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

ORDER PO-2668

Appeal PA06-307

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The requester submitted the following access request to the Ministry of Health and Long-Term Care (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the Act):

> I am writing to request the following from the Drug Programs Branch [DPB] of the Ministry of Health and Long-Term Care:
>
> 1. A copy of the DQTC [Drug Quality and Therapeutics Committee] subcommittee report and recommendations arising from its work for the DQTC Modernization Review of treatment for blood glucose control in diabetes.
>
> 2. Copies of records (as defined in [the *Act*]) between the aforementioned DQTC subcommittee and the DQTC regarding the subcommittee's report and its recommendations. The time frame for these records is from the date the subcommittee provided its recommendation to August 31, 2004.
>
> Items 1 and 2 above are requested under the provisions of subsection 13(3) of [the *Act*] as such a report would have been the basis for the decisions (recommendations) outlined in the Fall 2004 *Drug Programs Branch Bulletin* (Fall 2004 *Bulletin*).
>
> 3. Copies of [DPB] Records regarding policies and/or procedures for the handling, review and/or processing of Individual Clinical Review (ICR) requests for drug products indicated in the [Fall 2004 *Bulletin*] as still being "considered through the ICR (Section 8) mechanism" [four identified drugs]. Reference in such Records may be to the previously noted product names and/or to the drug class, such as oral antidiabetic drugs, oral antiglycemic drugs, oral antihyperglycemic drugs, sulfonylureas, thiazolidinidiones, etc. The time frame for these records is from July 1, 2004 to July 31, 2005.

The Ministry identified seven records as responsive to the request and issued a decision to the requester granting full access to Records 6 (Fall 2004 *Bulletin*) and 7 (ICR (Section 8) Request Form) and partial access to the other five records (meeting minutes). The Ministry denied access to the remaining portions of the records, citing the mandatory exemptions in sections 17(1)(a), (b) and (c) (third party information) and section 21(1) (personal privacy), and the discretionary exemption in section 13(1) (advice or recommendations).

The requester (now the appellant) appealed the Ministry's decision to apply the stated exemptions to the remaining portions of the records and also claimed that he was not provided with a response to part 3 of his request.

During the mediation stage of this appeal, the Ministry took the position that Records 5 (disclosed in part), 6 and 7 (disclosed in full) are responsive to part 3 of the request. However, the appellant believes that there must be more records and the adequacy of the Ministry's search for responsive records was added as an issue in this appeal.

Because attempts to mediate the appeal were not successful, the file was moved to the adjudication stage of the appeals process, where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Ministry, initially, seeking its representations. The Ministry provided me with submissions in response. In turn, I sent a modified Notice of Inquiry to the appellant, enclosing a copy of the non-confidential representations of the Ministry, to invite his representations, which I received.

The appellant indicated in his representations that he no longer wished to pursue information withheld under section 21(1), namely the DQTC reviewers/consultants' names or the conflict of interest declarations. Accordingly, the possible application of the personal privacy exemption in section 21(1) is removed from the scope of this appeal and will not be canvassed in this order.

I concluded that the appellant's representations raised issues to which the Ministry should be given an opportunity to reply. Upon review of the complete representations of the appellant, the Ministry provided additional submissions regarding the search for records responsive to part three of the request, as well as the section 13(1) and 17(1) exemptions. Concurrently, the Ministry also provided the appellant with a technical manual related to the entering of ICR (Section 8) requests into the Ministry's system.

While reviewing the file for the preparation of the order, my research indicated that the coverage of the oral antidiabetic medications at issue had changed. Accordingly, I sent the appellant a letter to inquire about his intentions in view of the developments in coverage. The appellant wrote back to confirm that he wished to proceed with the appeal as framed by the existing inquiry. The appellant's recent comments on access to the information are summarized under my consideration of the section 13(1) exemption below.

RECORDS:

Portions of five records, totaling 26 pages, remain at issue in this appeal:

- Records 1 & 2 - DQTC Diabetes Products Review Subcommittee (the Subcommittee) Meeting Minutes (November 21, 2003 and January 21, 2004); and
- Records 3 – 5 - Excerpts from DQTC Meeting Minutes (March 10, 2004, June 9, 2004, and July 23, 2004).

DISCUSSION:

Background

The records at issue in this appeal were created through a particular process for the approval of medications for coverage under the Ontario Drug Benefit Plan (ODBP) that is no longer in use. The former legislative scheme for the approvals process established under the *Ontario Drug Benefit Act* (ODBA) has now been replaced by the *Transparent Drug System for Patients Act, 2006*, S.O. 2006, c. 14. However, a brief description of the decision-making authority and process of the former DQTC, as provided by the Ministry, remains useful for understanding the context of the findings in this order.

