Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

RECONSIDERATION ORDER PO-3558-R

Appeals PA13-362 and PA14-50

Order PO-3503

Ministry of Health and Long-Term Care

December 8, 2015

Summary: The Ministry of Health and Long Term Care (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) for access to a pharmaceutical company's (the affected party's) submission to the ministry and the Committee to Evaluate Drugs (CED) for listing of a drug on the Ontario Drug Benefit Formulary.

Order PO-3503 was issued and found that the responsive information in the letters to and from the ministry was not exempt by reason of the mandatory third party information exemption in section 17(1), as the information was either not supplied or did not meet the harms test.

Order PO-3503 also found that the information for which the discretionary advice or recommendations exemption in section 13(1) had been claimed was not exempt by reason of the mandatory exception in section 13(2)(k) (committee report).

In this Reconsideration Order, the adjudicator finds that the ministry and the affected party have not established that grounds exist under section 18.01 of the IPC's *Code of Procedure* for reconsidering Order PO-3503.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 13(1), 13(2)(k); *IPC Code of Procedure*, sections 18.01 and 18.02.

Orders and Investigation Reports Considered: Orders PO-3503, PO-3062-R, PO-2538-R, MO-1200-R.

Cases Considered: ***Chandler v. Alberta Assn. of Architects*** **(1989), 62 D.L.R. (4th) 577 (S.C.C.);** ***Grier v. Metro Toronto Trucks Ltd,*** **(1996), 28 O.R. (3d) 67 (Div. Ct.).**

OVERVIEW:

[1] The Ministry of Health and Long Term Care (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to a pharmaceutical company's (the affected party's) submissions to the ministry to demonstrate the compliance of a specific drug product (the drug) with section 12(9) of Ontario Regulation 201/96 under the *Ontario Drug Benefit Act*.[1]

[2] After clarification of the request, the ministry identified four responsive records and provided notice to the affected party under section 28(1)(a) of the *Act* in order to offer it an opportunity to provide submissions respecting the disclosure of the records. After receiving those submissions, the ministry issued an access decision granting partial access to Records 1 and 4 and full access to Records 2 and 3. The ministry claimed the mandatory third party information exemption in section 17(1) to deny access to the severed portions of Record 1. It also claimed section 17(1), as well as the discretionary advice or recommendations exemption in section 13(1), for Record 4.[2]

[3] The affected party appealed the ministry's access decision and this office opened appeal PA13-362 to address the issues. The requester also appealed the ministry's access decision, resulting in this office opening appeal PA14-50.

[4] In appeal PA13-362, the affected party disputed the ministry's decision respecting Records 2, 3 and 4, asserting that Records 2 and 3 should be severed, rather than disclosed in full, and that Record 4 should be subject to further severances under section 17(1). Appeal PA13-362 did not involve Record 1.

[5] The ministry disclosed to the requester severed copies of Records 2 and 3 with the consent of the affected party and a copy of Record 4 as severed by both the ministry and the affected party. Record 1, severed as the ministry intended originally, was also provided to the requester.

[6] Regarding appeal PA14-50, the requester confirmed that he wished to pursue access to the information withheld from all of the records.

[7] It was not possible to resolve the appeals by mediation and they were transferred to the adjudication stage of the appeal process for an inquiry. Representations from the ministry, the affected party, and the requester were sought

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[1] *Ontario Drug Benefit Act*, R.S.O. 1990, Chapter O.10.

[2] Although it claimed section 17(1), the ministry did not provide representations on this exemption to the records. It's representations at the inquiry addressed the application of section 13(1) to two portions of Record 4, as well as the application of the public interest override in section 23 to the records.

by the adjudicator previously assigned to these appeals. These representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* (the *Code*) and *Practice Direction 7*.

[8] I was then assigned these appeal files and issued Order PO-3503 where I found that the information at issue in the records was not exempt under sections 13(1) and 17(1), other than certain information that the requester was not interested in obtaining. The order provisions of Order PO-3503 read:

> 1. I order the ministry to disclose to the requester all of the information in the records, by **August 5, 2015** but not before **July 31, 2015**, except for:
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> a. the first severance in Record 2;
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> b. the drug file numbers in Records 3 and 4; and,
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> c. the information at bullets 6, 8, and 9 of Record 4.
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> 2. 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 as disclosed to the requester.

