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

ORDER PO-2528

Appeal PA-040044-1

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 documentation including communications to or from the Ministry, internal memoranda of the Ministry, correspondence, technical or other reports or data, submissions, opinions, contracts and other relevant information relating to the application for the listing and the listing of the drug [a specific drug] in the Special Drugs Program [SDP] of the Ministry.

The requester stated further that the "…records relate to the availability to patients, through the [SDP], of a drug used in the treatment of anemia, in individuals suffering from chronic renal failure or undergoing chemotherapy, among others. The disclosure of the requested records is accordingly in the public interest."

The Ministry granted the requester access in part to the responsive records, but denied access to the remaining information pursuant to sections 13(1) (advice to government), 17(1)(a), (b), (c) (third party information), 18(1)(c), (d), (g) (economic and other interests), 19 (solicitor-client privilege), and 21(1) (personal privacy) of the *Act*. In addition, the Ministry charged the requester a fee of $143.90 for search, preparation and copies of the responsive records.

The requester, now the appellant, appealed the Ministry's decision in part. In her letter of appeal, the appellant limited the scope of her appeal as follows:

> **Appeal Limited to Documents of Public Interest**
>
> The Ministry relies on several of the exemptions in the Act to deny access to the records I requested. I am not appealing the denial of access to [r]ecords the Ministry has decided are protected under sections 2 [correspondence by an individual of a confidential nature and an individual's name], 17(a) and (c) [disclosure reasonably expected to prejudice the competitive position of a third party or cause undue loss or gain to a third party], 19 [solicitor-client privilege] and 21 [personal privacy] of the Act. I understand the need to protect the commercial interests of third parties that supply information to an institution in confidence, solicitor-client privilege and personal privacy, including that of external consultants retained by the Ministry to review drug submissions. I am appealing the Ministry's decision to deny access to Records on the authority of the following sections of the Act: **13** [advice to government]; **17(b)** [disclosure reasonably expected to result in similar information no longer being supplied]; and **18** [prejudice to the economic interests of an institution].

The appellant also raised the possible application of section 23 (public interest override) of the *Act* to the records at issue.

A resolution was not achieved during the mediation stage of the process and the file was transferred to adjudication for an inquiry.

During the course of reviewing this file for the purpose of commencing the inquiry, the Adjudicator originally assigned to the file noted that the Ministry's Index refers to the application of section 18(1)(a) as a basis to deny access to Records 32, 32a and 34. He acknowledged that the Ministry had raised the application of sections 18(1)(c), (d) and (g) in its decision letter to deny access to these records. However, on review of the file it would appear that the Ministry failed to issue a decision letter to the appellant regarding its decision to also rely on section 18(1)(a) with respect to these records. Under the circumstances, if the Ministry still wished to rely on the application of section 18(1)(a), this raised a "late raising of a discretionary exemption" issue.

With respect to the application of the 17(1) exemption, it should be noted that, with a few exceptions, sections 17(1)(a) and (c) have been claimed for the same records to which sections 17(1)(b) and 18 have been claimed. The Adjudicator noted that although the appellant has indicated that she is only interested in appealing the Ministry's reliance upon section 17(1)(b), since section 17(1) is a mandatory exemption the decision-maker is required to also consider the possible application of sections 17(1)(a) and (c). In other words, in order to determine the records at issue in this appeal, they must first be analyzed under sections 17(1)(a) and (c). If either of these sections is found to apply to the records or part of the records, they will be removed from the scope of the appeal in accordance with the requester's express intention to do so.

Accordingly, the application of the exemptions in sections 13(1), 17(1)(a), (b) and (c) and 18(1)(a), (c), (d) and (g) to the records remain at issue. In addition, the appellant has raised the possible application of the "public interest override" provision in section 23.

The Adjudicator first sought representations from the Ministry and two affected parties on the application of the above sections of the *Act*. Representations were received from the Ministry and one affected party (the affected party). The Adjudicator then sought representations from the appellant and attached the non-confidential portions of the submissions made by the Ministry and affected party to the Notice that was sent to the appellant. The appellant submitted representations in response, which addressed the application of the public interest override in section 23 of the *Act* only. These submissions were shared, in their entirety, with the Ministry and affected party, who were asked to provide representations in reply. After considering the reply representations that were submitted by both the Ministry and affected party, the Adjudicator decided to seek sur-reply submissions from the appellant regarding the possible application of the public interest override in section 23. He attached the Ministry's representations, in their entirety, along with the non-confidential portions of those submitted by the affected party. The appellant did not submit representations in sur-reply.

The file was subsequently transferred to me to complete the Adjudication process.

RECORDS AT ISSUE:

The following thirty-eight records were identified as remaining at issue in this appeal: 1, 1A, 1C, 1D, 1E, 1G, 1H, 1J, 2, 4, 5-8, 9-13, 14, 15, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 32a, 34 and 35. They are described in the Index of Records provided to the appellant by the Ministry and attached to this Order as Appendix A. It should be noted that where sections 19 and 21(1) of the *Act* have been applied to parts of the records set out above, these parts are not included in my discussion below as they were removed from the scope of the appeal by the appellant.

The Ministry has claimed the exemptions in sections 17(1), 18, and 21(1) for Record 1G. This record is a letter of complaint regarding a former Ministry employee. While some information in this Record relates to the affected party's product, I find this information to be so intertwined with the complaint that it is not severable from the personal information of the identifiable individual about whom the complaint was made. Since the appellant has indicated that she is not interested in records to which the mandatory exemption in section 21(1) had been applied, I find that Record 1G is not at issue in this appeal. Accordingly, I will not consider it under either section 17(1) or 18 of the *Act*.

DISCUSSION:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

As noted above, the Ministry's Index refers to the application of section 18(1)(a) to deny access to Records 32, 32a and 34. Although the Ministry had claimed the application of sections 18(1)(c), (d) and (g) in its decision letter to deny access to these records, the decision letter did not mention section 18(1)(a). This issue was not identified until the first Notice of Inquiry was sent.

In support of its argument that I ought to apply the discretionary exemption in section 18(1)(a) to these three records, the Ministry submits that the failure to include section 18(1)(a) in its decision letter was an inadvertent clerical error and that it had always intended to claim this exemption, as evidenced by the Index of Records. The Ministry submits further that the appellant is not prejudiced by the inclusion of this exemption as the appellant would be aware that it had been claimed on the Index of Records, which was provided to her along with the Ministry's decision letter. Moreover, the Ministry submits that since it had claimed other subsections of section 18(1), the addition of another subsection is not as significant as it would be if a completely new exemption was claimed.

