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

ORDER PO-2097

Appeal PA-010253-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to a submission for the listing of a product in the Ontario Drug Benefit Formulary (ODB). The requester sought access to:

i) relevant correspondence between the affected party or its representatives and the Drug Quality and Therapeutics Committee (DQTC), correspondence between the affected party or its representatives and the ODB, and correspondence between the ODB and the DQTC.

ii) cover letter of submission from the affected party or its representatives, ODB acknowledgement letter and any further status letters, acceptance letters, rejection letters and requests for further information.

iii) minutes of internal meetings, DQTC meetings, and meetings with the affected party or its representatives.

iv) reviewers' comments, including internal and external e-mail.

The Ministry granted partial access to one record, but denied access to 45 others in their entirety and one record in part, relying on the exemptions in sections 13(1) (advice or recommendations), 17(1) (third party information), 18(1) (economic and other interests) and 21(1) (invasion of privacy) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision to this office.

The Ministry notified two affected parties, the original applicant pharmaceutical company and its consultant, of the access request. After receipt of their representations, the Ministry decided to disclose portions of Records 9 and 11. Accordingly, those portions of the records are no longer at issue.

During mediation, the appellant confirmed that he was not seeking access to the names and addresses of the drug reviewers and external consultants. As a result, the personal information in Records 22-31 and the application of section 21(1) are no longer at issue in this appeal.

This appeal proceeded to the inquiry stage, and a Notice of Inquiry was sent to the Ministry and two affected parties. Representations were received from the Ministry and counsel for the affected parties. A copy of the Notice, along with the non-confidential portions of the representations of the Ministry and the affected parties, was sent to the appellant. The appellant also made submissions in response to the Notice, which were shared in their entirety, with the Ministry and the affected parties. Both the Ministry and the affected parties then provided additional representations by way of reply.

RECORDS:

The records at issue are listed in the Index of Records provided by the Ministry with its decision letter. Specifically, the appellant is seeking access to Records 1-8, 10 and 12- 46. The appellant has indicated in its submissions that it is not seeking access to the undisclosed portions of Records 9 and 11, which consist only of the dates of these documents. As a result, Records 9 and 11 are no longer at issue in this appeal.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry and the affected parties claim the application of the mandatory exemption in section 17(1) to apply to the information contained in Records 1-8, 10, 12-19, 20-21 and 22-31. For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected party must satisfy each part of the following three-part test:

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

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Order P-373, stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail

> and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

Portions of the representations of the affected parties and the Ministry were not shared with the appellant. These include certain affidavits filed by the affected parties in support of their submissions regarding the application of section 17(1) to the records. I intend to rely on the contents of these submissions, particularly with respect to my discussion of the possible harms which could reasonably be expected to result from the disclosure of the records. Due to the confidential nature of the representations, however, I am unable to refer to them in the text of this order. The basis for my reasons may not, accordingly, be completely set forth in this decision as to do so would result in the disclosure of these confidential representations. When quoting from the representations of the Ministry and the affected parties, I intend only to refer to those portions determined to be non-confidential at the Inquiry stage of the appeals process.

Part 1 of the Section 17(1) Test - Type of Information

Both the Ministry and the affected parties have made extensive submissions in support of their contention that the records contain information which qualifies as a "trade secret" for the purposes of section 17(1). They rely on the definition of that term adopted by former Commissioner Tom Wright in Order M-29, set out as follows:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Essentially, the Ministry and the affected parties submit that the economic information and the methodology employed in obtaining a listing on the Ontario Drug Formulary constitute trade secrets of one of the affected parties.

The appellant, on the other hand, disputes this contention, arguing that "There is no authority for the proposition that strategies and techniques for dealing with government may constitute trade secrets." The appellant goes on to add that:

> Moreover, the strategies and techniques for dealing with government are generally known in the pharmaceutical industry. As a major national and international pharmaceutical company, [the appellant] has considerable experience in making submissions to regulatory authorities, including the DQTC. The overall submission to ODB and the process of gaining Formulary listing is a highly structured process based on the *Ontario Drug Benefit Act* and Regulations, and the Ontario Guidelines for Drug Submission and Evaluation, which are available and known to the industry as a whole. The strategies and techniques for dealing with government arise within this strict framework and are common to all participants in the industry.

In its reply submissions, the affected party contends that the strategies which pharmaceutical companies employ in making a submission for inclusion in the Formulary "is a closely guarded secret" and a "competitive secret". It goes on to describe in its confidential representations the actual ingredients of its strategy and the reasons why it takes the position that this information qualifies as a "trade secret" for the purposes of section 17(1).

