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

ORDER P-235

Appeal 900276

Ministry of Health

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O R D E R

INTRODUCTION:

On April 16, 1990, a request was submitted to the Ministry of Health (the "institution") under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act"). The requester sought access to:

> All records relating to [named company]'s applications for listing of [name] tablets and [name] 5 mg tablets in the July 1990 Ontario Formulary, including
> - all reviewer's reports
> - all minutes of meetings of the DQTC
> - all internal memoranda of the Ministry and DQTC
> - all communications between the Ministry and DQTC
> - all communications from or to third parties

On May 15, 1990, the institution provided access to part of the requested records and responded to the balance of the request by telling the requester that:

> Some of the material requested will be severed under the authority of Section 19 of the Act, solicitor-client privilege. This discretionary severance was used in memoranda and other correspondence between Legal Counsel and the Program Area(sic). In reviewing her discretion, the Head has considered the sensitive nature of the material in deciding to pursue this exemption.
>
> Section 21(1) of the Act, personal information, was also used to sever out the names and addresses of independent reviewers, as Section 21 is a mandatory exemption and requires that such information be removed.

On June 12, 1990, the requester appealed the decision of the institution pursuant to subsection 50(1) of the Act. This subsection gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head of an institution under the Act to the Information and Privacy Commissioner.

On June 18, 1990, notice of the appeal was given to the institution and the appellant. The records at issue in the appeal were received and reviewed by the Appeals Officer.

Settlement of the appeal could not be effected, so notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution as well as to two persons who are affected persons within the meaning of subsection 50(3) of the Act. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal, and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the Report.

Written representations were received from the institution and from the two affected persons. While the appellant did not provide any representations, he had made statements to support his position in his letter of appeal.

BACKGROUND:

The following is a brief summary of the process which is followed when a manufacturer applies to the Drug Programs Branch of the Ministry of Health for the listing of a drug product in the Drug Benefit Formulary/Comparative Drug Index ("Formulary/CDI").

All drug product manufacturers are eligible to make submissions for the listing of their drug products in the Formulary/CDI. Documentation provided by the manufacturer, which includes results of tests and/or studies of a particular drug product, is reviewed by a member of the Drug Quality and Therapeutics Committee (the

"DQTC") and/or by a consultant retained for that purpose by the Drug Programs Branch. The reviewer analyzes the data, typically prepared by a research laboratory (whether independent or that of the manufacturer) and the reviewer then provides a report based on his or her analysis of

the data. Reports prepared by these reviewers are considered by a sub-committee of the DQTC which then makes a recommendation to the DQTC to accept or reject a drug product for listing in the Formulary/CDI. The manufacturer's submissions and the reviewers' reports are considered by both the committee and the sub-committee.

In this matter, the appellant has had full disclosure of the contents of the reports of both reviewers but not of their names, addresses, titles, positions or signatures.

RECORDS IN ISSUE:

The records relating to the request were identified by number in an index provided by the institution to this office. The records at issue in this appeal, together with the exemptions claimed, are numbered and described by the institution as follows:

Section 19

2. Dec. 4/89 - 2 pages
   Memo from B. Greenwood [Counsel] to Y. Drazin [the Drug Programs Branch]

3. Oct. 27/89 - 2 pages
   Memo from Y. Drazin to B. Greenwood

5. Oct. 31/89 - 2 pages
   Memo from B. Greenwood to Y. Drazin

7. Oct. 30/89 - 1 page
   Memo from Y. Drazin to B. Greenwood

8. Oct. 30/89 - 1 page
   Draft letter from Y. Drazin to [a drug manufacturer] for Counsel's Review.

Section 21

22. Oct. 30/89 - 5 pages
    Comparative Bioavailability Study of [two named drug products]
    Severance of reviewer's name.

23. Oct. 30/89 - 1 page

Information and Documentation for the Review of (sic)
Severance of reviewer's name.

24A. Oct. 30/89 - 1 page
Canada Post Shipment Receipt
Severance of reviewer's name and accepting person.

33. No Date - 4 pages
"[A named company's] Comparative Bioavailability Study of [a named drug product]"
Severance of reviewer's name and signature.

36. Feb. 15/89 - 2 pages
Letter from Dr. Pilla [the Drug Programs Branch] to the reviewer
Severance of reviewer's name/address, also severance of information not relevant to request.

