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

ORDER PO-2773

Appeal PA08-9

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> Any correspondence (including electronic notes, emails, etc.) in relation to the decision by CEDAC [the Canadian Expert Drug Advisory Committee] not to recommend [name of drug] for reimbursement pursuant to Ontario's drug benefit plan, including any internal memoranda, notes, emails or communications between representatives of the Ontario Ministry and representatives of CEDAC, Health Canada and/or any other organization.

After receiving the initial request, the Ministry contacted the requester to clarify the request. It was determined that the requester sought access to:

> ...records pertaining to the decision by the Committee to Evaluate Drugs [CED] not to recommend [name of drug] for reimbursement pursuant to Ontario's drug benefit program for the period January 1, 2005 to the present (July 12, 2007). These records should include CED minutes, reviewer's reports, correspondence between the Ontario Drug Benefit (ODB) Program and the manufacturer.

The Ministry located 12 responsive records. After receiving the submissions of a third party who may have an interest in the records (the affected party), the Ministry disclosed seven records in full, two records in part and denied access in full to three records.

In its decision letter, the Ministry denied access to the undisclosed information pursuant to sections 17(1) (third party information), 19 (solicitor-client privilege), and 21(1) (personal privacy) of the *Act*. In the Index of Records accompanying the decision letter, the Ministry also claimed sections 13(1) (advice to government) and 15(a) and (b) (relations with other governments) for certain records.

The requester, now the appellant, appealed the Ministry's decision.

During the course of mediation, the Ministry clarified that section 19 of the *Act* was not at issue in this appeal and that it was cited in the decision letter in error.

The mediator also clarified with the Ministry that, contrary to the Index of Records, the Ministry is not withholding any information in Record 12 pursuant to section 21(1).

The appellant advised the mediator that he is of the view that additional records exist. The Ministry advised the mediator that it does not have any additional responsive records. Accordingly, the reasonableness of the Ministry's search is at issue in this appeal.

As mediation did not fully resolve the issues in this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry and the affected party, seeking their representations. As Records 9 and 11 contain

the names of two non-Ministry individuals (the affected persons) and, therefore, their personal information may be contained in these records, I also sent a Notice of Inquiry to these individuals. I received representations from the Ministry, the affected party and the two affected persons. The affected persons made submissions on the personal privacy exemption in section 21(1) of the *Act*. I sent a Notice of Inquiry, as well as a complete copy of all of the parties' representations (except for the personal information of the affected persons), to the appellant, seeking his representations. I received representations from the appellant. I sent a copy of the appellant's representations to the Ministry and sought reply representations. I received reply representations from the Ministry, which I shared with the appellant and sought surreply representations. I received surreply representations from the appellant. I then had a staff member confirm with the appellant the information he stated in his representations that he was not seeking disclosure of the information in Records 1 and 7. As a result, Records 1 and 7 are no longer at issue.

RECORDS:

The records at issue and the exemptions claimed for them are itemized in the Index of Records as follows:

Index of Records

Record #	Description of Record	Exemptions Claimed	Disclosed by Ministry?
9	December 22, 2006 Excerpt of the Committee to Evaluate Drugs (CED) minutes relating to the named drug	17(1)(a), (b), (c) 15(a), (b); 21(1) (to the name of the affected person)	partial
10	July 11, 2007 Excerpt of CED minutes relating to the named drug	17(1)(a), (b), (c) 13(1)	partial
11	CED reviewer report - Pharmacoeconomic Review	17(1)(a), (b), (c) 13(1); 21(1) (to the name of the affected person)	no
12	CED clinical reviewer report of the named drug	17(1)(a), (b), (c) 13(1)	no

DISCUSSION:

BACKGROUND INFORMATION

The appellant is seeking information received by the Ministry from the CED. The Ministry describes the CED as a committee that reviews submissions made by drug manufacturers who wish to have their products recommended for listing on the Ontario Drug Benefit Formulary Comparative Drug Index (the Formulary). The CED evaluates the therapeutic value and cost effectiveness of drug products, and its terms of reference includes the following:

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

- To recommend to the Executive Officer which drug products should be designated as interchangeable products or listed drug products for the purposes of the *Ontario Drug Benefit Act* (the *ODBA*) and the *Drug Interchangeability and Dispensing Fee Act* (the *DIDFA*).

