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

ORDER PO-2944

Appeal PA09-429-2

Ministry of Health and Long-Term Care

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant made a request to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. All documents prepared by [named Company] in 2008 or 2009, containing any or all of:

    - a list of drugs coming off patent between fiscal year 2010 and fiscal year 2014
    - projections for future generic drug spending in Ontario
    - comparison of generic drug prices in Ontario and foreign countries
    - comparison of the number of pharmacies per 10,000 people in Ontario and foreign countries
    - observations regarding brand, generic and pharmacy profitability in Ontario
    - use of value-added services in Ontario pharmacies
    - options for policy changes relating to:
        - professional allowances
        - pharmacy services
        - distribution channels
        - generic pricing
        - brand pricing
    - recommendations which may cover:
        - improving the management of the Ontario Public Drug Programs (OPDP), e.g. drug utilization management and/or outcomes research activities
        - who receives benefits under the OPDP, what benefits they receive, and what contributions they make toward benefits (such as co-pays, deductibles or annual payments)
        - the role of pharmacy and other health care professionals in the delivery of the OPDP
        - tools to govern access to expensive medications

- any index, table of contents, and all chapters including analyses, conclusions, recommendations, and options relevant to the above.

2. All correspondence between members of the Ministry of Health and Long-Term Care and/or OPDP and representatives of [named Company] relating to the preparation and/or content of the document(s) listed in (1), above.

By way of background, the ministry explained in its representations that the record at issue was created by an affected party under the terms of a Service Level Agreement (SLA). The ministry submits that the affected party was contracted to:

> …act a Strategic Analyst to complete economic sector analyses, assist with stakeholder engagement, and assist in developing recommendations related to potential changes within Ontario's pharmaceutical sector.

Initially, the ministry issued a time extension decision pursuant to section 27 of the *Act*. The appellant appealed this decision and Appeal PA09-429 was opened. During mediation, the appellant confirmed that he was only appealing the ministry's time extension decision for the first part of his request. As a result of the appeal, the ministry issued an access decision for part one of the appellant's request and Appeal PA09-429 was closed.

The ministry's initial decision denied access to the entire record pursuant to sections 12(1) (cabinet records), 13(1) (advice or recommendation), and 17(1) (third party information) of the *Act*. It later also claimed the application of section 18(1)(d) (valuable government information) to the record.

The appellant appealed the ministry's decision and Appeal PA09-492-2 was opened. During mediation, the appellant submitted that there exists a public interest in the disclosure of the requested record and referred to section 23 (compelling public interest) of the *Act*.

Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During the inquiry into the appeal, I sought and received representations from the ministry, an affected party and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORDS:

The record at issue is titled, "Slide Deck from [named company]" and is 121 pages.

DISCUSSION:

LATE -RAISING OF DISCRETIONARY EXEMPTION

The ministry claimed the application of the discretionary exemption at section 18(1)(d) of the *Act* after the 35-day period in which it was notified of the appeal. I will first consider whether the ministry will be allowed to claim this exemption.

This office has the power to control the manner in which the inquiry process is undertaken [Orders P-345 and P-537]. This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*, (December 21, 1995) Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.). [see also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.)] Notwithstanding this policy, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

The ministry submits that its claim of section 18(1)(d) would not significantly prejudice the appellant. The ministry argues that there would not be considerable delay to the process, as the ministry originally denied access to the responsive record under the three exemptions noted above. Further, the ministry submits that the appellant is not prejudiced as he had the opportunity to respond to the new exemption claims within the adjudication process.

The appellant did not made submissions on the issue of whether I should allow the ministry to claim the new discretionary exemptions. However, the appellant did provide representations on the application of section 18(1)(d) to the record.

In the circumstances, and based on the fact that the appellant has had an opportunity to address the application of the exemption, I have decided to allow the ministry's claim of section 18(1)(d) and I will address its application to the record in my discussion below.

CABINET RECORDS

The ministry submits that the information on pages 25-31 and 33-41 of the record are exempt from disclosure based on sections 12(1)(b) and (c) which state:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does

> contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

The ministry submits that these pages of the record contain policy options and recommendations that were submitted to Cabinet and formed the basis of Cabinet deliberations. In particular, the information contained on pages 25-31 were presented to Cabinet as a list of options and recommendations and the information on pages 33-42 were presented to Cabinet as an analysis of the impact of the options. Finally, the ministry states that disclosure of these pages of the record would reveal the substance of Cabinet deliberations as:

> …in June/July 2009, the Record was provided to the Minister's Chief of Staff for the purpose of allowing the Minister to bring the information in the Record before Cabinet for discussion, and that, in fact, the information contained in pages 25-31 and 33-41 of the Record was discussed by Cabinet.

