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

ORDER PO-2864

Appeal PA08-298

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) 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*), for:

> Provide since October 1, 2006, as part of Bill 102 - the [*TDSPA*] regime:
>
> 1. (a) Summary records that indicate the number and type and length of the pricing and listing agreements in place
>
> 1. (b) And the still outstanding number and type of such agreements to do and projected dates for implementation.
>
> 2. (a) Summary data on the number of drugs covered under each agreement. If possible, break these numbers down by brand and generic origin.
>
> 2. (b) As well, provide summary data on those drugs on the Formulary yet to be part of agreements.
>
> 3. Summary records in list/chart or other form of the specific drug manufactures that have agreements with the ministry, be the agreements with the Minister, deputy minister, ADM [Assistant Deputy Minister] (Executive Officer) or others. Include the dates of such agreements or amendments, the specific drug products covered, the specific pricing undertaken, the specific amounts paid to the Ontario Government, the specific relationship between listing and pricing in the agreements.
>
> 4. Summary notes of agreements and on the development and maintenance of agreements, and on the degree of transparency expected about these agreements.
>
> Note the Ministry's web site indicates that 98% of pricing agreements are now in place and that listing and pricing agreements exist for more than 76% of products on the Formulary so there is specific and summary data that would back this up.
>
> Provide other records released on these above subjects under [the *Act*].

The Ministry located a number of responsive records and provided access to the records in part. The Ministry denied access to portions of the records in accordance with sections 18(1)(c) and (d) (economic and other interests). In addition, the Ministry removed some information as non-responsive.

In response to a clarification letter sent to the Ministry by the requester on 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 another 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.

During mediation, the appellant removed parts 2(b), 3 and 4 of his request from the scope of the appeal. At the conclusion of mediation, the appellant confirmed that he only seeks access to the following information:

- The withheld portions of the two records (Records 1 and 2) responsive to part 1(a) of his request, including the portions of Record 1 the Ministry identified as non-responsive.

- Records responsive to part 1(b) of the request, which the Ministry had stated did not exist. The appellant, however, believes that additional records must exist. He believes that there must be records describing the outstanding agreements. Therefore, the appellant wishes to proceed with this portion of the appeal on the basis that the Ministry did not conduct a reasonable search.

- The withheld portions of the one record (Record 3) responsive to part 2(a) of his request, including the portions of this record marked as non-responsive.

As mediation did not resolve the issues in this appeal, the file was transferred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, initially. I received representations from the Ministry. I 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, including representations on the issue raised by the appellant with respect to the public interest override at section 23 of the *Act*. I then sought further reply representations from the Ministry on the application of section 23 in response to a newspaper article sent to me by the appellant.

RECORDS:

The records at issue are as follows:

RECORD #	DESCRIPTION OF RECORD	RELEASED?	SECTIONS APPLIED
1.	Summary Tracking Sheet	in part	non-responsive
2.	Excerpt from slide presentation	in part	18(1)(c) and (d)

3.	Summary files by drug manufacturer - 49 sub-records related to 49 manufacturers	in part	18(1)(c) and (d) non-responsive

DISCUSSION:

RESPONSIVENESS OF RECORDS

I will first determine whether portions of Records 1 and 3 are responsive to the request.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (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
>
> …
>
> (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).

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]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Representations

The Ministry submits that:

> Part 1(a) of the appellant's original request is for "Summary records that indicate the number and type and length of the pricing and listing agreements in place". (emphasis added).
>
> The Ministry determined that Record 1, entitled "Signed Agreements Tracking Sheet" is responsive, in part, to this portion of the appellant's request, and has been disclosed. The remainder of the record is non-responsive because it simply does not deal with "listing and pricing agreements in place". This non-responsive