[9] The ministry then sought a reconsideration of my findings in Order PO-3503 to order disclosure of two portions[3] of Record 4 that it had claimed were exempt under section 13(1).

[10] The affected party also sought a reconsideration of my findings in Order PO-3503 to order disclosure of certain portions of Records 1 and 4 that it claims are exempt under section 17(1). In particular, the affected party sought a reconsideration of my decision to order disclosure of:

a. Record 1, page 2: bullets 1-5 of paragraph 1;

b. Record 1, page 3: second to last paragraph (starting with "We hereby request…");

c. Record 4, page 2: paragraph 1 (starting with "... have the above"), bullet 3, bullet 4, bullet 5 (starting with "This further...), bullet 7;

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[3] The ministry seeks a reconsideration of my findings that part of bullet 10 and the CED Recommendation in Record 4 are not exempt under section 13(1).

d. Record 4, page 3: bullet 10[4] and CED Recommendation.

[11] Representations on the issue of whether Order PO-3503 should be reconsidered were exchanged between the parties in accordance with section 7 of the *Code* and *Practice Direction 7*.

[12] In this order, I find that the ministry and the affected party have not established the grounds for reconsideration in section 18.01 of the *Code* and I do not reconsider Order PO-3503.

RECORDS:

[13] At issue in Order PO-3503 were the following records:

- Record 1 - Letter from the affected party to the ministry's Ontario Public Drug Programs branch director (OPDP) - September 15, 2011 (4 pages)
- Record 2 - Table of Contents to the affected party's drug submission (1 page)
- Record 3 - Letter from OPDP to the affected party - October 13, 2011 (2 pages)
- Record 4 - Letter from the OPDP to the affected party - January 4, 2012 (3 pages)

[14] Only portions of Records 1 and 4, as outlined above, are at issue in this reconsideration order.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* (the *Code*) to reconsider of Order PO-3503?

[15] This office's reconsideration process is set out in section 18 of the *Code* which applies to appeals under the *Act*. This section states:

> 18.01 The Commissioner may reconsider an order or other decision where it is established that there is:
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> (a) a fundamental defect in the adjudication process;
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> (b) some other jurisdictional defect in the decision; or

[4] Part of bullet 10 of Record 4 was disclosed to the requester by the ministry, therefore, only part of this bullet was at issue in Order PO-3503.

(c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

18.04 A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:

(a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed; or

(b) where decision does not require any action within any specified time period or periods, within 21 days after the date of the decision.

18.05 A reconsideration request should include all relevant information in support of the request, including:

(a) the relevant order and/or appeal number;

(b) the reasons why the party is making the reconsideration request;

(c) the reasons why the request fits within grounds for reconsideration listed in section 18.01;

(d) the desired outcome; and

(e) a request for a stay, if necessary.

18.06 A reconsideration request does not automatically stay any provision of a decision. A decision must be complied with within the specified time period unless the IPC or a court directs otherwise.

18.07 A reconsideration request does not preclude a person from seeking other legal remedies that may be available.

18.08 The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

> 18.09 Before deciding whether to reconsider a decision, the IPC may notify and invite representations from the parties.
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> 18.10 Where the IPC decides to grant or decline a reconsideration request, the IPC will make a written decision in the form of a letter or order and send a copy to the parties.

The ministry's request for reconsideration that section 13(1) does not apply to Record 4

[16] Record 4 is a letter from the Ontario Public Drug Programs branch director to the affected party. The ministry applied the discretionary advice or recommendations exemption in section 13(1) to two portions of Record 4. This section 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.

[17] I found in Order PO-3503 that the exception to the exemption in section 13(1) in 13(2)(k) applied and the information at issue in Record 4 was not exempt under section 13(1) as this record was a report within the meaning of section 13(2)(k). I ordered disclosed the two severances in Record 4 that the ministry had claimed were exempt under section 13(1).