Section 11.01 of the IPC's Code of Procedure provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written

> decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Claiming discretionary exemptions promptly is necessary in order to maintain the integrity of the appeals process. Unless the parties know the scope of the exemptions being claimed at an early stage in the proceedings, effective mediation of the appeal will not be possible. In addition, claiming a discretionary exemption for the first time after a Notice of Inquiry has been issued could necessitate re-notifying the parties to give them an opportunity to make representations on the exemption, and delay the appeal. In many cases the value of the information requesters seek diminishes with time, and requesters may be prejudiced by delays arising from late exemption claims (Orders P-658, PO-2113).

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113).

In the present appeal, the claim for the application of the additional discretionary exemptions in sections 18(1)(a) was identified at the beginning of the adjudication stage as a possible issue. Accordingly, the appellant was aware of and was able to turn her mind to its possible application at that point in time. Moreover, as noted by the Ministry, by including reference to section 18(1)(a) in its Index, it was apparent that the Ministry always intended to claim this exemption and that its omission was inadvertent. In the circumstances of this appeal, I am not persuaded that there would be any prejudice to the appellant to permit the Ministry to pursue this exemption. I will, therefore, consider its application in this order.

ADVICE TO GOVERNMENT

The Ministry has taken the position that the exemption in section 13(1) of the *Act* applies to Records 32, 32(a) and portions of Record 35.

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.

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

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

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564].

In Order 68, former Commissioner Linden made the following comments regarding the status of the DQTC in the context of whether records created by it fall within the ambit of section 13(1). He found that:

> [t]he DQTC is an advisory body created by Order in Council pursuant to section 9 of the *Ministry of Health Act*, supra. Section 9 reads as follows:

> The Lieutenant Governor in Council or the Minister may appoint committees to perform such advisory functions as are considered necessary or desirable in order to assist the Minister in the discharge of his duties.

In my view, the role of the DQTC as an advisory body to the Minister places it squarely within the scope of entities intended to be covered by subsection 13(1).

The former Commissioner went on to comment on the application of the section 13(1) exemption to certain records created by the DQTC as part of its legislative mandate. He concluded:

> As far as the records containing comments or discussions by the DQTC and the names of manufacturers where recommendations for inspection of facilities were discussed by the DQTC are concerned, in my view, they meet the requirements for exemption under subsection 13(1). In all instances, the severed information fits into one or the other of these categories of records. In my view, these are precisely the types of information intended to be the subject of a claim for exemption under subsection 13(1).

The Ministry has disclosed much of Record 35. The portions of this document at issue in this discussion contain references to the recommendations made by the DQTC regarding the affected party's application for reimbursement of a drug under the SDP. I find that disclosure of these references would reveal the advice and recommendations made by the DQTC and are, therefore, exempt under section 13(1).

Record 32 is a memorandum to the Minister from the Assistant Deputy Minister in which he sets out the overall advice and specific recommendations outlined in an attached Discussion Paper (Record 32(a)). The Ministry submits that they provide advice to the Minister about the background to the SDP program, the request for reimbursement and options for the Minister to consider.

In my view, Record 32 falls squarely within the definition of advice and recommendations as set out above and is, therefore, exempt under section 13(1) of the *Act*.

Record 32(a), as noted above, is a discussion paper. It contains a great deal of factual background information and analysis of the issues being discussed. Unlike many discussion papers, however, which simply address in general terms the issue under consideration, the focus of this paper is much more directional and leads the reader towards the overall advice being offered. I find that Record 32(a) is more properly described as an argument in favour of a particular approach suggested by the author. I am satisfied that this document sets out the author's advice with respect to a specific plan of action and implementation strategy. I find that this entails an approach that has been communicated to the Minister responsible for making decisions regarding the SDP in order to assist him in making that decision. Accordingly, I find that this document is exempt under section 13(1) as it contains both overall advice and specific recommendations.

As I have found Records 32, 32(a) and the identified portions of Record 35 to be exempt under section 13(1), it is not necessary for me to consider whether the exemptions in section 18(1) also apply to them.

THIRD PARTY INFORMATION

The Ministry and the affected party take the position that the mandatory exemptions in sections 17(1)(a), (b) and/or (c) apply to the information at issue contained in Records 1, 1A, 1C, 1D, 1E, 1H, 1J, 2, 4, 5-8, 9-13, 14, 15, 19, 21, 23-31, 34 and 35. 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;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected 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 Ministry 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 (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Before addressing this issue, I note that the affected party did not provide specific submissions on the application of the exemption in section 17(1) to the records at issue. The affected party was asked to address this issue in the Notice of Inquiry, and was advised that the onus was on it to establish the application of this exemption in the *Act* to the records. Rather, the affected party focused its submissions on the possible application of section 23. In doing so, the affected party noted that the appellant "has conceded that the documents excluded under these sections were properly excluded", referring to a notation in the Notice of Inquiry that the appeal was limited to documents of public interest. It should be noted that this reference was included as background information to the appeal. In the Notice, the Adjudicator clearly indicated that he would be looking at all of section 17(1) and therefore sought submissions on its application to the records at issue. As a consequence, the affected party has made no submissions on the application of section 17(1), and in particular, on the anticipated harms in disclosure.

While the failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus. [Order PO-2020] However, in this case, the Ministry has provided extensive submissions on the application of section 17(1), and I will refer to them in addressing the records at issue.

Part 1 of the Section 17(1) Test - Type of Information

Both the Ministry and affected party have submitted that the records contain information which qualifies as a "trade secret", commercial and/or financial for the purpose of section 17(1). I have also considered whether the information is "scientific" or "technical" information within the meaning of that section. Previous orders have defined these terms as follows:

Trade Secret

> "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.

(See Orders M-29, PO-2010)

Scientific Information

Scientific information is information belonging to an organized field of knowledge in either 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 specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

Technical Information

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, 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. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

Findings

Previous orders of this office have determined that information relating to a Formulary submission qualifies as “scientific”, “financial” and “commercial” information for the purposes of section 17(1). (See: Orders P-68, P-284, and PO-2097.)

The records at issue in this discussion all consist of correspondence or communications between the Drug Programs Branch (DPB) and others in relation to the application and submissions made

to the DPB by the affected party for the reimbursement of a drug under the SDP. In my view, the context in which the records have been created is sufficiently similar to the Formulary submissions referred to in previous orders such that the reasoning in these orders is relevant and applicable to many of the records at issue in the current appeal.