The DQTC was created in 1968 by Order-in-Council for the purpose of providing independent expert advice to the Minister of Health on the therapeutic value and cost effectiveness of brand drugs submitted for reimbursement under the ODBP, and the interchangeability of generic drug products. The terms of reference for the DQTC were:

- To recommend to the Minister those new products which should be considered for publicly funded programs, and advise the Minister of the conditions under which such products should be funded; and
- To recommend to the Minister which drug products should be designated as interchangeable products for the purposes of the DIDFA [*Drug Interchangeability and Dispensing Fee Act*] and the ODBA.

By reviewing drug manufacturers' submissions on the clinical, pharmacoeconomic and financial data, the DQTC formulated recommendations based on the efficacy, safety and cost-effectiveness of a drug in comparison with alternatives already listed for benefit, and possible impact on other health services. The options available to the DQTC were to recommend general listing, limited use listing, case-by-case reimbursement through a pre-approval mechanism (the ICR Section 8 request), or no reimbursement. The DQTC's recommendations were drafted into minutes which served as the means of communicating its advice to the Ministry.

The Ministry also explained that the authority to make decisions regarding the listing and interchangeability of drugs on the Formulary under the former system rested with, and was divided between, the Minister and Cabinet based on regulations passed under the ODBA and DIDFA.

THIRD PARTY INFORMATION

Introduction

The Ministry takes the position that the exemption in section 17(1)(a), (b) and/or (c) of the *Act* applies to some of the information in the records. Section 17(1) of the *Act* is a mandatory exemption that applies to exempt the information of a third party if certain requirements are met. The relevant parts of section 17(1) state:

> 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) of the *Act* recognizes that in the course of carrying out public responsibilities, government bodies receive information about the activities of private businesses. The exemption 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.), leave to appeal refused (November 7, 2005), Doc. M32858 (C.A.)].

Although one of the central purposes of the *Act* is to shed light on the operations of government through the release of information to the public, 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-2371, PO-2384, MO-1706].

For section 17(1) to apply, the Ministry 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 paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1 - Information

The Ministry submits that the records contain information that meets the definition of scientific, commercial, financial or technical information in the first part of the test for exemption under section 17(1). These types of information listed in section 17(1) have been described in a number of past orders as follows:

> *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].

> *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 [Orders P-493 and 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 [Order 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].
>
> *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].

I adopt these definitions for the purpose of this appeal.

Representations

The Ministry refers to Orders P-68, P-284, and PO-2097 in support of the argument that information relating to a Formulary submission qualifies as scientific, financial, commercial and technical information for the purposes of section 17(1) since the minutes record the DQTC's review and evaluation of information provided by the manufacturers in their submissions.

The Ministry states that

> … the severed portions of the 5 records contain scientific information that relates to 'natural or biological sciences', namely medical and pharmacological sciences. This scientific data describes the effectiveness of the drug products on particular population groups suffering from diabetes.
>
> The records also contain commercial and financial information… The Ministry submits that these records contain information about either the buying and selling of the drug products at issue, in the context of their being listed on [the] Formulary/CDI. Furthermore, they refer to the economic information contained in the pharmacoeconomic and financial impact analyses the manufacturers included in their submissions to the Ministry for the purposes of the diabetes drug review.

The Ministry also submits that the minutes contain technical information about the composition and effects of the diabetes drugs reviewed by the DQTC. The Ministry submits that the minutes contain information about the "operation" of certain drugs in the context of diabetes management and that "… the information relates to the practice of medicine, which is an applied science."

> Furthermore, the clinical data referred to by the subcommittee consists of technical information that reports of the results of human trial or tests conducted using the drugs at issue, or other, comparable drugs.

The appellant provides no specific representations on whether the records contain information fitting within the definitions founds in part 1 of the section 17(1) test.

Analysis and Findings

The Ministry has referred me to Orders P-68, P-284, and PO-2097 to support its argument that information relating to a Formulary submission qualifies as scientific, financial, commercial and technical information for the purposes of section 17(1). In my view, however, those orders are distinguishable from the circumstances present in this appeal. The Ministry's argument in this appeal appears to be based on the supposition that the DQTC and Subcommittee minutes record the review of information provided by the manufacturers in their submissions in the same, or a similar, fashion to the records reviewed in the referenced orders. However, those orders featured a much broader range of records, including actual Formulary submissions, in addition to correspondence and other communications with the drug manufacturers about those submissions. I note, furthermore, that only in Order P-68 was the application of section 17(1) to DQTC minutes reviewed.

On the basis of my review of the records at issue in this appeal, I am prepared to find that they contain scientific and, in a limited way, commercial information for the purposes of part 1 of section 17(1). The clinical studies discussed by the DQTC and Subcommittee contain scientific information and there is also information related, at least peripherally, to the buying and selling of pharmaceutical products.