[18] The exception in section 13(2)(k) states:

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

[19] The ministry submits that my finding in Order PO-3503 that Record 4 is a report constitutes a "fundamental defect in the adjudication process", and falls within section 18.01(a) of the *Code*. In particular, it submits that the following three conclusions, stated in paragraphs 101, 107 and 108 of Order PO-3503, are incorrect:

> [101] ...Record 4 is not a review prepared for the CED, but is instead a report on the drug submission...
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> [107] ...I find that this record is a report within the meaning of section 13(2)(k) of *FIPPA.* Record 4 is a formal statement or account of the results of the collation and consideration of information by the CED...

> [108] Record 4's contents consist of evaluations of observations and facts. Even though the ministry did not apply the discretionary exemption in section 13(1) to the entire record, the record is still a report within the meaning of section 13(2)(k). Accordingly, I find that the exception in section 13(2)(k) applies to the information in Record 4 that the ministry has claimed is subject to section 13(1).

[20] In its reconsideration representations, the ministry submits that section 13(2)(k) does not apply to the information severed from Record 4 because the two portions at issue are extracts from the minutes of a Committee to Evaluate Drugs (CED) meeting. It submits that the two severances at issue are not extracts from a report, and that the letter itself - Record 4 as a whole - is also not a report within the meaning of section 13(2)(k).

[21] I do not agree with the ministry that my finding that Record 4 is a report is a fundamental defect in the adjudication process. A fundamental defect in the adjudication process may include:

- failure to notify an affected party;[5]
- failure to invite representations on the issue of invasion of privacy;[6]
- failure to allow for sur-reply representations where new issues or evidence are provided in reply.[7]

[22] In Order PO-3062-R, Adjudicator Daphne Loukidelis was asked to reconsider her finding that the discretionary exemption in section 18 does not apply to the scoring methodology and evaluative summary in four records. She determined that the institution's request for reconsideration did not fit within any of the grounds for reconsideration set out in section 18.01 of the *Code*. She states:

> It ought to be stated up front that the reconsideration process established by this office is not intended to provide a forum for re-arguing or substantiating arguments made (or not) during the inquiry into the appeal… [emphasis added by me]

[23] Adjudicator Loukidelis goes on to review former Senior Adjudicator John Higgins' decision in Order PO-2538-R, where he had received a reconsideration request regarding Order PO-2405 from the LCBO and an affected party. It was argued that the Senior Adjudicator's findings (in Order PO-2405) were based on factual misapprehensions and incorrect interpretations of relevant principles and law, which

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[5] Orders M-774, Order R-980023, Order PO-2879-R, PO-3062-R.
[6] Order M-774.
[7] Orders PO-2602-R and PO-2590.

resulted in various defects or errors qualifying for reconsideration under sections 18.01(a) and (c) of the *Code*.

[24] In Order PO-2538-R, Senior Adjudicator Higgins provides an in-depth discussion of the *Chandler* case,[8] and other applicable case law regarding the reconsideration power of this office and then concludes that:

> **With respect to Order PO-2405, the parties requesting reconsideration do not allege that they made an error; rather, they argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect. This is, in essence, the argument put forward by the parties with respect to the following:** the nature of the mediation; the fact that I did not make a broader finding that some of the information in one of the records was personal information (which was an independent finding of my own, on an issue that had never been raised before me at all); **and the fact that I did not find certain information to be exempt under sections 18(1)(c) and (d).** It is also the basis of the affected party's argument about whether the dispute is finally settled. **In my view, these arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code of Procedure*, which are based on the common law set out in *Chandler* and other leading cases such as *Grier v. Metro Toronto Trucks Ltd.*[9]**
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> **On the contrary, I conclude that these grounds for reconsideration amount to no more than a disagreement with my decision, and an attempt to re-litigate these issues to obtain a decision more agreeable to the LCBO and the affected party.** … As Justice Sopinka comments in *Chandler*, "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.[10] [Emphasis added by Adjudicator Loukidelis]

[25] I find that the ministry is attempting to provide me with new evidence in its reconsideration representations, contrary to section 18.02 of the *Code*. As stated above, this section of the *Code* provides that the IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision. In its reconsideration representations, the ministry has provided a copy of the CED minutes[11] and more extensive arguments to those provided originally as to the application of section 13(1) to the information at issue.