The appellant's submits that the ministry has never suggested that it ever brought the record before Cabinet or that the record was prepared for Cabinet purposes.

To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made [Order PO-2320, PO-2554, PO-2677 and PO-2725].

Pages 25-31 and 33-42 are marked "Advice to Minister" on the record. Based on my review of the record and the representations of the ministry, I find that section 12(1)(b) applies to exempt pages 25-31 from disclosure. Pages 25-31 list the options for changing Ontario's pharmaceutical sales and I accept the ministry's submission that the options listed on these pages were presented to Cabinet and were subject to Cabinet deliberations on the issue. Disclosure of the information on these pages would reveal the substance of Cabinet deliberations and thus I find this information exempt under section 12(1)(b).

Further, I find that the information on pages 33-42 also are exempt under section 12(1)(b). Pages 33-42 contain further discussion of the options listed on pages 25-31, but also include a more fulsome discussion of their feasibility and compare and contrast the options provided. I find that disclosure of this information would also reveal the subject of Cabinet deliberations and are therefore exempt under section 12(1)(b) of the *Act*.

ADVICE AND RECOMMENDATIONS

The ministry submits that the following pages of the record are exempted from disclosure under section 13(1) of the *Act*: 3 (in part), 24 (in part), 32 (in part), 43-48, 50-52, 53 (in part), 55-60, 61 (in part), 62, 65-71 and 99-101. 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.)].

Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

"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 Order PO-1993, upheld on judicial review in *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)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

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

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); 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)*, (cited above)].

The ministry submits that, as evidenced by the SLA, it specifically retained the affected party to provide advice and recommendations about potential changes to Ontario's pharmaceutical sector. The affected party incorporated all of its recommendations in the record at issue. Further, the ministry submits that the portions for which it has claimed exemption suggest a recommended course of action that will ultimately be accepted or rejected by the ministry. The ministry makes the following arguments on the specific pages of the record:

> **Pages 3, 24, 53, 61** - The ministry submits that section 13(1) applies to the severed portions of these pages, which clearly reference the more detailed advice given throughout the Record. The severed portions of these pages represent a course of action being proposed to the Minister.
>
> **Pages 43, 45, 47-48, 55-60** - These pages reveal [the affected party's] expert advice in furtherance of the overall recommendation, and provide the ministry with options to consider in implementing the Recommendation. The ministry submits that section 13(1) applies to these pages of the Record, because they reveal advice in respect of specific components of the overall, integrated recommendation. This advice informs the recommended course of action.
>
> **Pages 50-52** - The ministry submits that this information is subject to section 13(1) because it is meant to further advise the ministry on the recommended course of action.
>
> **Page 62** provides a recommended course of action corresponding to the primary recommendation contained in the Record. The ministry submits that section 13(1) applies to this page since the information, in and of itself, is a recommended course of action.
>
> **Pages 65-71** would permit a reader to accurately infer the advice and recommendations contained elsewhere in the Record, and as such, are subject to the exemption at section 13(1) [Orders PO-2028, PO-2084].
>
> **Pages 99-101** provide additional advice to the ministry in respect of courses of action that the ministry could take in furtherance of the goals of the solution recommended in the Record. As such, the ministry submits that this advice is also subject to section 13(1).

The appellant submits that I should consider whether any of the exceptions in section 13(2) apply to the information at issue.

Based on my review of the record and the ministry's representations, I find that disclosure of some of the pages of the record, with the exception of page 62, would reveal the advice and recommendation of the affected party to the ministry regarding a suggested course of action, which was to ultimately be accepted or rejected by the ministry. Further, I did not find that any of the exceptions in section 13(2) apply to the information I have found exempt under section 13(1).

The options and recommendations set out on pages 3, 24, 32, 53 and 61 suggest a course of action that was to be ultimately accepted or rejected by the ministry. I agree with the ministry that these pages clearly refer to the detailed advice given in the record. I find that portions of pages 3, 24, 32, and 53 and all of page 61 are exempt under section 13(1). I will consider whether the balance of the information on pages 3, 24, 32, and 53 should be withheld under the other exemptions claimed in my discussion below.