36A. Feb. 15/89 - 1 page
Canada Post Receipt to reviewer
Severance of reviewer's name.

37. Feb. 15/89 - 1 page
Information and Documentation for the Review of (sic)
Severance of reviewer's name.

51. Mar. 15/90 - 3 pages
Memo from reviewer to Dr. Pilla re "Comparative Bioavailability of [two named drug products] submitted by [a drug manufacturer]."
Severance of reviewer's name and signature.

I note that the index description for Record 24A indicates the severance of the name of the person who accepted delivery of a "Priority Post" package. An examination of Record 24A reveals only
the initials of this individual. However, those initials were actually disclosed to the appellant and so were not at issue in this appeal.

The index description for Record 36 indicates the severance of information on the basis that it was "not relevant to the request". I note that although this is the only such reference in the index provided by the institution, three other records also had information severed as "not relevant to

the request" (Records 53, 54 and 55). However, the appellant did not raise the severance of this information as an issue in this appeal so it is not necessary to discuss these severances.

PRELIMINARY MATTER:

In his letter of appeal the appellant stated:

> Subsection 29(1)(b) of the Act provides that a notice of refusal to give access to a record or a part thereof shall set out, inter alia, the specific provision of the Act under which access is refused and "the reason the provision applies to the record".
>
> ...
>
> The letter from Mr. Parr fails to set out the specific basis upon which the discretion was apparently exercised by the Head in severing material on the basis of solicitor-client privilege. At the very least, it is submitted that there is an obligation on the part of the Head and Co-ordinator, Mr. Parr, to disclose the specific communications that are being severed, the basis upon which a solicitor and client relationship is alleged to exist and the basis upon which the discretion by the Head was exercised.
>
> ...
>
> In conclusion, there has been a complete failure to disclose any basis as to why non-disclosure of the severances is justified under the Act. Where there is a refusal of access to a record or a part of a record, the burden of proof lies upon the decision maker to prove that the record, or part, falls within an exception (section 53).

The appellant has raised an issue of general importance with respect to the operation of section 29 of the Act which is the content of the notice of refusal under subsection 29(1)(b). Former Commissioner Sidney B. Linden considered this issue in Order 158, dated April 9, 1990, and concluded that section 29 requires a head to provide the requester with information about the circumstances which form the basis for the head's decision to deny access. At pages 16 and 17 he stated:

> The degree of particularity used in describing the record at issue will impact on the amount of detail required in giving reasons, and vice versa. For example, if a

> record is described not in general terms, but rather as a memo to and from particular individuals on a particular date about a particular topic, then the reason the provision applies to the record could be given in less detail than would be required if the record were described only as a memo. The end result of either approach is that the requester is in a position to make a reasonably informed decision as to whether to seek a review of the head's decision.

It is my view that the notice of refusal of the institution in this appeal does not meet the requirements of subsection 29(1)(b) of the Act, because it does not provide the appellant with enough information. The reasons given to the appellant would, however, have been sufficient if they had been accompanied by a more detailed index, such as that set out in the "Records In Issue" section of this Order.

Since a more detailed description of the records has been set out in this Order, I do not see any purpose in ordering the head to send a new notice of refusal to the appellant. However, I do expect the institution to examine the format of its decision letters and to take all reasonable steps to ensure that these letters comply with the requirements of subsection 29(1)(b).

PURPOSES OF THE ACT/BURDEN OF PROOF:

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

It should also be noted that section 53 of the Act provides that the burden of proof that a record, or part of a record, falls within one of the specified exemptions, lies upon the head.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

A. Whether the head properly applied the discretionary exemption provided by section 19 of the Act.

B. Whether the information at issue in Records 22, 23, 24A, 33, 36, 36A, 37 and 51 qualifies as "personal information" as defined in subsection 2(1) of the Act.

C. If the answer to Issue B is in the affirmative, whether the information at issue falls within the scope of the exemption provided by subsection 21(1) of the Act.

ISSUE A: Whether the head properly applied the discretionary exemption provided by section 19 of the Act.

The institution has claimed that Records 2, 3, 5, 7 and 8 fall within the first branch of the section 19 exemption or, in the alternative, that they fall within the second branch.

