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

ORDER PO-2437

Appeal PA-050035-1

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 all records created or modified between November 1, 2003 and August 5, 2004 relating to three named types of medication.

The Ministry identified as responsive to the request eight documents containing a total of 35 pages. The Ministry agreed to disclose one record in its entirety and parts of four other records. The Ministry denied access to three other records in their entirety. For the records and parts of records to which the Ministry denied access, it relied upon the exemptions in sections 13(1) (advice and recommendations), 17(1) (third party information), 18(1)(g) (economic and other interests of government), 19(1) (solicitor-client privilege), and 21(1) (protection of personal privacy) of the *Act*.

The requester (now the appellant) appealed the decision to withhold this information.

This office appointed a mediator to assist the parties to resolve the issues in the appeal. During mediation, the appellant confirmed that he is not interested in the personal information withheld under section 21 in records 1 and 3. As this was the only information withheld from these records, they are no longer at issue.

In regard to record 3b, for which the Ministry claims the exemption under section 17(1), the mediator obtained from the Ministry the names of the two companies that it identified as the persons whose interests may be affected by disclosure under section 17(1). The mediator contacted these companies (the affected parties) and asked whether they consented to the disclosure of the information withheld under section 17(1) in Record 3b. The affected parties did not consent to disclosure of this information.

As no further mediation was possible, this appeal entered the adjudication stage. I initially invited representations from the Ministry on all issues set out in this Notice of Inquiry and from the affected persons, whom I shall call "affected party A" and "affected party B", on the question of whether the mandatory exemption at section 17 apply to record 3b. The Ministry provided representations and agreed that they could be shared with the appellant, except for one paragraph. Affected party A provided brief representations. Affected party B advised this office by telephone that it did not intend to provide representations.

I provided the non-confidential representations of the Ministry and the representations of affected party A to the appellant together with a Notice of Inquiry and invited him to provide representations. He responded, "In view of the fact that we do not have access to the documents in issue, we do not have any further representations to make."

RECORDS:

The records remaining at issue in this appeal and the exemptions claimed for these records are:

- Record 2a - Draft letter from Minister to pharmaceutical company (entirely withheld): ss. 18(1)(g), 13(1)

- Record 2b - Invitation/Meeting Request Summary (entirely withheld): ss. 18(1)(g), 13(1), 19
- Record 2c - Briefing note (portions withheld): ss. 18(1)(g), 13(1), 19(1)
- Record 3a - Draft Fabry Disease Speaking Points, dated September 10, 2004 (entirely withheld): ss. 18(1)(g), 13(1)
- Record 3b - Q's & A's, dated September 6, 2004 (portions withheld): ss. 18(1)(g), 17(1)

DISCUSSION:

The Ministry has provided background information that helps to explain the subject matter of the records at issue and the context in which its decision was made. According to the Ministry, the records all relate to whether the Ontario Government will reimburse the users of certain drugs called Enzyme Replacement Therapies (ERTs), and in particular the ERT Fabrazyme, for the cost of these drugs, using public funds.

Fabrazyme (an ERT used to control Fabry Disease) has undergone two reviews through the national Common Drug Review (CDR) process, resulting in two recommendations issued by the Canadian Expert Drug Advisory Committee (CEDAC). CEDAC provides expert advice for the CDR process by developing recommendations as to whether drug plans should cover the cost of a drug. Although the Ministry describes CDR as "national", from information received, it appears to be inter-governmental in nature.

Following a CDR review, the Ministry states that its own expert drug advisory committee, the Drug Quality and Therapeutics Committee (DQTC), reviews the DCR recommendation, along with other information that might be relevant, and makes its recommendations to the Government.

CEDAC issued its first recommendation relating to Fabrazyme in November, 2004 (after the Ministry received the request that is the subject of this appeal). CEDAC recommended that Fabrazyme not be listed in provincial drug formularies. Participating jurisdictions requested that the CDR follow up on CEDAC's review by considering some additional data regarding Fabrazyme. Based on this new information, CEDAC issued its second recommendation on May 18, 2005, again recommending that Fabrazyme not be listed in provincial drug formularies.