I find that the records at issue in this discussion contain information that qualifies as "commercial information" within the meaning of section 17(1) as it relates to the buying and selling of pharmaceutical products. Furthermore, I find that certain records contain information which describes the chemical make-up of the drug and thus qualifies as "scientific" information for the purposes of section 17(1). As well, portions of the records contain costing information which qualifies as "financial" information for the purposes of that section. As a result, I find that the first part of the section 17(1) test has been satisfied with respect to all of the records at issue in this discussion.

Part Two of the Section 17(1) Test - Supplied in Confidence

In order to satisfy part 2 of the test, the Ministry and the affected party must establish that the information was "supplied" to the Ministry by the affected party "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be "supplied" to an institution reflects the purpose in section 17(1) of protecting the informational assets of third parties (Order MO-1706).

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must be reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly. [Order M-169]

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

Representations

The Ministry and the affected party submit that the information contained in the records was provided to the Ministry in confidence by the affected party or would permit the drawing of accurate inferences with respect to information that was supplied by it in confidence. With respect to confidentiality, the Ministry states:

> The Ministry respectfully submits that these records were clearly supplied to the Ministry in confidence by the [affected party], or contain or refer to other information or documents that were submitted by the [affected party] to the Ministry in confidence. All drug submissions to the Ministry, whether made under the ODBA or the *Drug Interchangeability and Dispensing Fee Act* (for listing on the Ontario Drug Benefit Formulary) or for reimbursement under the SDP, are treated in confidence by the Ministry. As the Ministry clearly states in its *Ontario Guidelines for Drug Submission and Evaluation* (September 2000), provided to all manufacturers in Ontario, all drug submission information, with a few limited exceptions, will be held in confidence by the Ministry. In particular, all SDP submissions, as a matter of practice, are held in confidence by the Ministry.
>
> …
>
> Therefore, the records and information they contain were supplied with an express expectation of confidence. [The affected party], like other drug manufacturers, would have a reasonable expectation that the information it submitted to the Ministry as a part of its SDP submission was in fact submitted in confidence, and would be treated as such by the Ministry. As a matter of fact and practice the ministry does treat this information as highly confidential.

Findings

Records 1, 1A, 1C, 1D, 1E, 1H, 1J, 2, 4, 15, 21, 27, 28, 30 and 31

These records comprise correspondence sent to the Ministry by the affected party either by mail or e-mail regarding its submission of a drug under the SDP and were thus supplied within the meaning of this section. Based on the Ministry's submissions, I am also satisfied that they were supplied to the Ministry with a reasonably-held expectation of confidentiality for the purpose of section 17(1).

Records 14, 24, 26, 34

These records consist of correspondence from the Ministry to the affected party relating to its submission. The Ministry submits that these records contain information supplied by the affected party. I accept the Ministry's characterization of Records 14, 24 and 26 as such and find that disclosure of these records would reveal information that was supplied to the Ministry in confidence, within the meaning of section 17(1).

Record 34 is a "Letter of Intent" signed by representatives of the Ministry and the affected party. This document sets out the terms and conditions of an agreement reached between the Ministry and affected party.

In Order MO- 1706, Adjudicator Bernard Morrow states:

> ... [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution." The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

Neither the Ministry nor the affected party has made submissions on this issue. Based on my review of this record, it is apparent that its contents reflect the meeting of the minds that generally takes place during the negotiation process. In Order PO-2435, Assistant Commissioner Brian Beamish made the following comments regarding Service Level Agreements between the Ontario Family Health Network and various consultants:

> Further, upon close examination of each of these SLAs, I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.
>
> In summary, I find that the SLAs are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1).

The Letter of Intent on its face is identified by the Ministry as an agreement. It sets out the terms and conditions under which the drug is to be provided and is signed by representatives of both the Ministry and the affected party. Although it may contain terms proposed by the affected party, they have clearly been transferred into a document that was intended to reflect the agreement reached between the Ministry and the affected party. I find that, although perhaps not a contract *per se*, the body of this document signifies that the terms were subject to negotiation and, therefore, were not "supplied" within the meaning of section 17(1) of the *Act*. Moreover, based on the reasoning applied by Assistant Commissioner Beamish in Order PO-2435 and my own review of this document, I find that there is nothing in the body of this document that would fall into the "inferred disclosure" or "immutability" exceptions as set out above.

Accordingly, I find that Record 34 was not supplied to the Ministry and consequently section 17(1) does not apply to it.

Records 5-8, 9-13, 23 and 25

Records 5-8 and 9-13 are correspondence between the DPB and the DQTC and Records 23 and 25 are DQTC minutes relating to the affected party's submission. All of these documents contain specific detailed references to the affected party's submissions. The Ministry claims that all of the information at issue contained in these records was originally supplied to the Ministry by the affected party. I agree, and therefore find that disclosure of these records would reveal information provided by the affected party, in confidence, thereby satisfying the second part of the test under section 17(1).

Records 19 and 29

These are communications between Ministry staff relating to the affected party's submission. I find that Record 29 contains or would reveal information originally provided by the affected party. However, Record 19 relates to steps taken by the Ministry in addressing the affected party's application, but does not refer to information supplied by it nor would its disclosure reveal information supplied by the affected party regarding its application. Therefore, I find that the information in Record 19 was not supplied to the Ministry and consequently, section 17(1) does not apply to it.

Record 35

This is a Briefing Note of which only the last two pages have been exempted pursuant to section 17(1). This portion of the Briefing Note contains references to the affected party's product that was provided to the Ministry by the affected party and was, therefore, supplied within the meaning of section 17(1).

Part Three of the Section 17(1) Test - Harms

Introduction

To meet this part of the test, the institution and/or the affected party 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.)].

The Ministry's Representations

The Ministry provided the following representations with respect to the harms issue, in support of its position that the records qualify for exemption under section 17(1).

Section 17(1)(a)

The Ministry takes the position that the disclosure of the information would place the affected party at a competitive disadvantage and relies on the decision of Adjudicator Donald Hale in Order PO-2097 and the submissions it made in that appeal. Order PO-2097 involved a request for correspondence between an affected party and the DQTC regarding a submission made under the ODBA.