Disclosure of the information on pages 43 and 45, 47-48, 50-52, 55-60, 65-71 would permit the accurate inference of the advice and recommendation given by the affected party to the ministry. These records contain further information about the suggested course of action and I find that these pages are also exempt under section 13(1).

Pages 99-101 contain detailed additional advice to the ministry regarding the suggested course of action. I find that disclosure of this information would disclose the suggested course of action and also allow the accurate inference of the advice and recommendation given by the affected party. Accordingly, this information is also exempt under section 13(1).

Page 62 contains a schedule that is recommended by the affected party. The schedule relates to the suggested course of action. I find that disclosure of this information would neither disclose the suggested course of action nor permit the accurate inference of the advice and recommendation given. Thus, I find that page 62 is not exempt under section 13(1). I will consider whether this page of record is exempt under section 17(1) below.

THIRD PARTY INFORMATION

The ministry submits that section 17(1) of the *Act* applies to the record in its entirety, except for pages 4, 6-10, 15, 18-22, 44 and 46. The affected party submits that section 17(1) applies to exempt all the record except portions of page 5, 24, 32, 47, 53, 60, The affected party submits that section 17(1) does not apply to pages 6-14, 18-23, Appendix pages 73-97, 102-103, and 105 -111. While neither party claimed that pages 6-10 and 18-22 were exempt under section 17(1), I will consider its application to these pages of the record also. Finally, having found that page 62 and portions of pages 3, 24, 32, 53 and 61 are not exempt under section 13(1); I will also consider whether they are exempt under section 17(1).

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;
>
> (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.), leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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

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

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

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

Part 1: type of information

The ministry submits that disclosure of the record would reveal confidential "informational assets" provided by the affected party to the ministry. The ministry specifies that the record contains both commercial and trade secret information. The ministry submits that disclosure of the record would reveal commercial information as:

> [the Record] reveals [named Company's] approach to economic, product and market analysis, including forecasting, modeling and valuations, contains facts and figures and supporting material, and describes [named Company's] business

> processes and methodology, all of which have commercial value to [named Company] - an expert in the field of economic analysis.

The ministry refers to the proprietary database mentioned in the record that was used by the affected party to conduct its analyses. This is referred to as POBOS in the record.

The ministry goes on to explain that the subject matter of the record itself is also commercial in nature as it deals with the Government of Ontario's sale of pharmaceuticals, and as such is commercial information.

Finally, the ministry argues that disclosure of the record would also reveal the affected party's trade secrets as:

> …it represents a product derived from formulae, methods, and information, which:
>
> (i) is used in [named Company's] business as an expert in performing economic analysis of the pharmaceutical sector and providing recommendations and advice to [named Company's] clients,
>
> (ii) is not generally known in that business (in that the information represents [named Company's] own work product and not a generally accepted methodology or industry standard),
>
> (iii) has economic value from not being generally known, as evidenced by the fees paid by the Ministry to [named Company] for the purpose of generating the Record, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy, as evidenced by the confidentiality provisions built into the SLA [Order PO-2010].

The affected party submits that the record contains trade secret, commercial, technical and financial information, arguing that:

> [Named company's] value comes from the valuable body of strategies, methodologies, approaches, frameworks, know-how, tools and other intellectual capital that we have developed and that we bring to, and enhance during, each engagement. We are able to sustain our enterprise because of our ability to safeguard and leverage this intellectual capital in each of the projects we undertake.

> The Records represent the distilled experience, skills and knowledge of our organization learned and developed over numerous engagements. We are able to share and leverage this intellectual capital because we have retained ownership of it and protect its confidentiality…We do not claim any rights in respect of the data provided to us by the Ministry.

The affected party submits that the record also contains financial information as the information relates to the analysis of the sale of pharmaceuticals.

The appellant submits that the information at issue does not contain the type of information protected under section 17(1). He states:

> Neither the Ministry nor [the affected party] have provided any evidence of trade secrets. [The affected party] is merely providing services to a public client regarding a public program, and there is no evidence that any of those services warrant any special protection. The only example of ostensibly "proprietary" information mentioned in either party's submission is "POBOS"…Not only is POBOS not confidential, [the affected party] maintains a detailed website devoted to its POBOS services. I highly doubt that the [named Record], a non-electronic printout of a draft Powerpoint presentation, will provide any information permitting me or any other person to learn or reverse-engineer the truly proprietary aspects of POBOS or any other [of the affected party's] trade secret.