The Ministry has not yet made a decision whether to fund the use of Fabrazyme by patients in Ontario with Fabry Disease. It states that the final decision will not be made until the government has considered the recommendations of CEDAC and the DQTC. The Ministry explains that it is withholding the information to which access has been refused because it believes that the disclosure of the records would "fetter" the Government's ongoing decision-making process on this issue.

SOLICITOR-CLIENT PRIVILEGE

Does the discretionary exemption at section 19 apply to records 2b and 2c?

The Ministry has indicated on a copy of record 2b that the section 19(1) exemption applies to the whole record, but in its index of records and representations, the Ministry does not claim the section 19 exemption for record 2b. In light of this ambiguity, I have considered whether this exemption applies to record 2b. In record 2c, the Ministry claims that the section 19 exemption applies to the portions of pages 8, 9, 10, and 11 that the Ministry has highlighted on a copy of the record provided to this office.

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches, common law privileges and statutory privileges, as described below. The institution must establish that one or the other (or both) branches apply. Both branches encompass two types of privilege: solicitor-client communication privilege and litigation privilege. As the Ministry claims only solicitor-client communication privilege, it is unnecessary to discuss litigation privilege in this order.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Representations, analysis and findings

The Ministry provided the following representations on solicitor-client privilege, among others:

> The Ministry submits that Record 2c is subject to common law solicitor-client privilege and is therefore exempt from disclosure under section 19.
>
> The Ministry submits that the portions severed under section 19 contain legal advice prepared by Ministry counsel for Ministry clients. One discrete section of the Record contains information that clearly sets out legal considerations brought forward by Ministry legal counsel. Furthermore, the Ministry submits that the

> entire indicated section of the Record is interspersed with legal opinions that clearly stand out as such. [Emphasis in original].
>
> Moreover, this portion of Record 2c was prepared in consultation with Ministry legal counsel for the purpose of providing legal advice.
>
> Additionally, the Ministry submits that the relevant portion of Record 2c is a communication that was made in confidence. Each page of the Record that is identified as being exempt under section 19 is clearly labelled with the header "Confidential Advice to Minister". Also, all briefing materials related to this issue were treated as confidential by Ministry staff at the time.

The second sentence of the penultimate paragraph on page 8 of record 2c is legal advice from a government lawyer to the Ministry and is of a confidential nature.

In addition, although the Ministry's representations do not identify the information in record 2c that the Ministry claims "clearly sets out legal considerations brought forward by Ministry legal counsel", the information in the last three paragraphs of page 11 fits this description. These three paragraphs contain legal advice to the Ministry and are of a confidential nature.

I find that all of this information is subject to common law solicitor-client privilege and therefore is exempt under section 19.

However, neither record 2c itself nor the portions highlighted by the Ministry were created for the purpose of obtaining or giving legal advice, nor was the record prepared by or for Crown counsel. It was prepared for the purpose of giving policy advice to the Minister which included legal advice on certain issues relating to the policy issues. The fact that the Ministry consulted with Ministry legal counsel in preparing this record does not in itself render the entire record privileged (see Order P-1014).

In support of the claim that privilege applies, the Ministry cited a passage from Order PO-1742-I, which the Ministry claims stands for the proposition that a document that would be subject to review and comment by legal counsel is privileged. However, the Ministry omitted the portion of the passage that explains that the documents in question were notes "regarding various legal aspects of…regulation". In the present appeal, most of the parts of the record for which the Ministry claims privilege do not relate to "legal aspects" of the issue. For example, some of them deal with scientific and economic issues.

I do not interpret Order PO-1741-I to stand for the proposition that every time a public servant has a document reviewed by legal counsel, the document becomes privileged. If that were the case, institutions could turn every document they create into a privileged one by showing a draft to a lawyer.

Although the Ministry states that all the highlighted portions of the record are "interspersed with legal opinions that clearly stand out as such", it has not met its onus as it has not identified these

legal opinions and I cannot ascertain from reading the record any information that clearly stands out as being a legal opinion other than what I have identified above. Moreover, even if information not subject to privilege is interspersed with legal opinions, that does not make the information privileged.

