



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

# Reconsideration Order R\_970005

Appeal P\_9600463

Order P\_1497

Ministry of Health



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Téléc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **BACKGROUND:**

On December 5, 1997, I issued Order P-1497 which dealt with a decision by the Ministry of Health (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) to deny access to a number of records requested by the appellant. The Ministry claimed that these records qualify for exemption under sections 13(1), 17(1), 18(1)(c), (d), (f) and (g) and 19 of the Act. The records consist of memoranda, agreements, briefing notes, correspondence and notes.

In Order P-1497 I upheld the Ministry's decision to deny access to a number of the responsive records, in whole or in part. Other portions of Records A2, A52, A53, A54 and A55, B34, C1 and B133 were ordered disclosed as they did not, in my view, qualify for exemption under any of the sections claimed by the Ministry.

## **THE RECONSIDERATION REQUEST**

The Ministry has asked that I reconsider my decision to order the disclosure of the information contained in Records A2, A52 (and Records A53, A54 and A55), B34 (and Record C1), B133, C3 and D2. It argues that I failed to consider the application of all of the exemptions which it claimed for each part of these documents and that the exemptions which were upheld with respect to certain information in the records were inconsistently applied to similar information contained in these records.

The reconsideration policy of the Commissioner's Office provides as follows:

A decision maker may reconsider a decision where it is established that:

- (a) there is a fundamental defect in the adjudication process;
- (b) there is some other jurisdictional defect in the decision; or
- (c) there is a clerical error, accidental error or omission or other similar error in the decision.

A decision maker will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the decision.

Following receipt of the Ministry's request for reconsideration of Order P-1497, I invited the parties to the appeal (the Sunnybrook Health Science Centre (the Hospital), the Ministry, the appellant and the affected party) to make submissions on the issue of my jurisdiction to reconsider the decision as well as with respect to the substantive issues raised in the reconsideration request. Representations were received from the Ministry and the affected party, who has also requested that I revisit my decision with respect to Articles 6, 7 and 8 of Record A2.

In my view, by failing to address the possible application of each exemption claimed by the Ministry to each record or part of a record, there was a fundamental defect in the adjudication process, thereby falling within the reconsideration policy described above. As a result, Order P\_1497 was improperly decided and I will, accordingly, proceed to reconsider it.

## **DISCUSSION:**

### **ECONOMIC AND OTHER INTERESTS/PROPOSED PLANS, POLICIES OR PROJECTS OF AN INSTITUTION**

The Ministry submits that the undisclosed portions of Record A2, in particular Articles 2.1.1 and 2.2, are properly exempt under sections 18(1)(c) and (d) of the Act. In addition, it submits that those portions of Page 4 of Records B34 and C1 entitled "Special Drug Program" are exempt from disclosure under sections 18(1)(f) and (g) of the Act. These sections state:

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

Articles 2.1.1 and 2.2 of Record A2 describe the operation of the HIV Project Centre by the Hospital, which has consented to the disclosure to the appellant of any information relating to it that may be contained in the records. The Ministry states that the disclosure of what it describes as the "value-added" portions of Record A2 would prejudice its ability to negotiate similar agreements with drug manufacturers in the future.

I find, however, that I have not been provided with any evidence as to precisely how the disclosure of the information contained in Articles 2.1.1 and 2.2 would in any significant way prejudice the Ministry's competitive position or economic interests or be injurious to the financial interests of the Government of Ontario. In addition, it is not apparent on the face of these records that prejudice to the Ministry's ability to negotiate similar contracts with other drug

manufacturers would be adversely affected by the disclosure of this information. I find, therefore, that Articles 2.1.1 and 2.2 of Record A2 are not exempt under sections 18(1)(c) or (d).

