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

ORDER PO-1834

Appeal PA-990430-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health (now 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 the following information:

> (a) the names of all individuals that have been contracted by the [Ministry] to undertake reviews of:
>
> (i) Drug submission(s) made under the *Ontario Drug Benefit Act*, the *Drug Interchangeability and Dispensing Fee Act*, or the *Prescription Drug Cost Regulation Act*; and
>
> (ii) Requests made by physicians under Section 8 of the *Ontario Drug Benefit Act*.
>
> (b) the names of all such reviewers, the amounts paid to each of these reviewers under their contracts for the years 1997, 1998 and 1999 (up to the date of release of this information). If possible, I would appreciate the information be provided in the following format:
>
> | Name of Reviewer | 1997 Amount | 1998 Amount | 1999 Amount |
> |---|---|---|---|
> | [Name] | [$00.00] | [$00.00] | [$00.00] |
>
> Further, would you kindly provide an update of this information every three (3) months for the next two (2) years (as per Section 24(3) of the *Act*) . . .

The Ministry responded to the request by advising the requester that it was granting access to the amounts paid to reviewers, but not their names. The Ministry explained its decision in some detail, beginning with its position that disclosure of the names would constitute an unjustified invasion of their personal privacy:

> Subsection 21(1), a mandatory exemption under the *Act*, states that personal information shall not be disclosed to any individual other than the individual to whom the information relates. This subsection has been used to sever personal information from the record, the disclosure of which would be presumed to be an unjustified invasion of privacy. In arriving at this conclusion, all of the factors outlined in subsections 21(2) and 21(3) have been considered and subsections 21(2)(f) and (h) have been found to be applicable. This denial of access is consistent with Order P-669 of the Information and Privacy Commissioner/Ontario, in which it was determined that the disclosure of reviewers' names would constitute an unjustified invasion of their personal privacy.
> Medical experts are placed on the list of reviewers in accordance with their specialty to complement the expertise available on the Drug Quality and Therapeutic Committee (DQTC), the advisory body on drug related issues, to the [Ministry]. The list frequently includes one, sometimes two or more medical experts for a specific specialty. An educated

> reader might be able to guess which drug submissions or section 8 requests are reviewed by experts based on their specialties. This information is highly sensitive and the individuals/group of individuals to whom the information relates could be exposed unfairly to pecuniary or other harm and their reputation damaged, should this information be disclosed.
>
> Please note that these reviewers provide opinions/recommendations to the DQTC, on the clinical/pharmacoeconomic documentation submitted by drug manufacturers to have their drug products considered for listing in the Ontario Drug Benefit Formulary. They may also provide opinions on the coverage of non-Formulary drug products under the section 8 mechanism. The DQTC considers all the various reviewers' opinions/recommendations in making its final recommendations to the Ministry.
>
> A recommendation that is not in favour of listing a drug product in the Formulary could have significant impact on a drug manufacturer. Similarly, patients and requesting physicians might not accept a negative recommendation to cover a product under the section 8 mechanism. The Ministry is concerned that the pharmaceutical industry, patients as well as various stakeholder groups (e.g. disease-oriented groups/associations such as AIDS, cancer, heart, etc.) could lobby or even harass reviewers to persuade/influence them towards a position/recommendation when it is clearly in the interest of the government not to cover a specific product. This could potentially have serious detrimental effect on the impartiality of the review process by the consultant and jeopardise the DQTC's independent advisory role to the Ministry.

The Ministry elaborated on its decision to withhold the names on the basis of the "economic interests of government" exemption at section 18(1):

> Subsection 18(1), a discretionary exemption under the *Act*, states that a record may be exempted from access if disclosure would reveal, interfere with and/or prejudice the economic interests of the Government of Ontario or an institution (the Ministry). Clauses (c) and (d) have been used to support this exemption. The Ministry is concerned that if the reviewers cease to provide services to the DQTC and the Ministry as a result of the disclosure of their names, the economic interests of the government and its competitive position might be severely prejudiced. This could also be injurious to the government's ability to manage the economy of Ontario.

The Ministry also advised the requester that it was charging a fee of $300.60 for access to the records and, further, provided a fee estimate of $45.60 for access to each future quarterly report containing similar information.

The requester (now the appellant) appealed the Ministry's decision to this office.

This office initiated the inquiry by sending a Notice of Inquiry to the Ministry, which provided representations in response. The appellant was then sent the Ministry's non-confidential representations, together with a Notice of Inquiry. The appellant provided representations in response.

RECORD:

There are two records at issue in this appeal. Record 1 is a three-page list of names of reviewers, together with the amounts paid to each individual during the periods 1997-1998, 1998-1999 and 1999-2000. Only the individual names have been withheld from this record. Record 2 is a two-page list containing only the names of reviewers. This record was withheld in its entirety.

ISSUES:

PERSONAL INFORMATION

Introduction

In order for the section 21 personal privacy exemption to apply, the information in question must qualify as "personal information". Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including:

> (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,
>
> . . . . .
>
> (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;

Previous decisions

In Order P-235, former Commissioner Tom Wright found that the names of individuals who reviewed drug products for the Ministry constituted personal information:

> The institution cited subparagraphs (b), (e) and (h) of the definition of personal information in claiming that the information in issue is personal information as defined in the *Act*. Subparagraph (h) provides that a name is personal information where it appears with other personal information or where the disclosure of the name would reveal other personal information about the individual. In my view, in the circumstances of this appeal, the disclosure of the names of the individuals would reveal other personal information relating to the individuals because it would reveal that a particular person reviewed a particular drug product. I therefore conclude that the information at issue is personal information and that the personal information is that of individuals other than the appellant.

The former Commissioner's finding was applied in similar circumstances by Assistant Commissioner Tom Mitchinson in two subsequent decisions, Orders P-284 and P-291.

In Order P-661, an additional order involving a request for the names of individual drug reviewers, former Inquiry Officer Anita Fineberg rejected the appellant's argument that she should not follow the previous orders referred to above:

> In Order P-235, Commissioner Tom Wright decided that the name and/or address, title, position or signature of two individuals who had reviewed submissions for the listing of drug products on the Drug Benefit Formulary maintained by the Ministry constituted the personal information of the two individuals. He reached this conclusion on the basis that disclosure of the names of the reviewers would disclose other personal information relating to these individuals, namely that they reviewed a particular drug product. This decision was followed in Orders P-284 and P-291.
>
> As I have indicated, in the present appeal, the names and affiliations appear on a general list of consultants. Each name is not associated with a particular drug product or a review of a particular product. For this reason the appellant maintains that the information at issue is not "personal information" as defined in section 2(1) of the *Act*.
>
> However, both the appellant and the Ministry agree that the external consultants who are retained by the Ministry to do drug product reviews are requested to do so in relation to their own specific expertise. That is, these individuals conduct reviews with respect to their particular expertise in the area of pharmacology relevant to the drug product at issue.
>
> This situation may be contrasted to that of the reviews conducted by the DQTC committee members who are required to review submissions for products that fall both within and outside their areas of expertise. With respect to the committee member reviews, it is difficult for one to "guess" which DQTC reviewer will evaluate a particular drug product based only on information which is available to the public, i.e. the name, business address, speciality, educational degrees and the fact that an individual is a committee member. However, if one were to know the names and affiliation of the external consultants, one could look in the Canadian Medical Directory, a publicly available document, and determine the speciality of the consultants. Because there are so few external consultants of any one speciality, one could then link an individual or a very small group of individual consultants with a particular drug product review.

