end up paying more for its drug benefits and have less money to spend on providing access to newer drugs for Ontario Drug Benefit recipients.

**Analysis/Findings**

The information at issue is the cumulative amounts paid by drug manufacturers to the Ministry, pursuant to their listing agreements, as volume discounts. This information consists of the lump sum quarterly payments made by drug manufacturers to the Ministry, not the specific volume discount negotiated in a listing or pricing agreement by the Ministry for a particular drug as consideration for the Ministry entering into these agreements with drug manufacturers.

On the Ministry's website, it states that Ontario Drug Benefit (ODB) program provides coverage for over 3,200 drug products. During the responsive time period between October 1, 2006 and April 25, 2008, the Ministry invoiced 47 drug manufacturers. Forty-four of these drug manufacturers remitted quarterly payments to the Ministry during this time period. As the payments listed in the records are not broken down per drug product, I find that the information at issue would not reveal the specific financial details of the listing or pricing agreements entered into between the Ministry and the drug manufacturers for individual drugs.

Further, the information at issue does not reveal the actual price paid by the Ministry for a particular drug. It also does not reveal the amount of a volume discount negotiated for a particular drug. Therefore, the information at issue could not be used by other potential bulk prescription drug purchasers as a discount standard or price goal to be obtained from the drug manufacturers in the purchase of particular drug products.

Based on my review of the records, I agree with the appellant that disclosure of the information at issue in the records could not reasonably be expected to attract the harms contemplated in sections 18(1)(c) and (d).

In reaching my conclusion on the applicability of sections 18(1)(c) and (d) to the information at issue in the records, I have considered and distinguished the findings I made in Order PO-2863. In that order I considered the application of the exemptions in sections 18(1)(c) and (d) to the formula for the "Calculation of Volume Discount" in listing and pricing agreements entered into by the Ministry with drug manufacturers for specific drugs, as well as the actual volume discount amounts expressed in numerical values and a description of other value for money conditions used to leverage the discount amounts for specific drugs. In that order, I found that disclosure of the information at issue could reasonably be expected to discourage drug manufacturers in the future from negotiating large volume discounts and other favourable financial terms with Ontario, for fear of this information being used by their other public and private sector customers seeking to negotiate similar discounts with the drug manufacturers. Furthermore, other drug manufacturers would expect Ontario to negotiate a lower volume discount in the future for their drugs, if, by disclosure of the information at issue in Order PO-2863, it is revealed that Ontario was willing to negotiate a lesser discount for a similar drug with another drug manufacturer.

In this appeal, I find that disclosure of the information at issue could not reasonably be expected to seriously prejudice the Ministry's ability to secure savings on prescription drugs by weakening its bargaining position in negotiations with drug manufacturers. The information at issue does not disclose "confidential pricing information" for drug products, which is a concern of the individual drug manufacturers. The information at issue does not disclose either the volume discount amount or information related to the calculation of this amount for specific drug products. Therefore, I do not accept that disclosure of the information at issue could reasonably be expected to prejudice the economic interests or the competitive position of the Ministry under section 18(1)(c) in its ability to negotiate listing and pricing agreements with drug manufacturers.

Furthermore, as the information at issue does not reveal the specific details of conditions negotiated for a particular drug product, disclosure of this information would not demonstrate to other private sector industries the type of incentives Ontario is prepared to grant to drug manufacturers in order to attract business to Ontario. Therefore, I also do not accept that if this information were available to industry players, that it could reasonably be expected to prejudice the economic interests of the Ministry and be injurious to the financial interests of the Government of Ontario under section 18(1)(d) by weakening its negotiating position [Order PO-2569].

In conclusion, I find that the Ministry has not provided the kind of detailed and convincing evidence required to demonstrate that disclosure of the information at issue could reasonably be expected to prejudice the economic interests or the competitive position of the Ministry or to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of the province. Accordingly, I find that sections 18(1)(c) and (d) do not apply to the information at issue in the records. As no other exemptions have been claimed for the information at issue in this appeal, I will order it disclosed.

## ORDER:

I order the Ministry to disclose the information at issue in the records to the appellant by **February 3, 2010**.

Original signed by: January 13, 2010
Diane Smith
Adjudicator