> portion of the tracking sheet lists other types of agreements that are not listing or pricing agreements. This is immediately evident from the column entitled "Type of Agreement". All the responsive information from this column, which has already been disclosed to the appellant, is described as a "Listing", "Pricing" or "Amending Agreement" (to a Listing or Pricing Agreements). By contrast, the same column in the non-responsive portion of the record contains descriptions of agreements that are neither listing nor pricing agreements. Furthermore, the key in the bottom left hand corner of the non-responsive portion of the record indicates there are no "totals" for listing and pricing agreements in the non-responsive portion of the record because that part of the record does not track listing/pricing agreements...
>
> Record 3 is responsive to part 2(a) of the appellant's request for "Summary data on the number of drugs covered under each agreement. If possible, break these numbers down by brand and generic origin". [emphasis added]
>
> The non-responsive portions of Record 3 reflect information in respect of agreements that are no longer in effect because they have been superseded by new agreements. The drugs listed in the non-responsive portions of this record are no longer covered under the listing or pricing agreement referred to in these portions. The Ministry read part 2(a) of the appellant's request in the context of part 1, since part 2 refers only to "each agreement". In order to understand the meaning and scope of "each agreement", the Ministry looked to part 1, which indicates that the appellant's request is for information about pricing and listing agreements "in place" and projected agreements (i.e. "agreements to do and projected dates for implementation". The appellant did not ask for information about expired or obsolete agreements.

The appellant submits that:

> ***Record #1: summary tracking sheet***
> The Ministry, without contacting the appellant, has placed a narrow interpretation on what was sought that is not intended…
>
> ***Record #3: summary files by drug manufacturers***
> The Ministry knows full well that the appellant was interested in knowing about all agreements, including former agreements. The December 15, 2008 Ministry letter, on page three, clearly shows that the appellant sought data on former agreements.
>
> The Ministry in its representations acknowledges that there were a few former pricing agreements...

Analysis/Findings

As stated above, part 1(a) of the appellant's request seeks "Summary records that indicate the number and type and length of the pricing and listing agreements in place". I find that certain portions of Record 1, which were considered to be non-responsive to the appellant's request, are actually responsive to part 1(a) as containing information about certain types of listing and pricing agreements in place since October 1, 2006 as requested by the appellant. I find that the Ministry has narrowed the scope of the appellant's request to include only listing and pricing agreements in place as of the date of his request in 2008.

Concerning Record 3, part 2(a) of the appellant's request was for "Summary data on the number of drugs covered under each agreement…". I find that the Ministry has taken a narrow view of the appellant's request to include only agreements that were in place at the time the request was made. The appellant requested responsive information in the custody or control of the Ministry since October 1, 2006.

The Ministry was overly narrow in its reading of the appellant's request. Therefore, I find that all of the information severed from Record 3 as being non-responsive falls within the scope of the appellant's request and is responsive to part 2(a) of his request.

Since the Ministry has not turned its mind to whether or not an exemption should have been claimed for the non-responsive information in Record 3 and for the portions of Records 1 that I have found to be responsive to the appellant's request, I will return the matter to the Ministry for a decision respecting access to these portions of these records.

SEARCH FOR RESPONSIVE RECORDS

I will now determine whether the Ministry conducted a reasonable search for records responsive to part 1(b) of the request, which sought the outstanding number and type of pricing and listing agreements and the projected dates for implementation of these agreements.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Ministry was asked to provide a written summary of all steps taken in response to the request. In particular, the institution was asked to respond to the following:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Representations

The Ministry provided an affidavit from its Director of the Drug Program Services Branch (DPSB). He states in his affidavit that all records related to the *TDSPA* are located in DPSB offices and for each part of the request, he assigned a DPSB staff member familiar with the particular file to search file cabinets, drawers, folders and electronic files for responsive records.

The DPSB staff located three records responsive to this request, but did not locate records responsive to part 1(b) of the request.

The appellant submits that had the Ministry noted that his request was broader than just pricing and listing agreements, the outcome would have been different.

Analysis/Findings

Part 1(b) of the request seeks: "… the still outstanding number and type of such agreements to do and projected dates for implementation". Part 1(b) is a continuation of part 1(a) which seeks "Summary records that indicate the number and type and length of the pricing and listing agreements in place". I found above that the Ministry has narrowed the scope of the appellant's request in part 1(a) to include only listing and pricing agreements in place as of the date of his request in 2008. Therefore, I will order the Ministry to conduct another search for responsive records that detail the "outstanding number and type of [listing and pricing] agreements [dated from October 1, 2006 to the date of the request] and projected dates for implementation" of these agreements.

ECONOMIC AND OTHER INTERESTS

I will now determine whether the discretionary exemptions at sections 18(1)(c) and (d) apply to Records 2 and 3.

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

For section 18(1)(d) to apply, the Ministry must demonstrate that 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.

