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

ORDER PO-2863

Appeal PA08-297

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 requester specifically sought:

1. the model or mock up pricing and listing agreements, and procedures to negotiating, finalizing, and maintaining, amending or appealing under these agreements with drug manufactures;

2. any specific records on what's considered reasonable pricing under these pricing agreements, what kind(s) of pricing ratio/formula or bench marks exists between the list price and payments to be received, and what kind(s) of a relationship exists between pricing and listing agreements whether done as separate agreements or not;

3. the payment/reimbursement procedures/requirements;

4. the job description and terms of reference of the Executive Officer (ADM) in reference to these agreements and related matters, along with the Ministry's responsibilities in reference to these agreements;

5. 2007, 2008 meeting and briefing notes on administering and interpreting these agreements; and,

6. 2007, 2008 evaluations, audits or status reports to date on these new agreements and procedures.

The Ministry located a number of responsive records and provided access to them in part. The Ministry denied access to other responsive records claiming the application of the exemptions in sections 17(1)(b) and (c) (third party information), 18(1)(c)and (d) (economic and other interests) and 21(1) (personal privacy). In addition, the Ministry determined that the records contained some information that was non-responsive to the request.

In response to a clarification letter sent to the Ministry by the requester, the Ministry issued a follow-up decision that provided access to several additional records. The Ministry also issued a third decision letter answering a second set of questions posed by the requester.

The requester, now the appellant, appealed that decision. During the mediation process, the Ministry disclosed further records to the appellant.

In response to part 1 of the request, the Ministry located the template for the Pricing Agreement and the template for the Listing Agreement. The majority of the information contained in these records was disclosed to the appellant. Access to portions of these records was denied in accordance with sections 18(1)(c) and (d). The appellant advised that he disagrees with the Ministry's decision and seeks access to the withheld portions of these records.

The appellant advised the mediator that he believes that additional records responsive to part 2 of the request must exist. In particular, he believes that there must be background material discussing how the Ministry arrived at the pricing formula for the agreements. Therefore, the reasonableness of the Ministry's search for records responsive to part 2 of the request is at issue.

In response to part 3 of the request, the Ministry advised that the records responsive to this part of the request are the same as the responsive records in part 1 of the request. The appellant advised that he accepts the Ministry's explanation and that part 3 is not at issue in this appeal.

A copy of the job description for the Executive Officer was provided to the appellant in the subsequent decision letter dated November 19, 2008; therefore, part 4 of the request is not at issue in this appeal.

In response to part 5 of the request, the Ministry disclosed a briefing note from the Ontario Pubic Drug Program. The Ministry withheld a portion of the briefing note as non-responsive to the request. In a subsequent decision, the Ministry released a sample portion of a non-responsive briefing note to the appellant to show the material is, in fact, non-responsive. The appellant, however, still seeks access to the portion of the records that the Ministry claims is non-responsive and advised that he wishes to proceed with part 5 of the appeal.

In response to part 6, the Ministry disclosed the records in part. The appellant advised that he seeks access to all the withheld portions of these records, including the portions marked as non-responsive.

As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeal process where 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 seeking representations on all of the issues. I also sent a Notice of Inquiry seeking representations to the affected party whose third party information may be contained in the Summary Report (Record 4). As well, I sent a Notice of Inquiry seeking the representations of two affected persons whose personal information may be contained in the Summary Report. I received representations from only the Ministry and the affected party, not the affected persons. The Ministry advised in its representations that it did not rely on the third party exemption in section 17(1). However, this mandatory exemption was relied upon by the affected party concerning a single paragraph in Record 4.

I then sent a copy of the representations of the Ministry and the affected party to the appellant, along with a Notice of Inquiry. Portions of these representations were withheld due to confidentiality concerns. As the appellant raised the application of the public interest override in section 23 of the *Act*, I also sought representations from the appellant on the application of section 23 to the records. I received representations from the appellant in which he withdrew his appeal concerning the non-responsiveness of portions of Record 3, therefore, Record 3 is no longer at issue. I sent a copy of the appellant's representations to the Ministry, seeking representations in reply from it, including representations on the application of section 23. I received reply representations from the Ministry in response. 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.	Template for Pricing Agreement	in Part	18(1)(c) and (d)
2.	Template for Listing Agreement	in Part	18(1)(c) and (d)
4.	Summary Report	in Part	18(1)(c) and (d); 13(1); 17(1); 21(1)
5.	Deliverables Report	in Part	18(1)(c) and (d); non-responsive

DISCUSSION:

RESPONSIVENESS OF RECORDS

I will first determine whether a portion of Record 5 is 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].