The Ministry states that:

> The clinical, pharma-economic and financial data [of a drug manufacturer's submission] is reviewed and considered by the CED, specifically therapeutic efficacy and safety in the population groups served by the ODB program (e.g. seniors) cost-effectiveness of a drug in comparison to alternatives already listed in the Formulary, and impact on other health services.
>
> The CED discusses the manufacturers' submissions, with input from reviewers and expert external consultants when necessary…
>
> [T]he CED's recommendations are drafted into minutes (which include the expert reviews); …the minutes are the vehicle by which the CED will communicate its recommendations to the Ministry…

PERSONAL INFORMATION

The Ministry has severed the names of the affected persons in Records 9 and 11 and claims that this information constitutes their "personal information". That term is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,

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

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

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

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

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

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

The Ministry submits that:

> [The affected persons, who are] identified in Record 9 as "Consultant (guest)" and in Record 11 as the "Reviewer" were asked, because of their medical or scientific expertise, to review [the named drug]…
>
> As [explained in Order] PO-1834, "it is reasonable to expect that disclosure of the names alone ... would reveal the fact that these individuals are retained by the Ministry to review particular drug products. Therefore, the names qualify as personal information under section 2(1)(h)" and in [Order] PO-2617, "Disclosure of the names of the individual reviewers within the context of the records (DQTC meeting minutes) [now the CED] would reveal that these individuals reviewed a particular drug product and as such would reveal other personal information about these individuals (paragraph (h) in the definition of personal information in section 2(1) of the *Act*"...
>
> [The affected persons] were retained to review [the named drug] because of their particular medical or scientific expertise.

One of the affected persons is a consultant to the CED and the other affected person is an external reviewer to the CED. The affected persons both submit that:

> When a member consults for the main Committee to Evaluate Drugs of the Ministry or becomes the lead presenter to the subcommittee for a specific application regarding a drugs' inclusion on the Formulary, it is generally understood that the individual reviews and the names of the presenters are anonymous and that the advice and recommendations given by the committee members to the Ministry are provided in confidence. This confidentiality principle is similar to the concept of blind peer review for academic publications.

The appellant relies on section 2(3) and submits that this information at issue in Records 9 and 11 is not personal information, as the information relates to the affected persons in their professional capacity.

In response, the Ministry submits that the reviewers' names are personal information in accordance with section 2(1)(h) in that disclosure of these names would reveal other personal information, namely, that a particular person reviewed a particular drug product.

Analysis/Findings

I agree with the appellant that the names of the affected persons in Records 9 and 11 are not personal information as section 2(3) applies to this information. Section 2(3) reads:

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

Although prior orders have found that the names of reviewers or consultants reviewing specific drugs are personal information, these orders dealt with requests dated prior to the inclusion of section 2(3) in the *Act* on April 1, 2007 [Orders P-661, P-235, PO-1834 and PO-2617].

I find that the information at issue, namely the names of the affected persons, is not personal information, but information associated with the affected persons in their professional capacity. The affected persons were acting in their professional capacity in reviewing the named drug for the Ministry. The information at issue does not reveal something of a personal nature about these individuals. Review of a drug by an expert in the pharmaceutical field is a professional undertaking and is not personal information. Disclosure of the affected persons' names does not reveal other personal information about them.

The names of the affected persons are not personal information and as no other exemptions have been claimed for this information, I find that these names are not exempt by reason of section 21(1) and I will order this information to be disclosed.

ADVICE TO GOVERNMENT

I will now determine whether the discretionary exemption at section 13(1) applies to the information at pages 71 and 72 of Records 10, as well as to all of the information in Records 11 and 12, other than the name of the affected person in Record 11 which the Ministry has claimed is exempt only by reason of section 21(1).