Section 19 provides an institution with the discretion to refuse to disclose a record in two possible situations: (1) where a record is subject to the common law solicitor-client privilege (the first branch); or (2) where a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (the second branch).

In order for a record to qualify for exemption under the first branch, the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, and
   (b) the communication must be of a confidential nature, and
   (c) the communication must be between a client (or his agent) and a legal advisor, and

(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. The record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

The institution, in its representations, submitted that all of the documents are in writing and are confidential communications between a lawyer and her client. Since the institution has not claimed that the records were created or obtained especially for existing or contemplated litigation, I will not discuss that part of the first branch.

Record 2 is a memorandum providing legal advice in response to a request made by the client. Record 3 is an electronic mail message from the client to the lawyer which discusses previous legal advice and provides background information related to the provision of further legal advice. Record 7 is a memorandum requesting legal advice about Record 8, which is a draft letter from the Drug Programs Branch to a drug manufacturer. Record 5 is a memorandum from the lawyer to the client providing the legal advice requested by Record 7. Record 8, the draft letter, was the subject of both the request for, and the provision of, legal advice.

I have considered the records and am satisfied that each of them is a confidential written communication between a client and a legal advisor and is directly related to seeking, formulating, or giving legal advice. Having found that all five records meet the test for the first branch and qualify for exemption under section 19 of the Act, it is not necessary to consider the application of the second branch of the exemption provided by section 19.

Section 19 of the Act provides the head with the discretion to disclose a record even if it meets the test for exemption. In the circumstances of this appeal I find nothing improper in the way in which the head has exercised his discretion and I therefore uphold the head's decision to refuse to disclose Records 2, 3, 5, 7 and 8.

ISSUE B: Whether the information at issue in Records 22, 23, 24A, 33, 36, 36A, 37 and 51 qualifies as "personal information" as defined in subsection 2(1) of the Act.

The institution claimed that each of these records contains "personal information". The information at issue is the name and/or address, title, position or signature of two individuals.

In all cases where the request involves access to personal information it is my responsibility, before deciding whether the exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act, and to determine whether this information relates to the appellant, another individual or both.

"Personal information" is defined, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> ...
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the

> disclosure of the name would reveal other personal information about the individual;

The institution cited subparagraphs (b), (e) and (h) of the definition of personal information in claiming that the information in issue is personal information as defined in the Act. Subparagraph (h) provides that a name is personal information where it appears with other personal information or where the disclosure of the name would reveal other personal information about the individual. In my view, in the circumstances of this appeal, the disclosure of the names of the individuals would reveal other personal information relating to the individuals because it would reveal that a particular person reviewed a particular drug product. I therefore conclude that the information at issue is personal information and that the personal information is that of individuals other than the appellant.

ISSUE C: If the answer to Issue B is in the affirmative, whether the information at issue falls within the scope of the exemption provided by subsection 21(1) of the Act.

Once it has been determined that a record contains personal information, subsection 21(1) of the Act prohibits the disclosure of this personal information to any person other than the individual to whom it relates, except in certain circumstances. One such circumstance is where disclosure would not constitute an unjustified invasion of personal privacy, as set out in subsection 21(1)(f).

Guidance is provided in subsections 21(2) and (3) of the Act with respect to the determination of whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Subsection 21(3) identifies types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. In particular, subsection 21(3)(d) provides:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;

The institution submitted that subsection 21(3)(d) is applicable because disclosure of the names of the affected persons would reveal the occupation, position and employer of the two affected persons. Under subsection 21(3)(d), an unjustified invasion is presumed where the personal information relates to employment or educational history. I am of the view that a person's name, occupation, position, and employer, without more, would not attract the application of the presumption contained in subsection 21(3)(d).

Subsection 21(2) of the Act lists various criteria which must be considered in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. It provides as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The appellant submitted that while he has had disclosure of the reviewers' reports, he cannot assess the quality of those reports without knowing the identity of the authors [ss. 21(2)(d)]. He also argued that the rights of his company would be prejudiced by non-disclosure since without knowing the names of the reviewers he cannot know their qualifications. He submitted that since the reports prepared by the reviewers are about drug products rather than about another individual, the names of the reviewers should be disclosed. In his letter of appeal, he commented as follows:

> [named company] has a right to know not only the content of the communication but also the author and would be highly prejudiced if the author, and his or her attendant qualifications, were screened from scrutiny. The quality of the communication necessarily depends upon the qualifications of the author.