The Ministry has claimed the application of sections 18(1)(f) and (g) to the portion of Page 4 of Records B34 and C1 entitled "Special Drugs Program". It submits that this part of the records contains information with respect to the Ministry's plan for the review of the program and that this information has not yet been made public. I find that these proposed plans do not relate to the management of personnel or to the administration of an institution and that section 18(1)(f) has no application. However, I agree with the Ministry's contention that the disclosure of this information could reasonably be expected to result in undue gain to those drug manufacturers which may be interested in providing drugs to the Ministry following its program review. I find that those portions of Page 4 of Records B34 and C1 entitled "Special Drugs Program" are properly exempt from disclosure under section 18(1)(g).

### **SOLICITOR-CLIENT PRIVILEGE**

The Ministry submits that all of the undisclosed portions of Records A2, B34 and C1 are exempt under section 19 of the Act as each was "reviewed by legal counsel and contain legal advice in the form of review of, comments on and amendments". Record A2 is a copy of the Agreement while Records B34 and C1 are briefing notes. In Order P-1497, I found that any handwritten notes or comments made by legal counsel which referred to the contents of these records was exempt under section 19. However, none of those portions of these records which were ordered disclosed in Order P-1497 contain any comments, notes or other indication of legal counsel's views with respect to their contents.

While each may have been reviewed by legal counsel at some point, I find that those portions which were ordered disclosed in Order P-1497 do not contain legal advice for the purposes of section 19. To decide otherwise would permit the Ministry or any other institution to exclude any and all records simply by having them reviewed by legal counsel. Clearly, this is not the intention of the exemption.

### **CONSISTENT APPLICATION OF THE EXEMPTIONS**

The final ground for reconsideration put forward by the Ministry relates to what it sees as a number of inconsistencies in the manner in which I applied the exemptions to the records at issue in Order P-1497. I will set out the nature of each of the alleged inconsistencies individually.

The Ministry appears to argue that not excluding some portions of Record A2 (Articles 2.1.1, 2.1.2, 2.2, 2.3.1, 2.3.2, 2.3.3, 2.5.1, 2.5.2, 2.5.4, 8.2.2 and 8.2.5) is inconsistent with the severances which I had made to Record A52 (and Records A53, A54 and A55). It argues that by excluding certain references to projects funded through the Hospital in the briefing note in Record A52, I am bound to exclude what it sees as similar information in Record A2. I cannot agree that the information which was not disclosed in Record A52 (and Records A53, A54 and A55) is substantially the same as that in Record A2. I find that there is no inconsistency in the application of the section 17(1) exemption to each of these records.

The Ministry submits that, after finding that information relating to funding of and payments to the Hospital in Record A2 (Articles 8.3.1, 8.3.2, 8.3.3, 8.4.1, 8.4.2, 8.4.3 and 8.4.4) were exempt under section 17(1), I failed to consistently apply the exemption with respect to certain funding information in paragraph 4 of Page 3 of Record B34. I agree that the information contained in paragraph 4 of Page 3 of Record B34 is substantially similar to that which I found to be exempt in Record A2. In the interests of consistency, I find that this information is properly exempt from disclosure under section 17(1).

The Ministry further submits that those portions of Page 1 of Record B133 contain direct references to Articles 4.3.1 and 4.3.2 of Record A2, which I found to be exempt under section 17(1). Again, in the interests of consistency, those portions of Page 1 of Record B133 which refer specifically to Articles 4.3.1 and 4.3.2 of Record A2 are, in fact, exempt from disclosure under section 17(1) and ought not to be disclosed.

The Ministry indicates that the information in paragraph 3 of the "Current Status" section of Record C3 is identical to that in Record A52 which I found to be exempt from disclosure under section 19. I agree, and find that this portion of Record C3 is properly exempt under section 19.

Finally, the Ministry argues that the severed portion of Record D2 is identical to that which was exempted from disclosure in Record A52 under section 17(1). Record D2 is a letter from the Ministry's AIDS Bureau to the President and Chief Executive Officer of the affected party following the acquisition of the original affected party by another drug manufacturer. In my view, the information contained therein cannot reasonably be described as having been supplied to the Ministry by the affected party in confidence. I cannot agree with the Ministry's position that the information in Record D2 is so similar to that in Record A52 that it ought to be afforded the same protection from disclosure under section 17(1).