Section 13(1) states:

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

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the

decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

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

Advice or recommendations may be revealed in two ways:

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

[Orders PO-2028, PO-2084, 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]

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

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

[Order P-434; Order PO-1993, 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]

Only the Ministry provided representations specifically in relation to section 13(1). The appellant submitted that to the extent that the discretionary exemption contained in subsection 13(1) of the *Act* applies, it is subject to the mandatory exception contained in paragraph 13(2)(k).

The Ministry states that the CED reviews and evaluates the therapeutic value and cost effectiveness of new drug products, based on the submissions made by manufacturers, in order that new products can be considered for publicly funded programs. Drug manufacturers provide the CED with clinical, pharma-economic and financial data. The CED considers the therapeutic efficacy and safety in the population groups served by the ODB program (e.g. seniors), the cost-effectiveness of a drug in comparison to alternatives already listed in the Formulary, and impact on other health services. The CED discusses the manufacturers' submissions, with input from reviewers and expert external consultants when necessary.

The CED's recommendations concerning whether new products that should be considered for publicly funded programs are drafted into minutes (Record 10). These minutes include information from the expert reviews (Records 11 and 12). The minutes are the vehicle by which the CED will communicate its recommendations to the Ministry. A positive CED recommendation, however, is not a guarantee of listing; the recommendation can be accepted or rejected by the Executive Officer

The Ministry submits that the information at issue in Records 10 to 12 would reveal the CED's advice and information of such a nature that it, if disclosed, would permit the accurate inference of the actual recommendation. It relies on the findings of former Commissioner Sidney B. Linden in Order 68 where he concluded that:

> …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(l).

It also relies on Order PO-2097, which confirmed Order 68 and held that section 13(1) applies specifically to the minutes of the DQTC.

The Ministry submits that the CED's advice and recommendations to the Executive Officer, the Minister and the government fall squarely within this description as the CED's listing of recommendations can either be accepted or rejected by the Executive Officer.

The Ministry submits that the severed portions of Record 10 and all of Records 11 and 12 contain the CED's recommendations and information that, if disclosed, would permit the reader to accurately infer the CED's recommendations. In particular, it submits that since the CED's recommendations are drafted into minutes, the minutes as a whole, including the expert reviews, reflect the CED's recommendations.

Analysis/Findings

Record 10 is an excerpted version of the CED committee meeting minutes relating to the CED's review of the drug. At issue are two portions of these minutes at pages 71 and 72. The Ministry has directed me in particular to the final bullet points in the severed portions of pages 71 and 72.

In its submissions, the Ministry describes the information in Record 10 as containing the CED's evaluations of information provided by the manufacturer.

Although the CED is an advisory body to the Minister and is an entity intended to be covered by section 13(1) (see Order 68), I find that the information at issue in Record 10 does not suggest a course of action that will ultimately be accepted or rejected by the person being advised. Each of these severances repeats the clinical reviewer's comments, but it is not apparent from this that the severed information itself consists of advice or recommendations or that the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

Record 11 is the Expert Pharmacoeconomic Review and Record 12 is the Expert Clinical Review of the named drug. The Ministry submits that recommendations appear throughout these records and it has directed me, in particular, to the discussion under the "Costs" heading on pages 2-3 and the Conclusion on page 5 of Record 11 and the last four sentences of the top paragraph of page 2 of Record 12.

Both Records 11 and 12 comprise the CED reviewers' recommendations concerning the economic and clinical feasibility of the named drug. In my view, these records meet the requirements for exemption under subsection 13(1).

I find that disclosure of any of the information in these two records would reveal the advice or recommendations made by the reviewers to the CED and are, therefore, exempt under section 13(1). As noted previously, the Ministry does not claim this exemption for the names of the drug reviewers, and this information is, therefore, not exempt under section 13(1).

Sections 13(2): exceptions to the exemption

Section 13(2) creates 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.

The appellant relies on the exception in section 13(2)(k), which reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:
>
> > 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;

The word "report" appears in several parts of section 13(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

The appellant submits that the exception in section 13(2)(k) applies to Records 11 and 12 as these records are reports. He points out that these records are entitled: "CED Reviewer Report - Pharmacoeconomic Review" and "CED Reviewer Report - Clinical Review".