The Ministry made the following submissions in that appeal:

> Any information disclosed relating to scientific testing, manufacturing procedures and methods, sales or marketing projections, etc., would assist a competitor to bring a drug similar to [the affected party's product] onto the market even more quickly than would otherwise be the case. This would have an extremely adverse

> affect on the competitive position of [the affected party] in the pharmaceutical marketplace.
>
> …
>
> The Ministry relies on the decision of this office in Order 47 in support of its contention that the disclosure of information relating to the pricing of a drug product by a manufacturer would allow competitors to "calculate future price submissions and pricing structures" to the detriment of the original manufacturer. It also submits that some of the records contain information which, if taken out of context, could be used by competitors to the detriment of the affected party in the marketing of drug products similar to that under discussion in the records at issue in this appeal. It also indicates that the disclosure of the information in the records which relates to the strategies and techniques employed by the affected party in successfully having its product listed in the Formulary could reasonably be expected to be exploited by its competitors in their applications for other drug products.
>
> Insofar as the information relating to the financial impact of the inclusion of the affected party's product on the Formulary is concerned, the Ministry submits that the affected party would suffer real economic loss in its market should this information be disclosed. The Ministry points out that the pharmaceutical industry is particularly competitive as the stakes are so high. Potential sales and profits are substantial to a firm which is successful in having a product listed on the Formulary, particularly for a general as opposed to a limited use listing. For this reason, the manufacturers of drug products jealously guard the information they provide to the Ministry when seeking a listing.

The Ministry submits that all of the records at issue relate to the manufacturing procedures and methods, pricing and marketing of the drug by the affected party and that disclosure of this information would result in the same prejudice to the affected party as that argued in PO-2097. The Ministry notes that the Adjudicator expressly agreed with this position, stating:

> Generally, I find favour with the positions expressed by the Ministry and the affected parties with respect to the harms which could reasonably be expected to follow the disclosure of the information which I have found to be subject to Parts I and II of the section 17(1) test. I find that the affected parties in particular have provided me with convincing and detailed evidence of a reasonable expectation that disclosure of this information would result in harm to their competitive position in what is clearly a very competitive industry. It is clear from the evidence provided to me by all of the parties that pharmaceutical companies view their marketing strategies and the information they provide to the Ministry in support of a Formulary listing application as information worthy of protection from their competitors.

Section 17(1)(c)

With respect to section 17(1)(c), the Ministry states that submissions to the SDP are made by manufacturers in confidence precisely because they contain proprietary information about the manufacturer and its drug product that would be of great interest to its competitors. Again referring to the submissions made in Order PO-2097, the Ministry reiterates the anticipated harms in disclosure of this information:

> With respect to section 17(1)(c), the Ministry relies on the decision of former Assistant Commissioner Irwin Glasberg in Order P-1019 in support of its contention that the affected party would suffer an undue loss should the information contained in the records be disclosed. It also relies on a decision of the Nova Scotia Supreme Court in *Re: Appeal Pursuant to Section 41 of the Freedom of Information and Protection of Privacy Act*. The Ministry goes on to submit that the information contained in the records:
>
> > . . . was developed solely from the work and experience of [the affected party] staff, totally at the company's own expense, exclusively as a result of its own efforts. Release of any or all of these records could 'jump-start' a competitor by providing extremely valuable information relating to technical pharmaceutical issues, manufacturing methods, and sales/marketing strategies. In addition, disclosure of the records could provide a competitor with information with respect to how best to present data for regulatory and governmental approval. Thus, a competitor could address and avoid all the problems [the affected party] encountered during the submission process, without having extended any time, effort or expense of its own. The Ministry submits that this scenario is patently unfair to [the affected party], and thus satisfies that criteria for "undue loss" as presented by both the IPCO of Ontario and the Nova Scotia Supreme Court.
> >
> > . . .
> >
> > if such information were to be made available to [the affected party's] competitors, it could be used against [the affected party], resulting in irreparable harm to the company and its reputation. This damage to the company's goodwill and reputation could conceivably persist for an indefinite time period.

Findings

In general, I agree with the approach taken by Adjudicator Hale in Order PO-2097, which is clearly reflective of previous approaches of this office to similar types of information in a comparable context.

All of the information remaining at issue in the above-noted records contains specific references to the affected party's application and position relating to its product, details about the drug's history, development and chemical make-up as well as application and pricing details.

Based on the information at issue, as well as the representations of the Ministry and previous orders that have dealt with similar types of information, I find that the disclosure of the information in the records remaining at issue in this discussion could reasonably be expected to result in significant prejudice to the competitive position of the affected party. As all three parts of the section 17(1)(a) test have been satisfied with respect to the information remaining at issue, I find that it is exempt from disclosure under that exemption.

In summary, I find that Records 1, 1A, 1C, 1D, 1E, 1H, 1J, 2, 4, 9-13, 14, 15, 21, 24 and 26-31 qualify for exemption under section 17(1)(a). I also find that the withheld portions of Records 5-8, 23, 25 and the last two pages of Record 35 qualify for exemption under that section.

Throughout this appeal, the appellant has made it clear that although she takes issue with the Ministry's application of section 17(1)(b) to the records at issue, she is not interested in pursuing those records to which section 17(1)(a) and (c) applies. Since I have found that section 17(1)(a) applies to the above-noted Records, they are no longer at issue in this appeal and I will not consider whether the other exemptions claimed for them apply, including the possible application of section 23.

I have found that Records 19 and 34 do not qualify for exemption under section 17(1). As the Ministry has also applied the discretionary exemptions in sections 18(1)(c) and (d) to Record 19 and 18(1)(a), (c), (d) and (g) to Record 34, I will review the possible application of those exemptions to these two records.

ECONOMIC AND OTHER INTERESTS

The Ministry has claimed the application of sections 18(1)(c) and (d) to the information contained in the Records 17, 19, 20 and 34 with the additional exemptions in sections 18(1)(a) and (g) applied to Record 34. These exemptions state:

A head may refuse to disclose a record that contains,

> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

…

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

…

(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;

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

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

Other parts of section 18(1) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. This contrasts with section 18(1)(a), which is concerned with the type of the information, rather than the consequences of disclosure (see Orders MO-1199-F, MO-1564).

For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information

2. belongs to the Government of Ontario or an institution, and

3. has monetary value or potential monetary value.

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests. (Order P-441)

To establish a valid exemption claim under section 18(1)(d), the institution must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. (Orders P-219, P-641 and P-1114)

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.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

For sections 18(c),(d) or (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.)].