In view of my finding that the records at issue contain scientific and commercial information for the purposes of part 1 of the section 17(1) test, it is unnecessary for me to determine whether the records also contain technical or financial information. I will now consider the second part of the section 17(1) test.

Part 2 - Supplied in Confidence

In order to satisfy part 2 of the test, the Ministry 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).

Representations

The Ministry submits that the records reiterate, paraphrase or reflect confidential proprietary information that was submitted to the Ministry by the drug manufacturers whose products are discussed in the minutes. The Ministry also argues that:

> … the DQTC minutes necessarily and inevitably contain, reflect and refer to information that was originally contained in the manufacturers' submissions. Therefore, even though the records at issue are not the actual submissions made by the manufacturers, they nevertheless reveal the contents of those submissions.

The Ministry also submits:

> Throughout the minutes, the subcommittee members expressly refer to the sufficiency of the 'information provided in the manufacturer submission…" [eg. Record 1, page 5]. The disclosure of this information would therefore reveal or permit the drawing of accurate inferences about the information supplied by the manufacturers in their submissions.

The appellant's representations on this part of the test focus on the Ministry's alleged failure to distinguish between information that properly falls under the protection of section 17(1) and that which has entered the public domain and should not therefore be eligible for protection under the *Act*.

Analysis and Findings

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing, supra*]. In this appeal, the Ministry has attempted to persuade me that these particular records reflect the confidential proprietary information of third party drug manufacturers which was submitted to the Ministry. However, this assertion is not borne out by my own review of the records.

As stated in the Fall 2004 *Bulletin*, the Modernization Review consisted of evaluations of the "available clinical and economic literature and information from manufacturers." Upon my review of the minutes of the DQTC and its Subcommittee, I find that they contain information that is publicly available from one source or another; for example: the Compendium of

Pharmaceuticals and Specialties, product monographs, advertisements in medical journals, and the Fall 2004 *Bulletin* itself. Information of this nature is not "supplied" by the manufacturer for the purpose of section 17(1).

Similarly, relevant clinical studies referred to by DQTC and Subcommittee members cannot be construed as having been supplied by third party drug manufacturers for the purpose of the second part of the section 17(1) test. I note that the Ministry has severed parts of the records containing the comments of the DQTC or Subcommittee regarding these studies, as well as discussion of various drug products. As indicated in the Ministry's representations, this includes commentary on the "sufficiency" of the information provided by manufacturers. In my view, these severances are not eligible for exemption. The comments, and expressions of opinion, about the sufficiency, quantity or even quality of the "available clinical and economic literature and information from manufacturers" were not supplied by the third party manufacturers, originating as they do from the DQTC or Subcommittee members. In addition, on my reading of this information, I find that it does not reveal or permit the drawing of accurate inferences with respect to information that may have been supplied.

I find, therefore, that the second part of the section 17(1) test has not been established. Since the requirements of all three parts of the test must be met, I find that the Ministry's claim for exemption under section 17(1) fails.

ADVICE TO GOVERNMENT

The Ministry has taken the position that the undisclosed portions of all five of the records are exempt under section 13(1) of the *Act*.

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. Furthermore, 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)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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. In this appeal, the Ministry has addressed the possible application of the exceptions in sections 13(2)(a) and (k), and 13(3) in its representations. These sections state:

> 13(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material; …
>
> (k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
>
> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

Representations

The Ministry submits that past orders of this office have established that records produced as a result of DQTC discussions, such as meeting minutes, fall squarely within the section 13(1) exemption [Orders 68 and PO-2097]. The Ministry explains that the "Diabetes Review" was part of the Formulary modernization process and had been recommended by the DQTC in anticipation of the release of the new Clinical Practice Guidelines by the Canadian Diabetes Association. The Ministry notes that the type of review undertaken by the Subcommittee required less extensive submissions by manufacturers than for the initial Formulary listing, but

current pharmacoeconomic and clinical data was requested, and this information is reflected as the basis for the recommendations contained in the meeting minutes of the DQTC and its Subcommittee.

Referring to the companion cases of *Ontario (Ministry of Northern Development and Mines)* and *Ontario (Ministry of Transportation)* (cited above), the Ministry states:

> [T]he Ontario Court of Appeal confirmed the IPC's interpretation of s. 13. In order to qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. The Ministry submits that the DQTC's advice and recommendations to the Minister and the government fall squarely within this description. As [previously] noted … the DQTC's listing recommendations can either be accepted or rejected by the Minister and by Cabinet.
>
> Furthermore, as the IPC found in PO-2097, where the "factual information relied upon by the reviewers is inextricably intertwined with the advice and recommendations being provided to the Ministry … it is not possible to separate the factual information from the advice and recommendations … and [therefore] the exception in ss. 13(2)(a) has no application to it."