The Ministry submits that Records 11 and 12 are not "reports" under section 13(2)(k) of the *Act* because neither record is a "formal statement or account of the results of the collation and consideration of information". Rather, Records 11 and 12 provide the CED with additional expert information on particular aspects of the named drug, to help it make its recommendations.

The Ministry submits that:

> …the fact that a Ministry staffer called Records 11 and 12 "reports" for administrative purposes in creating the index of records does not make these records "reports" for the purposes of paragraph 13(2)(k). The Ministry notes that title at the top of Record 11 is "Pharmacoeconomic Review Template" and the title at the top of Record 12 is "Expert Review – [name of drug] … (2nd Review)"…
>
> [These records] are not reports of a committee, council or other body. Records 11 and 12 are reviews produced by individual experts for the CED, and as such were not produced by a committee, council or other body which is attached to the Ministry…
>
> Records 11 and 12 are expert reviews of individuals and they were completed to inform the CED on certain aspects of a particular drug product in order to assist the CED in making its recommendations. Therefore, neither Record 11 nor Record 12 is a formal statement or account of the results of the collation and consideration of information, such that they could be considered a report, as that term is defined.

Analysis/Findings

Section 13(2)(k) applies to any entity, body or organization similar to a committee or council, as long as the other elements of paragraph (k) are met. A body may be considered "attached" to an institution, even if it maintains some degree of independence from the institution [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*].

In Order PO-2681, Senior Adjudicator John Higgins canvassed the meaning of section 13(2)(k) and described the component parts of the requirements of the section as follows:

> An examination of this exception reveals that it has three essential requirements:
>
> > (1) the record must be a "report" of a "committee, council or other body";
> >
> > (2) the committee, council or other body must be "attached to" an institution;
> >
> > (3) the committee, council or other body must have been established 'for the purpose of undertaking inquiries and making reports or recommendations to the institution.'

The word "report" appears in several parts of section 13(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-2681, 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.)].

Based on my review of Records 11 and 12, I find that they are reviews, not reports. Neither document consists of or sets out a formal statement or account of the results of the collation and consideration of information [Order PO-2683].

These records are reviews prepared for the CED. The CED is the committee that would be issuing a report based on the information in these records. Requirement 1 has not been met. As all three requirements must be met, I find that the exception in section 13(2)(k) does not apply. Therefore, section 13(1) applies to both Records 11 and 12. These records are exempt from disclosure in their entirety, subject to my discussion of the Ministry's exercise of discretion.

EXERCISE OF DISCRETION

I will now determine whether the Ministry exercised its discretion under section 13(1) with respect to Records 11 and 12 and, if so, whether I should uphold the exercise of discretion.

The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations

- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Ministry submits that the factors it took into account in deciding not to exercise its discretion to disclose Records 11 and 12 under sections 13(1) were:

- The importance of protecting the CED's processes;
- Ensuring consistency between the information disclosed pursuant to this request for information and the information that will be disclosed in light of the new transparency provisions in the OPDP;
- The Ministry's consistent historic practice is to deny access to CED minutes based, in part, on section 13(1);
- Ensuring that CED recommendations are made in confidence that they will not be revealed, thereby encouraging frank and full discussions by CED members;
- Protecting the integrity of the Ministry's drug submission and drug formulary listing process;
- Protecting the value of confidentiality and the free flow of information between the CED and its federal counterparts;
- The negative financial impact disclosure would have on health care costs in the province, given the high costs associated with the ODBP;
- The likelihood that only competing drug manufacturers would be interested in the information at issue, and not the general public;
- The importance of protecting the Ministry's relationship with third party drug manufacturers, all of whom expect that information related to their submissions will remain confidential;
- The disclosure of the recommendations would result in the disclosure of the affected party's proprietary information, because of the way the information and the recommendations are intertwined, and disclosure of this information would be tantamount to disclosing information that is exempt under section 17(1), which is a mandatory exemption.