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:

> 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 Ministry submits that disclosure of the information at issue could reveal how much a named manufacturer paid the Ministry as a volume discount amount or other financial and "value for money" conditions a manufacturer agreed to provide to the Ministry for a specified drug. It claims that this would result in drug manufacturers being less likely to provide significant discounts, or accept the conditions described in the records, if they anticipated that this information would be disclosed to any requester, including their competitors, or third parties preparing to negotiate with them. It states that:

[T]he ODB [Ontario Drug Benefit Plan] budget forms a significant part of the provincial budget, any prejudice to the Ministry's economic interests in this regard has a repercussive, concomitant negative impact on the government's financial interests. This negative impact has been heightened by the current, severe economic situation affecting the province…

The Ministry submits that if the severed information were disclosed, manufacturers would consider this a frank breach of their expectations and, in the future, would be more reluctant to negotiate significant volume discounts. The disclosure of this information can negatively affect the manufacturer's competitive position since the information could be used by other provinces and private sector companies negotiating with the manufacturers as a low benchmark price for the manufacturer's given drug products. 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. …Without those [volume discount amount] 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 submits that the information severed from Records 2 and 3 reveals the precise details of the negotiations that took place between the Ministry and the manufacturers in respect of the listing and pricing agreements reflected in the records. The disclosure of these details would interfere with the Executive Officer's ability to use certain incentives and strategies in future negotiations with manufacturers, since the Ministry could not provide assurances of confidentiality in respect of these details. This, in turn, would reduce ODB savings that might otherwise be achievable if the Ministry could assure manufacturers that the details of their negotiations would remain confidential…

Record 2

The information severed from Record 2 describes the type of agreements negotiated for each of the drugs listed in the record. Although these are all listing or pricing agreements, the descriptor reveals the particular type of cost benefit the Ministry was able to negotiate for the named drug… [T]o a competing manufacturer or a third party purchaser negotiating with the manufacturer of the name drug, this is valuable information about the conditions the manufacturer accepted in its negotiations with the Executive Officer.

Record 3

The Ministry severed three types of information from Record 3:

- Former Benefit Price;
- Manufacturer Submitted List Price; and

- Headings that reveal the formula, or values for calculating the formula to determine the volume discount, or other financial information about the agreements pertaining to the listed drug products…

Former Benefit Price
Concerning this severance, the Ministry submits that:

> The Former Benefit Price information …reveals the actual baseline price used in negotiations between the Ministry and the manufacturer; that price is used as the baseline for calculating what should be the volume discount amount paid by manufacturers. If this price is disclosed, a sophisticated requester could calculate the approximate volume discount amount for a given drug product fairly accurately, based on the difference between the current Formulary price and the Former Benefit Price…
>
> The disclosure of the Former Benefit Price could also result in lower cost savings for the Ministry in the context of future negotiations with competitors of the manufacturers whose drug products are listed in this record. For example, if a competing drug manufacturer produces a drug similar to one listed in this record, the manufacturer would use the Former Benefit Price as leverage for negotiating that price with the Ministry when in fact its product is cheaper to produce than the one listed in this record. The disclosure (and certain distribution) of the baseline price information in respect of the similar drug would make it difficult for the Executive Officer to insist on using a lower baseline price as a starting point for negotiating with the competitor - - thereby effectively raising the price of the drug…

Manufacturer Submitted List Price
Concerning this severance, the Ministry submits that:

> [T]he Manufacturer Submitted List Price information is the actual volume discount price provided by the manufacturer…

Headings
Concerning this severance, the Ministry submits that:

> Most of the headings severed from Record 3 set out the actual volume discount formula plus a value for one or more of the lettered factors.

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 Ministry provided letters from the drug manufacturers referred to in the records. These letters consistently support the Ministry in its representations concerning the harm that would flow from disclosure of the pricing and financial information contained in the pricing and listing agreements.

The appellant did not provide direct representations respecting the application of sections 18(1)(c) and (d), other than to state that the information at issue should not be secret, but should be transparent. These arguments are best addressed in the portion of this order that concerns whether section 23 applies because there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1) exemption.

Analysis/Findings

Record 2

The information severed from Record 2 concerns whether a volume discount amount or other financial and "value for money" conditions were obtained by the Ministry in its listing agreement with a drug manufacturer. As such, it describes the type of condition negotiated for each of the drugs listed in this record, not the amount of the volume discount or the specific details of the other negotiated conditions concerning a particular drug.

As reflected in the parties' representations, the negotiation of volume discounts and other conditions by the Ministry with drug manufacturers is public information. The Ministry has not demonstrated that disclosure of the information at issue in this record could reasonably be expected to lead to manufacturers not providing the Ministry with a lower benchmark price for its drug products.