In reply to the appellant's allegations regarding POBOS, the affected party submits:

> POBOS is a benchmarking and analysis tool specifically developed by [named affected party] for the pharmaceutical industry sector. While our web-site describes what POBOS can do, and how (in very general terms) it works, the actual benchmarking methodology that POBOS uses is not disclosed, and is maintained in strict confidence by [the affected party]. The information in the Report that was generated by POBOS is itself confidential, because it represents the results of the application of the POBOS methodology to the comparative cost and price data gathered by [the affected party].

The affected party further submits:

> Moreover, the content of the Report identified for redaction 1) consists of analysis performed by [the affected party] from the data gathered by [the affected party] for the Report and/or 2) displays or allows an observer to re-engineer [the affected party's] analytical methodologies and data gathering insights and strategy…Information generated through analysis performed by

Past orders of this office have defined the types of information protected under section 17(1) as follows:

> *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].
>
> *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].

I adopt these definitions for the purposes of this appeal.

Based on the representations and the information in the record, I find that it contains commercial and financial information for the purposes of section 17(1). I do not find that the record contains information that qualifies as the affected party's trade secrets.

As the ministry states, it contracted with the affected party under the Service Level Agreement to receive the affected party's services in conducting an economic sector analysis of pharmaceutical sales in Ontario, as well as to receive recommendations about possible changes to the system. The record itself was a deliverable under the Service Level Agreement between the ministry and the affected party. I find that because the information contained in the record is a result of this contract, as well as the fact that it discusses the buying and selling of pharmaceuticals in Ontario, the content of the record is commercial information for the purposes of section 17(1).

I further find that the record contains financial information for the purposes of section 17(1). The content of the record is an economic analysis of the pharmaceutical system in Ontario and thus contains financial information about the purchase and sale of pharmaceuticals.

I do not find that the information in the record which the affected party describes as its "methodology, know how, or intellectual capital" is a trade secret for the purposes of section 17(1). While I accept that the affected party has a specialized knowledge of the pharmaceutical industry and has a specific methodology for conducting its analysis, I do not have sufficient evidence to find that the methodology employed by the affected party as set out in the record before me is not generally known in the industry. Nor do I have evidence to suggest that the methods employed by the affected party are somehow unique to it and not an industry standard.

The ministry submits that disclosure of the record would reveal "…a product derived from formulae, methods and information…" While I accept the ministry's argument that the information in the record is the result of the application of the affected party's methodology and know-how, I find that the disclosure of the record itself would not disclose information which I would characterize as trade secret information. Instead, I find that the affected party's methodology, know-how and intellectual capital to be specialized commercial information for the purposes of this appeal.

As the record contains commercial and financial information, the ministry and the affected party have met the first criteria for the application of the exemption under section 17(1).

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].

In confidence

In order to satisfy the "in confidence" component of part two, 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 [Orders PO-2043, PO-2371, PO-2497].

The ministry submits that the commercial and financial information in the record was supplied in confidence for the purposes of section 17(1). The ministry states:

> The Record is a Deliverable produced by [the affected party] under the SLA, and was submitted to the Ministry under the terms of the agreement, namely section 2.1. of the SLA, which provides that [the affected party], "…shall provide the Services and Deliverables specified in the Performance Statement of Work". [The affected party] is the author of the Record, which is not a negotiated document, and which was not amended or altered by the Ministry.

On the issue of whether the information was supplied in confidence, the ministry submits that there was both an implicit and explicit expectation of confidentiality. The ministry notes the following regarding confidentiality:

- The word "CONFIDENTIAL" appears on the covering page of the Record.

- The SLA's definition of "confidential information" included "all deliverables supplied or created by the affected party". Further, under section 10, the affected party was required to hold in confidence and keep confidential all defined confidential information. The ministry was required to keep in confidence all the affected party's materials including pre-existing tools, methodologies, templates and proprietary research and data used to produce the deliverables.

- Each of the affected party's personnel who worked on production of the Record were required to sign a Confidentiality Agreement, under which they agreed to hold in confidence information related to the SLA.

The affected party submits that the information was supplied in confidence to the ministry. The affected party states:

> The service level agreement also provides that the Ministry will hold in confidence and treat as confidential all Service Provider Materials and not disclose or make available any part of the Service Provider Materials or quote any excerpts from the Service Provider Materials outside the Ministry without prior written authorization from the Service Provider.

The appellant submits that the affected party cannot argue that it supplied the information in confidence as it posts many of its reports on its website which would presumably show the affected party's detailed analysis and methodologies.

