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

ORDER P-324

Appeal 900277

Ministry of Health

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ORDER

BACKGROUND:

The Ministry of Health (the institution) received the following request.

> All of the following records for the period 1986 to present relating to inducements offered by drug manufacturers to pharmacists for the purchase of products listed in the Ontario Formulary:
>
> - all complaints received by the Ministry
> - all records relating to audits by the Ministry of the records of drug manufacturers, wholesalers and pharmacists
> - all communications to or from the Ministry
> - all internal memoranda of the Ministry, including, without limitation, any memoranda assessing the scope of the problem and action to be taken by the Ministry

The institution responded by providing full access to six of the 88 responsive records. Access to the remaining records was denied, in whole or in part, pursuant to sections 13, 14, 19 and 21 of the Freedom of Information and Protection of Privacy Act (the Act).

The requester appealed the institution's decision to this office.

The Appeals Officer obtained and reviewed a copy of the records. Because settlement was not possible, the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. Enclosed with the Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Representations were received from the institution only.

After submitting its representations, the institution notified the appellant that it was providing access to an additional 19 records, or portions thereof. It also informed him that section 17 of the Act was being claimed, in the alternative to section 14, for certain records. The appellant was given the opportunity to make further representations with respect to the section 17 exemption claim, but chose not to do so.

In its representations, the institution submits that the second page of Record 64 is not responsive to the appellant's request. I have examined this record and I agree that it falls outside the scope of the appellant's request and, therefore, it is not at issue in this appeal and should not be disclosed.

The records all relate to the offering of incentives by drug manufacturers to pharmacists for the purchase of certain drug products. They are composed of letters of complaints, handwritten notes of information received via telephone, suggested strategies for investigation or inspection, and alleged evidence of incentives to purchase drug products supplied to or obtained by the institution.

PRELIMINARY ISSUE:

The appellant submits that the contents of the institution's decision letter did not satisfy the first two requirements of section 29(1)(b) of the Act. This section reads as follows:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In providing a notice of refusal under section 29, the extent to which an institution describes a record will have an impact on the amount of detail required under subsection (b)(ii). For example, if a record is described simply as "a memo", more detailed reasons for denying access would be required than if the record is described as "a memo to and from particular individuals on a particular date about a particular topic". Whichever approach is taken, the key requirement is that the requester must be put in a position to make a reasonably informed decision as to whether to seek a review of the head's decision (Orders 158, P-235).

The institution submits that the requirements of section 29(1)(b) were satisfied in this appeal, because the reasons and the circumstances forming the basis for the decision were provided, together with a document listing which exemptions applied to each record.

In my view, the notice of refusal of the institution in this appeal did not satisfy the requirements of section 29(1)(b) of the Act, because it did not provide the appellant with enough information.

In particular, it did not contain a description of each record. The general reasons contained in the notice of refusal would have been sufficient if they had been accompanied by a more detailed description or index of records. The Office of the Information and Privacy Commissioner recently prepared an edition of "IPC Practices" which outlines the requirements of a proper decision letter, and includes a sample index. I have attached a copy of this publication with the copy of my order sent to the institution, and I would encourage the institution to refer to it for future decisions made under the Act.

Because a more detailed description of the records was created by the Appeals Officer during the course of this appeal, I do not see any purpose in ordering the head to send a new notice of refusal to the appellant, in the circumstances of this appeal.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether the discretionary exemption provided by section 13 of the Act applies to Record 66.

B. Whether the discretionary exemption provided by section 14 of the Act applies to the remainder of the requested records.

C. Whether the exemptions provided by sections 17, 19 and/or 21 of the Act apply to any of the records, as claimed by the institution.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 13 of the Act applies to Record 66.

The institution claims section 13(1) of the Act with respect to Record 66.

Section 13(1) of the Act 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.

Section 13(2) sets out various exceptions to this exemption.

In its representations, the institution states that Record 66 is a draft form setting out provisions of the Ontario Drug Benefit Act (the ODBA), and suggesting questions which would elicit information from drug manufacturers. The institution submits that the form was drafted by a public servant, and constitutes his advice with respect to the means of collecting such information. The institution also states that the form has not been publicly distributed, and that none of the exceptions contained in section 13(2) are applicable to this record.

In my view, it is possible for a draft document prepared by a public servant to qualify as "advice" under section 13(1), provided that the institution can establish that the draft contains a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process (Order 161). Having examined Record 66 and considered the circumstances under which this record was created, in my view, it contains information which can accurately be characterized as the public servant's advice as to a method of collecting information to determine compliance under the OBDA and, as such, it falls properly within the scope of section 13(1). I also find that none of the exceptions provided by section 13(2) apply in the circumstances of this appeal.

Section 13 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 am satisfied that the head exercised his discretion in accordance with proper legal principles, and the decision of the head to deny access to Record 66 should not be disturbed on appeal.

ISSUE B: Whether the discretionary exemption provided by section 14 of the Act applies to the remainder of the requested records.

The institution submits that the remaining records are exempt under one or more of sections 14(1)(a), (b), (c) and (d), and sections 14(2)(a) and (c) of the Act.

In order for a record to qualify for exemption under any of these sections, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act. This definition reads as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or

> sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b).

The institution states that the Drug Programs Branch is responsible for processing submissions made to the Minister of Health for listing drug products on the Ontario Drug Formulary (the Formulary) pursuant to the ODBA. The Branch also processes submissions relating to the interchangeability of drugs pursuant to the Prescription Drug Cost Regulation Act (the PDCRA). Interchangeable drugs are listed in the Comparative Drug Index (the CDI). The Formulary and the CDI both list the "best available price" (the BAP) for each drug product.

In its representations, the institution provides a description of the process involved in regulating the BAP for drug products, and claims that this process falls within clause (b) of the law enforcement definition.