The appellant did not specifically address the factors taken into account when the Ministry exercised its discretion not to disclose the records under section 13(1). He merely submits that the Ministry "…consistently failed to take into account relevant considerations (and took into account irrelevant considerations) to arrive at the predetermined refusal to disclose information..."

Analysis/Findings

Based on my review of the information at issue in Records 11 and 12, I find that the Ministry exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. The section 13(1) exemption seeks to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations 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. In my view, disclosure will not increase public confidence in the operation of the Ministry and the information is significant to this institution and the affected party. Therefore, I will uphold the Ministry's exercise of discretion with respect to Records 11 and 12.

As I found that the Ministry has properly exercised its discretion with respect to Records 11 and 12 and, therefore, section 13(1) applies to these records, it is not necessary for me to determine whether the section 17(1) third party mandatory exemption also applies to these records.

RELATIONS WITH OTHER GOVERNMENTS

I will now determine whether the discretionary exemptions at sections 15(a) and (b) apply to two severed sentences of information in Record 9. The Ministry submits that this information consists of the results of a pharma-economic analysis run by the Common Drug Review (CDR). The CDR is a program run by the Canadian Agency for Drugs and Technologies in Health **(**CADTH).

Section 15(a) and (b) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of sections 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order

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.)].

For this exemption 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.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

Only the Ministry and the appellant provided representations on the applicability of section 15 to the information at issue in Record 9.

Section 15(a): prejudice to intergovernmental relations

In order for a record to qualify for exemption under section 15(a), an institution must establish that:

> 1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and
>
> 2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.
>
> [Reconsideration Order R-970003]

Concerning section 15(1)(a), the Ministry submits that:

> The CDR's goal of reducing duplication and providing equal access to high level evidence and expert advice to provincial drug plans, including the OPDP, depends on frank and open exchange of information, which is only promoted if the confidentiality of the information is assured. The Ministry submits that the information in the portions of Record 9 that is severed under section 15(a) and (b) was received in confidence. As provided for in the CDR Confidentiality Guidelines, …reviewers' reports are shared with provincial drug plans, such as the OPDP, in confidence.
>
> The CDR assures drug manufacturers that the confidential information contained in their submissions will be shared only with certain listed entities, such as the OPDP, but will otherwise remain confidential. If confidentiality in the exchange of information between the CDR and OPDP is not assured, it will jeopardize the

> relationship between the CDR and drug manufacturers, which in turn will discourage the CDR from providing confidential information to the OPDP. This result would undermine the entire purpose, of the CDR…
>
> The information in the severed portion of the records consists of the results of a pharma-economic analysis run by the CDR. This information was provided to the provincial drug plans, including the OPDP, through the CDR, as part of a project run by the CADTH, a national body funded by federal and provincial governments, to promote efficiency in the drug review process…
>
> [I]f the Ministry were to disclose information that it received from the CDR in confidence, the CDR would be less likely to provide such information in the future. This would inhibit Ontario's ability to participate in the exchange of information with the CDR.
>
> Consequently, the disclosure of the records at issue will prejudice Ontario's intergovernmental relations by inhibiting its ability to participate fully in the exchange of information through the CADTH's CDR program: if Ontario is unable to keep such records confidential, the CDR may be reluctant to share information with Ontario. In addition, disclosure may have the effect of making drug manufacturers less inclined to provide confidential information to the CDR in the future. Therefore, disclosure may also result in prejudice to intergovernmental drug review processes in general.

Analysis/Findings

Based on my review of the information at issue, I find that it was received by the Ministry from the CDR of the CADTH. However, based on my review of the information I find that its disclosure could not reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution. Similar information has already been disclosed to the appellant in Records 9 and 10. The information severed is not from the drug manufacturer, but results from the CDR's review of the drug. Despite being invited to provide representations, the affected party, the drug manufacturer for the named drug at issue, has not made submissions concerning the applicability of section 15 to this information. According to the Ministry's representations, the information at issue has been shared with provincial drug plans. Therefore, regardless of whether the CADTH is an agency of the government of Canada, I find that I do not have sufficient evidence to support a finding that disclosure could reasonably be expected to jeopardize the relationship between the CADTH and the Government of Ontario or an institution. On that basis, I find that section 15(a) does not apply to the information at issue.

