



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

## **ORDER P-457**

Appeal P-9300041

Ministry of Health



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# INTERIM ORDER

## BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) which reads as follows:

In 1991-92, the Ministry of Health capped drug manufacturers' price increases under the ODB [Ontario Drug Benefit] Formulary to 2%. Did the Ministry obtain or undertake any study of, or does it have any information on the actual or projected cost savings that resulted from this exercise. E.g. pharmacists must and did pay prices to manufacturers for products that increased beyond the 2%. What were the estimated savings from payments to pharmacists that occurred due to the capping exercise.

The Ministry sent a letter to the appellant acknowledging receipt of the request and confirming its understanding that his request was for "any study or information on the actual or projected cost savings that resulted from the 2% capping of manufacturers' price increases under the ODB Formulary". The Ministry did not make a decision on the request within the statutory 30 day period, and the requester appealed this lack of decision as a "deemed refusal", as provided under section 29(4) of the Act.

During mediation, the Ministry issued a decision denying access to a record which it identified as containing the responsive information. The Ministry stated that "access has been denied under the authority of section 12 of the Act as the document responsive to the request is contained in the Cabinet Submission". A copy of the record titled, "Ontario Drug Benefit Formulary: Formulary Edition No. 31 and Various Cost Savings Initiatives" was forwarded to this office. The record is dated April 9, 1992 and is marked "Cabinet Submission". The Ministry indicated that one page of this record which contains the figure for estimated "annualized" savings that the capping of drug prices will generate, is the part of the record that contains the information sought by the appellant.

The appellant advised the Appeals Officer processing the appeal that the Ministry did not properly identify the record responsive to his request. He indicated that he was seeking factual material relating to the savings after the decision of Cabinet to cap price increases has been made. The appellant's position was communicated to the Ministry; however, mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from the Ministry only.

The sole issue in this appeal is whether the Ministry's search for the requested records was reasonable in the circumstances.

In the Notice of Inquiry, the Ministry was asked to respond to specific questions relating to the steps taken to search for records responsive to the request and to submit an affidavit sworn by the

employee of the Ministry who conducted the search. The Ministry's written representations, signed by its Acting Freedom of Information and Privacy Co-ordinator, do not include an affidavit.

In its representations, the Ministry states that the search for the responsive records was conducted by the Program Analyst, Drug Programs Branch. It appears from the representations that the extent of the Program Analyst's search was limited to discussing the request with the Assistant Director, the Special Projects Co-ordinator and the Co-ordinator, Drug Pricing and Formulary Production, and requesting the relevant files from each person. With respect to how the record at issue was identified, the Ministry states:

The FIPP office was informed on January 26, 1993, by the Director of the Drugs Program Branch that having conducted a review of the records that might be responsive to this request, that there is one record responsive to the request. The record was identified as forming part of the Cabinet Submissions entitled Ontario Drug Benefit Formulary: Formulary No.31 and Various Cost Saving Initiatives.

The Ministry indicates that it does not have other records responsive to the request.

Section 24(1) states:

A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

In my view, where a requester has provided the Ministry with sufficient details describing the record sought, section 24(1) imposes an obligation on the Ministry to make a reasonable effort to identify records responsive to the request. On appeal, the onus is on the Ministry to demonstrate that it has discharged this obligation.

I have examined the part of the record which the Ministry claims to be responsive to the appellant's request. While I agree that the information in the record is relevant and can be considered to fall within the scope of the appellant's request, I do not find that it is directly responsive to the request. The request is worded clearly and, in my view, provides sufficient

detail to enable an experienced employee of the Ministry, upon a reasonable effort, to identify the responsive record, as required by section 24(1) of the Act. The Ministry has confirmed that its understanding of the appellant's request was for "any studies or information" undertaken by the Ministry on the actual or projected cost savings that "resulted" from the decision to cap the increase of manufacturers' prices under the ODB Formulary. However, the record it identified contains information which was apparently submitted for Cabinet's consideration, before the decision to cap the increase was made.

The Ministry has not identified in its representations the specific steps taken to search for responsive records, the nature and location of the search, or the types of files searched. I have not been provided with any information regarding the identities of the employee who conducted the actual search, the experience of the employee or his/her familiarity with the subject matter of the request. No direct evidence from the person who conducted the search was provided to me.

In my view, the Ministry has not provided me with sufficient evidence to enable me to conclude that it has discharged its statutory responsibility to conduct a reasonable search for records responsive to the request, in the circumstances of this appeal.

Accordingly, I require the Ministry to conduct a further search for responsive records and to provide me with a detailed affidavit sworn by an official of the Ministry who has knowledge of and understands the subject matter of the request. The contents of this affidavit are outlined in the provisions of my order.

After receiving this affidavit, I will determine whether the Ministry has conducted a reasonable search for the responsive records.

### **ORDER:**

I order the Ministry to conduct a further search for responsive records and to provide me with a detailed affidavit sworn by an official of the Ministry who has knowledge of and understands the subject matter of the request, within 20 days of the date of this Interim Order. At a minimum, the affidavit must contain the following:

- (1) Information about the official swearing the affidavit describing his or her qualifications and responsibilities;
- (2) It must state that the official has knowledge of and understands the subject matter of the request;
- (3) It must set out the date(s) the person conducted the search and the names and positions of other Ministry employees who were consulted by the person, if any;
- (4) The type of files searched, the nature and location of the search; and
- (5) If the official maintains that there is no credible basis for believing that a record responsive to the request exists in the custody or under the control of the Ministry, he/she must provide the reasons for holding such a belief as well as details of inquiries, if any, that were made to determine whether another institution has custody or control of the responsive records.

Original signed by: \_\_\_\_\_  
Asfaw Seife  
Inquiry Officer

\_\_\_\_\_ May 11, 1993