Accordingly, the information at issue in this appeal can be said to be analogous to that in the appeals that resulted in Orders P-235, P-284 and P-291. On this basis, I conclude that the names and professional affiliation of the DQTC reviewers/consultants constitute the personal information of these individuals under section 2(1)(h) of the *Act*.

Representations

The appellant submits:

> As a matter of interpretation, the term "include" in a definition generally has an exhaustive effect. *R. v. Loblaw Groceterias Co. (Man.)*, [1960] S.C.R. 138. When an

interpretation clause is used in a statute, it may generally be taken that the legislature intended to give the defined word a restricted meaning. See *Re Saskatchewan Co-op Elevator Co.*, [1933] 3 W.W.R. 669 (Sask. K.B.) and *I.A.F.F., Local 209 v. Edmonton (City)* (1979), 9 Alta. L.R. (2d) 119 (C.A.).

Therefore, the phrase "other personal information" [in paragraph (h) of the definition] must be restricted to only the personal information set out in the definition in section 2(1). To qualify as "personal information" under section 2(1)(h), the information must either "appear with" other personal information relating to the individual or the disclosure of the name must reveal other personal information about the individual.

The information sought of the reviewers' names is not requested in the context of other "personal information", therefore, it cannot be said to "appear with" other personal information. One must then consider whether it "would reveal" other "personal information". The "other" personal information which would be revealed must be restricted to that information which falls within the definition in section 2(1) of the *Act*.

The term "would reveal" is not a mere likelihood but a certainty, not a possibility. The language is specific and not permissive. It is not termed "may reveal" but rather "would reveal". The burden of proof upon the Ministry is therefore to prove that in fact the revelation of "other" personal information would occur. It must again be noted that the requirement under section 1 of the *Act* is that "necessary exemptions from the right of access should be limited and specific".

. . . . .

The Ministry relies on Order P-235 in its submission that the information constitutes "personal information". In Order P-235 the requests involved the reviewer's reports, minutes of meetings of the DQTC, internal memoranda of the Ministry and DQTC, all communications between the Ministry and the DQTC and all communications from or to third parties. The circumstances and facts dealt with in Order P-235 differ significantly and are distinguishable from those in this appeal. The information sought to be released in Order P-235 revealed the reviews and reports made by the reviewers and their communications concerning same as well as their names. In Order P-235, the requester was seeking to identify the reviewer together with their opinion, review and report. The individual's name appeared with other personal information relating to the individual, namely, in their written opinions, reports and other communications.

In this appeal, the name alone provides no information regarding the opinion, review or report given by a reviewer. In contrast to the facts in Order P-235, no review, report or communications are requested in this appeal merely the names of the reviewers. What is sought in this appeal is the name of the reviewer in the absence of the reviewer's report.

Commissioner Tom Wright states in summary in his decision in Order P-235 that "*In reaching my conclusion I have considered the fact that the appellant was granted full disclosure of the contents of the two reviewer's reports*."

The determination as to whether the information constitutes "personal information" in Order P-235 is distinguishable from the appeal herein on this basis.

In Order P-284 and Order P-291, the facts are similar to those in Order P-235, namely, that the requester was seeking disclosure of the reviewer's reports, minutes of meetings of the DQTC, internal memoranda of the Ministry and the DQTC, all communications between the Ministry and DQTC and all communications between the Ministry and DQTC or from or to third parties. The circumstances, as in those of Order P-235, in Order P-284 and Order P-291 are distinguishable from the present appeal.

With respect to Order P-669, [I do] not agree with the interpretation of Inquiry Officer Anita Fineberg primarily on the basis of her assumption that one can readily determine the opinion of a review/consultant. The requirement is that the name *would reveal* "other personal information". To clearly determine the opinion of a reviewer cannot be made with certainty.

Firstly, the assumption is made that any member of the public or stakeholder can conduct the investigation he suggests and determine or ascertain the review made by a particular reviewer. If one narrows the assumption to only drug manufacturers then the determination ignores the rights of other stakeholders or members of the public.

Secondly, the determination is premised on the assumption that one can narrow down to the particular reviewer that he/she or they made a particular review when the Ministry may have several experts, out of their list of in excess of 100 reviewers/ consultants, who are qualified in the particular field. One cannot say with any certainty that the review can be attributed to a particular individual where a pool of several qualified individuals are available. Furthermore, as the Ministry has stated, there may be more than one reviewer/consultant submitting an opinion.

Thirdly, as noted above, given the authority of the DQTC to endorse or reject a reviewer's opinion, the only opinion one can know for certain is that of the DQTC. The fact that the DQTC is free to reject or not endorse the opinion of a reviewer was not considered in Order P-669. If a drug product is not listed, it does not follow automatically that the reviewer's opinion was against listing the drug product. The reviewer may have, in fact, supported the listing of the drug product, however, the DQTC . . . may reject or decline to endorse the opinion due to cost issues or a member or members on the DQTC holding contrary opinions. The release of the reviewer's name, therefore, cannot be conclusively linked to the determination to list or not list a drug product. Even if we accept the Ministry's suggestion that a stakeholder can determine who is reviewing a particular drug product by just knowing all of the names of reviewers retained by the Ministry, one would still not know the reviewer's opinion but rather only the final decision of the DQTC and it may be subject to modifications or amendments.

. . . [T]he determination of Inquiry Officer Anita Fineberg should not be followed and . . . there is no requirement that same be followed.

In Order PO-1709 . . ., David Goodis, Senior Adjudicator, stated:

> I would first point out that the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier interpretations [*Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.)].
>
> . . . . .
>
> In addition, in Order P-669 names and affiliations are requested. Affiliations qualifies under the "other personal information" requirement. No such request for affiliations is sought in the present appeal.
>
> It is, therefore, submitted that the names of reviewers does not constitute "personal information" as defined in the *Act* [appellant's emphasis].

The Ministry submits that I should follow Orders P-235, P-284, P-291 and P-669 and find that the names in the records in this case constitute personal information:

> [I]n this case. . . it is a simple matter to utilize publicly available information, such as that in the Canadian Medical [Directory], university or business staff lists to ascertain the specialty of the reviewers and consequently the drugs that they would review.
> Medical experts on the roster of consultants are selected according to their areas of medical expertise to complement the expertise available on the DQTC. There are approximately 100 experts on the roster of consultants. They review drugs according to their area(s) of medical expertise and absence of conflicts of interests.
>
> A large number of medical experts specialize in the treatment of specific diseases within their specialty. For example, most oncologists will specialize in the treatment of specific cancers, e.g. cancer of the colon, breast cancer or skin cancer. As well, there are a number of medical specialties for which there are very few medical experts available in the province, e.g. multiple sclerosis, cystic fibrosis, or enzyme deficiency.
>
> It is possible for a drug manufacturer to determine the name of a reviewer of a drug product because, although there is a roster of 100 consultants, there can be as few as one or two reviewers from specific sub-specialties. Drug manufacturers need only to look at the list of reviewers, select those reviewers who would have the expertise in the treatment of the diseases using the single source drug product. In many cases there will be only one active relevant reviewer.
>
> In the case of the review of multiple source drug products, there are few experts able to review comparative bioavailability studies. Most of these experts are on the roster of consultants. There are only about three or four experts that are routinely used to review the data.