The affected party has made detailed submissions with respect to what it sees as an inconsistent application of sections 17(1) to Articles 6.3.2, 6.5.3, 6.5.4, 6.5.5, 6.5.6, 6.6.1, 6.6.2, 7.3.1, 8.1, 8.2.2, 8.2.5, 8.3.4, 8.3.6 and 8.3.7. It argues that because of the findings which I have made in Order P-1497 with respect to the application of section 17(1) to the remaining provisions in Articles 6, 7 and 8 of Record A2, in order to be consistent, I must also exempt from disclosure those portions of Record A2 listed above. It argues that the provisions in the Agreement which constitutes Record A2 dealing with the publication of research (Article 6.3.2), the treatment of intellectual property rights under the Agreement (Articles 6.5.3, 6.5.4, 6.5.5, 6.5.6, 6.6.1 and 6.6.2), the administration of program funds (Article 7, particularly Article 7.3.1) and those portions of the Agreement which address clinical and research programs (Articles 8.1, 8.2.2, 8.2.5, 8.3.4, 8.3.6 and 8.3.7) fall within the ambit of the section 17(1) exemption.

I have carefully examined the contents of these portions of Record A2 and find that, in order to maintain a consistent approach to the application of section 17(1) to the records at issue in this appeal, Articles 6.3.2, 6.5.3, 6.5.4, 6.5.5, 6.5.6, 6.6.1, 6.6.2, 7.3.1, 8.1, 8.2.2, 8.2.5, 8.3.4, 8.3.6 and 8.3.7 of Record A2 are properly exempt from disclosure under section 17(1). Each of these clauses describe in detail the commercial information which was supplied to the Ministry by the affected party with an expectation of confidentiality. I find that their disclosure could reasonably be expected to result in harm to the competitive position of the affected party.

By way of summary, I find that the following amendments to Order P-1497 are required:

1. Those portions of Page 4 of Records B34 and C1 entitled "Special Drugs Program" are properly exempt under section 18(1)(g).
2. Paragraph 4 of Page 3 of Record B34 is exempt from disclosure under section 17(1).
3. Those portions of Page 1 of Record B133 which refer to Articles 4.3.1 and 4.3.2 of Record A2 are exempt under section 17(1).
4. Paragraph 3 of the "Current Status" section of Record C3 is exempt under section 19.
5. Articles 6.3.2, 6.5.3, 6.5.4, 6.5.5, 6.5.6, 6.6.1, 6.6.2, 7.3.1, 8.1, 8.2.2, 8.2.5, 8.3.4, 8.3.6 and 8.3.7 of Record A2 are properly exempt from disclosure under section 17(1).

In all other respects, the terms of Order P-1497 are confirmed.

### **ORDER:**

1. I amend Order Provision 2 of Order P-1497 by upholding the decision of the Ministry to deny access to:
  - (a) Paragraph 4 of Page 3 and those portions of Page 4 of Records B34 and C1 entitled "Special Drugs Program",
  - (b) those portions of Page 1 of Record B133 which refer to Articles 4.3.1 and 4.3.2 of Record A2,
  - (c) Paragraph 3 of the "Current Status" section of Record C3,
  - (d) Articles 6.3.2, 6.5.3, 6.5.4, 6.5.5, 6.5.6, 6.6.1, 6.6.2, 7.3.1, 8.1, 8.2.2, 8.2.5, 8.3.4, 8.3.6 and 8.3.7 of Record A2.
2. I order the Ministry to disclose to the appellant by **March 23, 1998** but not before **March 18, 1998** those records ordered disclosed by Order P-1497, except as amended by Order Provision 1 above.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_

Donald Hale  
Inquiry Officer

\_\_\_\_\_ February 16, 1998