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

ORDER 47

Appeal 880043

Ministry of Health

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) of the Act a right to appeal any decision of a head to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On February 12, 1988, the Ministry of Health (the "institution") received a request for access to:

> "Listing by (drug company) manufacturer and product of prices submitted (to the Ministry) for Formulary 24 as B.A.P. (Best Available Prices). Listing of all products whose B.A.P. exceeded the price listed by the Ministry in the Formulary, i.e., those that exceeded 5% guideline artificially established by Ministry."

2. By letter dated February 15, 1988, the institution's Freedom of Information and Privacy Coordinator (the "Co_ordinator") replied to the requester that they would contact him by March 12, 1988, the end of the 30 day period for response allowed by section 26 of the Act, with a decision regarding the request. The requester was advised before that date, verbally, that his access request would be denied. A letter from the institution, dated March 17, 1988, confirmed the fact that access had been "...denied under the authority of Section 17 of the Act. The reason

this provision applies to the records requested is because these records contain commercial information supplied to the Ministry in confidence. The disclosure may prejudice the competitive position of the companies and may also result in similar information no longer being supplied to the Ministry."

3. On March 21, 1988, the requester sent a letter to the Information and Privacy Commissioner appealing the decision of the head to refuse to disclose the requested record.

4. Between March 21, and May 26, 1988, efforts were made by an Appeals Officer and the parties to settle the appeal. A sample copy of the record was obtained from the institution and examined by the Appeals Officer. Settlement was not effected as both parties maintained their respective positions.

5. On July 19, 1988, I sent notice to the appellant, the institution and 63 third parties (the drug manufacturers who had submitted a B.A.P. for consideration for inclusion in Formulary 24) stating that I was conducting an inquiry into this matter and requesting that written representations be made to me prior to August 15, 1988. Several extensions of this time limit were granted and, by September 30, 1988, I received written submissions from the appellant, the institution, an association representing pharmaceutical manufacturers, and 44 of the 63 third parties.

6. I have considered all submissions in making this Order.

It may be useful at this point to provide some general background information. I have relied, to a large extent, on the written representations received from the institution and counsel for the Pharmaceutical Manufacturers Association of Canada for this outline.

The Drug Programs Branch (the "DPB") of the Ministry of Health is responsible for the administration of the Ministry's drug programs, particularly the Ontario Drug Benefit Program (the "ODBP"). The ODBP was introduced in September, 1974. It was designed to provide prescription drug products, free of charge, to needy, elderly, blind and disabled persons living in Ontario. There are two main pieces of provincial legislation relating to the ODBP, the Ontario Drug Benefit Act, 1986 (the "ODBA") and the Prescription Drug Cost Regulation Act, 1986 (the "PDCRA"). Regulations are made, pursuant to the ODBA and PDCRA, at approximately six month intervals. These Regulations result in the compilation of a new edition of the Drug Benefit Formulary/Comparative Drug Index (the "Formulary/CDI") which lists all drug products which have been approved as benefits under the ODBA. The DPB requests pricing information from all drug manufacturers, by letter. Forms are provided by the Ministry, filled out by the manufacturers, and submitted to the branch by a specified date.

The Formulary/CDI also lists pharmaceutical products deemed to be interchangeable, and the maximum allowable costs at which pharmacies will be reimbursed by the Ministry for benefits

provided to eligible persons. The Ontario Drug Benefit Act, 1986 states that the price for each prescription drug listed in the Formulary/CDI will be an amount that includes the Best Available Price (the "B.A.P.") for a drug, as determined by the Minister of Health, an additional 10 percent of that price, plus a dispensing fee for each prescription. (B.A.P., as defined by subsection 18(4) of the Act means the lowest amount, calculated per gram, milliliter, tablet, capsule or other appropriate unit, for which a listed drug product of that drug in that dosage form and strength can be purchased in Canada for wholesale or retail sale in Ontario less any price reduction granted by the manufacturer or wholesaler or their representatives in the form of rebates, discounts, refunds, free goods or any other benefits of a like nature.) The additional 10 percent recognizes added

costs incurred by pharmacists, such as differences in drug distribution and quantities of drugs purchased. A pharmacist who supplies a listed drug product to an eligible person pursuant to a prescription is reimbursed by the Ministry and is prohibited from charging the eligible person any amount in respect of that drug product.

Under the Prescription Drug Cost Regulation Act, 1986 the pharmacist, when filling prescriptions for drugs where more than one manufacturer's product is available, must inform the customer if a lower cost drug is available. For each interchangeable drug, the pharmacist can only charge the B.A.P. of the drug (the price set out in the comparative drug index less the value of any price reduction granted by the manufacturer or wholesaler) plus 10 percent of the B.A.P., and the pharmacist's usual dispensing fee. Pharmacies are required

to indicate both the cost of the drug and the amount of the dispensing fee on the customer's receipt.