The linking of a reviewer's name with the drugs s/he will or has reviewed is not mere "guesswork" as suggested by the appellant . . . All drugs have a nine-digit "PCG" (Pharmacologic-Therapeutic Classification Group) number. Drugs are indexed by their therapeutic classification. This Index of Pharmacologic-Therapeutic Classification is publicly available and appears in Part V of the Ontario Drug Benefit Formulary/Comparative Drug Index. Thus if the name of Dr. "X" is disclosed, as noted, it is a relatively simple matter to ascertain that Dr. X is, for example, a dermatologist. One can then determine that s/he will review the "skin and mucous membrane preparations" set out in the "84" classification . . .

If one begins with the premise, as found in Orders P-235, P-284 and P-291, that the names of individuals who review a particular drug products constitutes the personal information of these individuals, then . . . the position of former Commissioner Tom Wright as set out in Order P-230 should apply. That is his statement that:

> I believe that provisions of the *Act* relating to protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

In that case, the issue was whether the information that did not contain the name of an individual could nonetheless be said to relate to the individual because of the surrounding circumstances. In the present case . . . the issue is the same, but from the opposite perspective - whether the circumstances are such that the individual's name and their identification as a drug reviewer could reveal the personal information relating to them, namely that they would review a particular drug product. The position of the [Ministry], based on the information provided on the operations of the DQTC, is that it would. Accordingly, the information at issue in this appeal constitutes the personal information of the drug reviewers.

Furthermore, just as noted in the quote from the Assistant Commissioner in Order P-291 . . . the appellant has provided no information to establish a change in circumstances which would distinguish this appeal, and the findings which should be made, from the previous ones.

With respect to the "personal information" at issue in [Record 1] . . . it consists of three elements (a) the names of the reviewers; (b) the drugs they review; and (c) the amounts paid under their contracts. The [Ministry] has already explained how the first two elements constitute "personal information".

The amounts paid under their contracts, clearly constitute the "personal information" of these individuals by virtue of paragraph (b) in the s. 2(1) definition of "personal information" . . .

Discussion

In my view, the earlier decisions in Orders P-235, P- 284, P-291 and P-669 are applicable here. I find that, in the circumstances, it is reasonable to expect that disclosure of the names alone in both Records 1 and 2 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 paragraph (h) of the section 2(1) definition. In addition, disclosure of the names alone in Record 1 would reveal payments made to these individuals, which fits within the scope of paragraph (b) ("financial transactions") of the definition.

I do not accept the appellant's submission that the word "including" in the definition of personal information has an exhaustive effect or that the phrase "other personal information" in paragraph (h) of the definition must be restricted to only the personal information set out in the definition. In reasons adopted by the majority in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.), La Forest J. explained the meaning of the similar definition of personal information under section 3 of the federal *Privacy Act*, the terms of which are incorporated into the federal *Access to Information Act*:

> . . . On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at pp. 289-91 . . . Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.
>
> As noted by Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)* [[1988] 3 F.C. 551] at p. 557, the language of this section is "deliberately broad" and "entirely consistent with the great pains that have been taken to safeguard individual identity". Its intent seems to be to capture *any* information about a specific person, subject only to specific exceptions; see J. Alan Leadbeater, Deputy Information Commissioner of Canada, "How Much Privacy for Public Officials?", Speech to Canadian Bar Association (Ontario), March 25, 1994, at p. 17. Such an interpretation accords with the plain language of the statute, its legislative history and the privileged, foundational position of privacy interests in our social and legal culture [emphasis in original].

Further, I do not accept the appellant's submission that the words "would reveal" in paragraph (h) of the definition require a standard of proof at the level of a "certainty". This approach would conflict with one of the fundamental purposes of the *Act*, which is "to protect the privacy of individuals with respect to personal information about themselves held by institutions" [section 1(b)]. I accept that another fundamental purpose of the *Act* is to provide a right of access to information under the control of institutions in accordance with, among others, the principle that necessary exemptions from the right of access should be limited and specific [section 1(a)(ii)]. However, in the case of the personal privacy exemption, unlike the other exemptions, this latter principle is tempered by the equally important privacy principle in section 1(b). In *Dagg*, La Forest J. explained that neither access nor privacy rights should receive pre-eminence under the federal legislation (at 401-402):

> In summary, it is clear that the *Access to Information Act* and *Privacy Act* have equal status, and that courts must have regard to the purposes of both statutes in considering whether a government record constitutes "personal information" . . . It is suggested that the two statutes should be considered conceptually distinct and that the right to access should be the paramount consideration under the access legislation.
>
> As I have indicated, however, this interpretation flies in the face of the language, structure and history of the legislation . . . The *Access to Information Act* clearly provides that "personal information" is not to be disclosed except in certain specified circumstances. Of course, the determination of what constitutes "personal information" will involve a balancing of competing values. Such a balancing process, where mandated by legislation, cannot be avoided simply because it might be easier to apply a clear, bright-line rule that favours one interest over another. By employing the considerations set out in the *Privacy Act*, courts are perfectly capable of developing a jurisprudence that achieves consistency in principle.

Accordingly, I adopt the former Commissioner's statements on this point in Order P-230 as cited by the Ministry, that the privacy provisions of the *Act* should not be read in a restrictive manner and that information will qualify under the section 2(1) definition if there is a reasonable prospect that the individual will be identified by the information. My decision in this respect is reinforced by other orders of this office which have found that, even where personal identifiers have been removed from a record, disclosure willbe considered to reveal personally identifiable information where the record's contents relate to a sufficiently small group of individuals [see Orders P-924, P-1045, P-1130].

The appellant submits that Orders P-235, P-284, P-291 and P-669 are distinguishable from the present case. Although some of the circumstances in these orders differ from those here, in each of these cases, the names alone were found to constitute personal information, on the basis that they could be linked to types of drugs through publicly available sources. These earlier cases are not distinguishable from the present case in this regard. The fact that the records do not contain the reviewers' opinions or affiliations does not negate this finding. Although I am not bound by these earlier orders, I find them applicable here, and the appellant has not persuaded me that I should reach a different conclusion under the section 2(1) definition of "personal information". Further, I note that in this case, unlike in earlier cases, disclosure of the names in Record 1 also would reveal financial information about the reviewers.

Conclusion

The names of the individuals in Records 1 and 2 constitute "personal information" under the section 2(1) definition.

INVASION OF PRIVACY

Introduction

Where a requester seeks personal information of other individuals, section 21(1) of the *Act* prohibits an institution from disclosing it unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In the circumstances, the only exception which could apply is section 21(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) states that despite section 21(3), a disclosure does not constitute an unjustified invasion of personal privacy if the information falls within one of three categories set out in paragraphs (a) through (c).

Section 21(3)(f): financial information

The Ministry submits that this presumption applies to the names in Record 1. Section 21(3)(f) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The appellant submits:

> . . . [T]he information does not describe a reviewer's finances or income as a whole, nor does it describe the reviewer's assets, liabilities, net worth, bank balances, financial history or creditworthiness . . .

In this submission, the appellant omitted the word "activities" which appears in section 21(3)(f).