In seeking to further demonstrate that the exception for "factual material" in section 13(2)(a) does not apply, the Ministry also refers to Order 24. In this order, former Commissioner Sidney Linden distinguished between occasional assertions of fact in the record and "a coherent body of facts separate and distinct from the advice and recommendations contained in the record," finding that only the latter type of information qualifies for the exception in section 13(2)(a). The Ministry submits that because the factual information in the records at issue is interwoven with the recommendations, it cannot be considered a distinct body of fact and does not, therefore, fit within the section 13(2)(a) exception.

Relying on PO-2097, the Ministry also submits that the exception in section 13(2)(k) does not apply since DQTC meeting minutes are not a "report" for the purpose of that subsection.

The Ministry maintains that the exempt information in the minutes is not limited to that which follows the terms "MOVED and SECONDED" or "RECOMMENDATION" since the summarized discussions contained in the minutes

> … are either completely intertwined with the recommendations recorded at the end of the respective minutes, or provide accurate inferences about those and earlier subcommittee recommendations. …

> To a sophisticated reader familiar with the type of drug products at issue, the disclosure of any of the severed portions of these 5 records would reveal the substance of the DQTC's eventual recommendations regarding the drug products.

The Ministry also submits that the exemption continues to apply even if the decision–making process regarding the listing of the medication is complete since the exemption "is designed to have a prospective effect on the free flow of advice and recommendations within government" [Orders MO-1180 and MO-1264].

In responding to the Ministry's submissions, the appellant seeks to contextualize the exemptions claimed by the Ministry by referring to the purposes section of the *Act*: section 1. The appellant contends that reliance upon section 13(1) (and section 17(1)) must be balanced with the principle enunciated in section 1(a)(ii) that exceptions to the right of access must be limited and specific. The appellant submits that the Ministry's application of the exemptions claimed is "overly broad."

Furthermore, as I understand the appellant's submission, the fact that portions of the reviews and recommendations from the DQTC minutes were reproduced in the Fall 2004 *Bulletin* means that this information has entered the public domain and should no longer be afforded the same protection under the *Act*. This suggestion dovetails with the appellant's argument that the exception in section 13(3) applies. The appellant submits that:

> … in the [Fall] 2004 *Bulletin*, the Ministry has publicly cited the DQTC subcommittee review as the basis for the recommendations made by the DQTC Modernization Review, and hence [the minutes] must be disclosed based upon s. 13(3).
>
> In the [Fall] 2004 *Bulletin*, the Ministry writes:
>
> > The following provides an overview of the Drug Quality and Therapeutics Committee (DQTC) Modernization Review of treatment for blood glucose control in diabetes; and to *clarify both the outcome (i.e. recommendations) and the process by which those recommendations were made.* Modernizing the Formulary is a means to ensure that the list of Formulary benefits meets current standards of safety, efficacy and cost-effectiveness in light of the most recent clinical knowledge and practice.
> >
> > A *comprehensive review* of treatment for blood glucose control was conducted in 2003-2004 *to ensure that reimbursement of diabetes medications reflects current clinical knowledge* and data on efficacy, safety, and cost-effectiveness. The review consisted of a *series of meetings with DQTC members* and external consultants

> including endocrinologists, and experts in internal medicine, epidemiology, and health economics.
>
> Available clinical and economic literature and information from manufacturers were reviewed. The *DQTC's recommendations* for these products are described on the following pages. [*emphasis added by appellant*]

> Clearly the [Fall] 2004 *Bulletin* itself indicates that the review conducted by the DQTC subcommittee was the basis for the final decisions of the DQTC in the Modernization Review. The comprehensive review is a direct reference to the work of the DQTC subcommittee. Since the Ministry has publicly cited the DQTC subcommittee review as the basis of the decision, the Appellant contends that the discretionary exemption under section s. 13(1) is inapplicable.

In reply to the appellant's submissions on section 13(3) of the *Act*, the Ministry notes that the Fall 2004 *Bulletin* "makes only summary reference to the substance of the DQTC review." The Ministry also argues that the DQTC's recommendations do not qualify as "decisions" for the purpose of section 13(3) of the *Act*. To elaborate on this submission, the Ministry states:

> While the DQTC's recommendations are communicated to the Ministry through the DQTC's minutes, a positive recommendation by the DQTC is **not** a guarantee of listing; … Since the DQTC can only make recommendations, and is not vested with any decision-making authority, the Ministry submits that it would be incorrect to treat DQTC recommendations as "decisions" for the purpose of the section 13(3) of the Act.
>
> The [Fall] 2004 *Bulletin*, including the portions of the [Fall] 2004 *Bulletin* that the Appellant refers to in its representations, clearly indicates that its contents summarize recommendations that were made in the course of the DQTC's review. Nothing in the [Fall] 2004 *Bulleting* [sic] suggests that the DQTC was vested with any decision-making authority [emphasis in original].