The Ministry submits that:

> [I]n response to part 6 of the appellant's original request, the Ministry disclosed a portion of Record 5 and severed one paragraph on page 2 of the record as non-responsive. Part 6 of the request is very precise: "2007, 2008 evaluations, audits or status reports to date on these new [pricing and listing] agreements" (emphasis added). Record 5 is a Deliverables Report on these agreements and is therefore responsive to the request. However, the paragraph severed on page 2 refers to a Ministry activity, not an aspect of the agreements or the manufacturers' obligations (i.e. deliverables) under those agreements. Furthermore, a Ministry activity or obligation that is neither reflected in nor arises from these agreements cannot be a factor included in the "evaluation, audit or status" of the agreements.
>
> Therefore the Ministry submits that the paragraph on page 2 was properly removed from the record as non-responsive because it falls outside the scope of the appellant's request. In part 6 of his request he did not ask for information about Ministry activity or information that is not included in the provisions of pricing or listing agreements.

The appellant submits that the Ministry took a narrow view of its own internal reporting activity status reports.

Analysis/Findings

Based on my review of the information at issue, I find that it is responsive to the appellant's request. This information concerns the evaluation of a listing agreement. The information at issue is located under the column entitled "Timeframe". The remaining information in this column has been released. As this information contains an evaluation of a listing agreement in 2007, it is responsive to the request. The Ministry has not claimed an exemption for this portion of Record 5 that it held as non-responsive. Since the Ministry has not turned its mind to whether or not an exemption should have been claimed for this portion of Record 5, I will return the matter to the Ministry for a decision respecting access.

ECONOMIC AND OTHER INTERESTS

I will now 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

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 provided both confidential and non-confidential representations on the applicability of sections 18(1)(c) and (d) to the information at issue in the records. In its non-confidential representations, it submits that disclosure of the information at issue would reveal the confidential volume discount amounts and other information that relates to the calculation of the volume discount amounts paid by drug manufacturers to the Ministry pursuant to listing or pricing agreements. 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.
>
> Volume discounts are negotiated by the Executive Officer with each manufacturer, in confidence, and are included in the Schedules of Listing and Pricing Agreements. The information severed from the records at issue in this appeal reveals, or could be used in combination with other information to reveal how much a named manufacturer paid the Ministry as a volume discount amount, and what other financial and "value for money" conditions a manufacturer agreed to in its confidential negotiations with the Executive Officer…
>
> 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. That trust is premised, in large measure, on maintaining the confidentiality of the volume discount amount, the value for money conditions in the listing and pricing agreements, and the actual details of the negotiations. Without that trust, the Ministry's ability to negotiate significant savings in respect of the ODB Program is hampered. The Ministry submits that it would 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.

Records 1 and 2 are the Template Listing and Pricing Agreements. The information severed from both records sets out a formula for the "Calculation of Volume Discount". The information

severed from Records 4 and 5 contains the actual volume discount amounts expressed in numerical values and a description of other specific value for money conditions used to leverage the discount amounts. The Ministry submits that the information severed from Records 4 and 5 reveals the mechanics of the negotiations that took place between the Ministry and the manufacturers in respect of the listing and pricing agreements that are reflected in the records.

The Ministry provided detailed representations as to how the information at issue in the records could be used to calculate the volume discount and other monetary conditions negotiated by the Executive Officer in the listing and pricing agreements with individual drug manufacturers. Concerning the individual records, it also stated that:

> 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…

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 information at issue in the records.

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 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

I find that the disclosure of the information at issue in the records 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 each drug manufacturer.

Based on my review of the records, I agree with the Ministry that disclosure of the information at issue in the records could reasonably be expected to attract the harms contemplated in sections 18(1)(c) and (d). The information about how much a named manufacturer paid the Ministry as a volume discount amount and what other specific financial and value for money conditions a manufacturer agreed to provide to the Ministry 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 for which it has claimed the sections 18(1)(c) and (d) exemptions could reasonably be expected to prejudice the economic interests or the competitive position of the Ministry, and 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) apply to the information for which it has been claimed.

ADVICE TO GOVERNMENT

I will now determine whether the discretionary exemption at section 13(1) applies to five portions of Record 4, identified in this record at pages 1, 5, 8, 9 and 10.