I found above that disclosure of the names alone in Record 1 would reveal payments made to the reviewers, which fits within the scope of paragraph (b) ("financial transactions") of the definition of personal information in section 2(1) of the *Act*. Similarly, I find that disclosure of payments made to the reviewers constitutes those individuals' "financial activities" under section 21(3)(f), and therefore disclosure of the names in Record 1 is presumed to constitute an unjustified invasion of privacy. I do not accept that the section 21(3)(f) presumption requires that the information describe the individual's "finances or income as a whole" [Orders P-1502, PO-1705, M-1154].

Disclosure of the names of the reviewers in Record 2, however, would not reveal the type information described in section 21(3)(f) and, therefore, the factors at section 21(2) must be considered.

Section 21(2)

Introduction

The Ministry submits that the factors set out in paragraphs (e), (f), (h) and (i) of section 21(2) weigh against disclosure. Those sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The Ministry also submits that two unlisted factors, the "economic climate" and the "professional integrity climate", apply in the circumstances.

The appellant submits that the factors at sections 21(2)(e), (f), (h) and (i) do not apply, and further submits that the factors in paragraphs (a) and (b) of section 21(2), which weigh in favour of disclosure, apply. Those sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;

I will first address the applicability of the section 21(2)(f) "highly sensitive" factor.

Section 21(2)(f): highly sensitive personal information

The Ministry submits:

> . . . [T]he personal information that is highly sensitive is the names of the drug reviewers associated with the drugs that they review for the [Ministry]. The [Ministry] recognizes that for information to be considered highly sensitive, disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual [Orders M-1053, P-1681, PO-1736].
>
> . . . . .
>
> When [the *Act*] came into force in 1988, DQTC members and the reviewers expressed grave concerns about the disclosure of their identities with respect to their reviews of drugs and section 8 requests. The issue was discussed extensively at DQTC meetings and with senior [Ministry] staff at that time. Senior ministry staff, on a number of occasions assured the reviewers that their identities would not be disclosed under any circumstances.
>
> Over the years, several drug manufacturers have attempted to obtain the reviewers' identities. FOI requests and appeals, culminating with Order P-669 . . . confirmed that their identities would not be disclosed under any circumstances.
>
> . . . . .
>
> The Minutes of a recent Sub-Committee on the Review of Anti-Infective Agents include a reference to the protection of the identity of the Sub-Committee members.
>
> In the previous orders discussed above (Orders P-235, P-284, P-291 and P-669), the [Ministry] claimed, and the IPCO accepted, that similar personal information was highly sensitive . . .

In addition, the Ministry has provided an affidavit from a senior official with its Drug Programs Branch [the Ministry official] in support of its argument that the section 21(2)(e) factor (unfair exposure to pecuniary or other harm) applies. In my view, these submissions are relevant to the section 21(2)(f) "highly sensitive" factor. This affidavit states, in part:

> A decision whether or not to list a product can have significant cost implications for the program. The annual cost of the drug program is $1.6 billion and the cost of adding a new single product to the Formulary has been as high as $70 million per annum in the last several years.
>
> In addition, a listing decision on the Formulary has significant financial implications for a drug manufacturer. The Ontario Drug Benefit Program is the largest single payor for drugs in Canada and the second largest single payer in North America. Decisions made by Ontario are critical for manufacturers in that they serve as landmark decisions which influence other decision makers. Decisions made by Ontario have influenced decisions taken by other provinces in the past, and have also influenced decisions taken by private payors. As a result, manufacturers invest significant resources to lobbying Ontario government decision makers.
>
> . . . . .
>
> Although the identity of the DQTC members is published information, the identities of individual reviewers are not disclosed by the Ministry. The DQTC makes recommendations as a committee. The recommendations are made as a group and cannot

be attributed to individual members. Individual reviewers, on the other hand, make recommendations on their own and would be more vulnerable to direct or indirect lobbying by drug manufacturers.

. . . . .

In the past, the Ministry has been informed of a number of instances where either DQTC members or consultants have been approached directly or indirectly by manufacturers regarding specific drug submissions. The following cases are examples of where manufacturers have made such contact:

- A representative of a drug manufacturer recently approached a DQTC reviewer by arriving unannounced at the reviewer's office after it became known that this reviewer would be present at a meeting between representatives of the DQTC, the [Ministry] and the manufacturer to discuss the DQTC recommendation not to list this manufacturer's product in the Formulary.

- A representative of a manufacturer made an appointment with a DQTC member who is a dermatologist to discuss a specific non-dermatological drug that was scheduled to be reviewed by the DQTC. The member cancelled the appointment when the purpose of the appointment was realized.

- Several years ago, the newly introduced AIDS drugs presented a significant challenge to the DQTC and the Ministry to arrive at a decision regarding reimbursement for these products. These decisions were difficult ones in light of the emerging nature of the science in this area, and the life threatening nature of the condition. The deliberations were made more difficult when individual experts who were suspected of advising the Ministry were cornered at scientific meetings by representatives of manufacturers and other medical colleagues, and pressured to reveal their role in advising the Ministry and the positions they had taken.

- Following a meeting between representatives of a manufacturer, the DQTC and the [Ministry], a manufacturer recently faxed information to each DQTC representative present at the meeting. This is a clear contravention of the ministry's Guidelines for Drug Submission and Evaluation. The [Ministry] is currently drafting a letter noting the action by this manufacturer.

- Over the years, the drug industry repeatedly mailed/faxed drug submission information directly to DQTC members in an attempt to sway them in their favour. All instances were followed by a letter/telephone call from the Executive Secretary to the DQTC discouraging them from such practices.

In light of the current fiscal climate, many medical departments, of which many reviewers are members, rely on funding from drug manufacturers to fund research initiatives, attendance at conferences and fellowship and residency programs. DQTC members and reviewers have indicated to me on many occasions the importance in ensuring that they will not be singled out in relation to specific drug evaluations. In particular, during the recent

> DQTC Antibiotics Review, DQTC members and reviewers emphasized that their names should not be released for fear of repercussions from the manufacturers.

The Ministry also provided an affidavit from a former member of the DQTC, and current reviewer [the current reviewer]. This individual states:

> . . .[T]he concerns [the Ministry official] expressed . . . in relation to the disclosure of the drug reviewers names are shared by me . . .
>
> . . . I am well aware of the resources available to manufacturers to take all steps they deem necessary to promote their products.
>
> If names of reviewers are disclosed, I am concerned that the manufacturers would use these resources to attempt to gain a more favourable review. In the event that they were unsuccessful in obtaining a favourable evaluation, there is concern that direct and indirect attempts would be made to influence or discredit those reviewers who have provided unfavourable evaluations. This will . . . inhibit reviewers from providing an impartial review due to the fear of subsequent action against them by manufacturers.
>
> . . . I have been involved in situations where manufacturers have attempted to influence recommendations of DQTC, or have taken action after receiving a negative recommendation from DQTC. For example, I was involved in a review where the manufacturer suggested that research funding to our institution would be contingent on a favourable review for the drug. There are other instances where I believe decisions by a manufacturer to not work with me were related to them identifying me as being responsible for the negative outcome relating to its product.
>
> I am also aware that other DQTC members and reviewers have been approached by manufacturers as well, and am aware of instances where manufacturers have directed other specialists to DQTC members and reviewers to have the specialists lobby the DQTC members and reviewers on behalf of the manufacturer of a specific drug under review.
>
> In addition to the concerns relating to manufacturers, I and other DQTC members and reviewers are well aware of recent cases where physicians who have acted as government reviewers have had their reputations scrutinized in a negative manner as a result of media attention.