In the most recent communication from the appellant in response to my contact with him regarding the changed circumstances of the listing of the medications in question, the appellant stated:

> The government of Ontario has chosen to restrict access to certain medications and treatment to the poor and elderly of the province who have medication coverage under the Ontario Drug Benefit Plan. My information request was based on the feeling that if this segment of the population is to be denied certain approved and effective treatments, then the reasons for the government denying this treatment should be available to the public…

Analysis and Findings

The Ministry claims that the exemption for advice or recommendations in section 13(1) of the *Act* applies to exempt large portions of the DQTC and DQTC Subcommittee minutes at issue in this appeal. However, following my own review of the minutes, and for the reasons that follow, I find that section 13(1) applies to certain small portions of the minutes, but not to others. Furthermore, I find that the mandatory exception in section 13(3) applies to the advice or recommendations contained in the DQTC and the DQTC Subcommittee minutes which are reflected in the Fall 2004 *Bulletin*.

As the Ministry has noted, this office has previously endorsed the application of section 13(1) of the *Act* to exempt DQTC records. In Order 68, former Commissioner Sidney Linden stated the following about the status of the DQTC and whether records created by it fall within the ambit of section 13(1):

> … [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 also reviewed the types of DQTC records that may fall within the section 13(1) exemption, noting these would include records representing DQTC discussions directed toward fulfilling its legislative mandate. In Order PO-2097, also cited by the Ministry, Adjudicator Donald Hale found that DQTC meeting minutes qualified for exemption, stating that,

> The minutes reflect the concerns and findings of the members of the Committee, as well as their conclusions with respect to their position on whether the product ought to be listed on the Formulary. I find that Record 32 qualifies for exemption under section 13(1) as its disclosure would reveal the advice and recommendations of the DQTC members to the Ministry regarding the inclusion of the product on the Formulary.

In general, I agree with the line of reasoning enunciated by former Commissioner Linden and Adjudicator Hale in Orders 68 and PO-2097, and adopt it for my consideration of the DQTC minutes at issue in this appeal, subject to certain caveats discussed below.

I should first state that for the purpose of my analysis under section 13(1) of the *Act*, I see no reason to distinguish between the DQTC and its Subcommittee. As I understand it, both the DQTC and its Subcommittee were conferred with an advisory capacity in relation to reviewing the existing representation of oral antidiabetic drugs on the Formulary and providing recommendations with respect to its modernization in anticipation of the new clinical practice guidelines of the Canadian Diabetes Association. The ultimate recipient of the review and recommendations contained in those minutes was the Ministry on behalf of the Minister and Cabinet who, at that time, were vested with the decision-making authority and accountability for listing drugs on the Formulary.

Based on my review of the records, I am satisfied that the information contained under the headings "Subcommittee Recommendations," "Recommendation(s)," "Summary and Recommendations," and "DQTC Recommendations" constitutes advice or recommendations for the purposes of section 13(1) and I find that it is exempt, subject to my review of the exceptions below. In addition, where the minutes otherwise reflect the input or opinions of DQTC and Subcommittee members which would reveal the advice given, I also find that this information qualifies for exemption under section 13(1).

However, I have also been mindful of the appellant's reference to one of the stated purposes of the *Act*, namely the exhortation that "necessary exemptions from the right of access should be limited and specific." Moreover, it being well-established that the findings in each appeal turn on the facts, as well as the law, I am drawn further into the content of the actual records which, it is often said, speak for themselves. Upon consideration, I must agree with the appellant that allowing the Ministry's current claim of the exemption in section 13(1) for all of the information it seeks to withhold would be an "overbroad" application.

Quite apart from the actual recommendations and member input, there are other segments of the minutes the Ministry has sought to withhold that do no more than outline current clinical knowledge and practice, or studies related to the medical management of diabetes. In my view, these portions of the minutes do not reflect the input or advice of the DQTC or Subcommittee members nor would they reveal the recommended course of action. As former Commissioner Sidney Linden observed in Order 118, "'advice', for the purposes of subsection 13(1) of the *Act*, must contain more than mere information." Since this material would not reveal advice or recommendations, it does not qualify for exemption under section 13(1) and I will order its disclosure.

Given the detailed nature of the records, and the number of severances, I will be providing a copy of the records to the Ministry identifying the portions of the minutes exempt under section 13(1) or otherwise, according to the findings that I make further on in this order.

As previously mentioned, there are mandatory exceptions to the exemption in section 13(1). In this appeal, the Ministry addressed two of the section 13(2) exceptions of their own initiative. I note that appellant has not suggested that any of the exceptions in section 13(2) apply to the records at issue and has chosen instead to focus on the exception in section 13(3).