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair

pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993 upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, cited above; and Order PO-1993, cited above]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, cited above; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, cited above]

The Ministry submits that:

> … the Committee to Evaluate Drugs' (CED) [formerly the Drug Quality and Therapeutics Committee (DQTC)] role [is] to review submissions made by drug manufacturers who wish to have their products recommended for listing on the Formulary. The CED's terms of reference [include]:

- To recommend to the Executive Officer those new products that should be considered for publicly funded programs, and advise the Executive Officer of the conditions under which such products should be funded;

- To recommend to the Executive Officer which drug products should be designated as interchangeable products or listed drug products for the purposes of the *ODBA* and *DIDFA*.

In doing so, the CED reviews and evaluates the therapeutic value and cost effectiveness of drug products, based on the submissions made by manufacturers. A positive CED recommendation, however, is not a guarantee of listing; the recommendation can be accepted or rejected by the Executive Officer…

The portion severed on page 1 contains information that reflects, and is followed by an actual recommendation of the DQTC. The Ministry submits that this information falls squarely within the exemption as a "recommendation" made to the Ministry that can be accepted or rejected by the Executive Officer.

The Ministry submits that the same reasoning applies to the information on pages 5, 8 and 10, under the heading "Direction"/ "Clinical Direction" The portion on page 5 includes background information about the recommendation, the actual recommendation made, and its implementation. The portions on page 8 and 10 both reveal information about what the CED's advice will include.

The information severed from page 9 reveals what the CED is recommending as a future course of action.

The appellant did not provide representations on whether Record 4 contains advice or recommendations within the meaning of section 13(1).

Analysis/Findings

The CED discusses and provides advice to the Ministry in respect of manufacturers' submissions. The CED is an advisory body to the Ministry and is an entity intended to be covered by section 13(1) (see Orders 68 and PO-2773). I find that the information at issue suggests a course of action that will ultimately be accepted or rejected by the person being advised.

The information at issue in the records contains the CED recommendations concerning named drugs. In my view, this information meets the requirements for exemption under subsection 13(1). Further, I find that none of the exceptions in sections 13(2) and 13(3) to section 13(1) apply. Therefore, I find that disclosure of the information at issue would reveal the advice or recommendations made by the CED to the Ministry and is, therefore, subject to my review of the Ministry's exercise of discretion and the application of the public interest override in section 23, exempt under section 13(1).

EXERCISE OF DISCRETION

I will now determine whether the Ministry exercised its discretion under sections 13(1) and 18(1), and if so, whether I should uphold this exercise of discretion.

The sections 13(1) and 18(1) exemptions are discretionary, and permit 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 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. For example, the only information severed from the template agreements at issue … is Schedule B... 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 in these appeals 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 s request is to serve its own private commercial interest, not the public interest.
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> 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.
>
> 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.

Concerning the exercise of discretion under section 13(1) the Ministry submits that:

> [T]he factors the Ministry took into account in deciding not to exercise its discretion to disclose under s. 13(1) were:
>
> - The importance of protecting the CED's processes;
> - Disclosure of the CED's recommendations would set a very problematic precedent; if disclosed in this appeal, drug manufacturers would pressure the Ministry to disclose them in all instances in the future, and this would affect the integrity of the CED process;
> - The Ministry's consistent historic practice is to deny access to CED advice and recommendations based, in part, on s. 13(1);
> - Ensuring that CED recommendations are made in confidence that they will not be revealed, thereby encouraging frank and full discussions by CED members;
> - Protecting the integrity of the Ministry's drug submission and drug formulary listing process;
> - The negative financial impact disclosure would have on health care costs in the province, given the high costs associated with the ODBP;

- The likelihood that only competing drug manufacturers would be interested in the information at issue, and not the general public;

The appellant submits that:

> It is better to err on the side of disclosure, especially in the section 13(1) claims and in disclosures about the Committee to Evaluate Drugs process. The section 18(1) claims are questionable if the Ministry through side arrangements and incentives is not helping the integrity of drug pricing discounting and the very person exercising access decision making is also making such side arrangements.

Analysis/Findings

The sections 18(1)(c) and (d) exemptions seek to protect the economic interests of institutions or the Government of Ontario. The section 13(1) exemption seeks to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations and also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure. I found above that disclosure of the information at issue could reasonably be expected to cause economic harm to the Ministry and the Province of Ontario under section 18(1) or would reveal associated advice or recommendations under section 13(1).

Having considered all of the circumstances of this appeal, I am satisfied that the Ministry exercised its discretion in a proper manner under sections 13(1) and 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 and I uphold the claimed exemptions in sections 18(1)(c) and (d) and 13(1).