In my view, the types of information contained in the records at issue in this appeal do not constitute "trade secrets" for the purposes of section 17(1). Despite the evidence tendered by the affected party, I find that the strategies and the methodologies relating to governmental relations which are included in the records are common throughout the pharmaceutical industry and are not in any way unique to the affected parties. The Guidelines referred to by the appellant set the ground rules for the submission of new drug products and describe the process to be employed by all manufacturers. The records do not describe the processes or formulas for the manufacturing of the drug produced by one of the affected parties, rather they relate strictly to the company's efforts to have the drug included in the Ontario Formulary. In my view, this information cannot qualify as a "trade secret" for the purpose of section 17(1) as it is generally known in the pharmaceutical industry and is common to all manufacturers.

The Ministry and the affected parties also submit that the records contain information which qualifies as "commercial", "scientific", "technical" and "financial" information within the meaning of section 17(1). These terms have been defined in previous orders as follows:

Scientific Information

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

Technical Information

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

One of the affected parties relies on the findings of former Commissioner Sidney B. Linden in Order 68 and Assistant Commissioner Tom Mitchinson in Order P-284 where it was held that information relating to a Formulary submission qualified as "scientific", "financial" and "commercial" information for the purposes of section 17(1). Specifically, it argues that Records 4, 15, 17 and 19 also contain scientific information relating to its product. It indicates that other records contain information relating to the marketing of this product and that this portion of the records qualifies as "commercial" information. Further, it submits that other records contain information which qualifies as "financial" information within the meaning of section 17(1).

The appellant submits that any "scientific " information relating to the affected party's product "is already captured in the Product Monograph approved by Health Canada and generally available to health practitioners and the public." It argues that any information relating to the safety or efficacy of this product, including clinical reviews, is already widely available. Accordingly, it submits that if the records at issue contain such information, it ought not to qualify for exemption under section 17(1) as it is already publicly available. The appellant also submits that records submitted in support of an application for a Formulary listing do not include information relating to the applicant's financial position or marketing strategies and, therefore, the records do not contain information which qualifies as either financial or commercial information.

Records 1, 3, 6 and 7, which are each entitled "Notice of Drug Submission Status", were sent to the affected party by the Director of the Ministry's Drug Programs Branch. In my view, these records do not contain information which qualifies as commercial, financial, scientific or trade

secret information for the purposes of section 17(1). As such, they do not qualify for exemption under this section. As this is the only exemption claimed for these records, I will order that they be disclosed to the appellant.

Records 2, 4, 5, 8, 10, 12-19, 20-21 and 22-31 contain information which relates to the selling of merchandise, the affected party's product. The records relate directly to the efforts of the affected party to market this product through its inclusion in the Ontario Formulary. I find that these records contain "commercial information" within the meaning of section 17(1). Further, I find that discrete portions of these records also contain information which qualifies as "financial" and "scientific" information for the purposes of section 17(1). As a result, I find that the first part of the section 17(1) test has been satisfied with respect to Records 2, 4, 5, 8, 10, 12-19, 20-21 and 22-31.

Part Two of the Section 17(1) Test - Supplied in Confidence

The Ministry and the affected parties submit that the information contained in Records 2, 4, 5, 8, 10, 12-19, 20-21 and 22-31 was provided to the Ministry in confidence by the affected parties.

Supplied

The "supplied" requirement of the Part 2 test reflects the purpose in this exemption, that being the protection of the informational assets of a third party. The authors of the William Commission report (*Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980)) made the following comments about this purpose:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. (pp. 312-315) [my emphasis]

In its confidential representations, the Ministry sets out in the form of a table the circumstances surrounding the supply of each of the records to which it has applied section 17(1). Based on the contents of this submission, I find that the information contained in each of Records 2, 4, 5, 8, 10, 12-19, 20-21 and 27-31 were supplied by the affected parties to the Ministry within the meaning of section 17(1).

However, Records 22 to 26 are copies of letters sent to the members of the DQTC requesting their reviews of one of the affected parties' application for the listing of its product on the Formulary. I find that these documents do not contain information which was "supplied" to the Ministry by the affected parties for the purposes of section 17(1). The letters serve only to request the reviewers comments and do not include the actual submission of the affected parties. In order to qualify for exemption under section 17(1), the information must have been supplied by the third party to the institution. In the case of Records 22 to 26, the information contained in these records originated with the Ministry and not the affected parties.