Section 15(b): information received from another government

The Ministry submits that for section 15(b) to apply, that it need not show that any prejudice will result from the disclosure of the records under section 15(b), but only that the information was

received in confidence from another government (or its agencies). It submits that it received the information at issue in Record 9 in confidence from the CADTH, through the CDR. The Ministry submits that:

> …the expectation of confidentiality is established in the CDR Overview and CDR Process documents and CDR Confidentiality Guidelines, available on the CADTH website… In addition, the Ministry submits that the information was received in confidence by Ontario, and that Ontario treated the information as confidential material.

Analysis/Findings

I have reviewed the CADTH CDR Confidentiality Guidelines referred to by the Ministry. These guidelines define confidential information as:

> …information supplied by a drug manufacturer in a document that is clearly marked with the word "confidential" or other similar language, and any other non-public scientific, technical, or commercial information about a Manufacturer's business or a Manufacturer's product received as a result of the exchange of information…

The Confidentiality Guidelines also provide that the CDR Reviewer's Reports may be shared with certain authorized recipients. The information at issue is not information received from a drug manufacturer, but information concerning a review done by the CDR of the CADTH. I find that I have insufficient evidence to find that the information at issue in Record 9 was received by the Ministry in confidence from the CADTH. In particular, I have not been provided with any documents that demonstrate that the specific information at issue was provided to the CDR in confidence. Therefore, regardless of whether the CADTH is an agency of the government of Canada, I find that section 15(b) does not apply to the information at issue. As the Ministry has also claimed the application of section 17(1) for the two severed sentences at issue in Record 9, I will consider the application of the section 17(1) exemption to this information and to the severed information in both Records 9 and 10.

THIRD PARTY INFORMATION

I will now determine whether the mandatory exemptions at sections 17(1)(a), (b) and (c) apply to the severed information in Records 9 and 10. Both records are excerpts from CED minutes.

Section 17(1) states in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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 and MO-1706].

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

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

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

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

Only the Ministry provided submissions concerning section 17(1). The affected party supported the Ministry's submissions concerning Records 9 and 10, and could not make specific representations concerning Records 11 and 12 as it had not seen a copy of these records.

Part 1: type of information

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

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

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

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

Labour relations information has been found to include:

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

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

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]

- an account of an alleged incident at a child care centre [P-121]

- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

The Ministry submits that the records:

> …contain scientific, financial or commercial information submitted by the drug manufacturer or contain the CED's and the expert reviewers' review and evaluation of information provided by the manufacturer in its submissions, all of the records contain scientific, financial or commercial information and therefore satisfy part 1 of the section 17 test…
>
> Records …9, 10, …all contain scientific information that relates to "the natural or biological sciences", namely medical and pharmacological sciences. This scientific data describes the potential effects and estimated cost effectiveness of the drug product on particular population groups,
>
> In addition to containing scientific information, commercial and financial information is contained in Record 9, … and the severed portions of Record 10 found on pages 29, 30, 31, 71, 72, 73 and the top of page 74 and page 75-76…
>
> The Ministry submits that these records contain information about either the buying and selling of the drug products at issue or the manufacturers' pricing of those products.

Analysis/Findings

Based on my review of the records at issue, I agree with the Ministry and find that they contain commercial information within the meaning of section 17(1). This information relates to the buying and selling of the named drug [Order MO-2197]. I also agree with the Ministry that the records contain financial information, namely, information concerning cost and pricing of this drug. I also find that the records contain scientific information concerning the observation and testing of a specific hypothesis or conclusion regarding the drug undertaken by experts in the field [Order PO-2010]. Therefore, part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the 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 Ministry submits that:

> [R]ecords 9 and 10, record the CED's evaluations of information provided by the manufacturer [the affected party] in its submissions, the[se] minutes necessarily reflect …information.. about [name of drug] that was "supplied" by the manufacturer to the Ministry... For example, in Record 9, the second last bullet on page 3 refers to the manufacturer's budget impact analysis. In, Record 10, on page 29, the CED states, "According to the manufacturer's report, the cost.... is estimated at [$]"…
>
> The disclosure of this information would therefore reveal or permit the drawing of accurate inferences about the information actually supplied by the manufacturer in its submissions.
>
> For example, the CED's comments about clinical trials and studies, and about bio-equivalencies and drug formulations are based on and respond directly to information that was originally provided by manufacturer in its submissions. Consequently, the disclosure of any of this information would reveal or permit the drawing of accurate inferences about the information originally supplied by the manufacturer.