. . . . .

Many DQTC members and reviewers work in an environment where they or their departments or institutions depend in part on funding from large pharmaceutical manufacturers. As a result, they have concerns relating to the impact that negative evaluations could have on such funding or their standing within their institution should the identity of the reviewer be disclosed.

. . . . .

> It is my view that individual reviewers are much more vulnerable than the DQTC members since the reviewers provide individual recommendations on products, and the members provide input in a committee setting.

In response, the appellant submits:

> . . . [T]he disclosure of solely the names of reviewer cannot be considered "highly" sensitive nor could it be considered to reasonably be expected to cause excessive personal distress to the subject individual. For information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause *excessive* personal distress to the subject individual [Orders M-1053, P-1681, P-1736] [appellant's emphasis]. A name, in itself cannot be "highly sensitive" without more.
>
> One must distinguish this situation, being the disclosure of simply the names of reviewers from the disclosure of personal information of a "highly" sensitive nature such as those dealing with bodily integrity. The names of victims of sexual assault would be considered "highly" sensitive and considered to reasonably be expected to cause excessive personal distress to the subject individual. The disclosure of the name of a reviewer tells nothing more about the reviewer. Even if one accepts that a reviewer's opinion can be ascertained from disclosure of a reviewer's name, which is disputed and discussed above . . . the opinion cannot be considered "highly" sensitive. As previously stated, DQTC members, like independent reviewers, work in the pharmaceutical industry and would be subject to the same potential influences as an independent reviewer and no doubt more so since they have the authority to endorse or reject a reviewer's opinion. The DQTC members' names, however, are a matter of public record. Therefore . . . similar information regarding an independent reviewer is not "highly sensitive". The reviewers are not highly susceptible to harm by the public or stakeholders for the reasons discussed above. It is submitted that the Ministry fails to provide "detailed and convincing" evidence of same.
>
> . . . . .
>
> The Ministry states that the exposure is unfair merely because they are identified as performing a function. Firstly, it must be established that they are indeed exposed to pecuniary or other harm. The Ministry states that the reviewers *will be exposed* to these harms . . . The Ministry has no evidence that such a result will result. The Ministry's allegations are speculative and not "detailed and convincing".
>
> The Ministry states, on the pecuniary side, pressures from drug manufacturers "may" result in the reviewers refusing to continue to provide their services to the Ministry. Firstly, the Ministry premises this on the assumption that there are pressures from drug manufacturers. . . [T]he Ministry provides no detailed and convincing evidence of this . . . [T]he drug manufacturers and other stakeholder[s] would not expose the reviewers to harms as it would jeopardize their own interests and their ability to have a drug product listed either due to sanctions imposed or the lack of experts available to review their product.
>
> Secondly, even if one assumes a reviewer may refuse to continue to provide services to the Ministry due to what they submit is pressures from drug manufacturers, it does not necessarily follow that they have suffered a pecuniary loss or other harm. The reviewer may be preserving his or her financial position rather than suffering a loss of remuneration.

The Ministry further suggests that stakeholders would engage in lobbying or harassment. Firstly, it must be noted that lobbying by a drug manufacturer or other stakeholder does not necessarily constitute a harm, however, if a stakeholder attempts to unduly influence the process significant financial and other sanctions are readily available… [T]here is no evidence that it is probable that a stakeholder would harass or has harassed a reviewer. No examples of harassment sufficient to constitute a "harm" have been provided.

The Ministry again submits . . . that manufacturers can resort to direct and indirect pressures on reviewers which can influence their professional well-being in their clinical practice or research activities. Such references are vague and unspecific. [The Ministry official] references in [the] affidavit . . . only four minor incidents where a DQTC member or members were forwarded submissions or an attempt was made to have an appointment scheduled with a DQTC member (which was simply cancelled). I note that one was to have occurred "several years ago". In incidents cited, of which little detail is provided, there is no evidence that these matters amounted to harassment and they were summarily dealt with nor did they deal with harms to the clinical practice or research activities of reviewers. As DQTC members often are in contact with drug manufacturers due to the fact that the members work in the pharmaceutical industry, contact in itself between the DQTC members and pharmaceutical industry representatives is hardly unusual. It does not follow that drug manufacturers are harassing DQTC members. [The Ministry official]'s innuendo is that drug manufacturers will engage in acts of undue influence to achieve the listing of a drug. No substantive evidence is provided to back these allegations. As noted below regarding the *Leenan* and *Myers* cases, the courts are not prepared to accept attacks on such unfounded allegations. It is submitted that the Ministry's evidence is far from detail and convincing in this regard.

The Ministry further suggests that funding may be withdrawn. No evidence is submitted that this has, in fact, happened to the DQTC members who undertake the decision to list or not list a drug product, whose names are public record and who work in the pharmacology-medical field.

Even if harassment potentially could occur, safeguards are in place to protect the reviewer from harassment.

Inspectors may be appointed pursuant to the *ODBA* and the *Prescription Drug Cost Regulation Act* (the *PDCRA*) for the purposes of ensuring compliance with the legislation. The investigations may lead to prosecutions and could ultimately result in penalties or sanctions upon conviction. Inspections or investigations that are conducted under the authority of the *OBDA* or *PDCRA* lead or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed. [See Order 324] A drug manufacturer would face substantial financial risk if it partook in any such conduct. A drug listing could be delayed, denied or other sanctions could be imposed. [The Ministry official] . . . confirms that sanctions are available and have been used where there have been direct contact by a manufacturer and DQTC members relating to specific submissions including deferring the consideration of a product. In addition, sanctions could also be brought in the

> civil courts for actions including but no limited to the tort of intentional interference with economic relations and violations of the Business Practices Act.
>
> The Ministry states that the DQTC . . . may reject a reviewer's opinion on a drug and that knowledge of this reversal may have an adverse effect on the consultant's reputation and affect them financially if they lose financial grants . . .
>
> Firstly, the Ministry presumes that stakeholders would have knowledge of the rejection of the reviewer's opinion. There is no basis for this position as the reviewer's opinion and any rejection of same is unknown to the stakeholder. Secondly, it a reviewer's opinion was to list a drug product and the DQTC rejected such listing, assuming the stakeholder would be aware of such rejection as the Ministry's suggests, it is unlikely that a stakeholder would pose a harm to a reviewer that supported its position. Furthermore, a drug manufacturer would not wish to damage the credibility of a reviewer whose opinion supported the listing of their drug product. If anything, the drug manufacturer would more likely wish to bolster the professional reputation of such a reviewer. This is premised on the assumption that the drug manufacturer would even have knowledge of the reviewer's opinion. [The Ministry official] claims . . . that "it *may be possible* for manufacturers to identify who will be reviewing specific drugs" [appellant's emphasis]. The standard of proof requires that it "would reveal" not merely that there is a possibility.
>
> The Ministry fails to explain how the making public of a reviewer's opinion would damage the professional credibility of the reviewer. One can only presume that it may result if the reviewer's opinion was not based on objective scientific evidence or the foundation for the opinion was flawed in a material respect. If the Ministry's implication is that a stakeholder may falsely accuse or defame a reviewer, the Ministry is engaging in making the same unsubstantiated innuendos as it implies may be made by a stakeholder. The courts have demonstrated that they are prepared to fully compensate an individual whose reputation is defamed (see *Leenan* and *Myers* cases).

