



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

ORDER P-284

Appeal 900095

Ministry of Health



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O R D E R

BACKGROUND:

On November 23, 1989, the Ministry of Health (the "institution") received a request for access to:

All records relating to [named company's] applications for listing of [named drug] and [named drug] in the January 1990 Ontario Formulary, including:

- all reviewers reports
- all minutes of meetings of the Drug Quality and Therapeutics Committee (DQTC)
- all internal memoranda of the Ministry and DQTC
- all communication between the Ministry and DQTC

On December 21, 1989, the request was clarified to include all representations and correspondence to the institution relating to the above drug listing applications, including representations submitted by the originator-manufacturers, and replies sent by the institution.

On December 22, 1989, the institution provided partial access to 62 records, with severances pursuant to sections 17, 19 and 21 of the Freedom of Information and Protection of Privacy Act (the "Act"). On March 27, 1990, 14 additional records were disclosed, with severances pursuant to sections 17 and 21. Finally, on June 14, 1990, three additional records were located and disclosed, with severances pursuant to section 17. The

requester appealed the head's decision with respect to all severances.

Because attempts to mediate the appeal were not successful, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. Notice was also given to two corporations and four persons whose interests

could be affected by the outcome of the appeal (the "affected parties"). Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making representations to this office concerning the subject matter of the appeal. Written representations were received from the institution, and five of the affected parties. Representations were not received from the appellant, although his correspondence with this office contained statements which support his position.

Following issuance of the Appeals Officer's Report, the institution disclosed the information severed from Record A-76, as well as one severance in Record A-63. The institution and the affected party to which the information related withdrew their objections to the release of Parts 1, 2 and 5 of Record A-242, and information originally severed under section 17 in Records A-44, A-50 (one severance remains), A-52, A-58, A-59, A-62, A-63, A-69 and A-77. I order the institution to disclose the information contained in these severances to the appellant, if it has not already done so.

While the institution also claimed section 17 for the remaining severance in Record A-50, and the severances made to Record A-

64, I am of the view that this information is not responsive to the appellant's request, and is outside the scope of this appeal.

Appendix A to this Order lists the severances to the records which remain at issue in this appeal.

PRELIMINARY MATTERS:

The appellant submits that the contents of the institution's decision letters did not satisfy the first two requirements of section 29(1)(b) of the Act.

Section 29(1)(b) of the Act states:

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.

The institution acknowledges that the first two decision letters did not provide reasons, as required by section 29(1)(b)(ii). It has undertaken to ensure that section 29(1)(b) is fully complied with in the future, and has amended its procedures accordingly.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 19 of the Act applies to the records.
- B. Whether the mandatory exemption provided by section 17 of the Act applies to the records.
- C. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- D. If the answer to Issue C is yes, whether the mandatory exemption provided by section 21 of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 19 of the Act applies to the records.

The institution submits that the information severed from Records A-2 and A-79 is exempt under section 19 of the Act.

Section 19 of the Act states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), 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 adviser, 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.

(Order 49)

Record A-2 is an internal memorandum from an individual at the Drug Programs Branch to the institution's counsel, providing information and requesting legal advice. I am satisfied that the information contained in the severance meets the requirements for exemption: it is a confidential written communication between a client and a legal advisor, which is directly related to seeking, formulating, or giving legal advice.

Record A-79 is a memorandum from the same individual at the Drug Programs Branch to the institution's legal counsel, reporting on the contents of a telephone conversation between the individual and the appellant. In my view, the information contained in the severance is not directly related to seeking, formulating, or giving legal advice, nor was it created or obtained especially for the lawyer's brief for existing or contemplated litigation. Accordingly, I find that the information contained in the severance does not satisfy the requirements of Branch 1 of the exemption.

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to the Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

(Order 210)

Although I agree that Record A-79 was prepared for Crown counsel, the institution has not provided sufficient evidence to establish that the information severed from this record was prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation. I am of the view that this record was created for information purposes only, and I find that Branch 2 of the test for exemption under section 19 has also not been satisfied.

ISSUE B: Whether the mandatory exemption provided by section 17 of the Act applies to the records.