The institution states that the BAP is defined in both the ODBA and the PDCRA, and represents the lowest price for which a drug of a particular dosage, form and strength can be purchased in Canada, for wholesale or retail sale in Ontario. The BAP for each product, under both the ODBA and the PDCRA, is then prescribed by regulation.

In establishing the BAP for drug products, the institution relies on the accuracy of information supplied by drug manufacturers. Applications for the listing of drug and drug products under the ODBA and PDCRA must, by regulation, set out proof of availability of the product and list the cost to the pharmacist or wholesaler for each package size offered for sale. This information is used for several purposes, including the determination of the BAP for each drug product.

In addition, prior to the semi-annual publication of the Drug Benefit Formulary/CDI, manufacturers are required, pursuant to the ODBA, to supply pricing and sales information for listed products, as well as products for which listing applications are pending.

In its representations, the institution states that in providing information to the institution for the purpose of the Formulary/CDI, the manufacturers:

> specifically state that the BAP and sales data submitted are complete and correct. It is also stated that if after submission of prices and printing of the next Formulary/CDI the manufacturer reduces prices of its products below the BAPs submitted, it is acknowledged that the listing may be amended to reflect the revised BAP, that manufacturers will notify the Ministry of any price reductions on or before the effective date of such reductions.

If any manufacturer offers incentives to a pharmacist, such as discounts, bonuses or rebates, such incentives could be seen as price reductions which would affect the BAP. Failing to report them could also be a violation of ODBA and PDCRA reporting requirements.

The institution submits that the records at issue in this appeal relate to "investigations undertaken by inspectors appointed pursuant to [section 14(1) of] the ODBA and [section 12(1) of] the PDCRA for the purposes of ensuring compliance with the legislation". The institution states that the investigations may lead to prosecutions and could ultimately result in penalties or sanctions upon conviction.
Having reviewed the representations of the institution and the relevant provisions of the ODBA and the PDCRA, I find that the investigative process under these two statutes satisfies the requirements of the definition of "law enforcement" under section 2(1) of the Act. Inspections or investigations that are conducted under the authority of the ODBA or the PDCRA lead or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed.

Turning first to section 14(2)(a), the institution claims that this exemption applies to Records 18 and 65. This section reads as follows:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

In Order 200, Commissioner Tom Wright outlined the following three-part test, each part of which an institution must satisfy in order to properly exempt a record under section 14(2)(a):

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

Record 18 consists of a BAP investigation report, and Record 65 contains the findings of an investigation into alleged improper drug price reductions by three manufacturers.

In my view, both of these records satisfy the requirements of the section 14(2)(a) exemption: they properly constitute "reports" - they each consist of a formal account of the results of the collation and consideration of information gathered in the course of investigations or inspections; they were both prepared during the course of law enforcement investigations and/or inspections; and the agency which prepared the reports, the institution, has the function of enforcing compliance with the ODBA.

The institution claims section 14(1)(c) as one of the bases for exempting the following records or parts of records: Records 29, 30, 35, 36, 39, 40, 41, 44, 45, 51, 54, 58, 64, 67-70, 81, 84, 85, 87, and 88. These records are described by the institution as documents relating to suggested strategies, procedures and recommended courses of action regarding possible BAP infractions and inspections, and/or relating to evidence of BAP infractions supplied to the institution or obtained during the course of its investigations.

Section 14(1)(c) reads as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

In its representations, the institution submits that the records exempted under section 14(1)(c) contain strategies, procedures and specific drug industry investigation targets, as well as other courses of action which, if disclosed, would reveal techniques and procedures currently in use or likely to be used in law enforcement.

I have reviewed the contents of these records and I agree with the institution that they qualify for exemption under section 14(1)(c) of the Act.

The institution claims section 14(1)(d) as one of the bases for denying access to the following records or parts of records: Records 1-4, 6, 9, 11, 12, 14, 15, 19, 21, 22, 24, 25, 28, 31, 34, 37, 38, 46, 47, 53, 55, 57, 60, 61, 63, 71-80, 82, 83 and 86. These records are described by the institution as letters or complaints containing confidential information about alleged BAP incentives, and/or handwritten notes of various institution employees created from telephone conversations with confidential complainants regarding evidence of alleged incentives to purchase drug products.

Section 14(1)(d) reads as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

The institution submits that these records consist of complaints from individuals who supplied the institution with this type of information in confidence. The institution points out that it is important that the identity of these individuals be kept confidential because they are a major source of information regarding '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. Speaking more broadly of the section 14(1)(d) claim, the

institution submits that it relies on individuals in the field who are aware of current trends in the market place, and points out that:

> " ... [The] sources of information are part of the competitive marketplace, a place where the Ministry has no employees, but which it is responsible for ensuring compliance with the relevant Ontario statutes. ... Disclosure would therefore result in disclosure of information furnished only by confidential sources".

Having reviewed all of the above-noted records and considered the circumstances under which they were created, in my view, they satisfy the requirements for exemption under section 14(1)(d) of the Act.

Because section 14 of the Act is discretionary, it is my responsibility to ensure that the head has properly exercised his discretion when deciding not to grant access to any records which qualify for exemption. In the circumstances of this appeal, I have found nothing improper in the head's exercise of discretion.

Because I have found that all records or parts of records which have not already been released to the appellant qualify for exemption under sections 13(1), 14(1)(c), 14(1)(d) or 14(2)(a) of the Act, it is not necessary for me to discuss sections 14(1)(a) and (b), 14(2)(c), and Issue C.

ORDER:

I uphold the head's decision to deny access to all records at issue in this appeal.

Original signed by: July 2, 1992
Tom Mitchinson
Assistant Commissioner