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[8] *Chandler v. Alberta Assn. of Architects* (1989), 62 D.L.R. (4th) 577 (S.C.C.).
[9] (1996), 28 O.R. (3d) 67 (Div. Ct.).
[10] See also the discussion of reconsideration in Order PO-2879-R, cited by the first affected party.
[11] The ministry did not provide a copy of the CED minutes with its original representations.

[26] I have carefully reviewed the ministry's reconsideration representations. I find that in its reconsideration representations, the ministry is rearguing the substantive arguments made during the inquiry. Adopting the finds set out above in Orders PO-3062-R and PO-2538-R, I find that the ministry's arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code*. In particular, I find that the ministry has not established that there was a fundamental defect in the adjudication process for the purpose of section 18.01(a) of the *Code*. Therefore, I will not reconsider my decision concerning the application of section 13(1) to the information at issue in Record 4.

[27] In addition, even if I had determined that there had been grounds to reconsider my decision concerning section 13(1), based on my review of the ministry's reconsideration representations I would have still concluded that the Record 4 is a report and is not exempt under section 13(1) by reason of the exception in section 13(2)(k).

[28] I maintain my finding that Record 4 is a report within the meaning of the exception in section 13(2)(k). The ministry's representations that Record 4 should be characterized as a "reporting letter" to the affected party and the Assistant Deputy Minister and Executive Officer are insufficient to establish that the exception at section 13(2)(k) does not apply. In deciding that this record is a report, I did not find, as the ministry argues, that every letter that contains the details and rationale for a given recommendation is a report. In the circumstances of these appeals,[12] I have found that Record 4 is a report as it contains a formal statement or account of the collation and consideration of information by the ministry.[13]

[29] I agree with the ministry that the two severances on their own appear to contain advice or recommendations and may be exempt under section 13(1) if found in another type of record. However, I have found that this information is contained in a report, therefore, by reason of section 13(2)(k), this information is not exempt under section 13(1).

The affected party's request for reconsideration that section 17(1) does not apply to portions of Records 1 and 4

[30] The affected party seeks a reconsideration of the findings made regarding the applicability of section 17(1) to certain portions of Records 1 and 4. In particular, it seeks a reconsideration of my finding that section 17(1) does not apply to:

- Record 1, page 2: bullets 1-5 of paragraph 1;

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[12] Appeals PA13-362 and PA14-50.

[13] 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. (See paragraph 98 of Order PO-3503).

- Record 1, page 3: second to last paragraph (starting with "We hereby request…");

- Record 4, page 2: paragraph 1 (starting with "... have the above"), bullet 3, bullet 4, bullet 5 (starting with "This further...), bullet 7;

- Record 4, page 3: bullet 10 and CED Recommendation

[31] The affected party relies on sections 18.01(a) and (c) of the *Code*.[14] It provided both confidential and non-confidential representations in support of its reconsideration request[15] that I reconsider my decision in Order PO-3503 to order disclosure of certain portions of Records 1 and 4. I will now address the portions at issue in the affected party's reconsideration representations.

Record 1, page 2: bullets 1-5 of paragraph 1

[32] Bullets 1 to 5 of the first paragraph of Record 1, page 2, is a point form list of the subject of certain studies, not the data from or the results of these studies. The affected party submits that this information contains detailed descriptions of the studies that it conducted. It argues that because I determined part 2 of the test under section 17(1) had been met for this information, that my finding that part 3 of the test had not been met constitutes an error or omission under section 18.01(c) of the *Code*.

[33] The three part test under section 17(1) states that in order for this exemption to apply, the institution and/or the third party must satisfy each part of the following 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.