The institution originally submitted that section 17 applies to Records A-44, A-50, A-64, A-86 and A-242. As stated previously, the affected party and the institution have withdrawn their objections to the disclosure of Parts 1, 2 and 5 of Record A-242, and the information severed from Records A-44 and A-50 (with the exception of one severance). Further, the remaining severance in Record A-50 and the severances made to Record A-64 are outside the scope of this appeal. Remaining at issue are Parts 3 and 4 of Record A-242 and the severance made to Record A-86.

Sections 17(1) (a), (b) and (c) of the Act states:

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

In Order 36, former Commissioner Sidney B. Linden established a three-part test, each part of which must be satisfied in order for a record to be exempt under section 17(1)(a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section 17(1)(d). This new section is not covered by the test established in Order 36, and is also not relevant in the circumstances of this appeal. The test for exemption under section 17(1)(a), (b) or (c) is as follows:

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 types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Record A-242 is a written submission relating to drug interchangeability data provided to the institution by one of the affected parties. Parts 3 and 4 of this record remain at issue

under section 17. The affected party which produced the record and the institution both submit that these parts of the record contain scientific, technical and commercial information, and provide evidence to indicate that there was an explicit expectation of confidentiality on the part of both parties at the time the record was provided to the institution. I am satisfied that the first two parts of the section 17 test have been satisfied with respect to Parts 3 and 4 of this record.

As far as the third part of the test is concerned, the affected party provides detailed and convincing evidence in support of its position that the disclosure of Parts 3 and 4 would significantly prejudice its competitive position; would cause undue loss to the affected party and undue gain to its competitors; and would result in this type of information no longer being supplied to the institution by it and other pharmaceutical companies. I am satisfied that the third part of the test has been satisfied, and that Parts 3 and 4 of Records A-242 are properly exempt under sections 17(1)(a), (b) and (c) of the Act.

Record A-86 is a "Bioavailability Study Review" form prepared by the institution. The severance at issue relates to the master formula availability of a particular drug. During the course of this appeal, the institution withdrew its objections to the disclosure of this information. The affected party to which this severance relates objects to disclosure, claiming that it

reveals the existence of scientific and technical information in the institution's files which was provided to the institution in confidence, and that its disclosure could provide a competitive advantage to generic manufacturers.

I note that the master formula for the drug in question is not identified in this severance; the severance only relates to whether or not the master formula for this drug is contained in the

institution's files. Master formulae for drugs listed in the Drug Benefit Formulary must be filed with the institution. Because the drug to which the severance relates is now so listed, the institution no longer considers the severed information to qualify for exemption under section 17. I agree with the institution's assessment, and find that the prospect of disclosure of the severed portion of Record A-86 does not give rise to a reasonable expectation of any of the types of harm listed in section 17(1) (a), (b) or (c).

ISSUE C: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

The records which have been severed under section 21 are listed in Appendix A.

In order to qualify for exemption under section 21, it must first be established that the information meets the definition of "personal information" in section 2(1) of the Act. Section 2(1) states in part:

"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,

...

(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 severance at issue in Record A-69 contains the name of a person employed by a U.S. federal government organization who supplied information to the institution. The institution submits that this severance is "personal information" because it relates to the individual's employment history [paragraph (b)]; it contains his views or opinions [paragraph (e)]; and it appears with other information relating to the individual [paragraph (h)].

In this appeal, the institution disclosed the individual's current professional title, severing only his name. Because a name, when combined with a person's current position, does not

relate to an individual's employment history, paragraph (b) is not relevant (Order 61). The record also does not contain the individual's "personal opinions" or "views", nor would the disclosure of the name reveal other personal information about the individual. Therefore, in my view, the severed name in Record A-69 does not qualify as personal information and, because no other mandatory exemptions apply, it should be disclosed.

The severed portions of the remaining records contain the names and/or addresses of persons who reviewed drug products for the institution. Commissioner Wright considered whether this type of information is "personal information" in Order P-235, involving the same appellant and institution. At page 11 of that Order he stated that:

... 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.