The Ministry's Representations

The Ministry's submissions on the application of sections 18(1)(c), (d) and/or (g) refer generally to the information contained in all of the records, many of which I have found to be exempt under section 17(1). The Ministry's representations again refer to the submissions it made in Order PO-2097, reiterating that the issues are very similar in both cases and the anticipated harms outlined in Order PO-2097 apply equally to the disclosure of the information in the case at bar. The Ministry replicates its earlier submissions as follows:

In these times of fiscal and economic restraint, the Ministry must work to ensure that the people of Ontario receive the best possible health care at the lowest feasible costs. An important component of this is that the most cost-effective drugs are listed on the Formulary/CDI so that maximum value is achieved for the funds spent. It is especially important for those taxpayers (such as senior citizens and lower-income individuals) that depend on drugs listed on the Formulary that their limited tax dollars are spent prudently. Thus, it is in the interests of the Ontario Government that residents receive the best possible health services and pharmaceuticals for government expenditures.

The Ministry submits that disclosure of the records … would prejudice its economic interests in that the operation of the drug submission and Formulary listing system would be impeded and compromised. Pharmaceutical companies typically submit all of the necessary records to the DPB of the Ministry in the strictest confidence, and rely on the fact that this confidence will not be breached. If these records were to be disclosed, pharmaceutical companies would lose trust in the good faith of the government with respect to the maintenance of confidentiality.

This expectation is reasonable due to the nature of the records at issue… [T]hese records contain highly confidential trade secrets as well as scientific, technical, commercial and financial information as defined by the Act. Furthermore, there is information in some of the records that, if publicly disclosed, could be deliberately misused in order to create the impression that the drug product is unsafe or ineffective. In addition, some of the data in the records, if taken out of context or presented in isolation by an unscrupulous competitor, could be used to infer that the marketing campaign for [the specified drug product] was fraudulent or misleading.

It is reasonable to expect that disclosure of these records would result in damage to both the tangible and intangible assets (i.e. its reputation in the industry) of [the affected party. As a result, it is highly unlikely that this company would desire to participate in the Formulary/CDI drug submission process of the MOHLTC in the future. It thereby follows, that if a well-known pharmaceutical company such as [the affected party] suffers a serious breach of confidentiality, resulting in the loss of valuable trade secret and sensitive scientific/technical, commercial and financial information, few, if any other pharmaceutical companies will be willing to be involved in dealings with the Ontario Government.

The MOHLTC submits that this scenario described above would be extremely injurious to both the financial interests of the Government of Ontario and to the Government's ability to manage the economy of the province.

. . .

> On its own, a savings loss of this magnitude would be injurious to the provincial government, especially in the light of the present climate of fiscal restraint. However, as previously noted, it is likely that disclosure of the confidential information of one drug company would lead to a "ripple effect" throughout the industry, whereby few, if any pharmaceutical companies would be willing to commit the time, money and resources necessary to complete the drug Formulary submission process. The MOHLTC submits that such a resulting outcome would be extremely injurious to the financial interests of the Government of Ontario as well as to the ability of the Government to manage the economy.

With respect to the specific records remaining at issue in this discussion, the Ministry makes the following submissions.

Application of sections 18(1)(c) and (d) to Records 17, 19 and 20

The Ministry submits that Records 17 and 19, which constitute internal e-mails, contain discussions about the reimbursement process under the SDP. The Ministry states further:

> …expressly refer to the process for reimbursement of the drug product [a named product] after a prolonged "freeze" of the SDP. Deliberations leading to the reimbursement of [the drug] reveal economic aspects of the government of Ontario's financial management of the SDP.
>
> If such information were disclosed it would jeopardize the government's ability to effectively manage the costs of the SDP. It is reasonable to expect that the government of Ontario would suffer serious financial loss if this information were disclosed because it would give other manufacturers a "window" into the government's decision-making process.
>
> …If the Ministry's decision-making processes with regard to this SDP drug were revealed, this would cause serious harm to the Ministry's ability to effectively manage the SDP. It would also permit manufacturers in the future to have a "leg up" on their competition which, in and of itself, would have a negative effect on the integrity of the SDP process as a whole.

With respect to Record 20, the Ministry submits that:

> [It] is a letter whose disclosure would reveal details of the review process and strategies used by the Ministry during the review of a manufacturer's submission under SDP. This disclosure could prejudice the economic interests of the Ministry as it would reveal the Ministry's review process and thus prejudice the Ministry's ability to manage the SDP and maintain the integrity of the program.

Application of sections 18(1)(a), (c), (d) and (g) to Record 34

Section 18(1)(a)

According to the Ministry:

> Record 34 is correspondence between [the affected party] and the Ministry. It…contains commercial and financial information of the Ministry as it relates to the reimbursement of [the drug] under the SDP.
>
> …
>
> …It contains commercial and financial information belonging to the Government of Ontario, in the sense that this information is confidential and not generally known to the public. It contains commercial and financial details relevant to the management of the SDP, which is owned by the Government of Ontario, and operated by the Ministry.
>
> The Ministry submits that the disclosure…would threaten the integrity and viability of the SDP. Should this information be released, the Ministry's ability to effectively manage a financially viable and complex special drugs program for the Government of Ontario would be jeopardized. The public, particularly vulnerable individuals who benefit from the SDP, have an interest in the continued viability of the program.
>
> The Ministry submits that the records contain highly confidential commercial and financial information that has potential monetary value for pharmaceutical companies wishing to have products listed in the Drug Formulary under the ODBA or be part of the SDP.
>
> *Sections 18(1)(c) and (d)*
>
> The Ministry submits that Record 34:
>
> …contains detailed financial and commercial information whose disclosure would prejudice both the Ministry's economic interests and the Government's financial interests. Given the financial impact of the SDP on the government and the Ministry, due to the high costs associated with this program, and the possibility that drug manufacturers would use this information in future SDP applications, the Ministry submits that the disclosure of this financial information could reasonably be expected to result in the harms described in paragraphs (c) and (d).
>
> In addition…disclosure…could undermine the SDP and, potentially, the ODBA formulary listing processes. If the integrity of these programs is threatened, this would have negative economic consequences for the Ministry. Given that the

> government ultimately funds these two programs, the disclosure would be injurious to the Government's financial interests as well.

Section 18(1)(g)

The submissions made by the Ministry regarding this exemption were specific to Records 32 and 32(a), which are not at issue in this discussion. The Ministry did not address Record 34 in this submission.