The manufacturers in their letters are concerned with their specific pricing and financial information being disclosed. Record 2 does not contain specific pricing or other detailed monetary information. Therefore, disclosure of the information at issue in this record would not reveal or result in the revelation of the volume discount amounts paid by drug manufacturers to the Ministry, the method for calculating these payments nor the specific details of the financial and value for money conditions negotiated as consideration for the Ministry entering into pricing and listing agreements with drug manufacturers. Although disclosure would reveal whether a specific drug is associated with a volume discount or other type of condition, the details of this benefit granted to the Ministry is not revealed by disclosure of the information at issue in Record 2.

In reaching my conclusion on the applicability of sections 18(1)(c) and (d) to the information at issue in this record, 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 in Record 2 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 the method for calculating this amount for specific drug products nor the actual specific details of the financial or "value for money" conditions.

Accordingly, I find that the information at issue in Record 2 is not exempt under sections 18(1)(c) and (d) as disclosure could not reasonably be expected to prejudice the economic interests or the competitive position of the Ministry and 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. As no other exemption has been claimed for this information, I will order it disclosed.

Record 3

The Ministry severed three types of information from Record 3:

- Former Benefit Price;
- Manufacturer Submitted List Price; and
- Headings that reveal the formula, or values for calculating the formula to determine the volume discount, or other financial information about the agreements pertaining to the listed drug products…

Based upon my review of the information at issue in Record 3, I find that the disclosure of the information at issue in this record would reveal or could result in the revelation of the volume discount amounts paid by drug manufacturers to the Ministry, the method for calculating these payments and the specific details of the financial and value for money conditions negotiated as consideration for the Ministry entering into pricing and listing agreements with drug manufacturers.

Based on my review of the records, I agree with the Ministry that disclosure of the information at issue in this record could reasonably be expected to attract the harms contemplated in sections 18(1)(c) and (d). The specific information about how much a named manufacturer paid the Ministry as a volume discount amount could be used by other potential bulk prescription drug purchasers as a discount standard or price goal to be obtained from the drug manufacturers.

I find 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 [Order PO-2786]. Furthermore, other drug manufacturers would expect Ontario to negotiate a lower volume discount in the future for their drugs, if it is revealed that Ontario was willing to negotiate a lesser discount for a similar drug with another drug manufacturer. I find that disclosure of the information at issue could 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 [Order PO-2780].

In reaching my conclusion as to the applicability of sections 18(1)(c) and (d) to the information at issue in the records, I have considered the reasoning of Adjudicator Catherine Corban in Order PO-2569, where she stated that:

> …disclosure would demonstrate to other private sector industries seeking [the Financial Contribution that Ontario was prepared to make in support of a specified project] "how far Ontario is prepared to go in order to attract business to Ontario". Considering the information contained in the records, I accept that disclosure of this information would undermine Ontario's ability to negotiate competitive financial contribution packages with respect to business ventures. I accept that disclosure of this information would not only give an indication of how much Ontario might be willing to contribute to Bombardier's competitors in the aerospace industry but that would also set a benchmark for other large industry sectors in their attempts to negotiate financial contribution packages for comparable projects. Even for projects that could not be considered comparable, in my view, knowledge of Ontario's contribution would allow other industries to make an educated guess as to what Ontario's bottom line might be for their projects. Therefore, I accept that if this type of information were available to industry players, it could reasonably be expected to prejudice the economic interests of the Ministry and would be injurious to the financial interests of the Government of Ontario, by weakening its negotiating position.

In conclusion, I find that the Ministry has provided the kind of detailed and convincing evidence required to demonstrate that disclosure of the information at issue in Record 3 could be reasonably expected to prejudice the economic interests or the competitive position of the Ministry and 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) apply to the information at issue in this record.

EXERCISE OF DISCRETION

I will now determine whether the Ministry exercised its discretion under section 18(1) with respect to the information at issue in Record 3, and if so, whether I should uphold this exercise of discretion.