Since 1977, the Ministry has established several committees and commissions to deal with concerns that much of the saving on prescription drugs resulting from the combined federal (compulsory licensing) and provincial (product selection) legislation was not being passed on to the public. The concerns arose out of reports about the problem of "price spreading" _ a practice by some drug manufacturers of submitting artificially high prices for inclusion in the Formulary/CDI while selling to pharmacists at much lower rates. Because the Formulary/CDI prices serve as a guide for drug sales in the "cash" market, its prices, if artificially high, could also mean excess costs for cash customers in the non_ODB market. The Ontario Drug Benefit Act, 1986 and the Prescription Drug Cost Regulation Act, 1986 were passed in response to the problem of price spreading.

One of the types of records at issue in this appeal was prepared by the third party drug manufacturers, in compliance with the Regulations made under these two Acts. The form, filled out by

the third party drug manufacturers, consists of a list of all products to be listed in the Drug Benefit Formulary for inclusion as benefits to eligible persons under the Ontario Drug Benefit Act, i.e., the name, dosage form and strength of the drug product; the Drug Identification Number (DIN) assigned by the Health Protection Branch of Health & Welfare (Canada); the percentage of units of each package size of the drug product that were sold directly to retail pharmacies in Ontario (excluding sales to hospitals); the package size or sizes in which the drug product is sold; the best available price for

each unit of the drug product within the meaning of subsection 18(4) of the Ontario Drug Benefit Act; the total number of units of the drug product that were sold; the total sales in dollars for the drug product; the average unit price of the drug product (calculated by dividing the total sales for the drug product by the total number of units of the drug product); and the percentage of sales of the drug product sold at the best available price.

The institution created two further records from this information supplied by the drug manufacturers. The first was a form for each drug manufacturer listing name, dosage form and strength of all drug products to be listed; their DINs; the prices listed for the product in editions #22 and #23 of the Formulary; the "% #23 vs #22"; the E#24 price; the "% #24 vs #23"; the "% #24 vs. #22"; the "new price"; and the "projected savings". Information from these pages for individual drug manufacturers was consolidated on the second form _ a master list _ which showed the manufacturers names; the product, strength and dosage form of each drug product; its DIN; the previous BAP of the product; the BAP of the product as submitted by the manufacturer for Formulary #24; the percentage of the increase, if any, in the BAP from Formulary #23 to #24; the "Annual Estimated Cost" of the products listed in Edition #23 of the Formulary; the "Annual Estimated Cost" of the products listed in edition #24 of the Formulary; and the

"Estimated Ceiling" and "Estimated Savings", projected by the Ministry, based on past sales to wholesalers and retailers in Ontario.

The only information contained on these forms that is published in the Drug Benefit Formulary is the name of the drug product; the strength and dosage form; the DIN; the abbreviation of the manufacturer's name; the name and DIN of an interchangeable drug product, if one exists; and the BAP for each drug product (the prices published in the Formulary as the "Best Available Price" are determined by the Minister of Health and prescribed by the Lieutenant Governor in Council, pursuant to subsection 7(1) of the Prescription Drug Cost Regulation Act, 1986 and subsection 18(2) of the Ontario Drug Benefit Act, 1986. Therefore, the prices published in the Formulary may not be the "Best Available Prices" originally submitted by the individual drug manufacturers.)

The issues arising in this appeal are as follows:

A. Whether the records at issue are exempt from disclosure pursuant to section 17 of the Act.

B. If the records at issue are exempt from disclosure pursuant to section 17, whether there is a compelling public interest in the disclosure of these records which clearly outweighs the purpose of the section 17 exemption, as provided by section 23 of the Act.

It should be noted, at the outset, that the purposes of the Freedom of Information and Protection of Privacy Act, 1987 as defined in subsections 1 (a) and (b) are:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> ...
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions ...

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head. In the case of third parties seeking to rely on an exemption from disclosure (i.e., the drug manufacturers in this case), as I stated at page 4 in my Order 3 (Appeal No. 880031), they bear an onus of proving that an exemption relied upon applies to the records in issue.

ISSUE A: Whether the records at issue are exempt from disclosure pursuant to section 17 of the Act.

Subsection 17(1) of the Act reads as follows:

> 17.(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or

(c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to fall within the section 17 exemption, the record in issue must meet the following three_part test established in my Order 3:

1. the records must contain 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 types of injuries specified in (a), (b) or (c) of subsection 17(1) will occur.

All three parts of this test must be satisfied in order for the section 17 exemption to apply.