Findings

Section 18(1)(g)

Since the Ministry did not specifically address the application of section 18(1)(g) to Record 34, it has failed to meet its onus in establishing its applicability in the circumstances. Its general submissions appear to refer primarily to the submissions process itself, rather than the negotiated end product of that process. Even if I were to conclude that these submissions somehow referred to the contents of Record 34, I do not find the Ministry's submissions contain the type of detailed and convincing evidence or argument necessary to establish the application of the section 18(1)(g) exemption to Record 34. In my view, the Ministry has not adequately demonstrated that the disclosure of a negotiated agreement which sets out the terms and conditions under which a product will be funded by tax payers' money could reasonably be expected to result in the harm contemplated by this exemption. The Ministry does not refer to any pending policy decision that could be prematurely disclosed by disclosure of this record. Moreover, in letters to external stakeholders and the pharmaceutical manufacturers (Records 36 and 37, disclosed by the Ministry), the fact that the affected party's drug will be covered by the SDP, the willingness of the Ministry to consider submissions for additional brands/formats of drugs currently listed on the SDP and the Ministry's intention to consider administrative changes to the SDP to help manage the program has been made public. I therefore find that section 18(1)(g) does not apply.

Section 18(1)(a)

As discussed above under my discussion of section 17(1), I accept that Record 34 contains commercial and financial information. Accordingly, the first part of the section 18(1)(a) test has been met.

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], Senior Adjudicator David Goodis reviewed the phrase "belongs to" as it appears in section 18(1)(a) of the Act. After reviewing a number of previous orders, he summarized the status of the relevant previous orders as follows:

> The Assistant Commissioner [Tom Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use

> or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. (See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein).

I adopt these comments for the purposes of the current appeal, and conclude that for information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trademark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party, and may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information. [PO-1763, PO-1783, PO-2226, PO-2433]

I find that the information contained in Record 34 does not "belong to" the Government of Ontario in the sense contemplated by this section. In my view, the record does not contain the types of information contemplated in the discussion above. Rather, it is a negotiated agreement that sets out the terms and conditions designed to direct the actions of each party to the agreement. Further, under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. As quoted above, the Ministry asserts that the information in Record 34 "belongs to the Government of Ontario, in the sense that this information is confidential and not generally known to the public." This passage represents the extent of the Ministry's submissions on this part of the test under section 18(1)(a). While these are relevant considerations that assist in determining the issue, beyond making a bald statement that the information is "proprietary", the Ministry offers no basis for me to find that it has any recognized intellectual property interest in it; nor has it established any basis for concluding that there is a "substantial interest in protecting the information from misappropriation. In my view, this submission is overly broad and does not provide me with sufficient evidence to conclude that this part of the test has been met.

All three parts of the test must be met for section 18(1)(a) to apply. Since I have found that the information in Record 34 does not "belong to" the Government of Ontario, this section does not apply.

Sections 18(1)(c) and (d)

I do not agree with the Ministry's characterization of Records 17 and 19 as revealing economic aspects of the government's financial management of the SDP. While they relate to the "reimbursement" process generally, they are more specifically documentation relating to the steps taken by the Ministry in assessing the affected party's submission. These two records, as well as Record 20, relate to the process that the Ministry undertakes in reviewing a drug for inclusion in the SDP. They represent communications that form part of the Ministry's efforts in obtaining information to assist in the decision-making within that process. I find that there is no inherent commercial value to the Ministry in these records. Rather, the information in Records 17, 19 and 20 primarily pertains to safety and process issues. The Ministry has failed to explain how disclosure of this type of information could have any of the financial repercussions described in sections 18(1)(c) and/or (d).

Moreover, the Ministry has not explained how giving the appellant a "window" into its decision-making could reasonably be expected to result in the anticipated harms, particularly given the transparency purpose of the *Act*.

Part of the Ministry's concern, it seems, is that pharmaceutical companies will be less willing to deal with it if they fear disclosure of sensitive information about their products. While these records contain information regarding the Ministry's efforts to investigate or "check up on" the product and/or other issues pertaining to it in the larger medical sphere, I am not persuaded that this limited exposure could reasonably be expected to have the consequences suggested by the Ministry. It is clearly in the financial interests of pharmaceutical companies to work with the Ministry in the listing of their drugs in the various formularies or programs established by it. I have already found that the vast majority of sensitive commercial, financial and scientific information of the affected party is exempt under section 17(1). The disclosure of what remains would have minimal, if any, impact on the tangible or intangible assets of the affected party sufficient to lead to a reasonable expectation that it would cease promoting its drugs to the Ministry for inclusion in the SDP or any other drug listing.

Overall, I do not find the Ministry's representations provide me with the kind of detailed and convincing evidence necessary to establish a reasonable expectation that the harms alleged in sections 18(1)(c) and/or (d) would occur from the disclosure of the information in Records 17, 19 and 20.

With respect to Record 34, although the Ministry has expressed concerns that disclosure would undermine the SDP process, it has not explained how this might occur. I find the Ministry's submission regarding the possible use drug manufacturers might make of the information in their future SDP applications to be vague, speculative and made without any kind of evidentiary foundation. Moreover, the agreement which comprises Record 34 was clearly the result of

extensive negotiation and is specifically geared to the unique components of the particular drug. It is not at all clear to me, nor have I been provided with any evidence as to how such an agreement could be replicated in the future by a different (or the same) company for a different drug.

Similar to my findings regarding Records 17, 19 and 20, I find that the Ministry's representations do not contain sufficiently detailed and convincing evidence to establish a reasonable expectation that the harms alleged in sections 18(1)(c) and/or (d) would occur from the disclosure of the information in Record 34.

Accordingly, I find that Records 17, 19, 20 and 34 are not exempt under the *Act* and should be disclosed to the appellant.

PUBLIC INTEREST OVERRIDE

The appellant has raised the application of the section 23 "public interest override" as a basis for requiring the disclosure of the records at issue in this appeal.

Section 23 states:

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

I have found Records 32, 32(a) and portions of Record 35 exempt under section 13(1). Some records will be ordered disclosed to the appellant and the remaining records discussed in this order are no longer at issue as I have found either section 17(1)(a) or 2(1) to apply to them and the appellant has indicated that she is not interested in pursuing personal information or records to which sections 17(1)(a) or (c) have been applied. Consequently, I will only consider whether the public interest override in section 23 applies to Records 32, 32(a) and the portions of Record 35 withheld under section 13(1).

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a compelling public interest in disclosure, and (2) this compelling public interest must clearly outweigh the purpose of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

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

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

With respect to section 13, in Order 94, former Commissioner Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

In her submissions, the appellant notes that the SDP reimburses the full costs of specified expensive outpatient drugs used by patients on a long term or permanent basis who were suffering from specified catastrophic conditions. She notes further that the drugs reimbursed through the SDP may be the only treatment available for a person and these drugs are not covered by the ODB.