The circumstances of this case are very similar to those in the four previous orders of this office discussed above (Orders P-235, P-284, P-291 and P-669). In Order P-235, former Commissioner Wright accepted the submissions of the Ministry and two reviewers who were notified as affected persons that, in the circumstances, the reviewers' names were "highly sensitive" under section 21(2)(f), and were supplied by the reviewers "in confidence" under section 21(2)(h). The reviewers had expressed concerns that "manufacturers can resort to direct and indirect pressure on [reviewers] which can influence their professional well-being in their clinical practice or research activities" and that "such disclosure in connection with a particular drug product or review could lead to significant lobbying and potential harassment of reviewers by the manufacturers . . ."

The former Commissioner also found that these factors outweighed the concerns of the appellant that the information was relevant to a fair determination of his rights under section 21(2)(d), and that disclosure would be an unjustified invasion of the personal privacy of the affected persons.

In Order P-284, Assistant Commissioner Mitchinson received submissions from reviewers which "expressed similar concerns about potential for pressure and lobbying on the part of drug manufacturers" should their names be disclosed. In that case, and in similar circumstances in Order P-291, the Assistant Commissioner again held that disclosure of the reviewers' personal information would be an unjustified invasion of their privacy.

Finally, in Order P-669, Inquiry Officer Fineberg considered this previous line of cases and concluded:

> I similarly find that the Ministry's concerns that the information is highly sensitive is a relevant factor, weighing in favour of protecting the personal privacy of the reviewers, in this appeal. I do not accept the appellant's submission that disclosure of similar information in other jurisdictions supports the characterization of the personal information in this appeal as being "non-sensitive". The circumstances of each case must be examined separately.

In all four cases, the names of drug reviewers were considered to be "highly sensitive" under section 21(2)(f) of the *Act*.

Although I am not bound by these earlier decisions, I am inclined to follow them, particularly under the "highly sensitive" factor, unless it is established that present circumstances are significantly different. In my view, the appellant has not done so. In any event, I am satisfied that the Ministry has provided detailed and convincing evidence to establish that disclosure of the names in present circumstances could reasonably be expected to cause excessive personal distress to the individual reviewers, through lobbying, harassment, inducements and undue influence.

In my view, section 21(2)(f) is designed to take into account a wide variety of circumstances. The fact that one situation, such as the name of a sexual assault victim, may involve a higher level of sensitivity, or cause excessive personal distress in a different manner, does not negate the application of this factor. I am satisfied that, should the names of the reviewers be disclosed, it is reasonable to expect that, either immediately or over a longer period of time, these individuals will suffer excessive personal distress.

I am also not convinced by the appellant's argument that reviewers' names should be disclosed, since DQTC members names are known. The Ministry has satisfied me that the circumstances of these two groups of individuals are substantially different, particularly because the members operate in a group, rather than an individual setting.

To conclude, I find that the Ministry has established the application of the "highly sensitive" factor at section 21(2)(f) of the *Act* to the names in Record 2, and I give it moderate weight.

In the circumstances, it will not be necessary for me to consider the application of the other factors relied upon by the Ministry in support of its position that the names are exempt under section 21.

Section 21(2)(a) and (b): public scrutiny/promotion of health and safety

The appellant submits:

> . . . [T]he information sought is desirable for the purpose of subjecting the activities of the government and its agencies to public scrutiny and . . . access to the information may promote public health and safety (see section 21(2)(a) and (b) of the *Act*). As earlier stated, the water quality crisis in Ontario points to a clear and present need for the public to have the right to scrutinize matters of public health and safety . . . [T]here is a compelling public interest in having the right to scrutinize matters affecting health care and the access to drug products. The public, particularly the elderly on fixed incomes and the financially disadvantaged, has a right to ensure that its access to drug products have not been limited by decisions that emphasize financial considerations over the public's right to better quality or innovative drug products and fiscal considerations over quality of life issues. There are considerable safeguards in place to protect those to which the disclosure applies and, therefore, the public interest should be paramount.

The appellant has not satisfied me that either of the factors at sections 21(2)(a) or (b) applies. The appellant has not established a logical connection between the *names* of the reviewers alone and any public scrutiny interest, or benefit to health and safety. No one could argue with the general statement that the public has a Aright to scrutinize matters of public health and safety" and that the public has a right to ensure that decisions on drug products are made on the basis of proper considerations. However, at issue here are the names of reviewers alone, as opposed to other material such as the substance of the reviewers' reports. The appellant has not established the application of section 21(2)(a) or (b) of the *Act*.

Conclusion

Section 21(2)(f), weighing against disclosure, is the only factor under section 21(2) I have found to apply. Therefore, the section 21(1)(f) exception does not apply, and the names in Record 2 are exempt.

Section 21(4)(b): financial or other details of a contract for personal services

The appellant argues that section 21(4)(b) applies to permit disclosure of the names in Record 1. That section reads:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > discloses financial or other details of a contract for personal services between an individual and an institution;

In my Order PO-1763, involving a request for the names and salary ranges of employees of the Ontario Lottery Corporation (OLC), I found that section 21(4)(a) applied. That section reads:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

> discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

In my decision, I stated:

> In my view, the requested information falls within section 21(4)(a), since it discloses the salary range of officers or employees of the OLC. The wording of section 21(4)(a) is clear, and I do not accept the OLC's argument that, in effect, it should be "read down" due to the particular status of the OLC and its employees. The OLC is designated as an institution in the Regulation 460 under the *Act*, and thus section 21(4)(a) applies to its employees' salary ranges just as it would to the same information about employees of any other institution under the *Act*.
>
> . . . . .
>
> The OLC argues that even if section 21(4)(a) applies, the application of this section can be overridden by factors, either listed or unlisted, under section 21(2).
> In Order P-237, former Commissioner Wright found that disclosure of information relating to an investigation into allegations of misconduct by police officers was presumed to be an unjustified invasion of those individuals' privacy under section 21(3)(b). However, after considering the factor weighing in favour of disclosure under section 21(2)(a) ("public scrutiny"), the former Commissioner determined that the section 21(3)(b) had been rebutted. Accordingly, he concluded that the section 21 exemption did not apply.
>
> On judicial review in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, a majority of the Divisional Court quashed Order P-237. One aspect of the decision concerned the relationship among sections 21(2), (3) and (4), and the impact of a finding that one of the presumptions in section 21(3) was present. On this point, the court stated (at 783-784):
>
> Having found an unjustified invasion of personal privacy pursuant to s. 21(3)(b), and having concluded that none of the circumstances set out in s. 21(4) existed so as to rebut that presumption, the Commissioner considered both enumerated and unenumerated factors under s. 21(2) in order to rebut the presumption created by s. 21(3).
>
> The words of the statute are clear. There is nothing in the section to confuse the presumption in s.21(3) with the balancing process in s. 21(2). There is no other provision in the *Act* and nothing in the words of the section to collapse into one process, the two distinct and alternative processes set out in s. 21. Once the presumption has been established pursuant to s. 21(3), it may only be rebutted by the criteria set out in s. 21(4) or by the "compelling public interest" override in s. 23. There is no ambiguity in the *Act* and no need to resort to complex rules of statutory interpretation. The Commissioner fundamentally misconstrued the scheme of the *Act*. His interpretation of the statute is one the legislation may not reasonably be considered to bear. In purporting to exercise a discretion in the form of a balancing exercise, he gave himself a power not granted by the legislation and thereby committed a jurisdictional error.