I note that the Ministry has referred me to Orders 24, PO-1709 and PO-2097 in which adjudicators found section 13(2)(a) and/or 13(2)(k) inapplicable to DQTC minutes. However, I would refer to section 13(2)(a), in particular, to emphasize that such findings necessarily turn on the degree to which the factual information is inextricably intertwined with the advice and recommendations being provided to the decision-maker. The exception in section 13(2)(a) can apply only where it is possible to effect that separation, or where the information forms a coherent body of fact. In my own review of the minutes for the application of section 13(1), I was able to separate the factual information from the advice and recommendations. However, having found that certain portions of the minutes containing "mere information" do not qualify for exemption under section 13(1), it is not necessary to further review the possible application of the exceptions to that information.

I now turn to the possible application of the mandatory exception in section 13(3), about which the appellant has offered considerable argument. To paraphrase it, the question to be answered in reviewing this exception is whether or not I am persuaded that the head has publicly cited the DQTC and Subcommittee minutes as the basis for making the decision about listing the four identified drugs on the Formulary.

I have considered the representations provided by the Ministry in reply to the appellant's arguments on section 13(3). Its main argument relates to the characterization of the information contained in the minutes as "decisions." With respect, the Ministry's submissions on this matter miss the point. Contrary to what the Ministry asserts, the appellant does not argue that the DQTC's recommendations were "decisions" or that the DQTC was vested with any decision-making authority. Rather, as I understand it, the appellant's argument is that it is the reference in the Fall 2004 *Bulletin* to the DQTC and Subcommittee recommendations that satisfies the requirements of section 13(3).

In my view, the appellant has correctly identified the nature of the section 13(3) question: Is the reference in the Fall 2004 *Bulletin* to the DQTC review and recommendations, as highlighted by the appellant in his representations and reproduced on page 12 above, the equivalent of the head publicly citing the records as the basis for the Formulary listing decision? Answering this question requires consideration of the intent of the exemption.

The rationale for what was to be the section 13(1) exemption was canvassed in 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), as follows:

> Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making

> processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public. We are in general agreement with both of these propositions [page 288].

The authors of the Williams Commission Report also asked themselves if "… the exemption [should] apply to deliberative materials that have been referred to publicly by the government as the basis for a particular decision?" In seeking to answer this question, the authors discuss the jurisprudence available from the United States, noting that:

> … [F]urther useful points of clarification emerge from the jurisprudence interpreting the equivalent exemption in the U.S. act. First, U.S. courts have determined that the exemption does not apply to documents whose purpose is to provide an explanation or interpretation of a decision previously made. The act has been said to not apply to "post-decisional" documents. Second, U.S. courts have decided that the exemption would not apply to a document expressly described by an agency as containing the reasons for or justifications for a decision.

In concluding that the reasons underlying the exemption relating to deliberative materials should not extend to documents falling within those categories, the Williams Commission Report went on to make the following recommendations [at page 293]:

> We recommend that the freedom of information law include an exemption for documents containing advice or recommendations of public servants and consultants retained by a governmental institution, provided that the exemption should not be construed to include documents of the following kinds:
>
> 1. an explanation or interpretation of a decision previously made by a governmental institution;
>
> 2. a document that has been expressly referred to by the institution as containing the reasons for or justification of a decision made by the institution; …

In my view, the mandatory exception in section 13(3) for records publicly cited as forming the basis for a decision (or policy) embodies this effort to strike a reasonable balance between public access and protection of the deliberative processes of government.

In Order 164, former Commissioner Sidney Linden reviewed the decision of the Ontario Human Rights Commission (the Commission) regarding a request for access to a report titled, "AIDS-

Related Discrimination and the Human Rights Code" (the Report) that had been prepared for that Commission. Among the other issues raised by that appeal, the former Commissioner had occasion to consider the mandatory exception in section 13(3) to a portion of the record at issue.

After the Report had been submitted to the Commission, the television program "W5" aired a segment related to the segregation and treatment of inmates with HIV/AIDS. In response to the segment, the Commission's Director of Communications and Education wrote to the Executive Producer of "W5", noting that the Report had identified certain policies and practices of the Ministry of Corrections (as it was then known) as being of concern. In asking that "W5" clarify certain points for its audience, the Director also advised that the Commission had met with the Ministry about these matters, which resulted in policy changes in Ontario jails relating to inmates with HIV/AIDS.

Regarding the effect of this letter from the Commission's Director to the Executive Producer of "W5", former Commissioner Linden observed:

> Portions of this letter were read on the air during a subsequent "W5" program. While [the Director] is not the "head" of the institution, I am prepared to find that on this occasion he was speaking on behalf of the institution, and it is clear that the letter or its contents were intended to be made public.
>
> One of the chapters of the record entitled "Accommodation" contains material relating to policies and practices in the treatment of prisoners with AIDS in Ontario jails. It is to this material that [the Director] referred in his letter… It would appear that [the Director] publicly cited that portion of the record as the basis of a decision by the institution to approach the Ministry of Corrections with a view to voicing concerns regarding the Ministry's policies and programs in this area.