The severances in the remaining records are contained either in reports submitted by the reviewers, or in other internal documents relating to these reviews. Disclosure of the severances would identify persons who provided the institution with evaluations of particular drug products. In my view, Order P-235 is directly applicable, and the information at issue is the personal information of the persons providing the evaluations.

ISSUE D: If the answer to Issue C is yes, whether the mandatory exemption provided by section 21 of the Act applies to the records.

Once it has been determined that a record contains personal information, section 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 section 21(1)(f) of the Act which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In Order P-235, Commissioner Wright concluded that disclosure of the names and addresses of drug reviewers would be an unjustified invasion of personal privacy. The concerns of the institution and reviewers about the importance of maintaining confidentiality to preserve the integrity of the drug review process and avoid harassment and lobbying on the part of drug manufacturers, were found to outweigh the appellant's arguments that the identity of these individuals was necessary in order to assess the quality of their reports.

Representations received from the reviewers in this appeal expressed similar concerns about the potential for pressure and lobbying on the part of drug manufacturers. The institution submitted that identification of reviewers would likely put the

drug review process at risk because the few available experts would become unwilling to provide their services to the institution. In his correspondence relating to this appeal, the appellant submitted that he would be highly prejudiced if the identity of the reviewers and their qualifications were not disclosed. The appellant was invited to provide this office with information indicating any change of circumstances which might distinguish the present appeal from that in Order P-235, but no response was received.

Having considered the representations of all parties, I find that the disclosure of the reviewers' personal information would be an unjustified invasion of their privacy.

ORDER:

1. I find that the remaining severance in Record A-50 (found in the seventh paragraph) and the three severances in Record A-64 fall outside the scope of this appeal.
2. I uphold the head's decision to deny access to the severed portions of Records A-2, A-26, A-41, A-42, A-43, A-51, A-67, A-85, A-87, A-88, A-103, A-104, A-108, A-109, A-110, A-115, and Parts 3 and 4 of Record A-242.
3. I order the institution to disclose to the appellant the information severed from Records A-44, A-50 (with the exception of the one severance contained in the seventh paragraph), A-52, A-58, A-59, A-62, A-63, A-69, A-77, A-79, A-86 and Parts 1, 2 and 5 of Record A-242.

4. I order that the institution not disclose these severances until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the severances are actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order the institution to disclose the severances within thirty-five (35) days of the date of this Order.

5. I further order the institution to advise me in writing within five (5) days of the date on which disclosure was made. Any notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ March 25, 1992

APPENDIX A

Records exempted under s. 19

A-2 Memo dated November 24/89 from Y. Drazin to B. Greenwood/M. Lewittes

A-79 Memo dated November 23/89 from Y. Drazin to B. Greenwood

Records exempted under s. 17

A-86 Information and Documentation for the Bioavailability Study Review (one severance at issue)

A-242 Study submitted by an affected party (Parts 3 and 4 remain at issue)

Records exempted under s.21

A-26 Part of a bioavailability report dated September 1, 1989. (reviewer's name severed.)

A-41, A-42 August 1, 1989 letter from the institution to reviewer. (reviewer's name/address severed.)

A-43 Information and documentation of August, 1989 for the review of certain drug products (reviewer's name severed)

A-51 Part of an undated memo concerning

bioequivalence
 (reviewer's name
 severed)

A-67 July/89 Drug Submission
 Status Report
 (reviewer's name
 severed)

A-69 October 20, 1989
 institution interoffice
 memo (consultant's name
 severed)

A-85 Information and
 documentation of August
 1, 1989 for the review
 of certain drug products
 (reviewer's name
 severed)

A-87, A-88 August 1, 1989 letter
 from institution to
 reviewer (reviewer's
 name/address severed)

A-103, A-104 August 30, 1989 report
 (reviewer's name/address
 severed)

A-108 October 19, 1989 letter
 from institution to
 reviewer (reviewer's
 name/address severed)

A-109 October 30, 1989
 reviewer's report
 (reviewer's name/address
 severed)

A-110 November 14, 1989 report
 (reviewer's name
 severed)

A-115 July, 1989 Drug
 Submission Status Report (reviewer's name severed)