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly. [Order M-169]

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

Representations of the Ministry and the Affected Parties

The Ministry submits that Records 1 to 8 consist of confidential correspondence between one of the affected parties and its Drug Programs Branch (the DPB) which was "supplied implicitly in confidence", owing to its highly sensitive strategic and proprietary nature. It states that such information is treated as "highly confidential" by the DPB and the affected party. It goes on to submit that Records 10 and 12-19 consist of confidential correspondence submitted by one of the affected parties to the Ministry and that the information they contain includes:

- communications relating to the submission of [the affected party's product] for inclusion in the Formulary;
- pharmacoeconomic and other background information relating to [the product];
- information relating to the safety and efficacy of [the product];
- strategies used by [the affected party] in dealing with the Government with respect to its drug submissions; and
- trade secrets and highly sensitive commercial and marketing information regarding [the product].

In support of its contention that the records were submitted with an explicit expectation that they would be treated in a confidential manner, the Ministry points out that Records 14 and 15 are clearly labelled "confidential and urgent".

The Ministry also submits that Records 20 and 21 contain financial and economic projections for the sale of the drug product. With respect to Records 22 to 31, the Ministry submits that these consist of confidential correspondence between the DQTC reviewers and the DPB. In particular, Records 27 to 31 are the actual clinical and pharmacoeconomic reports on the drug product under consideration as prepared by the DQTC reviewers.

The affected parties submit that all of the information contained in Records 1-8, 10, 12-19, 20-21 and 22-31 was supplied with an implicit expectation that they would be treated confidentially. The affidavit materials filed by the affected parties speak directly to this issue and I am unable to refer to them specifically in this order. The affected parties submit that in their experience, the Ministry routinely considers material contained in or related to a submission for listing a product on the Formulary to be confidential, and that they share this view. The Ontario Guidelines for Drug Submission and Evaluation prepared by the Ministry in September 2000 support the affected parties' contention as it states, at page II-5, that:

> All other submission information will continue to be held in confidence by the Ministry.

Representations of the Appellant

The appellant acknowledges that the records at issue contain information which was supplied by the affected parties to the Ministry. It submits, however, that the affected parties cannot have a reasonable expectation that the information they provide will be kept confidential. The appellant submits that:

> [it] recognizes the critical public purpose of the regulatory process and expects transparency in that process. The regulatory process necessarily and rightfully subjects participants to some measure of public scrutiny.
>
> . . .
>
> The argument that a pharmaceutical company which applied to have its drug listed on the Formulary, to permit it to be prescribed to and paid for by Ontario's

> citizens, has a right to confidentiality in safety and efficacy information filed in support of its application is manifestly unreasonable.

Findings with Respect to the "In Confidence" Aspect of Part II of the Test

I find that the information in Records 2, 4, 5, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 was provided to the Ministry by one of the affected parties with a reasonably-held expectation of confidentiality. The records themselves speak to the confidential nature of the information which they contain and I accept the affected party's submissions on this aspect of the section 17(1) test.

The information in Records 20 and 21 was provided to the Ministry by the other affected party. Again, the contents of the records themselves indicate the confidential nature of the information which they contain. I find that Records 20 and 21 were supplied to the Ministry by the affected party with a reasonably-held expectation that they would be treated confidentially.

Records 27-31 are the actual reviews undertaken by the DQTC reviewers charged with providing their professional comments on the affected party's product. I find that these records contain detailed information which originated with the submissions made by the affected party. The disclosure of these records would, therefore, reveal information which had been supplied with an expectation of confidentiality by the affected parties. Accordingly, I find that I have been provided with sufficient evidence to make a finding that these records contain information which was supplied to the Ministry in confidence for the purposes of section 17(1).

Part Three of the Section 17(1) Test – Harms

Introduction

To discharge the burden of proof under the third part of the test, the parties opposing disclosure, in this case the Ministry and the affected parties, must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed. [Order P-373]

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)]. [Orders PO-1745 and PO-1747]

Representations of the Ministry

The Ministry submitted detailed representations with respect to the harms issue, referring to each individual record which it claims is subject to the exemption in section 17(1). Portions of those representations were not shared with the appellant due to concerns about confidentiality and, as indicated above, I am unable to refer to them in this decision.