The section 18(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Concerning section 18(1), the ADM explained her exercise of discretion as the Executive Officer of the Ontario Public Drug Programs to not release the information at issue as follows:

> Under the *Act*, the principle of the public's right of access to government information must be balanced against the purpose of the exemption under which the information may be withheld. Accordingly, only very limited information was severed from the various records. ... Although there may be a generalized public interest in the disclosure of information about pricing and listing agreements, the disclosure of the detailed information at issue … would primarily serve private interests - - those of competing drug manufacturers. Typically, requests for information of the type at issue in this appeal are made by competitors of the drug manufacturers named in the records, and the goal of a competitor's request is to serve its own private commercial interest, not the public interest.
>
> Knowing the difference between the listed Drug Benefit Price for a given drug and the "effective price" paid by the Ministry would demonstrate the extent of the savings the Ministry has achieved for Ontario taxpayers and how the Ministry has promoted efficiencies in Drug Programs. Considered from this perspective, the Ministry could benefit from the public disclosure of this "good news" item.
>
> In my view, however, the public interest is best served in this case by not disclosing this information, in order to preserve the overriding public interest in the Government's ability to control drug costs for the benefit of Ontarians, and to ensure that the Government is able to make a wide array of necessary drug products available to vulnerable ODB recipients. This is consistent with the principles set out in the *ODBA*, which aims to meet the needs of Ontarians as patients, consumers and taxpayers; to achieve value-for-money; and to ensure the best use of resources at every level of the system.
>
> Consequently, if the disclosure of the information at issue would in any way discourage drug manufacturers from agreeing to provide significant volume discounts to the Ministry through negotiated agreements, this would prejudice the public interest. Higher costs for ODB Program benefits necessarily prejudice the Ministry's and the province's financial interests which, in turn, has a direct, negative impact on taxpayers.
>
> The extent to which transparency is reduced by not disclosing information that relates only to the calculation of volume discount amounts is small when compared to the greater benefit of ensuring the Government's ongoing ability to manage the costs of the ODB Program.
>
> In addition:
> Disclosure of the information would undermine the principles set out in section 0.1 of the ODBA, and the legislative intent underlying the entire statutory scheme.

> Disclosure of the information would be inconsistent with the intent of the ODBA Regulation, which expressly sets out what aspects of these agreements should be made public.
>
> I have exercised my discretion carefully; only information that could be used by the appellant to calculate the volume discount amount, or determine other value for money conditions underlying the agreements has been severed. Most of the information requested by the appellant has already been disclosed to him, including the body of the pricing and listing agreement templates.
>
> My approach is consistent with other Canadian jurisdictions in treating volume discounts provided by drug manufacturers as highly confidential information.
>
> Drug manufacturers were unanimous in their view that pricing information is confidential and should not be disclosed for the reasons described in the letters that I have enclosed in support of the Ministry's representations in this appeal.

The appellant submits that there are at least three problem areas with the way discretion was exercised with respect to Record 3, as follows:

> 1. The same person responsible for making the access decision to exempt the drug payment data is the Executive Officer who entered into discussions with drug companies about those payments. This places the Ministry's access decision making on a conflict of interest course and colours the access decision made.
> 2. In exercising the discretionary test under Section 18(1), the Ministry failed to consider applying the public interest override test in Section 23.
>
> 3. The Ministry is creating two classes of requesters - lay people and sophisticated users supposedly all private-interest people. The *Act* makes no such distinctions but states that exercising discretion should lean to disclosure, not to how or why the data could be used.

Analysis/Findings

The sections 18(1)(c) and (d) exemptions seek to protect the economic interests of institutions or the Government of Ontario. I found above that disclosure of the information at issue in Record 3 could reasonably be expected to cause economic harm to the Ministry and the Province of Ontario under sections 18(1)(c) and (d). Although the Executive Officer was responsible for making the access decision to exempt the drug payment data and also entered into discussions with drug companies about those payments, I find that I have no evidence before me that supports a finding that the Executive Officer had a personal interest in the disclosure or non-disclosure of Record 3 [Order M-1091]. I cannot conclude from the evidence before me that she exercised her decision-making power in this appeal in bad faith or for an improper purpose. Therefore, I find that the appellant has not established that the decision-maker on his access

request had a conflict of interest or was biased, or that there was a reasonable apprehension of bias [Order PO-2381].

In this appeal, the Executive Officer considered the purposes of the *Act*, including the principles that information should be available to the public, the wording of the exemption and the interests it seeks to protect, the nature of the information and the extent to which it is significant to the Ministry and whether the requester has a sympathetic or compelling need to receive the information.