Analysis/Findings

Based upon my review of the information at issue in Records 9 and 10, I find that only certain specific information was supplied by the affected party to the Ministry. This information consists of information about the named drug at issue in this appeal and various studies of this drug conducted by the affected party, the drug manufacturer. The remaining information was not directly supplied to the Ministry by the drug manufacturer, nor would its disclosure reveal or permit the drawing of accurate inferences with respect to information supplied by the drug manufacturer [Orders PO-2020, PO-2043]. The information that was not supplied consists of the comments of the CED or its subcommittee regarding reviews or studies, such as comments on the expert pharma-economic and clinical reviews (Records 11 and 12), as well as discussions of various drug products and treatments.

Other than the specific information that was supplied, the remaining severances are not eligible for exemption under section 17(1), as this information does not meet part 2 of the test and, therefore, is not third party information. This information consists of the comments, and expressions of opinion, about the sufficiency, quantity or even quality of the available clinical and economic literature and information and was not supplied by the affected party, originating from the CED or its 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 will now determine whether the information that I have found to meet the "supplied" test, was supplied "in confidence".

In confidence

In order to satisfy the "in confidence" component of part 2, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The Ministry submits that the information was submitted by the manufacturer to the Ministry with an express expectation of confidentiality. It states that:

> [It] has never considered making drug manufacturers' submissions public, since it would completely undermine the competitive submission process, and, more seriously, might result in less candid submissions. Making the submissions of drug manufacturers public was never suggested as part of the Ministry's initiative to increase transparency in the drug submission process. The Ministry's assurance of confidentiality is contained in a Ministry document entitled, "Transparency of the Drug Review Process", dated March 27, 2007. In it, the Ministry states that, while a summary of the CED recommendation and rationale will be published on the Ministry website, it will "endeavour to continue to hold all manufacturer submissions in confidence".
>
> Consistent with this policy, it should be emphasized that only short summaries of the Executive Officer's Decisions and CED Recommendations have been published on the Ministry's website. The summaries, of approximately 2 pages in

> length, contain high level information in bullet point form. The summaries do not contain any detailed, proprietary information supplied by manufacturers.
>
> Moreover, …the Executive Officer's Decision and CED Recommendation in respect of [the named drug] have not yet been published on the Ministry's website..

Analysis/Findings

I agree with the Ministry that the information that I have found to have been supplied by the affected party, which consists of information about the named drug and various studies of this drug conducted by the affected party, was supplied in confidence.

I accept that the affected party supplied the information contained in the select portions of Records 9 and 10 that I have found to be supplied to have been supplied "in confidence". In the circumstances of this appeal, I am satisfied that this information was supplied to the Ministry with a reasonably-held expectation of confidentiality. In my view, the confidentiality statement in the Ministry's document, evinces a clear intention that the information provided to the Ministry was being provided in confidence.

Accordingly, I find that the information that I have found to be supplied by the affected party was "supplied in confidence", thereby satisfying part 2 of the section 17(1) test.

There is no need for me to consider part 3 of the test as the appellant states in his representations that:

> …he has no interest in obtaining specific third party scientific, commercial or financial information concerning third parties. The appellant is willing to concede that such information should be severed from the respective records where it appears.

In conclusion, the information that I have found to be third party information in Records 9 and 10, namely, the information that I have found to have met both parts 1 and 2 of the test set out above, has been removed from the scope of the appeal by the appellant and will not be disclosed. As neither the mandatory exemption in section 17(1), nor any other exemptions, applies to the remaining information at issue in Records 9 and 10, I will order this remaining information to be disclosed to the appellant.