Analogy to *John Doe* would suggest that as with section 21(3), the application of section 21(4) cannot be "overridden" or "rebutted" by factors under section 21(2). Any different interpretation could be construed as conflicting with *John Doe*.

In addition, section 21(4), as distinct from section 21(3), is not phrased as a "presumption"; rather, the section states that ". . .disclosure does not constitute an unjustified invasion of privacy . . ." This suggests that if section 21(4) applies, the information is conclusively not exempt under section 21, leaving no room for an argument that section 21(4) merely sets up a presumption which may be rebutted.

I also do not accept the OLC's argument that the opening words of section 21(4), which read "Despite subsection (3)", indicate that section 21(4) only removes the operation of section 21(3), but still leaves room for a conclusion that the information is exempt under section 21. Not all of the types of information captured by section 21(4) necessarily fall within the scope of section 21(3). For example, a salary range would not qualify as an individual's "employment history" under section 21(3)(d), nor is this information subject to any of the other presumptions under section 21(3). Therefore, in my view, section 21(4) should be read such that any information within its scope is necessarily not exempt under section 21, and the factors at section 21(2) cannot apply to such information.

In any event, even if the OLC's interpretation of section 21 were correct, the OLC has not persuaded me that this is an appropriate case in which section 21(2) factors favouring privacy would rebut section 21(4). First, for the reasons outlined above, I am not convinced that the OLC and its employees stand in a position so different from other municipal or provincial government institutions that public scrutiny of the OLC's salary ranges is not necessary or desirable.

Second, the section 21(2)(h) factor ("supplied in confidence") could not apply in the circumstances, since the information in question was not "supplied" to the OLC at all, but was created by it in the course of administering its employment functions.

Third, the fact that the request in this case is for all salary ranges, rather than for specific employees, does not distinguish this case from others in which section 21(4) or its municipal counterpart were found to apply. Section 21(4) does not make a distinction between a request for a salary range of a specific individual and a request for the same information about a group of individuals.

The fact that the appellant may have "another, non-public purpose to the request" has no bearing on whether access should be granted under the *Act*. Section 4(1) grants a right of access to *records* not subject to an exemption, without qualification. A requester is not required to justify, or provide reasons for, his or her request [see Order M-96, upheld on judicial review in *O.S.S.T.F., District 39 v. Wellington (County) Board of Education* (February 6, 1995), Toronto Doc. 407/93 (Ont. Div. Ct.), leave to appeal refused (October 16, 1995) Doc. M15357 (C.A.)]. The only limitation to this principle is that

> access may be refused where the institution is of the opinion that the request is "frivolous or vexatious", a claim that the OLC has not made in this case.
>
> . . . . .
>
> In the circumstances, based on the application of section 21(4), I conclude that disclosure would not constitute an unjustified invasion of personal privacy within the meaning of section 21(1)(f) of the *Act* and, therefore, the information at issue is not exempt under section 21.

In the vast majority of cases, revealing the fact that an independent contractor performs work for an institution or a particular department within an institution would not be a sensitive matter, whether or not this information appears with financial or other details of a particular contract. In my view, that is the reason for the strong language in the preamble to section 21(4) read in conjunction with paragraph (b). In the circumstances of this case, however, disclosure of the names of individuals appearing on Record 1 would reveal more than simply the information which falls within the scope of section 21(4)(b). It would reveal the fact that the individuals in question are engaged on the Ministry's behalf to perform specific functions which render them highly susceptible to be targeted for lobbying, harassment, inducements and undue influence. It is this unusual capacity for the information in question to have a profound impact on the individuals in question that makes it both personal and highly sensitive.

The Ministry and the reviewers have clearly gone to great lengths to protect the identity of the reviewers which, to my knowledge, it has not done in the case of any other individual employees or contractors. Moreover, this office has time and again found that disclosure of the names of drug reviewers would constitute an unjustified invasion of privacy. In my view, should I find that the names ought to be disclosed here, simply because they appear in a record which contains payment information, the result would be highly unjust given the history of this issue and the interests at stake, and would conflict with one of the two fundamental purposes of the *Act*, which is to protect the privacy of individuals [section 1(a)]. While another important purpose of the *Act* is to provide a right of access to information, the amounts paid to the individual reviewers have already been disclosed and the key public scrutiny objective of section 21(4)(b) has been met. Accordingly, in my view, the individuals' privacy concerns in this case outweigh any factors which might be present on the access side.

Conclusion

The names of the reviewers in both Record 1 and Record 2 are exempt under section 21 of the *Act*. In the circumstances, it is not necessary for me to consider the application of the exemption at section 18 of the *Act*.

FEE AND FEE ESTIMATE

The Ministry advised the requester that it was charging a fee of $300.60 for access to the records, broken down as follows:

Photocopies	3 pages @ 00.20/page	=	00.60
Manual search time	8 hours @ 30.00/hour	=	240.00
Development of computer program	1 hour @ 60.00/hour	=	60.00
	Total	**=**	$300.60

The Ministry further provided a fee estimate of $45.60 for access to each future quarterly report containing similar information, broken down as follows:

Photocopies	3 pages @ 00.20/page	=	00.60
Manual search time	1.5 hours @ 30.00/hour	=	45.00
	Total	=	45.60

The appellant specifically takes issue with the Ministry's assessment of charges for search time.

The Ministry submits:

> In preface, it should be noted that the requested information represented information regarding approximately 112 individuals and involved a three-year time period. There was no single record in existence that would respond to the information requested. The information sought was in a specified format, "name of reviewer -1997 amount, 1998 amount and 1999 amount". Thus, the responsive record was a chart of approximately 112 rows and four columns of information.
>
> In several previous orders the IPCO has accepted the principle that there is no obligation for institutions to create a record in response to a request. In Order 99, former Commissioner Sidney B. Linden made the following statement on this issue:
>
> > While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the *Act* is to *information contained in a record existing at the time of his request*, in my view the creation of a record in some circumstances is not only consistent with the spirit of the *Act*, it also enhances one of the major purposes of the *Act i.e.*, to provide a right of access to information under the control of institutions [Ministry's emphasis] (See also M-33, M-85, M-102, M-786, MO-1299, P-196, P-652, P-995, P-1359, P-1384, P-1464)
>
> Although there is no obligation under the *Act* to create a record in response to a request, the [Ministry] elected in this case to take the approach of creating a record, to comply with the spirit of the legislation, *because the appellant requested that the information be*

provided to him in a specific format. The [Ministry] reviewed its obligations as set out in Order M-1153, dealing with the issue of whether an institution was obliged to provide access to the requested information in the format requested by the appellant, as well as under s. 30 of [the *Act*]. The [Ministry] concluded that it was "*reasonably practicable*" to provide access to the appellant in the form requested and thus created a record to satisfy its statutory obligation under s. 30.

Furthermore, creating the record in the form requested was the most cost-effective approach for the requester. Had the [Ministry] not adopted this approach and relied on the original source accounting records the charges for reproduction and severing the non-responsive information from the records in preparation would have incurred much higher costs to the requester, which would have been in addition to the search costs to locate the record already incurred. Furthermore, some of the accounting system documents would have been in the form of codes that the requester could not easily interpret.