Having considered all of the circumstances of this appeal, I am satisfied that the Ministry exercised its discretion in a proper manner under section 18(1), taking into account relevant considerations and not taking into account irrelevant considerations, in withholding the information at issue. The information at issue is significant to the Ministry. Therefore, I find that the Ministry's exercise of discretion was reasonable with respect to Record 3 and I uphold the claimed exemptions in sections 18(1)(c) and (d) for the information at issue in Record 3.

I will consider below the application of the public interest override as suggested by the appellant.

PUBLIC INTEREST OVERRIDE

I will now determine whether there is a compelling public interest in disclosure of Record 3 that clearly outweighs the purpose of the section 18(1) exemption.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, **18**, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]
- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

The appellant first raised the issue of the applicability of the public interest override in section 23 and also provided a National Post article in support. He states that:

> The issue of Ontario's not being willing to disclosure summary data related to its drug purchasing it buys for the Formulary by way of Ministry drug company agreements is of significant public interest:
>
> - given the way the agreements are set up raises questions on side deals, potential conflict of interest, inflated discount prices and best value
>
> - as prescription drugs account for such a big expenditure in Ontario health care, how can fair or too high drug pricing data be hidden in a public drug program. - is there sufficient evidence that this is an effective mechanism to help manage this part of the economy, and has Ontario's Auditor even reviewed the Ministry's claims that this management discount pricing tool and approach is really "good news" for lowering drug prices? Is it really all "good news" needs a public face.
>
> - given that a significant number of millions more Ontario residents (other than the 2.4 or 2.6 or 2.8 million people that the Ministry at different points alludes to and states are covered under the Ontario Drug Benefit Program) have to pay higher and fuller drug prices that are not discounted and that have a higher list price…
>
> A minimal degree of accountability is suspect in this case especially when some 50 multinational drug companies have and will keep having such secret arrangements with side-deals with the Ministry. The data sought is summary items and would shed further light on the agreement process

The Ministry submits that:

> …a public interest does not exist in the records simply because they relate to the expenditure of public funds. To find otherwise would mean that every record relating to the expenditure of public funds would be subject to disclosure under section 23, because neither sections 17 or 18 would apply to protect the confidentiality of the records. This would effectively distort the application of the *Act*…

The Ministry submits that the appellant has failed to demonstrate that there is a public interest in the disclosure of the actual records at issue in this appeal. The details of contractual arrangements that the Ministry has with particular companies is not of general public interest. By contrast, if there were allegations in the media that the Ministry was misspending public funds or not obtaining value-for-money in its contractual arrangements with particular drug manufacturers, the issue might very well be different. …In addition, the Ministry submits that much of this information can be characterized as relating to cost-savings, not cost expenditures. What the appellant wants to know is not how much public money the Ministry spent, but rather, how much money it received under certain contractual arrangements.

Further, the Legislature's intention regarding the level of transparency and openness that should apply to agreements between the Ministry and drug manufacturers is clearly evidenced in the amendments it made to the *ODBA*, [section 1.2(2)]…

This provision prescribes what information must be listed on the Formulary. The Ministry complies with these requirements by ensuring that the listed price being offered by a manufacturer, which is the maximum price paid by the Ministry, is properly subject to public scrutiny.

Furthermore, the Ministry consulted directly with the drug industry about what level of transparency would allow the Government to not only control the cost of drugs for the benefit of Ontarians, but also ensure public accountability. As a result of these informed consultations, the Legislature chose not to require the disclosure of negotiated volume discounts under the Formulary. This is also clearly evidenced in the ODBA Regulations, which provide:

> 12.(7) If required by the executive officer, the manufacturer of the product shall enter into an agreement with the executive officer that specifies any volume discount or other amount that may be payable by the manufacturer to the Minister of Finance, and shall agree that the executive officer may make public the following information, and that information only, with respect to the agreement:
>
> 1. The name of the manufacturer.
>
> 2. The subject-matter of the agreement.
>
> 3. The fact of entering into or terminating the agreement.

...As noted by the Executive Officer of the Ontario Public Drug Programs [the ADM] …the public interest is, in fact, best served by not disclosing these records

> since disclosure would discourage other drug manufacturers from agreeing to provide significant volume discounts to the Ministry. As a consequence, disclosure would actually adversely impact the Ministry's ability to control drug costs for Ontarians…

The appellant provided me with a newspaper article published in the National Post entitled "Drug Firms Revamp Pricing". In his letter that accompanied the article, he stated that the article confirms that Ontario drug pricing scheme is too secretive, such secrecy can lead to questionable deal-making and that such a scheme creates a two tier drug pricing scheme, leaving many in Ontario on private plans and without coverage paying higher prices.