The former Commissioner found that the severed portions of the record addressing the treatment of HIV positive prisoners fell within the ambit of section 13(3) of the *Act*, and he ordered their disclosure.

Turning to the circumstances of the present appeal, I note the Ministry's assertion that the Fall 2004 *Bulletin* "makes only summary reference to the substance of the DQTC review." Having compared the contents of the Fall 2004 *Bulletin* with the actual records, however, I am of the view that the *Bulletin* contains considerably more than "summary reference" to the substance of the DQTC and Subcommittee minutes. From my review of it, the Fall 2004 *Bulletin* reproduces both the recommendations and a considerable amount of the modernization review background and discussion that appears in the DQTC and Subcommittee minutes.

The minutes at issue in this appeal served to communicate recommendations and were relied upon by the Ministry (the Minister and Cabinet) in making decisions regarding the listing of the four identified drugs on the Formulary. In addition, based on my consideration of the purpose of

the advice or recommendations exemption through the lens of the Williams Commission Report, I am also of the view that the exception in section 13(3) applies not only to the actual recommendations, but to the "explanation or interpretation of [the] decision" or "the reasons for or justification of [the] decision," which is represented by the background and discussion contained in the records at issue.

Moreover, I am satisfied that the Fall 2004 *Bulletin* represents the Ministry's public reliance upon the DQTC and Subcommittee advice or recommendations, as embodied in their minutes, as the basis for the Formulary listing decision. The situation here is analogous to the one faced by former Commissioner Linden in Order 164. While the Fall 2004 *Bulletin* may not have been written by the "head" of the Ministry, I am similarly prepared to find that the *Bulletin* was intended to state the Ministry's decision and communicate and explain it to the public.

Accordingly, I find that section 13(3) applies to portions of the records previously found exempt under section 13(1) that contain recommendations, or content of an explanatory or justificatory nature, and I will order the disclosure of those specific portions.

One notable exception to my finding on the application of the section 13(3) exception is that certain recommendations of the Subcommittee did not ultimately form the basis of the Formulary listing decisions made by the Ministry. Accordingly, since these recommendations were not acted upon, they were not cited in the Fall 2004 *Bulletin* and, therefore, remain exempt under section 13(1) of the *Act*.

On the enclosed copy of the records at issue in this appeal, I have highlighted the portions that I find do not constitute advice or recommendations. I have also marked those that are exempt under section 13(1) and, finally, those that are subject to section 13(1), but also fall under the exception provided by subsection 13(3). The first and last of these portions must be disclosed to the appellant.

EXERCISE OF DISCRETION

General principles

After deciding that a record or part thereof falls within the scope of the exemption in section 13(1), the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. An institution must exercise its discretion in this regard.

On appeal, the Commissioner, or her delegate, may determine whether the institution failed to do so. In addition, it is open to an adjudicator to find that the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; takes into account irrelevant considerations; or 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)].

I have considered the Ministry's submissions on the factors it took into consideration in exercising its discretion to not disclose the portions of the records for which it had claimed section 13(1). These factors include the importance of protecting the integrity of the ODB program and the Formulary/CDI submission process; the fact that denying access to DQTC minutes under section 13(1) is the Ministry's consistent practice historically; and the importance of ensuring complete confidentiality of the process to encourage frank and full discussion by DQTC members.

The appellant did not submit representations on the Ministry's exercise of discretion.

Having considered the Ministry's representations and the overall circumstances of this appeal, I find that the Ministry has exercised its discretion within generally accepted parameters, and I will not interfere with it on appeal. I uphold the Ministry's exercise of discretion.

REASONABLE SEARCH

The appellant believes that additional records responsive to part three of his request, regarding ICR (Section 8) requests (under the former *ODBA*) should exist.

General Principles

In appeals, such as this one, that involve a claim that additional responsive records exist, the issue to be decided is whether the institution in question has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out by the Ministry was reasonable in the circumstances, I will uphold it. If I am not satisfied, further searches may be ordered.

The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records that are reasonably related to the request [Orders M-282, P-458, M-909, PO-1744 and PO-1920]. Furthermore, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Representations

The Ministry submits that it was not necessary to contact the appellant to clarify the request because it specifically identified the DPB and DQTC as areas of the Ministry where responsive

records would be located. In addition, submits the Ministry, DPB staff confirmed that no other areas of the Ministry would retain records about the DQTC for the following reason:

> The DQTC reports to the Minister of Health and Long-Term Care through the Drug Programs Branch as their key function is to assess the suitability of drug products for those members of the public receiving drug coverage under [the] *Ontario Drug Benefit Act*, e.g. seniors. The DQTC is funded through the Drug Programs Branch which provides Secretariat support.