I find that the record at issue was supplied by the affected party to the ministry in order to fulfill its obligations under the service level agreement. The report which relates to proposed changes to Ontario's pharmaceutical sector was created by the affected party and supplied to the ministry for the purposes of fulfilling its obligations under the SLA. Accordingly, I find that the "supplied" portion of this criterion has been met.

I further find that the affected party had both an implicit and explicit reasonable expectation that the report would remain confidential when it provided the report to the ministry. This expectation is indicated by the affected party and ministry's actions and behaviour, as well as the terms of the SLA.

I reviewed the affected party's website in light of the appellant's arguments; however, I was unable to find evidence that the affected party had not treated the information supplied to the ministry in a confidential manner.

Accordingly, I find that the ministry and the affected party have met the criteria for the second party of the test in section 17(1).

Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1) [Order PO-2435].

Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

The affected party provided representations on the harm that it alleges would ensue if the record was disclosed, on a page by page basis. Rather than setting out all of these representations, I have summarized them below. The affected party submits that the following would occur should disclosure of the record be allowed:

- Competitors would have a road map of how to conduct similar analysis, the specific questions to address, conclusions of fact, recommendations/options for change and sources to examine for similar work in other jurisdictions.[1]

- Competitors could appropriate the work done and re-engineer the model used at no cost to themselves.[2]

- Competitors would appropriate affected party's knowledge of assessment, costing, financial and pharmaceutical sector analysis in their own models.[3]

The affected party also submits that it faces ongoing competition from:

1. Other strategic and industry consultants for similar and related consulting work in other Canadian (federal and provincial) and international jurisdictions that administer public drug plans and interchangeable federal formularies.

2. Other participants in public drug plans who are equally impacted by changes in costs, pricing and conditions of supply of pharmaceutical products and by changes to regulatory regimes for interchangeable formularies and public drug plans, such as pharmacy organizations, drug manufacturers and private plan payers.

The ministry relies on the affected party's submissions for the harms in sections 17(1)(a) and (c).

The appellant submits that the affected party's submissions are just blanket assertions and that the affected party has not provided evidence of the harms. The appellant states:

> Ontario's drug system is unique, and even if competitors had access to [the affected party's] analysis, they could not merely apply it to other public health organizations and expect it to work. I am sure [the affected party] would agree that public drug policy analysis is highly contextual, and experience, knowledge and insight are required in each case in order to properly lead public clients to smart policy decisions. I doubt that a competitor accessing a single slide deck prepared for the Ontario government will allow the competitor to undercut [the affected party's] business in advising governments on their own drug policies around the world.

Based on my review of the record and representations, I find that certain portions of the information remaining at issue are exempt under section 17(1)(a) and (c). In particular, I find pages 1-4, 5(in part), 15-17 of the record to be exempt.

Based on my careful review of these pages of the record, I find that disclosure of this information could reasonably be expected to prejudice significantly the competitive position and result in

[1] Pages 1-5 and 53-59 of the record.
[2] Pages 15-17 of the record.
[3] Pages 25-31, 32-37, 38-52, 60-71, 98-101, 104 and 112-120.

undue loss to the affected party. Accordingly, I find that sections 17(1)(a) and (c) apply. These pages of the record set out the affected party's method for conducting its analysis and contain analytical work done by it. I find that disclosure of these pages would allow a competitor to gain from the affected party's work and would also provide a competitor with the affected party's road map for its analysis conducted.

I find the following pages are not exempt under sections 17(1)(a) and (c): 5 (in part), 6-14, 18-22, 32 (in part), 44, 45, 46, 49, 53 (in part), 54, 62-64, 73- 97, 98, 104, 112-120. The affected party and/or the ministry did not provide sufficiently detailed or convincing evidence of the harm anticipated in these subsections. The affected party did not provide evidence to substantiate its claims, outside of its blanket assertions of harm. Without additional evidence, I am unable to find that on the record's face, it is apparent how the affected party's competitors could use the information to either prejudice the affected party's competitive position or to profit from the disclosure.

The affected party argues that disclosure of these pages of the record could be used by its competitors to either conduct similar analysis for work in other jurisdictions and would appropriate the affected party's methods without the expenditure of the time and cost put in by the affected party. I find the appellant's arguments on this point to be compelling. The analysis conducted by the affected party is presumably unique to the province and dependent on highly contextual experience and knowledge about the pharmaceutical business. The affected party did not provide me with sufficiently detailed evidence or arguments to support its position that competitors could use the information at issue to compete against the affected party or to profit from the use of the affected party's analysis or methodology.