In response to the National Post article, the Ministry submits that:

> … this article demonstrates that there is a forum to address public interest considerations regarding Ontario's drug pricing scheme, and that the public interest does not extend to the detailed information about actual drug pricing contained in the records at issue in this appeal (Orders P-123 and P-124).
>
> …the following facts outlined in the article support the Ministry's previous submissions that there is in fact a public interest in not disclosing the information at issue in this appeal:
>
> - Quote from the Executive Officer [the ADM] confirming that non-disclosure of drug pricing is unavoidable because the drug industry has indicated that it will not enter into negotiations if the results were to become public;
>
> - Quote from the Executive Officer acknowledging that although not 100% transparent, the current drug pricing system saves the Government tens of millions dollars, which are re-invested in the public drug system.
>
> Conclusion
> For these reasons the Ministry respectfully submits that the single National Post article provided by the appellant is not sufficient evidence of a "compelling" public interest in the detailed drug pricing information and formulas that are actually at issue in this appeal…

Analysis/Findings

The appellant's representations on the question of a possible public interest in the withheld portions of Record 3 raises broad public accountability issues regarding access to contracts entered into by publically-funded institutions. Even though there is generally a significant public interest in obtaining access to agreements entered into by institutions, I am not satisfied that there exists a compelling public interest in disclosure of the information at issue in the records in the present appeal.

Although the appellant claims that the volume discounts scheme leaves many in Ontario on private plans and without coverage paying higher drug prices, I am not satisfied that even if this is the case that disclosure of the information at issue would significantly aid in remedying this situation. The information at issue reveals how much the Ontario government pays for drugs purchased in bulk from manufacturers for its ODB program. This pricing information does not relate to the pricing of the same drugs purchased by private interests.

In my view, the public information already available serves to inform the public about many of the specifics of the listing and pricing agreements entered into by the Ministry with drug manufacturers. The information severed from Record 3 reveals the volume discount amount obtained by the Ministry or the method for calculating this amount. The Ministry has disclosed the remaining aspects of this record. I agree with the Ministry that it has provided enough information to satisfy whatever public interest there may be in the price and types of drugs covered by listing and pricing agreements, without revealing information that both the Executive Officer and the manufacturers considered highly confidential.

Furthermore, I am not persuaded that any public interest that may exist in the disclosure of the information would outweigh the purpose of the section 18(1) exemption. As identified above, sections 18(1)(c) and (d) serve the purpose of protecting the ability of institutions to earn money in the marketplace. These exemptions recognize that institutions sometimes have economic interests and compete for business with other public or private sector entities, and provide discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions. I have found that disclosure of the information withheld in Record 3 could reasonably be expected to result in the harms contemplated by sections 18(1)(c) and (d). I am not satisfied that there exists a public interest in the disclosure of this information that clearly outweighs the sections 18(1)(c) and (d) exemptions.

Accordingly, in the circumstances, I am not satisfied that the public interest override applies to the withheld portions of Record 3 for which sections 18(1)(c) and (d) was claimed.

ORDER:

1. I order the Ministry to issue an access decision to the appellant for all of the portions of Record 3 marked by the Ministry as non-responsive and for the portions of Record 1 that I have found to be responsive to the appellant's request, treating the date of this order as the date of the request. For ease of reference I have highlighted on a copy of page 2 of Record 1 the portions of this record that I have found to be responsive to the appellant's request.

2. I order the Ministry to conduct another search for responsive records that detail the outstanding number and type of listing and pricing agreements dated from October 1, 2006 to the date of the appellant's request and the projected dates for implementation of these agreements and to provide the appellant with a decision in accordance with the provisions of section 26 of the *Act*, treating the date of this Order as the date of the

request. I further order the Ministry to provide me with a copy of its decision letter to the appellant.

3. I order the Ministry to disclose to the appellant by **February 3, 2010** all of the portions of Record 2 that is has withheld under sections 18(1)(c) and (d).

4. I uphold the Ministry's decision to deny access to the portions of Record 3 that it has withheld under sections 18(1)(c) and (d).

5. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the portions of Record 2 disclosed to the appellant.

Original signed by: January 13, 2010
Diane Smith
Adjudicator