In addition, as section 18(1)(c) and (d) was claimed for the same information in Record 4 that section 17(1) was claimed, there is no need for me to consider the application of the third party exemption in section 17(1) to this same information.

PUBLIC INTEREST OVERRIDE

I will now determine whether there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13(1) and 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.

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-347 and 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.)].

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 raised this issue for the first time in his representations. He states that the information in the records should be disclosed to ensure that meaningful discounts are being achieved by the Ministry. He submits that:

> The issue of the process whereby Ontario's discounts drugs it buys for the formulary by way of drug company agreements and side deals set up by the Ministry is of significant public interest…

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 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 the records 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. Records 1 and 2 are Template Listing and Pricing Agreements. The only information severed from both records is Schedule B, which sets out a formula for the "Calculation of Volume Discount". The remainder of these two records has been disclosed to the appellant.

The information severed from Records 4 and 5 contains the actual volume discount amounts expressed in numerical values; the formulae used to calculate the volume discount (as per Schedule B of Records 1 and 2); and a description of other specific value for money conditions accepted by manufacturers in their negotiations with the Executive Officer (the ADM). The Ministry has disclosed other aspects of these records, such as (in Record 4), the dates of the agreements, the listing dates, non-fiscal deliverables and (in Record 5), the CED Direction in respect of most drug products. I agree with the Ministry that it has provided enough information to satisfy whatever public interest there may be in these agreements, without revealing information that both the Executive Officer and the manufacturers consider 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 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 information 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 the information at issue that clearly outweighs the sections 18(1)(c) and (d) exemptions.

I am also not persuaded that any public interest that may exist in the disclosure of the information would outweigh the purpose of the section 13(1) exemption. The purpose of section 13(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making without unfair pressure. I am not satisfied that there exists a public interest in the disclosure of the information at issue that clearly outweighs the section 13(1) exemption.

Accordingly, in the circumstances, I am not satisfied that the public interest override applies to the withheld portions of the records for which sections 13(1) and 18(1) were claimed.

PERSONAL INFORMATION

I will now determine whether Record 4 contains "personal information" as defined in section 2(1) and, if so, to whom it relates. The Ministry severed the names of CED expert reviewers from pages 1 and 8 of this record.

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Section 2(3) of the *Act* modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

The meaning of "identifiable"

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry submits:

> …that the names of expert reviewers who provide advice to the Ministry on the listing of potential drugs on the Formulary, has consistently been treated as personal information by the Ministry and by the IPC [Information and Privacy Commissioner/Ontario].
>
> In accordance with Orders P-661, P-235, PO-1834 and PO-2617, the Ministry submits that the names of the identified reviewers fall within the definition of personal information under section 2(1)(h) of the *Act*. As the IPC itself explains in PO-1834, "it is reasonable to expect that disclosure of the names alone ... would reveal the fact that these individuals are retained by the Ministry to review particular drug products. Therefore, the names qualify as personal information under [section 2(1)(h)]".
>
> The Ministry submits that the same reasoning applies to the names severed in this record. These individuals were retained to review the drugs at issue because of their particular medical or scientific expertise.

The Ministry acknowledges that in Order PO-2773, issued on April 6, 2009, the IPC signaled that it was taking a new approach to such information, based on s. 2(3) -- the new exception to s. 2(1) --which excludes the "name, title contact information or designation of an individual that identifies the individual in a business, professional or official capacity". In that Order, the Adjudicator concluded that "the names of the affected persons is not personal information, but information associated with the affected persons in their professional capacity.... The information at issue does not reveal something of a personal nature about these individuals".

The Ministry respectfully submits that the addition of section 2(3) into the *Act* does not change the analysis of the information at issue and, moreover, does not apply to it. In addition, even before the amendment, the Commission had developed its own, non-statutory distinction between "personal and professional" information, and a considerable body of orders that reflected this distinction. The Commission could easily have applied this distinction to the names of DQTC (precursor of CED) expert or external reviewers even without the advent of s.2(3). The fact that it never did so indicates that the Commission accepted and agreed with the Ministry's analysis of this information as personal information falling within s. 2(1)(h): the disclosure of the reviewer's name would reveal "other personal information about the individual".

Furthermore, the record in this case does not include "the title, contact information or designation of the reviewers that "identifies the individual in a ...professional capacity".

The record only contains their names, nothing else. It is the Ministry's submissions that provide context for the name -- that is, the individual's role in the CED process.