[34] In particular, the affected party argues that since I found that it supplied the information at issue to the ministry in confidence, I erred in finding that the harms test under part 3 had not been met. It states that my finding concerning part 3 that these bullets contain similar types of general information about studies that were done on the drug as that found in the drug product monographs is in conflict with my finding under part 2 of the test that the particular information at issue was supplied in confidence,

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[14] These sections of the *Code* are set out above.
[15] I will only be referring to the non-confidential representations in this order.

and was not publicly available.

[35] The affected party also argues that my finding in Order PO-3503 that the bulleted information is general information about studies performed on the drug is an error in the adjudication process as it conflicts with the affected party's representations.

[36] I find that the affected party's arguments concerning bullets 1 to 5 of Record 1 do not come within the grounds of section 18.01(c) of the *Code*. A clerical error or accidental error under that section may include:

- a misidentification of the "head" or the correct ministry;[16]
- a mistake that does not reflect the Adjudicator's intent in the decision;[17]
- information that is subsequently discovered to be incorrect;[18] and
- an omission to include a reference to and instructions for the institution's right to charge a fee.[19]

[37] In Order MO-1200-R, Assistant Commissioner Tom Mitchinson discussed the meaning of "accidental error" in section 18.01(c) of the *Code*. He stated that:

> The decision in *Grier*[20] would appear to allow an adjudicator to reopen a case in order to correct a factual error of a fundamental nature going to the actual issue to be determined. In my view, Adjudicator Jiwan was faced with an error of this nature in reaching her decision in Order MO-1167. A grievance did in fact exist. Adjudicator Jiwan was unaware of it, and she relied on the appellant's statement that no grievance had been filed in finding that the Board did not have a "legal interest" for the purposes of section 52(3). This finding was fundamental to the outcome of Adjudicator Jiwan's conclusion that the records fell within the jurisdiction of the Act. In my view, this qualifies as an "accidental error" within the meaning of clause (c) of the Reconsideration Policy of the Commissioner's office. On this basis I am prepared to reconsider Order MO-1167 and to consider the new evidence which has been provided with respect to the grievance.

[38] The affected party is not claiming that I made a factual error of a fundamental nature going to the actual issue to be determined in Order PO-3503[21] but is disagreeing

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[16] Orders P-1636 and R-990001.
[17] Order M-938.
[18] Order M-938 and MO-1200-R.
[19] MO-2835-R.
[20] *Grier v. Metro International Trucks Ltd.* (1996), 28 O.R. (3d) 67.
[21] As was the case in Order MO-1200-R.

with my interpretation of the section 17(1) exemption to the evidence before me at the appeal stage.

[39] In particular, I find that the affected party in its reconsideration request concerning bullets 1 to 5 of Record 1 is attempting to reargue the appeal and to have me reconsider my finding as to the application of the section 17(1) exemption based on new arguments. I find that this is not a clerical error, accidental error or omission or other similar error in the decision within section 18.01(c) of the *Code*.

[40] Similar to my findings above for section 13(1), I find that the affected party is not permitted under the reconsideration process to reargue the appeal by the introduction of new arguments or new evidence. Therefore, I will not reconsider my decision that bullets 1 to 5 of paragraph 1 of Record 1 are exempt under section 17(1).

Record 1, page 3: second to last paragraph (starting with "We hereby request…"); and Record 4, page 2: paragraph 1 (starting with "... have the above")

[41] Concerning these portions of Records 1 and 4, the affected party states that I misconstrued its evidence on the appeal and provided inconsistent rulings with respect a certain phrase that appears in both Records 1 and 4. I found this phrase in Record 1 as having been supplied in confidence while I found the same phrase not to have been supplied in confidence in Record 4. The affected party does not indicate how my findings with respect to this phrase should be reconsidered as falling within the grounds set out in section 18.01 of the *Code*.

[42] Even if it is my decision not to find this phrase in Record 4 to have been supplied in confidence[22] was an accidental error,[23] namely, a mistake that does not reflect my intent in the decision,[24] I note that I also found that part 3 of the test under section 17(1) was not met for this phrase as it appears in Record 4. Therefore, I still would have ordered disclosure of this phrase.