The third bullet point on page 1 of record 2b sets out the advice of government lawyers and an intention that it be confidential is implicit in the context of the communication. I find that this information falls within the first branch of section 19.

I find that apart from the information identified above as exempt none of the information in this record highlighted by the Ministry is exempt under either branch of section 19.

ADVICE TO GOVERNMENT

Does the discretionary exemption at section 13 apply to records 2a, 2b, 2c and 3a?

The Ministry has claimed the section 13(1) exemption for the whole of records 2a, 2b and 3a, and parts of record 2c.

General principles

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.)].

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, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*], 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

[Orders P-434, PO-1993, PO-2115, 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.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*], above.

Representations, analysis and findings

The Ministry claims that records 2a, 2b and 2c collectively constitute a coherent body of advice that was given to the Minister by public servants for the purpose of "managing the Fabrazyme issue" while the drug is being evaluated through the CDR process and the Ministry's own DQTC process. The Ministry states that "this is evident from Record 2 (already disclosed), which is an email containing or referring to all of these other records".

The Ministry submits that while each of the records contains advice or recommendations, the records should also "be understood as together presenting one coherent piece of advice" (though I note that the Ministry has already disclosed the whole of record 2 and parts of record 2c). As a result of this submission, I have considered these records both individually and collectively in analyzing them for the purpose of this exemption.

When I consider them collectively, as the Ministry suggests, I note that the same information that the Ministry has withheld in some records, it has disclosed in the representations shared with the appellant with the Ministry's consent or in other records that it has agreed to disclose to the appellant.

I agree that records 2, 2a and 2b can be read together as dealing with a specific recommendation regarding how the Minister should respond to a specific "meeting invitation". However, record

2c, in my view, deals with broader issues, and therefore the four documents cannot be understood as "together presenting one coherent piece of advice". I also note that throughout its representations the Ministry refers to the general nature of the advice that it is concerned to protect but never clearly tells me what the actual advice is.

The Ministry states that record 2a is a draft letter prepared by Ministry staff for the Minister that contains a response to a "meeting invitation". The Ministry submits that, "as a draft letter, the record itself is essentially a recommendation to follow the policy directions suggested by records 2, 2a, 2b, and 2c". Alternatively, the Ministry submits that disclosure of the record would permit one to accurately infer the advice or recommendations given by public servants, because the contents of the draft letter clearly indicate the direction that Ministry staff are suggesting to the Minister on this issue.

However, it is clear from reading record 2b that disclosure of the response in record 2a would reveal the advice and recommendations contained in record 2b. I find that record 2a is exempt from disclosure under section 13(1).

The Ministry does not clearly articulate what portions of the text constitute the specific advice that it seeks to protect in record 2b, but rather describes the general nature of that advice. Record 2b is a document setting out advice and a recommendation to the Minister on how to respond to a meeting invitation, as well as reasons for the recommendation. The recommendations themselves are subject to section 13(1). Reasons for a recommendation are not necessarily advice nor can the recommendation itself always be inferred from the reasons. However, in this case, the disclosure of the reasons for the recommendation as part of this particular record, in conjunction with other information in the record, would permit an accurate inference as to the recommendation itself. Accordingly, I find that record 2b is exempt under section 13(1).

The Ministry states that record 2c is part of the set of records prepared for the purpose of giving advice on the issue of whether to provide public funding for two ERTs and that the withheld part of this record contains a full explanation of the advice contained in records 2a and 2b, and is therefore exempt.

Records 2a and 2b deal with a recommendation regarding a specific event. Record 2c deals with a broader issue. In my view, the withheld portions of record 2c do not reveal the advice or recommendations in records 2a or 2b.

The information withheld in record 2c is on pages 8 to 17. Some of the information consists of advice and recommendations while other portions are factual and background information that sets out matters that Ministry staff took into consideration in arriving at the advice and recommendations.

However, section 13 only exempts advice and recommendations. Reasons for advice or recommendations are exempt only if that information, if disclosed, would permit one to accurately infer the advice or recommendations given. That is not the case here. Much of the information in question merely elaborates on information the Ministry has already disclosed to

the appellant in the non-confidential portions of the Ministry's representations or has agreed to disclose in other parts of records 2c and 3b, and would reveal advice or recommendations no more than the disclosed information does. Moreover, with a few exceptions (discussed below), where the information does contain advice or recommendations, it consists largely of findings and recommendations of national or interprovincial processes and advisory bodies, which are not exempt under section 13(1), rather than public servants or others employed in the service of an institution or consultants retained by the institution.