The appellant states further:

> ...The SDP has been frozen since about 1993. It is for this reason that the Ministry's decision to reimburse [the drug] for end stage renal disease...is of great significance to stakeholders in the health care system, including patients. The decision appears to signal the end of the freeze or at least a partial opening of the SDP, because as we understand it, [named drugs], does not meet the criteria for interchangeability with Erthropoietin...[named drug] can not be considered to fall into the exceptions listed in the Ministry's memorandum to stakeholders reproduced on page 3 of its representation for: "additional format line extensions or dosage forms of products currently listed...to be in reimbursed through the SDP". In effect, [named drug] is not interchangeable with erthropoietin such that it could be added without opening the SDP, but a new drug being used for a condition that is covered under the SDP.

…

Unless clarification is provided as to the basis on which the Ministry included [named drug] in the SDP, patients and their physicians will not know whether they may request, through submissions to manufacturers or the Ministry, reimbursement by the Government for drugs that are not currently covered by the SDP or interchangeable with those covered by the SDP... Access to health care including pharmaceuticals may be the key issue in health care today, as evidenced by public opinion polls, press releases and initiatives of the Ministry and the Government of Ontario, the recent agreement signed by the Minister and the Ontario Medical Association and cases taken to the courts addressing the coverage of treatments not currently listed on provincial formularies...or the reimbursement of treatment provided outside of Canada when it was not available in a province on a timely basis.

In our submission, there is a relationship between the records we have requested and the central purpose of the [*Act*], which is to shed light on the operations of Government. The Ministry's decision to add [named drug] to the SDP appears to represent a change in the long-standing policy of the Ministry, of which notice does not appear to have been given to stakeholders. The effect of the change may be to provide access, in Ontario, to a broader range of drug products to patients suffering from catastrophic diseases.

The interests that are at issue in this request are public rather than private in that they involve the accessibility of drug products and the transparency of the Ministry's decision about the products that the Government is prepared to provide to Ontario residents through the SDP. The debate over how to balance the cost of health care with access to care, including whether it is better to provide reduced services and fewer drug products universally or expensive treatments to a limited number of persons is active in Ontario. The public will not be in a position to express its views on the issues, or make political choices, unless it is given enough information to understand the Ministry's approach to access to health care including drug products

... In our submission, manufacturers as well as other stakeholders in the health care system would benefit from understanding the criteria on which the Ministry approves a drug product for reimbursement under the SDP. Rather than having a chilling affect the disclosure of the Ministry's listing criteria will assist manufacturers in focusing their submissions.

...

...Our request is in aid of understanding whether the Ministry is accepting new drugs that are not merely additional formats, line extensions or dosage forms of product currently reimbursed through the SDP, into the SDP and if not, the basis

> on which [named drug] was listed. We are only interested in records regarding the inclusion of [named drug] in the SDP to the extent that the records indicate the Ministry's intentions with respect to the SDP. The public has a compelling interest in knowing whether the Ministry is prepared to entertain submissions for the inclusion of drugs that are not interchangeable with drugs included in the SDP and whether the Ministry has changed the test for drug interchangeability. Contrary to the position expressed by the Ministry in paragraph 64 of its representations, we submit that the public is entitled to have a "window" into the Ministry's decision-making process where access to health care is concerned and that the integrity of the process will be enhanced rather than diminished by making such information available.

In its representations, the Ministry notes that the appellant characterizes the public interest in disclosure of these documents as involving public accessibility of drug products and the transparency of the Ministry's decision about the products that the government is prepared to provide to Ontario residents through the SDP. The Ministry submits that this interest would not be served through disclosure of the records at issue. In this regard, the Ministry states that the decision to reimburse a drug through the SDP relates to the products and services that will be available within the health care system. The decision is based on technical valuations and drug companies' submissions. The Ministry submits that this issue is distinct from the issue of access to services, which relates to who will have access to the services and in what manner they will be made available. The Ministry notes that these issues are subject to public input and debate. The Ministry takes the position that the interest expressed by the appellant is essentially a private interest, as the records relate to confidential proprietary information, the disclosure of which would not significantly inform the public about access to health care issues in the province.

The Ministry also notes that the appellant has indicated that she is only interested in records regarding the inclusion of the named drug in the SDP to the extent that the records indicate the Ministry's intentions with respect to the SDP. The Ministry submits that its intentions in this regard and the basis on which it would consider submissions were indicated in a December 2002 general memorandum to stakeholders. The Ministry submits that this memorandum captures its policy on this issue, and that there would be no furtherance of the public interest in regard to access to drugs if the records were to be released.

With respect to the appellant's argument that the Ministry has changed the test for drug interchangeability, the Ministry states:

> Drugs covered for [ODB] recipients, as listed on the ODB Formulary/Comparative Drug Index (Formulary), are subject to the regulatory *Interchangeability and Dispensing Fee Act*. Products included under the SDP are administered through the authority of the *Health Insurance Act* (*HIA*). Interchangeability is not a relevant construct under the scope of the *HIA*. This was again communicated to pharmaceutical manufacturers on April 17, 2003, as follows: "Manufacturers may make submissions to the ministry for additional brand/formats of drugs currently reimbursed on the SDP. Note that the

> regulations to the *Health Insurance Act*, which specifies the substances covered under the SDP, will not be changed, and therefore, new drugs/substances will not be added. In addition, interchangeability rules do not apply to products reimbursed under the SDP."

I acknowledge the appellant's views. As recognized by the Ministry and affected party, there is a public interest in the existence of the SDP itself and the safety and efficacy of the drugs listed on it. As noted by former Commissioner Linden in Order P-68:

> …[T]he public's interest in knowing that all drug products are safe for marketing in Canada is satisfied at the time an individual product is approved by the federal government's Health Protection Branch; the DQTC is simply involved in recommending already-approved drug products for inclusion on the Formulary/CDI.

While there is clearly an interest in drug manufacturers knowing the strategies and techniques employed by their competitors in getting their drugs onto one of the formulary lists, be it the OBD or the SDP, I am not persuaded that such interest translates into a public interest in the disclosure of all records pertaining to this process. I agree with former Commissioner Linden. The public interest lies in feeling confident that the drugs that are listed are safe, effective, approved and available through the government administered programs. I am not persuaded that the disclosure of the process whereby the drugs get placed on such a list will enhance this public interest. Moreover, the records at issue in this discussion pertain to the Ministry's internal decision-making process regarding the operation of its programs and the policies pertaining to them. In my view, there is significant value in permitting the decision-making process to proceed unencumbered by outside influences, particularly where such influence is motivated by or has the ability to enhance individual drug manufacturer's economic interests.