Pages 6-10 and 18-22 are information used in the affected party's analysis. I find that disclosure of this information could not be expected to either prejudice significantly the affected party's competitive position or result in undue loss to it.

Pages 11-14 contain an overview of the drug pricing in other countries and a comparison to drug pricing in Ontario. I find that disclosure of this information could not be expected to either prejudice significantly the affected party's competitive position or result in undue loss to it.

The portions of pages 5, 32 and 53 I have found not exempt under section 13(1) contains a flow chart whose disclosure could not be expected to either prejudice significantly the affected party's competitive position or result in undue loss to it. I am unable to find, based on the information in this part of the record and the affected party's representations, that a competitor could either reverse engineer the affected party's methodology or that a competitor would gain an unfair advantage in this information

Pages 44-46 and 49 contain analysis by the affected party about pharmacies, including comparison information. Based on the representations of the affected party and the information contained on these pages, I am unable to find that the affected party's methodology could be reverse engineered by a competitor or how disclosure of this information could prejudice significantly the affected party's competitive position.

Page 54 contains analysis conducted by the affected party. I find the affected party has not provided detailed and convincing evidence to suggest that disclosure of this information would provide competitors with a significant "jump start" to their own proposals to the prejudice of the affected parties. Further, I am unable to find that this information provides a "road map" to other industry participants and represents a lost opportunity to the affected party.

Pages 62-64 contain the affected party's suggested plan to the ministry. I find that the information contained on these pages to be a generalized discussion of the plan implementation. The affected party did not provide detailed and convincing evidence of how this information could be used by its competitors to "replicate" the affected party's planning and advice or as a "springboard" in order to develop their own expertise.

Pages 73-97 contain case studies from other jurisdictions. Neither the ministry nor the affected party provided representations on the application of section 17(1) to these pages. Based on my review of these pages I am unable to find that disclosure of this information could reasonably be expected to either significantly prejudice the affected party's competitive position or result in undue loss to it.

Page 98 contains the affected party's analysis. The affected party submits that disclosure would reveal information about how it analyses competition in the pharmaceutical market and would allow competitors to replicate its analysis for their own proposals. I find that the affected party has not provided detailed and convincing evidence that the harm would occur and I am unable to discern how the analysis could be replicated if it were disclosed.

Page 104 contains the affected party's analysis. The affected party argues that disclosure would permit competitors to appropriate their work at no cost for use in their own proposals. Based on the information in the record and affected party's representations, I am unable to find that disclosure could result in an undue loss to the affected party. Furthermore, the appellant provided a copy of this page of the record with his representations demonstrating that the information had been incorporated in a ministry presentation which he was able to access.

Pages 112-120 contain the affected party's analysis. I am unable to find that disclosure of this information would result in competitors being able to jump start their own ability to provide analysis and recommendations in these issues to the affected party's prejudice.

As the ministry did not claim additional exemptions for the following pages of the record and I have found them not exempt under section 17(1)(a) or (c), I will order these pages to be disclosed to the appellant: 5 (in part), 6-10, 18-22, 44, 46, 62-64, 98, 104, 112-120.

ECONOMIC AND OTHER INTERESTS

I will now consider the application of section 18(1)(d) to the following pages of the record: 11-14, 23, 24(in part), 32 (in part), 45, 49, 53 (in part), 54, 73-97, 102-111. Section 18(1)(d) states:

A head may refuse to disclose a record that contains,

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

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

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

For sections 18(1)(b), (c), (d), (g) or (h) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363].

Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233].

In support of its section 18(1)(d) claim, the ministry explains that in its attempt to deal with the challenge of managing Ontario Drug Benefit costs and to ensure its sustainability it contracted with the affected party to provide, "…expert analysis as to ways in which the Ministry could be better able to manage the current and future financial aspects of Ontario's public drug program."

The ministry further submits that the record provides recommendations and analysis on the following issues which would improve the value for money that Ontario pays for drugs:

> [From page 2 of the Record]
>
> - How do Ontario drug benefit costs compare to other jurisdictions?
> - Where in the value chain are surplus margins being captured?
> - What are the major opportunities to increase value for money given the current economics of generic manufacturers and pharmacies?
> - How have other jurisdictions in similar situations managed the transition?