I will go through an examination of the record in question and the type of information contained therein, in order to determine whether the head properly relied on section 17 in refusing to disclose the requested information.

section 17 test/part 1: the records must contain information that is a trade secret or scientific, technical, commercial, financial or labour relations information

None of the parties to this appeal made specific representations as to the type of information withheld by the institution, although it was variously referred to in their representations as "financial information concerning commercially sensitive issues of pricing and market considerations"; "pricing and market information"; and "commercial and financial in nature". The seventh edition of the Concise Oxford Dictionary defines "financial" as follows:

> "of revenue or money matters";

and "commercial" as follows:

> "of, engage in, bearing on, commerce".

Black's Law Dictionary (5th ed.) defines "financial" as:

> "Fiscal. Relating to finances.";

and "commercial" as follows:

> Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. Generic term for most all aspects of buying and selling."

The Freedom of Information and Protection of Privacy Manual prepared by Management Board of Cabinet and used by Co_ordinators to assist them in interpreting the Act defines "financial information" as follows:

> "The term refers to information relating to money and its use or distribution. For example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs." (p. 4_13)

and "commercial information" as follows:

> "This term refers to information concerning the sale or exchange of goods, products or property." (p. 4_13)

After reviewing the record, I find that the essence of the information submitted by the drug companies is both "financial" and "commercial" in nature, and therefore meets the requirements of the first part of the section 17 test.

section 17 test/part two: the information must have been supplied to the institution in confidence, either implicitly or explicitly.

The institution, the association representing pharmaceutical manufacturers, and 41 out of the 44 manufacturers who made

representations to me, all submitted that the information provided to the institution by the third parties was supplied in confidence, either implicitly or, as some stated, explicitly.

The institution stated that:

> "It has always been the policy and the practice of the (Drug Programs) Branch, since the inception of the Program, communicated to the manufacturers, that all manufacturers' price submissions will be treated as confidential. All further information related to price submissions received from manufacturers is also regarded by the Branch and the manufacturers as confidential."

The association representing pharmaceutical manufacturers cited the equitable doctrine of breach of confidence in their representations, stating that the doctrine suggests third party information i) not generally known or readily available to the public, and ii) imparted in circumstances where an obligation of confidence arises, is information supplied in confidence within the meaning of section 17 of the Act.

Most of the third party appellants asserted that the information was provided to the institution for a very specific purpose, and on the understanding that the information would be held in strictest confidence by the institution. Several of the third party appellants went so far as to state that the information was explicitly provided in confidence, and one of the appellants cited a letter from the Ministry of Health, dated June 16, 1986 which stated:

> "In determining the Best Available Price [BAP] for each listed drug, the Ministry requires sales data for all drug products listed or proposed for listing in the ODB Formulary. This information will be used by the Ministry for the preparation of drug product listing (i.e. ODB Formulary and 'interchangeable' drug list) under the relevant legislation, and will be treated confidentially."

The appellant states in his representations that:

> "One of the concerns of the Government of Ontario must be the protection of commercial information that manufacturers supply in confidence. We do not believe we are asking for anything confidential or commercial that should not be public information."

I am satisfied, after reviewing all submissions, that the information regarding the manufacturers' proposed "Best

Available Prices" was provided to the institution by the various manufacturers in confidence implicitly and, in some cases, explicitly. As a result, the record meets the second part of the section 17 test.

section 17 test/part 3: the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of subsection 17(1) will occur

To meet the requirements of the third part of the section 17 test, it must be demonstrated that the release of the information contained in the record could reasonably be expected to result in specified types of harms.

To qualify under subsection 17(1)(b) it must be shown that disclosure could reasonably be expected to result in similar information no longer being supplied to the institution. In my view, this result is unlikely with respect to the information under consideration. The Ontario market for prescription drugs is very lucrative and, if drug manufacturers want access to the Ministry of Health's substantial share of that market, they must comply with the reporting requirements of the Ontario Drug Benefit Act, 1986 and submit pricing, and other information, to the Drug Benefit Branch. Very few of the third parties raised subsection 17(1)(b) in their submissions, and I have no difficulty in deciding that the harm contemplated by this subsection is not reasonably foreseeable.

Subsection 17(1)(a) states that disclosure must reasonably be expected to result in significant prejudice to a third party's "competitive position" or "contractual or other negotiations";

and subsection 17(1)(c) requires the institution or affected third party to establish that disclosure could result in "undue loss or gain" to someone. I will now turn to an examination of the arguments made about the applicability of each of these two subsections to the records at issue.

In its representations, the institution stated that: _

> "...any disclosure of information about a manufacturer's ... pricing strategies for drug products can be used by competing manufacturers in order to put their own responding strategies into place earlier, or otherwise attempt to shore up their own market share, to the detriment of the first manufacturer."

The association representing drug manufacturers submitted that pricing information could permit a competitor to underbid and disclosure of the price submissions would permit competitors to calculate future price submissions and pricing structures. The association went on to state that: _

> "Competitors would be in a position to estimate and undercut B.A.P.'s submitted for inclusion in future formularies or if prices varied in the non_ODB market, a pharmacist not receiving a favourable price from a manufacturer might try and negotiate the price downward or stock an interchangeable drug product manufactured by a competitor."