Pages 8 and 9 recount the process and recommendations of bodies that are not institutions under the *Act* and repeat and elaborate on information which the Ministry has already disclosed or has agreed to disclose to the appellant. Pages 12 to 16 also repeat and elaborate on information that the Ministry has already disclosed or agreed to disclose. They set out considerations which do not point so strongly in one direction that a recommendation could be inferred from them.

Pages 10, 11 and 17, however, point strongly in the direction of a particular recommendation, which can be inferred from reading it, and is therefore exempt under section 13(1).

I find that the information in record 2c, that I have highlighted on a copy of this record provided to the Ministry with this order, constitutes advice or recommendations. This information is exempt from disclosure under section 13(1).

I find that the rest of record 2c is not exempt under section 13(1).

The Ministry claims that record 3a is exempt in its entirety. Record 3a contains the kind of information referred to in the Ministry's confidential representations, which is a kind of information that is not advice or recommendations, as well as factual and background information. In addition, the Ministry has already disclosed much of this particular information to the appellant in the non-confidential portions of the Ministry's representations and has agreed to disclose or has already disclosed to the appellant parts of records 2c and 3b that contain this information.

I find that record 3a is not exempt under section 13(1).

Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. Having reviewed the records and the Ministry's representations, I find that none of the information that I have found to be exempt under section 13(1) falls within any of the exceptions in sections 13(2) and (3).

Accordingly, I find that the whole of records 2a and 2b and the portions of record 2c, that I have highlighted on a copy of the record provided to the Ministry with this order, are exempt from disclosure under section 13(1).

THIRD PARTY INFORMATION

Does the mandatory exemption at section 17 apply to record 3b?

The Ministry invoked the section 17(1) exemption for the highlighted portion of page 2 and the second and third highlighted portions of page 3 of record 3b. The Ministry did not specify why this exemption applies or which subsection(s) apply. It merely stated, "The Ministry relies on the submissions of the affected parties in support of this claim".

As mentioned earlier, affected party B made no submissions. The representations of affected party A were limited to the following:

> We [cite] section 17(1) of the Freedom of Information Act. The information was supplied to the Ministry in confidence and should be kept confidential. Information about [the affected person's] actions/communications with the Ministry, and the timing and comprehensiveness of our drug submissions, is considered private and disclosure of such to our competition could harm our competitive position on this or future product submissions.

The representations do not reveal whether the affected person considers the information in question to be a trade secret or scientific, technical, commercial, financial or labour relations information.

Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or

electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

Having reviewed the passages highlighted by the Ministry and the representations of the Ministry and affected party A, I find no evidence that any information in the highlighted passages falls into any of the categories described above. Accordingly, I find that part 1 of the test has not been met, and it is therefore unnecessary to consider parts 2 and 3 of the test. However, I will add the observation that it is clear that most, if not all, of the information in question was also not "supplied" to the Ministry by the affected persons and therefore does not meet part 2 of the test.

I find that the information at issue in record 3b is not exempt under section 17(1).

Does the discretionary exemption at section 18(1)(g) apply to the records?

The Ministry claims that the section 18(1)(g) exemption applies to parts of record 2a, 2b, 2c, 3a and 3b.

I have already found that records 2a and 2b in their entirety, and page 10 of record 2c, are exempt under section 13(1). I have found that the whole of page 11 of record 2c is exempt under sections 13 and 19. I will not include this information in my consideration of section 18(1)(g).

Section 18(1)(g) states:

> A head may refuse to disclose a record that contains,
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Section 18(2) creates an exception to the section 18(1) exemption for results of product or environmental testing carried out by or for an institution. This exception does not apply in the circumstances of this case.

For section 18(1)(g) 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.)].

In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or
   (ii) undue financial benefit or loss to a person.