Search costs

In order to locate the information requested, searches had to be conducted in two separate areas of the ministry, the Drug Programs Branch (DPB) and the Supply and Services Branch (SSB), covering a three-year time period. The search for responsive information involved manual searches through both hard copy files and printouts from the computerized accounting system.

In order to understand the extent of manual searches, it is necessary to describe the processing of the accounting and expenditure records. [DPB] reviews all operational and administrative expenses incurred by the Branch, including fee-for-services for DQTC members and consultants. The Branch then prepares a request for payment for each invoice it receives and submits it for payment by the [SSB]. Expenditure reporting is normally made according to department budget code and vendor code. [SSB] provides a monthly report detailing each transaction/payment it processed during the previous month. The information is sorted by expenditure codes and by chronological order of transaction/payment dates.

[DPB] maintains the original request for payment for each invoice plus a copy of the payment computer printout for the current and previous fiscal years. Records for previous fiscal years are kept at the Government Records Retention Centre. [SSB] also maintains records for the current fiscal year, plus the previous year. Data for previous fiscal years, that is data more than two years old, is electronically archived. In order to process the request for responsive records, [DPB] requested the assistance of [SSB] in providing the following reports:

1. Fiscal Year 1999/2000 (April 1, 1999 to the date of the request)
2. Fiscal Year 1998/1999 (April 1, 1998 to March 31, 1999)
3. Fiscal Year 1997/1998 (April 1, 1997 to March 31, 1998)

[SSB] had to develop a computer program to extract the data for a 12-month period. In addition, they needed to retrieve the data for fiscal year 1997/1998 from the electronic archive first before they could produce the report for that year. The resulting reports (about 3 inches thick) were a detailed list of the expenditures for all DPB vendors sorted by budget code and vendor code. The accounting codes reflected all expenses related to the various fees paid to reviewers and were not broken down into the level of details that the requester was seeking.

In order to locate and extract the relevant information, the DPB needed to,

1. Prepare a list of the over 100 reviewers who provided services during the three year period requiring a manual search through the DPB hard copy program files. This manual search through these files took one hour.
2. Search the accounting codes to determine the vendor number that would match each DQTC member/consultant. This manual search took one-half hour.
3. From the print outs of the computer system, conduct a manual search through both the printouts and hard copy invoice files to determine which expenses were responsive to the requests, i.e., those invoices for reviews of drug submissions and section 8 requests. This search through approximately 250 pages of hard copy detailed printouts took six and one-half hours. In some instances verification with the program invoice files was necessary because the computerized accounting system only contains information related to the payee, the amount and the cost-centre code.
4. Compute all appropriate expenses (several consultants conducted more than one review for the DQTC)
5. Prepare summary reports (chart of approximately 112 rows and four columns of alpha and numerical information)

To summarize the manual search activities which are chargeable at a rate of $7.50 per quarter-hour ($30/hour):

1. Manual searches through DPB files to locate all the individuals who provided services for each of the three years (1.0 hr)
2. Manual search of the accounting codes to match with each DQTC member (0.5 hr)
3. Search through the approximate 250 pages of computerized printouts and invoices to determine which expenses reviews and section 8 requests for over 100 individuals (6.5 hrs)

Total: 8 hours @ $30/hour = $240.00

. . . . .

Quarterly Reports

The ministry provided a fee estimate for the cost of future quarterly reports, according to the request for continuing access. The estimate included photocopy charges of $.60 based on the charges for the three-page report originally produced. In addition, an estimate of 90 minutes was provided for the manual search charge. As the scope of the future reports was a substantially shorter time frame, records would only need to be search for one fiscal quarter. Normally these records would be held in the [DPB] . . . [T]his estimate is reasonable as the list of individuals is over 100 persons, the estimate search time for the cost to search for information related to each individual would be less than one minute per individual.

To summarize, the fee estimate provided for each of the quarterly reports is as follows:

1. three pages of photocopying at a rate of $.20 per page: $.60
2. Manual search time of 90 minutes at a rate of $30.00/hour: $45.00

Total: $45.60

Conclusion

. . . [T]he fees charged and future estimates in the request were fair and equitable and [the Ministry] has supplied this detailed description of the time and cost in support of that conclusion. Section 57 of the *Act* and section 6 of the Regulation are based on a "user-pay" principle. Several previous orders of the IPCO have upheld this user-pay principle. (For Orders #P-6, P-111, P-184, P-264, P-265, M-376, M-538) Other previous decisions of the IPCO have indicated that even though the manner in which an institution files its records may not be the most efficient, the *Act* does not require an institution to keep records in such a way as to accommodate the various ways in which a request for information might be framed. (Orders #P-31, M-166, M-203, M-372, M-546, M-549, M-583)

The appellant submits:

. . . [T]he length of time required to produce the requested information is excessive. The allocation of six and a half hours to review or scan printouts is excessive . . . [T]he names can be extracted from billing information and databases utilized by the Ministry. Further, the Ministry contends that it has a "roster" of reviewers/ consultants and, therefore, such information should be readily available. It has been established that two page per minute standard is considered reasonable where multiple severances are required on various pages of records [Order PO-1721]. Therefore, 250 pages at 2 pages/minute equates to 125 minutes (2 hours and 5 minutes).

The appellant misstates the time standard for multiple severances established by this office in Order PO-1721 and several earlier decisions [Orders P-26, P-184, P-565]. In Order PO-1721, involving the Ministry, Assistant Commissioner Mitchinson stated:

> In its representations, the Ministry states that severances were required for 50 of the 56 pages of records disclosed to the appellant, and that this process took one minute and 20 seconds per page for a total of 1 hour and 15 minutes. The Ministry points out that this time is well under the "two minutes per page" standard established in previous orders of this office (eg. Orders P-26, P-184 and P-565).
>
> I agree that the "two minutes per page" standard is reasonable in situations where multiple severances are required on various pages of records. As far as the records disclosed to the appellant in the present appeal are concerned, some required more severing than others, but the Ministry's estimate is well within the allowable range established in previous orders, and I find that it is reasonable in the circumstances. Therefore, I uphold the Ministry's estimate of $37.50 for preparation time.

The severance time standard adopted by this office is, in fact, "two minutes per page".

In this case, unlike the earlier cases, the Ministry is charging a fee for locating and extracting information from printout pages, not for making severances. In my view, a reasonable estimate for this exercise is one minute per page and, therefore, the Ministry's estimate of 8 hours' search time in respect of approximately 250 pages (equivalent to just under two minutes per page) is excessive. As a result, the search fee should be reduced to $125.00.

The estimated search time for the quarterly reports, in my view, is reasonable. Since the Ministry estimates that 250 pages need to be reviewed for three years' worth of reports, it is reasonable to assume that approximately 90 pages will need to be reviewed for each year. This leads to a time estimate of 90 minutes, the same figure quoted by the Ministry. As a result, I see no basis for revising the Ministry's quarterly report estimate.

ORDER:

1. I uphold the Ministry's decision to withhold the names in Records 1 and 2 under section 21 of the *Act*.

2. I order the Ministry to issue a revised fee decision to the appellant reflecting the revised search time charges as described above by **December 14, 2000**.

3. In order to verify compliance with provision 2, I reserve the right to require the Ministry to provide me with a copy of the Ministry's revised decision.

November 23, 2000

David Goodis
Senior Adjudicator