[43] The affected party is also seeking the removal of this phrase as it appears in Records 1 and 4 from the scope of the appeal on the basis that the requester did not want access to pricing information in the records. As noted in Order PO-3503, in his representations, the requester stated that he did not seek access to the pricing information of the drug product in bullets 8 and 9 of Record 4. I also found that bullet 6 of Record 4 had pricing information for the drug product. In Order PO-3503, I, therefore, removed bullets, 6, 8 and 9 of Record 4 from the scope of the appeal as they revealed pricing information.

[44] The affected party submits in its reconsideration request that I should have

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[22] Thereby meeting part 2 of the test under section 17(1).
[23] An accidental error under section 18.01(c) of the *Code*.
[24] Order M-938.

removed Record 1, page 3: second to last paragraph and Record 4, page 2: paragraph 1 from the scope of the appeal as I should have found that these portions of the records reveal the level or category of funding requested for the drug product. This is a new argument. In Order PO-3503, I did not find this information pricing information; nevertheless, a level or category of funding is not apparent from a review of this information in the records. Even if these portions of Record 4 reveal the level or category of funding, I find that this is not the same as pricing information as in bullets 6, 8 and 9 of Record 4.

[45] I find that the affected party, particularly in the confidential portions of paragraphs 28 and 29 of its reconsideration representations related to part 3 of the test, is raising new arguments as to why the information at issue as it appears in Records 1 and 4 should be withheld. As stated above, the affected party is not permitted under the reconsideration process to reargue the appeal by the introduction of new arguments or new evidence.

[46] Therefore, I will not reconsider my decision that Record 1, page 3: second to last paragraph and Record 4, page 2: paragraph 1 are not exempt under section 17(1).

Additional Representations on Record 4

Part 2 of the test

[47] The affected party states that I did not consider its detailed representations on the supplied test in part 2 and asks me to reconsider my decision concerning:

- Record 4, page 2: paragraph 1 (starting with "... have the above")
- Record 4, page 2: bullet 5
- Record 4, page 2: bullet 7.

[48] In Order PO-3503, I found that:

> The first severance is on page 2 and is about the purpose of the CED review. This information contains a brief statement about the affected party's request for listing the drug on the formulary. This severance does not reveal information that was supplied by the affected party.
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> The remaining severances contain some of the comments made by the CED in its review. Certain severances do not reveal information that was supplied by the affected party. In particular:
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> > • Bullet 5 – the information at issue in that bullet is a conclusion of the CED drawn from its review of a study and a guideline.

> • Bullet 7 – this bullet mentions information not supplied by the affected party to the CED in its submission.
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> The information at issue in bullets 5 and 7 is not in the affected party's submission to the ministry; nor is it about the CED's interpretation or position on the drug. I find that this information was not supplied by the affected party, nor does it reveal information supplied by the affected party.[25]

[49] The affected party submits in its reconsideration request that I misconstrued the evidence, in particular with respect to Record 4, page 2: bullet 7, as there "…appears to be a misapprehension of the applicable law and evidence or a simple error or omission". As stated above, my interpretation of evidence is not an error or omission within section 18.01(c) of the *Code*.

[50] The affected party also submits that I should have removed these portions of Record 4 from the scope of the appeal as I should have found that this information reveals pricing strategy. Again, relying on my analysis above, I did not determine in Order PO-3503 that these portions of Record 4 revealed pricing information.

Part 3 of the test

[51] The affected party states that I did not consider its detailed representations on the harms test in part 3 and asks me to reconsider my decision concerning:

- Record 4, page 2: bullet 3
- Record 4, page 2: bullet 4
- Record 4, page 3: bullet 10 and the CED Recommendation

[52] In Order PO-3503, I found that part 3 of the test under section 17(1)(c) did not apply to exempt the records. I also stated with respect to the harms test under section 17(1)(a) concerning the information bullets 3 and 4 of Record 4 that:

> • Bullet 3 - the affected party states that this information should be protected from disclosure as it refers to preliminary unpublished data. Although this bullet mentions unpublished data, it does not specifically state what this unpublished data is. Even if this unpublished data could be deduced from a reading of bullet 3, it is not apparent what harms could reasonably be expected to be incurred should the information in this bullet be disclosed. The affected party did not address this in its representations.