The institution and the two affected persons submitted that a consideration of subsection 21(2) leads to the conclusion that disclosure of the personal information would constitute an unjustified invasion of personal privacy. The essence of their representations can be summarized very briefly as: there was an understanding of confidentiality [ss. 21(2)(h)]; the livelihood of a reviewer could be jeopardized as reviewers would likely be subjected to lobbying or harassment by drug product manufacturers [ss. 21(2)(e)]; and, disclosure would likely put the Ministry's

entire drug review process at risk since the few available experts would likely become unwilling to provide their services to the Ministry [ss. 21(2)(b)].

The institution submitted that:

> The individuals hired as consultants and the individual members of the DQTC work in the pharmaceutical industry and may be dependent on private drug companies for a substantial portion of their consulting income. Moreover, consultants perform reviews for consideration by the DQTC on the understanding that their services in this regard will be kept confidential.
>
> It is submitted that a disclosure of the names of consultants or members of the DQTC who review submissions might significantly jeopardize their livelihoods. If it were known that DQTC reviewers' names and opinions of drug products were disclosed, it would be extremely difficult to recruit experts to review drug products for the Ministry, furthermore, the individuals hired as consultants and individual members of the DQTC would not make themselves available and this would consequently jeopardize their livelihoods.
>
> Moreover, such disclosure may also jeopardize the entire drug review process of the Ministry in that experts, which are few in number (sic), may become unwilling to provide their services to the Ministry if it is known that their names, in the context of reviews of particular drug products, are public information.
>
> Furthermore, were it known in the drug industry which individuals are consulted to review which kinds of submissions, such disclosure would create significant lobbying of the reviewers by manufacturers which would be detrimental to the unbiased process of drug selection.
>
> ...

The representations of one affected person contained these

comments:

> ... The community of experts in our province from which [reviewers] can be selected and invited to serve is relatively small. The very nature of the advice they provide to the Minister of Health and/or the Ministry of Health about the inclusion or exclusion of drug products in the Ontario Benefit Formulary naturally thwarts the expectations of many Pharmaceutical Manufacturers. Since millions of dollars in potential sales are at stake, any negative decisions about Formulary inclusion of any product has sizeable financial consequences. This means that manufacturers can resort to direct and indirect pressure on [reviewers] which can

> influence their professional well-being in their clinical practice or research activities.
>
> ... the consequences of releasing any identification also encompasses the review process. At present, in the review process of all drug products, there is an honest attempt to remain unbiased, and [reviewers] feel safe in questioning at length and in depth the information presented by the manufacturers. In the absence of such protection, the review process would be tarnished by outside forces and both the government of Ontario and the users of the Formulary benefits would lose out. Therefore, there would be substantial negative consequences if any identifying information was released to manufacturers.
>
> ... if personal identification was permitted to be released, I can assure you that all or most present [reviewers] would resign and it would be exceedingly difficult to find replacements.

The other affected person stated:

> I am asked to perform reviews for the Ministry and do so on the understanding that such services provided will be kept confidential. It is my feeling that disclosure of reviewers would clearly jeopardize the whole review process, particularly if we as reviewers become unwilling to do the reviews if it is known that our names and reviews of a particular product are made public. It is also my opinion that such disclosure in connection with a particular drug product or review could lead to significant lobbying and potential harassment of reviewers by the manufacturers, and could clearly jeopardise the unbiased review process that is needed.

Having considered the circumstances set out in subsection 21(2) of the Act, it is my view that the concerns about confidentiality [ss. 21(2)(h)] and sensitivity [ss. 21(2)(f)] outweigh the appellant's concerns that the information is relevant to a fair determination of his company's rights [ss. 21(2)(d)]. In reaching my conclusion I have considered the fact that the appellant was granted full disclosure of the contents of the two reviewer's reports. It is my opinion that the disclosure of the personal information sought by the appellant would be an unjustified invasion of the personal privacy of the two affected persons.

ORDER:

I uphold the head's decision.

Original signed by: June 28, 1991
Tom A. Wright Date
Commissioner