The Ministry explained that the Manager and Senior Pharmacist of the Drug Submission of the DPB carried out the searches.

> Both individuals have many years of experience and knowledge of the Branch and had the expertise to be able to identify all the records responsive to the access request. A search of all filing cabinets, drawers, folders and computer filing systems was conducted. Seven (7) responsive records were located. To the best of the Ministry's knowledge, the search … identified all records responsive to the Appellant's request.

Referring to the time period contemplated by part 3 of the request – July 1, 2004 to July 31, 2005 – the Ministry adds that its retention period for these types of records is "12 years on site."

The appellant expresses concern about the adequacy of the efforts undertaken by the Ministry to identify records responsive to the part of his request relating to the policies and procedures for ICR requests.

> [T]he Ministry has stated that the appellant outlined his request with sufficient precision for a literal interpretation. Despite this precision, the Ministry failed to provide any indication as to why there was no information pertaining to the policies and procedures behind ICR requests.
>
> The Appellant contends that it is unreasonable to conclude that there is no documentation concerning the handling of these requests.

The appellant then refers to a privacy complaint report (PC-030036, *Ministry of Health and Long-Term Care* [2004] O.I.P.C. No. 136), in which the Ministry provided this office with a copy of a "policies and procedures manual for entering ICR requests into the 'section 8 database.'"

> Incredibly, no such manual was provided to the appellant in his request for information, nor was the existence of such manual even referenced by the Ministry. In light of this manual, it is reasonable to conclude that further documentation pertaining to the [third part of the] request exists.

> The Ministry has failed to produce any documentation pertaining to the handling of ICR requests or provide any comments as to the absence of any such records. … In this way, the appellant's contention is that the Ministry has failed to respond to [the third part of the] request as there is no indication as to why his precisely defined request yielded neither positive results nor explanations save for a copy of the section 8 form itself.

In response to the appellant's representations on the issue, the Ministry referred to the manual described by the appellant as "a technician's manual that was prepared for the purpose of instructing Ministry staff on the procedural steps involved in processing ICR requests." The Ministry indicated that this technical manual was not initially considered a responsive record, but that in view of the concerns expressed by the appellant, a copy had been sent to him. The Ministry notes that the manual is not reflective of current Ministry practices. Further, the Ministry submits that:

> Upon receiving the Appellant's representations in this appeal, the Ministry's Drug Programs Branch reviewed the Appellant's request and confirmed with knowledgeable staff involved in the ICR program that a complete and thorough search were conducted and no additional records responsive to the Appellant's request were identified.

Analysis and Findings

As previously stated, in appeals involving a claim that additional records or information responsive to a request exist, the issue to be decided is whether an institution has conducted a reasonable search for these as required by section 24 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records or information might exist must still be provided.

Having considered the representations of the Ministry and the appellant, as well as the general circumstances of this appeal, I am satisfied that the Ministry has provided sufficient evidence to show that it made a reasonable effort to identify and locate records and information responsive to the request.

There is some balancing to be brought to the task of reviewing an institution's search for responsive records. On one hand, the appellant must provide a reasonable basis for showing that such records may exist. In this appeal, the appellant has, in a manner of speaking, appealed to common sense by suggesting that it defies reason to think that there would be no records other than those previously identified that address the Ministry's policies and procedures for the individual evaluation of ICR (section 8) requests for drug coverage.

On the other hand, the Ministry has conducted searches with knowledge of the nature of the records said to exist because the appellant did provide specific direction in this regard.

Ultimately, the issue comes down to whether or not I am satisfied that the Ministry made a *reasonable* effort to identify and locate any existing records that might be responsive to part 3 of the appellant's request. To reach my decision, I have considered whether the Ministry engaged an experienced employee to expend a reasonable effort to locate the specific records in places these could be expected to be found. Based on the information provided to me, I am satisfied that the Ministry did so.

I understand that the appellant may be frustrated to discover that information that a member of the public might assume would have been subject to relatively routine use by the Ministry simply may not exist. However, based on the information provided by the Ministry and the appellant, and having considered the circumstances of this appeal, I am satisfied that the Ministry's search for records responsive to the request was reasonable in the circumstances.

ORDER:

1. I order the Ministry to provide the appellant with the portions of the records marked with green highlighter by May 22, 2008.

2. I uphold the Ministry's decision to withhold the remaining portions of the records under section 13(1) of the *Act*.

3. I uphold the Ministry's search for responsive records.

4. 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 as they are disclosed to the appellant.

Original signed by: April 30, 2008
Daphne Loukidelis
Adjudicator