[25] See paragraphs 30 to 32 of Order PO-3503.

> • Bullet 4 - the affected party states that this bullet represents unpublished data related to the CED Recommendation. It states that the ministry provided its acceptance of information from the CED Recommendations on February 29, 2013. It states that the only additional information that has been posted is that which is contained in a specific publication, which reflects the ministry and CED's final recommendations, rationales and decision regarding listing of the drug. It further states that the specific information that the affected party has redacted reflects certain isolated comments or considerations taken into account by the CED, but does not accurately reflect its rationale for the recommendation, which is based on a holistic review. It submits that the release of these isolated considerations could reasonably be expected to be misconstrued and to cause harm to the affected party.
>
> Based on my review of the information at issue in bullet 4, I do not agree that this information can be misconstrued such as to cause harm to the affected party within the meaning of section 17(1)(a). This type of information, which concerns the use of the drug, is apparent throughout the product monographs.[26]

[53] As stated above, the ministry disclosed to the requester a severed copy of Record 4 as severed by both the ministry and the affected party. On this severed copy of Record 4 as provided to the requester and on the highlighted copy of the record as provided to this office by both the affected party and the ministry, only section 13(1), not section 17(1), was identified as applying to bullet 10[27] and the CED Recommendation.

[54] In its representations, the affected party's only direct statement that could be now possibly be construed to come within part 3 of the test regarding bullet 10 and the CED Recommendation in Record 4 was that:

> [Bullet 10] should be redacted for the same rationale as bullets 1 & 2.[28] In addition, as regards both bullet 10 and the CED Recommendation that appears below bullet 10, publication of this information is inappropriate as outside of the ministry's established process for release of summary information relating to the CED Recommendation. In addition, release of

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[26] See paragraphs 58 and 59 of Order PO-3503.

[27] Only part of bullet 10 of Record 4 was at issue in this appeal, as part of this bullet was disclosed to the requester by the ministry.

[28] The affected party's representations concerning bullet 1 and 2 of Record 4 did not address the harms issue directly and only provided that:

> Information in bullets 1 & 2 should be protected from disclosure as it is taken from [the affected party's] submission and discloses [the affected party's] confidential and proprietary characterization of the rationale for the design of [the drug].

> this information would cause competitive harm to Purdue on the basis that the CED's comments and considerations could reasonably be expected to be taken out of context and misconstrued..

[55] As I stated above, it was not marked on the copies of the severed or highlighted Record 4 provided to this office that section 17(1) was being claimed for either bullet 10 or the CED Recommendation. Nor was it apparent from my review of the affected party's representations that it was claiming the application of section 17(1) to bullet 10 and the CED Recommendation. Even if that was the case, I would have found that the affected party's only direct statement on harm, namely that the information could reasonably be expected to be taken out of context and misconstrued, was not sufficient evidence for me to find this information exempt under part 3 of the test.

[56] The affected party also submits that as the credibility of its evidence was not questioned by me during the inquiry, that my decision to order disclosure of the information that I had found met part 2 of the test under section 17(1) constitutes a fundamental defect in the adjudication process under section 18.01(a) of the *Code*. As stated above, my interpretation of evidence does not constitute a fundamental defect in the adjudication process within the meaning of section 18.01(a) of the *Code*.

[57] Therefore, I will not reconsider my decision concerning the following information in Record 4:

- page 2, paragraph 1, bullets 3 to 5 and 7, and
- page 3, bullet 10 and the CED Recommendation.

Conclusion

[58] I have found in this reconsideration order that both the ministry and the affected party have not established under section 18.01 of the *Code* with regards to Order PO-3503 that there was:

> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.

[59] Accordingly, I decline to reconsider Order PO-3503 under section 18 of the *Code*.

ORDER:

I uphold the order provisions of Order PO-3503 and order the ministry to disclose the information ordered disclosed in that order to the requester by **January 12, 2016.**

Original Signed by: December 8, 2015

Diane Smith
Adjudicator