The Ministry submits that the only relevant question is whether the disclosure of the individuals' name, in the context of this record, would reveal "other personal information" about the individual -- not whether the individual's name is personal information -which is what section 2(3) addresses.

The Ministry submits that the "other personal information" that would be revealed is information that the IPC has consistently treated as personal information: the fact that these individuals were asked to review a particular drug product for the CED. That they did so in their "professional capacity" is beyond doubt, but the fact that they actually did agree to review a specific drug for inclusion on the Formulary is personal information about them and their activities. It reveals their willingness to be involved in a Ministry process, not as regular CED members, and not as Ministry employees, and that they provided advice to the Ministry in respect of a particular, named drug. Their association with the drug review is what falls within s. 2(1)(h).

The appellant did not provide representations as to whether the names at issue qualify as "personal information" as that term is defined in section 2(1).

Furthermore, as stated above, the expert reviewers (the affected persons) did not provide representations in response to the Notice of Inquiry sent to them.

Analysis/Findings

In Order PO-2773, I determined that the names of expert reviewers or consultants to the CED were not personal information as section 2(3) applies to this information. Section 2(3) reads:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

I stated in that order that:

> Although prior orders have found that the names of reviewers or consultants reviewing specific drugs are personal information, these orders dealt with requests dated prior to the inclusion of section 2(3) in the *Act* on April 1, 2007 [Orders P-661, P-235, PO-1834 and PO-2617].
>
> I find that the information at issue, namely the names of the affected persons, is not personal information, but information associated with the affected persons in their professional capacity.
>
> The affected persons were acting in their professional capacity in reviewing the named drug for the Ministry. The information at issue does not reveal something of a personal nature about these individuals. Review of a drug by an expert in the pharmaceutical field is a professional undertaking and is not personal information. Disclosure of the affected persons' names does not reveal other personal information about them.

I adopt this reasoning to the names of the expert reviewers at issue in Record 4. Furthermore, I do not agree with the Ministry that section 2(1)(h) applies to the names at issue. Disclosure of these names would not reveal other personal information about the expert reviewers. Disclosure would reveal only that these reviewers provided reviews to the CED about information within their professional as opposed to their personal knowledge.

I conclude that the names of the affected persons are not personal information within the definition of that term in section 2(1). As only "personal information" can qualify for exemption under section 21(1), I find that this mandatory exemption does not apply. As no other exemptions were claimed for this information and no mandatory exemptions apply, I will order this information to be disclosed to the appellant.

SEARCH FOR RESPONSIVE RECORDS

I will now determine whether the Ministry conducted a reasonable search for records responsive to part 2 of the request.

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 Ministry was asked to respond to the following, preferably in affidavit form:

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.

The Ministry provided an affidavit from its Director of the Drug Program Services Branch (the DPSB). He states that upon receipt of the appellant's request he assigned a staff member familiar with the particular file, to search for responsive records. He states that his staff located three records responsive to the request; however, no records responsive to part 2 of the request were located.

The Director states that he did not contact the appellant for additional clarification as he felt that the request contained sufficient details, including a timeline, to allow a complete and thorough search to be conducted. After the appellant received the Ministry's initial response, he sent a clarification letter to the Ministry. In response, the Director directed a DPSB staff member to prepare a follow up decision letter, which he reviewed, and in which the appellant was provided with additional information. He also directed the same DPSB staff member to prepare a third decision letter for his review, in which the Ministry responded to a second set of additional questions posed by the appellant.

The appellant believes that further records exist responsive to part 2 "concerning the pricing and issues and was not contacted on this matter".

Analysis/Findings

In my view, the Ministry has provided a thorough explanation of the efforts made by its experienced employees to identify and locate any records responsive to part 2 of the appellant's request, as well as providing an explanation as to why no responsive records could be located. Therefore, I find that the Ministry has provided sufficient evidence to establish that it has made a reasonable effort to identify and locate responsive records and I uphold the Ministry's search.

ORDER:

1. I order the Ministry to issue an access decision to the appellant for the portion of Record 5 that it held as non-responsive, treating the date of this order as the date of the request.

2. I order the Ministry to disclose the withheld names of the drug reviewers on pages 1 and 8 of Record 4 to the appellant by **February 17, 2010** but not before **February 12, 2010**.

3. I uphold the Ministry's decision to deny access to the remaining portions of the records on the basis of the exemptions in sections 13(1) and 18(1).

4. The searches conducted by the Ministry were reasonable and I dismiss this portion of the appeal.

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 4 disclosed to the appellant.

Original signed by: January 13, 2010
Diane Smith
Adjudicator