The ministry states the following about the portions of the record for which it claimed section 18(1)(d):

> …[these] include extremely detailed cost breakdowns, profit pool breakdowns (including estimates of margin levels) and economic and financial analyses, all of which feed into the overall recommendation as to the best overall integrated solution to meet the Ministry's twin goals of value and implementability [sic].

The ministry argues that disclosure of this information would permit its stakeholders (i.e. drug manufacturers, wholesalers and pharmacists) to use the information to strategically aim their business, marketing and pricing strategies to circumvent the ministry's attempts to use the cost saving measures recommended by the affected party. Accordingly, the ministry submits that disclosure would be injurious to the Government's ability to manage the economy of Ontario, to the extent that OPDP affects a significant part of that economy[4] and thus the information in the record is exempt under section 18(1)(d).

In conclusion, the ministry submits that because of rising drug costs and limited financial resources, it must balance competing interests in the policy development process. To that end, the ministry states:

> …the stated purpose of section 18(1)(d) is to protect the Ministry's ability to manage the economy of Ontario; the Ministry submits that to achieve this purpose, the Ministry must control ever-rising drug costs, and to do so, it must reform the public drug system. The Ministry submits that its intended reform will essentially be hampered or obstructed by the disclosure of the Record.

[4] In its earlier representations, the ministry notes that drug costs have risen more than 140% since 1997, making it the fastest growing health care costs in Canada. Ten percent of Ontario's provincial health care costs are spent on drugs, making drug spending the ministry's highest health care cost after hospital services. The ministry submits that drug costs are one area where budget growth consistently outpaces overall provincial economic capacity.

The appellant submits that without disclosure, the public will lack the necessary information to meaningfully debate the issue of Ontario drug program reform. The appellant states:

> This could lead to non-acceptance of the reforms by system stakeholders. Non-disclosure of the record would undermine the public confidence in the Ontario Public Drug Programs…

Further, the appellant submits that the ministry has not provided detailed and evidence of the anticipated harm in section 18(1)(d), and further disclosure would advance Ontario's economic interests.

Based on the ministry's representations and the information on the pages in the record, I find that disclosure of the information on pages 11-14, 45, 49 and 54 would be injurious to the financial interests of the Government of Ontario or its ability to manage the economy of Ontario. I accept the ministry's representations that drug costs account for large portion of the province's health care costs. I further accept that the record, and specifically the pages I have identified, contain information which if disclosed may affect the province's ability to manage the provincial drug program. The information contains information about particular stakeholders, comparison information and recommendation information. I find that pages 11-14, 45, 49 and 54 are all exempt under section 18(1)(d).

On the other hand, I find that pages 23, 73-97, 102-111 and portions of pages 24, 32 and 53 are not exempt under section 18(1)(d). I note that portions of pages 102-111 are contained in the appellant's Appendix A in support of his argument that the ministry has disclosed some of the information in the record. I find that disclosure of the information on these pages could not reasonably be expected to be injurious to the financial interests of the province or its ability to manage the economy of Ontario. Neither the information on these pages or the ministry's representations provides detailed and convincing evidence that this information is exempt.

EXERCISE OF DISCRETION

The section 13(1) and 18(1)(d) exemptions are 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 43(2)].

In support of its exercise of discretion, the ministry submits that the Executive Officer acted in good faith and took into account the following factors:

- The importance of protecting the sustainability of Ontario's public drug system.

- To the extent that the Drug Programs budget forms a significant part of the provincial budget, any prejudice to the Ministry's economic interests in this regard has a simultaneous, negative impact on the Government's financial interests.
- The inherent need for confidentiality in the Government's policy development process, and the Government's need to make tough decisions free from undue influence, and the fact that the need for confidentiality is heightened when the policy development process must balance competing interests.

- The negative financial impact that disclosure of the recommendations and pending policy decisions would have on drug costs in the province.

- The public interest that is served by **not** disclosing the Record. Namely the overriding public interest in the Government's ability to make tough decisions to control drug costs for the benefit of Ontarians, and to ensure that the Government is able to ensure the ultimate sustainability of the public drug system.

  [emphasis in original]

The appellant did not make representations on this issue.

Based on the ministry's representations and information I have found exempt under sections 13(1) and 18(1)(d), I find that the ministry properly exercised its discretion to withhold the information under these exemptions. The ministry considered the exemptions and the interests they seek to protect; the nature of the information and its significance and sensitivity to the institution as well as the purposes of the *Act*. I find that the ministry considered relevant factors and not irrelevant factors and I uphold its exercise of discretion to withhold the information under sections 13(1) and 18(1)(d).