The appellant, on the other hand, submitted that: _

> "We do not see how any commercial party can be harmed by providing data which is in itself also in the public domain."

This submission by the appellant is not totally accurate. The prices submitted by the manufacturers are not always accepted by

the institution and published in the Formulary. Therefore, in some cases the requested data may never be in the public domain.

The appellant also submitted that the pricing information could have commercial significance before publication of the Formulary, but not after publication. By this, I assume the appellant means that the submitted prices which are not subsequently published in the Formulary, would have no commercial significance after the prices determined by the Ministry are published.

One of the third party appellants submitted that the knowledge that price adjustments occurred or were planned by a manufacturer might be detrimental to a company's competitive position because such knowledge could be used by competitors or the press to create an unfair impression and, consequently, damage the company's reputation.

As well, the institution stated that, "...the release now of the price increases which had been proposed for the January 1988 Formulary/CDI can reasonably be expected to be detrimental to the manufacturers concerned. To the extent that the manufacturers' proposed price increases submitted in respect of the January 1988 Formulary/CDI have not been implemented, their submissions may still be indicative of the manufacturers' plans for future increases.".

As well as claiming that disclosure would affect the commercial relationship between the third parties and their customers, the third party appellants also submitted that disclosure of the information would result in loss of market share. In their

view, competitors could undercut prices as a result of their knowledge of the third parties' marketing strategy, sales volume and price history, and this information could enable competitors to work "average unit price" to their advantage. Some third party appellants also claimed that the information could be manipulated to reveal other confidential financial information.

After reviewing all the submissions, I have reached the conclusion that the institution and the affected third parties have identified a reasonable expectation that disclosure of the information contained in the record at issue in this appeal could result in a significant prejudice to the competitive position of these third parties, and have thus satisfied the requirements of subsection 17(1)(a). Because only one of the 3 subparagraphs of subsection 17(1) need be established to satisfy the three part test, it is not necessary for me to consider whether or not the requirements of subsection 17(1)(c) have been satisfied.

ISSUE B: If the records at issue are exempt from disclosure pursuant to section 17, whether there is a compelling public interest in the disclosure of these records which clearly outweighs the purpose of the section 17 exemption, as provided by section 23 of the Act.

Section 23 of the Act provides that:

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

The two requirements contained in section 23 must be satisfied in order to invoke the application of the so_called "public interest override": there must be a compelling public interest

in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

The Act is silent as to who bears the burden of proof in respect of section 23. However, it is a general principle that a party asserting a right or a duty has the onus of proving its case and, therefore, the burden of establishing that section 23 applies is on the appellant.

In this case, the appellant believes it is in the best interests of the public that he "...know which manufacturers have increased the prices above the guideline..." in order to "...alert (his) members directly to price vagaries". He states that "[T]his will allow us to analyze what the prices that are currently listed in the government Formulary are, so that we may advise our members where the reimbursement prices listed under the Ontario Drug Benefit Act plus 10% are less than the price that they can reasonably buy the product, given the manufacturers' price submission of best available price to the Province of Ontario."

In his representations, the appellant has clearly indicated how the release of the records in question could further the interests of members of the Association he represents. However, he presented no evidence to demonstrate how the public interest would be served by disclosure.

The appellant made reference to one instance in which his Association had alerted the Ministry to a drug manufacturer who was offering a price lower than that published in the Formulary; however, he did not indicate that the Association would be

prepared to act as a reliable and accurate public "watchdog" in this regard. I should also note that regulations passed under the Ontario Drug Benefit Act, 1986 actually require operators of pharmacies to notify the Ministry of Health if they discover price vagaries in the marketplace after the Formulary is published. As well, each drug manufacturer is required to make a statement when they submit their products to be considered for listing, affirming that the pricing and sales data submitted is complete and correct and in accordance with the Ontario Drug Benefit Act, 1986 and the Prescription Drug Cost Regulation Act, 1986 and their Regulations. In addition, the drug manufacturer also undertakes in writing that,

> "If after submission of prices and printing of the Formulary/CDI, the company reduces prices of products listed below the BAP submitted, we understand that the government may revise our submission listing to comply with the legislation to reflect the BAP. We agree to notify the Ministry (Co_ordinator of Drug Pricing and Formulary Production) of any price reductions."

Accordingly, I do not agree that section 23 of the Freedom of Information and Protection of Privacy Act, 1987 is properly applicable to the record in issue. In my view, the appellant has failed to demonstrate that there is a compelling public interest in the disclosure of this record which clearly outweighs the purpose of the section 17 exemption.

Therefore, I uphold the decision of the head not to release the records at issue to the appellant.

Original signed by:
Sidney B. Linden
Commissioner

April 3, 1989
Date