> [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

The meaning of "plan" has been discussed in several orders. In Order P-348, former Assistant Commissioner Tom Mitchinson dealt with a record containing recommendations for plans relating to the management of personnel and administration. In doing so, he adopted the following definition of "plan" for the purposes of both sections 18(1)(f) and 18(1)(g):

> The eighth edition of *The Concise Oxford Dictionary* defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme".

I adopt this definition of "plan" for the purpose of deciding this appeal.

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726]. As Adjudicator Donald Hale stated in Order P-790:

> It has been established in a number of previous orders that the term "pending policy" decision contained in the second part of the test refers to a situation where a policy decision has been reached but has not yet been announced. More specifically, the phrase does not refer to a scenario in which a policy matter is still being considered by an institution. [Orders M-182 and P-726].

The Ministry submits that the disclosure of the records could lead to premature disclosure of a pending policy decision with respect to the reimbursement of patients using Fabrazyme. As the Ministry's representations acknowledge, no decision has been made as to whether to provide such reimbursement. Whether to reimburse is not a "pending policy decision" under this section, and, in any event, it is not the decision that the Ministry is concerned about revealing.

The Ministry's confidential representations describe the decision that the Ministry does not wish to reveal at this time. It is a decision about an approach, process, or strategy. That decision has been made, but has not yet been announced. Decisions such as the one in question may be policy decisions or they may be operational decisions, depending on the circumstances of the case. In these circumstances, I am satisfied that the decision can be reasonably described as a policy decision and that it is "pending" in the sense referred to in Order P-790.

The Ministry claims that section 18(1)(g) applies to pages 8 to 17 of record 2c. As indicated earlier, pages 10 and 17 are exempt under section 13 and page 11 is exempt under sections 13 and 19.

Pages 8 and 9 of record 2c contain information about the process and recommendations of bodies other than the Ministry that are not "institutions" and therefore their interests are not protected by section 18(1)(g). These pages also do not set out proposed plans, policies or projects. Pages 12 to 16 set out a series of principles as well as questions about the application of those principles. These principles and questions do not constitute a plan, policy or project. The Ministry has not provided detailed and convincing evidence that disclosure of any of this information could reasonably be expected to disclose the pending policy decision.

The Ministry claims that section 18(1)(g) applies to the whole of record 3a. In record 3a, page 1 and the first 4 paragraphs of page 2 do not disclose proposed plans, policies or projects and therefore are not exempt under section 18(1)(g). However, the information I have highlighted on page 2 and the whole of pages 3 and 4 are exempt under section 18(1).

In my view, the information highlighted by the Ministry in paragraph 8 of record 3b is also not a plan, policy or project. It is a list of possible future recommendations. Moreover, it does not reveal the decision referred to in the Ministry's confidential representations and there is no evidence that the decision to which it relates has been made. Therefore, the Ministry has not established that it is a pending policy decision. Accordingly, it is not exempt under section 18(1).

EXERCISE OF DISCRETION

Did the institution exercise its discretion under sections 13, 18 and 19? If so, should this office uphold the exercise of discretion?

General principles

The section 13, 18 and 19 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

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

Some of these considerations favour exercising discretion in favour of exemption, while others favour exercising discretion in favour of disclosure. In its representations, the Ministry described its consideration of several relevant matters. It states that its exemptions were "limited and specific", that it disclosed record 2 in its entirety and parts of records 1 and 3, and that it took into account the "recent and sensitive nature of the information contained in the records and the fact that the request was not for the personal information of the requester". The appellant provided no information about any considerations that might weigh in favour of disclosure and there is no evidence that the Ministry ignored any relevant matters or took into account any irrelevant considerations.

I find nothing improper in the Ministry's exercise of its discretion.

ORDER:

1. I uphold the decision of the Ministry not to disclose the information that I have found to be exempt. For greater certainty, this is the information that is highlighted on a copy of the records provided to the Ministry with this order.

2. I order the Ministry to disclose to the appellant the information that I have not found to be exempt. For greater certainty, this is the information that is **not** highlighted on the copy of the records provided to the Ministry, by sending him this information before **January 26, 2006**, but not earlier than **January 20, 2006**.

3. To verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant.

Original signed by: December 20, 2005
John Swaigen
Adjudicator