PUBLIC INTEREST OVERRIDE

Section 23 states:

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

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773 and M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614]j

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

- the records do not respond to the applicable public interest raised by appellant [Orders MO-1994 and PO-2607]

The appellant submits that there is a compelling public interest in the disclosure of the record which outweighs the purposes of the section 13, 17 and 18 exemptions. The appellant states:

> The comprehensive and constant media coverage of the Ministry's drug policy reforms over the past month speaks for itself…
>
> The compelling public interest in the content of the McKinsey Report may be inferred not only from the Ministry's conduct but also from the far-reaching implications and consequences that the proposed regulations will have on various stakeholders in Ontario and abroad, and from the notable displeasure and concern that these stakeholders have voiced since announcement of the proposed regulations was first made. Accordingly, in the event that the Commissioner finds that any of the exemptions to disclosure in ss. 13, 17 or 18 of the *Act* apply, the

> Commissioner should apply the public interest override in s. 23 of the *Act* to require immediate disclosure of the McKinsey Report.

The appellant also provided an appendix of newspaper articles which he submits highlights, "…the scope of the impact that these regulations will have throughout the province and potentially the country at large."

In his appeal letter, the appellant further urged that the people of Ontario are being denied the ability to engage in meaningful debate as the government has not disclosed the record at issue.

In response, the ministry submits that the appellant has failed to demonstrate that there is a "public" interest in the record. The ministry argues that the appellant's evidence illustrates that the stakeholders interested in the record include:

> …large chain drug stores like Shoppers Drug Mart, community and independent pharmacies/pharmacists, and generic drug manufacturers, all of whom have a financial or commercial interest in the reforms and the records upon which those reforms may have been based.
>
> …
>
> None of the newspaper articles demonstrate that the *public at large* has an interest in the detailed information actually contained in the Record. If anything, the articles suggest that the public's interest in the issue is diametrically opposed to that of the pharmacies.

As evidence of its argument, the ministry highlights a number of newspaper articles that indicate that the interest in the province's drug reforms is not coming from the public but rather from private business interests. The ministry states:

> ..these excerpts clearly indicate that the public's interest in the issue is the Ministry's goal - lower drug costs. The Appellant has not demonstrated, through these various news articles, that the public has an interest let alone 'a compelling one, in seeing and evaluating the actual advice and pricing models the government may have received and relied on to develop proposals to achieve this goal. None of the articles indicate the public wants to review and evaluate the exact methodology the government may have relied on for its reform initiatives.

Accordingly, the ministry submits that the appellant has "…a strong or rousing *private* financial or commercial interest in the Record, and that section 23 does not apply to such an interest."

In the circumstances of the present appeal, I find that the appellant has not provided me with sufficient evidence to suggest that there is a compelling public interest in the information which I have withheld under sections 13, 17 and 18 of the *Act*. The evidence provided by the appellant, specifically various newspaper articles, relate to the pharmacies' interest in the government's drug reform policy, not a public interest. Further, the information in the record which I have

withheld also relates to this particular group of stakeholders. I find that the appellant's interest in the record is essentially a private one. Further, I find that the appellant has not provided me with sufficient evidence to suggest that this private interest in the record raises issues of general application such that I am able to evince a public interest in the record. The appellant's argument that public debate is being stifled by the withholding of the record is not borne out by the evidence presented.

Accordingly, I find that section 23 does not apply to the information I have withheld under section 13, 17 and 18.

ORDER:

1. I uphold the Ministry' decision to deny access to the following pages of the record:

   1-4, 5(in part), 11-14, 15-17, 24 (in part), 25-31, 32 (in part), 33- 42, 43, 45, 47, 48, 49, 50-52, 53 (in part), 54, 55-61, 65-71, 99-101

2. I order the Ministry to disclose the following pages of record by providing the appellant with a copy of these pages by **March 2, 2011** but not before **February 25, 2011**. For clarity, I have provided the ministry with a copy pages 5, 32 and 53 of the record with the information to be withheld highlighted. To be clear, the information highlighted should **not** be disclosed to the appellant.

   5 (in part), 6-10, 18-22, 23, 24(in part), 32 (in part), 44, 46, 53 (in part), 62-64, 73-97, 98, 104, 102-111, 112-120

3. In order to ensure compliance with Order provision 2, I reserve the right to require the ministry to provide me with a copy of the pages of record provided to the appellant.

Original Signed by: January 25, 2011
Stephanie Haly
Adjudicator