I accept that there is a general interest that benefits the public in new drugs, or drug formats, making their way to the different formularies, in particular, the SDP. However, I am not persuaded by the appellant's arguments that the process employed by the Ministry which provides an established and controlled avenue for drug manufacturers to make submissions and expect to have them seriously considered by the Ministry, has been brought into question as a result of the arrangements reflected in the records at issue. As the Ministry notes, notification to the industry has been made and, in my view, clearly sets out the Ministry's process and establishes the parameters for the expectations of the drug manufacturing sector. It does not appear that there is any deterrent or obstruction, intentional or otherwise, to competitors of the affected party making submissions. While the appellant may question the Ministry's decision to reimburse the named drug under the SDP, the evidence does not establish that there is any restriction on another drug company engaging the Ministry's attention in an attempt to achieve a similar result.

As a result of this inquiry, the appellant will receive some information relating to the safety of the affected party's drug and the contractual terms under which the drug will be reimbursed by the SDP. The only information remaining at issue under section 23 is information pertaining to

the advice and recommendations made by Ministry staff regarding the SDP and the particular circumstances relating to the submission made by the affected party. The evidence before me, including the withheld information in Records 32, 32(a) and portions of Record 35, does not support a finding that there is a compelling interest in the disclosure of that particular information. Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I order the Ministry to provide the appellant with copies of Records 17, 19, 20 and 34 by **December 29, 2006** but not before **December 22, 2006**.

2. I uphold the Ministry's decision to withhold the remaining records.

3. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant.

Original Signed by: November 22, 2006
Laurel Cropley
Adjudicator

APPENDIX A

FIPPA REQUEST - A-2003-01116 - INDEX OF RECORDS

Item #	DESCRIPTION (description of record e.g., title, correspondent names, dates, etc.)	# of Pages	RELEASE	SEVER (Yes/No)	SECTION (FIPPA exemption section(s) #(s) applied
1	Letter from Amgen to Office of the Minister of Health	1	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
1A	Letter from Amgen to Drug Programs Branch (DPB)	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
1B	Letter from DPB to Amgen	1	Access Denied	Yes	17(1)(a)(c)
1C	Letter from Amgen to Drug Programs Branch (DPB)	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
1D	Letter from Amgen to Drug Programs Branch (DPB)	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
1E	Letter from Amgen to Drug Programs Branch (DPB)	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
1F	Letter from DPB to Amgen	1	Access Denied	Yes	17(1)(a)(c)
1G	Letter from Amgen to Drug Programs Branch (DPB)	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g) 2(1)(f)(h)[21(2)(e)(i)]
1H	Letter from Amgen to Ministry + Attachment	2 4	Access Denied Access Denied	Yes Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g) 19
1I	Letter from DPB to Amgen	1	Access Denied	Yes	17(1)(a)(c)
1J	Letter from Amgen to Ministry	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
2	Letter from Amgen to DPB	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
3	Letter from DPB to Amgen	2	Access Denied	Yes	17(1)(a)(c)
4	Letter from Amgen to DPB	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)

5-8	Correspondence from Drug Programs Branch to DQTC reviewers	8	Partial Disclosure e	Yes	17(1)(a)(b)(c) 18(1)(c)(d) 2(1)(h)and 21(1)[21(2)(f)(h)]
9-13	DQTC reviewers reports	13	Access Denied	Yes	17(1)(a)(b)(c) 13(1) 18(1)(c)(d) 2(1)(h)and 21(1)[21(2)(f)(h)]
14	Letter from DPB to Amgen	1	Access Denied	Yes	Same as for Record #4
15	Email between Amgen and DPB staff	1	Access Denied	Yes	Same as for Record #4
16	Letter from DPB to Amgen	1	Access Denied	Yes	17(1)(a)(c)
17	Internal email between DPB staff	1	Access Denied	Yes	18(1)(c)(d)
18	Letter from DPB to Another Provincial Drug Program	1	Disclose	No	28(1)(2)
19	Internal email between DPB staff	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d) 2(1)(d) and 21(1)[21(2)(f)(h)]
20	Letter from DPB to Health Canada	1	Access Denied	Yes	18(1)(c)(d)
21	Email between Amgen and DPB staff	2	Access Denied	Yes	Same as for Record #4
22	Letter from Amgen to DPB	5	Access Denied	Yes	17(1)(a)(c)
23	DQTC minutes of teleconference call	2	Partial Disclosure e	Yes	17(1)(a)(b)(c) and 18(1)(c)(d)(g) 13(1) 2(1)(h)and 21(1)[21(2)(f)(h)]
24	Letter from DPB to Amgen	2	Access Denied	Yes	Same as for Record #4
25	Excerpt from DQTC Meeting Minutes	5	Partial Disclosure e	Yes	17(1)(a)(b)(c) and 18(1)(c)(d)(g) 13(1) 2(1)(h)and 21(1)[21(2)(f)(h)]
26	Letter from DPB to Amgen	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)

27	Letter from Amgen to DPB	19	Access Denied	Yes	Same as for Record #4
28	Letter from Amgen to DPB	2	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
29	Internal Emails between DPB staff + attachment	5	Access Denied	Yes	Same as for Record #28
30	Letter from Amgen to DPB	1	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(c)(d)(g)
31	Letter from Amgen to Ministry	2	Access Denied	Yes	Same as for Record #4
32 + 32a	Internal memo to Minister of Health and Long-Term Care + Attachment	45	Access Denied	Yes	18(1)(a)(c)(d)(g) 19 13(1)
33	Letter to Amgen from the DPB	2	Access Denied	Yes	17(1)(a)(c)
34	Letter from MOHLTC to Amgen	5	Access Denied	Yes	17(1)(a)(b)(c) 18(1)(a)(c)(d)(g) 28(1)(2)
35	December 20, 2002 – Briefing Note	6	Partial Disclosure e	Yes	13(1) 17(1)(a)(b)(c) 18(1)(c)(d)(g)
36	Letter to external stakeholders re SDP	1	Disclose	No	
37	Letter to pharmaceutical manufacturers re SDP	2	Disclose	No	
		165			