SEARCH FOR RESPONSIVE RECORDS

I will now determine whether the Ministry conducted a reasonable search for records.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried

out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Ministry was asked to provide a written summary of all steps taken in response to the request. In particular, the Ministry was asked to respond to the following, preferably in affidavit form:

1. Did the Ministry contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the Ministry did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the Ministry inform the requester of this decision? Did the Ministry explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The Ministry submits that:

> After receiving a request seeking access to correspondence "in relation to the decision by CEDAC not to recommend [the named drug] for reimbursement pursuant to Ontario's drug benefit plan... ", the Ministry contacted the appellant.
>
> The appellant changed the request to a request for records "pertaining to the decision by the Committee to Evaluate Drugs not to recommend [the named drug] for reimbursement pursuant to Ontario's drug benefit program for the period January 1, 2005 to the present (July 12, 2007)…
>
> The Ministry did not contact the appellant for additional clarification as the revised request contained sufficient details to allow the Ministry to conduct a complete and thorough search.
>
> The request specifically identified the CED and Ontario's drug benefit program (now the OPDP), and the OPDP division confirmed that no other areas of the Ministry would retain records related to the drug submission process or decisions of the CED.
>
> The Drug Programs Services Branch (DPSB) of the OPDP was identified as the program area that would have responsive records. Knowledgeable and experienced staff under the direction of the Manager of the Drug Benefits Management section of the DPSB carried out the search. These individuals have many years of experience and knowledge within the DPSB, as well as the expertise to be able to identify all of the records responsive to the access request.
>
> A search of all filing cabinets, drawers, folders and computer filing systems was conducted. Twelve responsive records were located.

The appellant submits that the Ministry's search was not reasonable as it only located 12 responsive records. He identifies these records as eight pieces of correspondence between the affected party and the Ministry, two sets of minutes of meetings held by the CED and two expert review reports.

He submits that other responsive records, including correspondence between the reviewers and the CED, internal memoranda, emails, notes, etc. should exist.

In reply, the Ministry submits that these other responsive records sought by the appellant do not fall within the scope of the request, as clarified by the appellant. In particular, the Ministry notes that in the clarified request the appellant no longer sought access to internal memoranda, notes, emails or other communications between representatives of the Ministry and representatives of CEDAC, Health Canada and/or any other organization. The Ministry submits that it conducted a reasonable search for records responsive to the appellant's request. This search was carried out

by an experienced Ministry staffer, who is knowledgeable about both the Ontario Public Drug Program and about processing access requests under the *Act*.

Analysis/Findings

Although the appellant asserts that additional responsive records should exist in response to his request, I find that the appellant has not provided me with a reasonable basis for concluding that additional responsive records exist.

Upon my review of the wording of the appellant's clarified request and the Ministry's and the appellant's representations, I find that the Ministry has provided sufficient evidence to show that it has made a reasonable effort to identify and locate records that are actually responsive to the request as clarified [Order P-624].

I conclude that the Ministry has provided a comprehensive description of the steps it undertook to locate records responsive to the appellant's request. Accordingly, I find that the Ministry has performed a reasonable search for responsive records and I dismiss that aspect of the appeal.

ORDER:

1. I uphold the Ministry's decision not to disclose Records 11 and 12 to the appellant, except for the name of the affected person on page 6 of Record 11.

2. I uphold the Ministry's decision not to disclose the information which has been removed from the scope of this appeal by the appellant in Records 9 and 10. For ease of reference, I have highlighted the portions of Records 9 and 10 that should *not* be disclosed to the appellant on the copy of these records sent to the Ministry with this order.

3. I order the Ministry to disclose to the appellant the remainder of the information in Records 9 and 10, including the name of the affected person on page 1 of Record 9, as well as the name of the affected person on page 6 of Record 11, by **May 15,** 2009 but not before **May 11, 2009**.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant.

5. I uphold the Ministry's search for responsive records and dismiss this part of the appeal.

Original Signed by: April 6, 2009
Diane Smith
Adjudicator