Section 17(1)(a)

Essentially, the Ministry takes the position that prejudice to the affected party's competitive position could reasonably be expected to occur should the records at issue be disclosed. It argues that:

> Any information disclosed relating to scientific testing, manufacturing procedures and methods, sales or marketing projections, etc., would assist a competitor to bring a drug similar to [the affected party's product] onto the market even more quickly than would otherwise be the case. This would have an extremely adverse affect on the competitive position of [the affected party] in the pharmaceutical marketplace. In turn, the detriment suffered by [the affected party] would translate to a negative effect on the Ministry, since the listing of [the affected party's] product would result in substantial cost savings to the MOHLTC. [more elucidation on this point is provided in the Ministry's decision of the application of section 18(1) below]

The Ministry relies on the decision of this office in Order 47 in support of its contention that the disclosure of information relating to the pricing of a drug product by a manufacturer would allow competitors to "calculate future price submissions and pricing structures" to the detriment of the original manufacturer. It also submits that some of the records contain information which, if taken out of context, could be used by competitors to the detriment of the affected party in the marketing of drug products similar to that under discussion in the records at issue in this appeal. It also indicates that the disclosure of the information in the records which relates to the strategies and techniques employed by the affected party in successfully having its product listed in the Formulary could reasonably be expected to be exploited by its competitors in their applications for other drug products.

Insofar as the information relating to the financial impact of the inclusion of the affected party's product on the Formulary is concerned, the Ministry submits that the affected party would suffer real economic loss in its market should this information be disclosed. The Ministry points out that the pharmaceutical industry is particularly competitive as the stakes are so high. Potential sales and profits are substantial to a firm which is successful in having a product listed on the Formulary, particularly for a general as opposed to a limited use listing. For this reason, the manufacturers of drug products jealously guard the information they provide to the Ministry when seeking a listing.

It further submits that the disclosure of the clinical reviews of the drug product described at Records 27-29:

> . . . could expose strengths and weaknesses of [the affected party's] new drug to its competitors. This would obviously benefit competitors of [the affected party], while having a detrimental and prejudicial effect on the competitive position of [the affected party] itself.

With respect to Records 30 and 31, the Ministry submits that:

> The financial and economic projections for the drug are highly sensitive and would be of particular interest to competitors of [the affected party] since it would aid them in planning future marketing and research strategies. This would offer competitors a unique competitive advantage over [the affected party], and would prejudice the competitive position of [the affected party].

Section 17(1)(b)

The Ministry submits that the disclosure of the records "could be expected to result in similar information no longer being supplied" to it. It argues that:

> Reputation is extremely important in the pharmaceutical industry. Since much of the information contained in the previously discussed records is sensitive, proprietary and confidential to [the affected party], the company's reputation could be damaged if disclosure to competitors occurred. Release of this information and its inevitable negative consequences would have a definite chilling effect on the entire pharmaceutical industry, with the likely effect that drug manufacturers would be discouraged from making full and complete disclosure to the Ministry.
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> The MOHLTC submits that it is clearly in the public interest that similar information continues to be supplied to it by drug manufacturers. Ontario courts have acknowledged that the smooth operation and continuance of this procedure is vital to the new drug submission and Formulary listing process.

The Ministry then refers to the decisions in *Re Apotex Inc. and Attorney General for Ontario*, (1984), 11 D.L.R. (4th) 97 and *Nu-Pharm Inc. v. Ontario (Ministry of Health)*, [1991] O.J. No. 500 which describe in detail the process whereby new drug products are introduced to the Ontario Formulary. The Ministry goes on to submit that:

> . . . if information related to the potential listing on the Formulary of new drugs is not supplied to the Ministry by pharmaceutical companies, harm would result to the public interest. The general public could be needlessly burdened with higher costs for prescription drugs, and certain segments of society, such as lower income individuals and the elderly could lose access to certain drugs [as they would no longer be listed on the Formulary and could not be dispensed in accordance with the Ontario Drug Benefit Act]. The overall ability of the MOHLTC and the Ontario Government to successfully operate an economically feasible prescription drug program would be compromised.

Section 17(1)(c)

With respect to section 17(1)(c), the Ministry relies on the decision of former Assistant Commissioner Irwin Glasberg in Order P-1019 in support of its contention that the affected party would suffer an undue loss should the information contained in the records be disclosed. It also relies on a decision of the Nova Scotia Supreme Court in *Re: Appeal Pursuant to Section 41 of the Freedom of Information and Protection of Privacy Act*. The Ministry goes on to submit that the information contained in the records:

> . . . was developed solely from the work and experience of [the affected party] staff, totally at the company's own expense, exclusively as a result of its own efforts. Release of any or all of these records could 'jump-start' a competitor by providing extremely valuable information relating to technical pharmaceutical issues, manufacturing methods, and sales/marketing strategies. In addition, disclosure of the records could provide a competitor with information with respect to how best to present data for regulatory and governmental approval. Thus, a competitor could address and avoid all the problems [the affected party] encountered during the submission process, without having extended any time, effort or expense of its own. The Ministry submits that this scenario is patently unfair to [the affected party], and thus satisfies that criteria for "undue loss" as presented by both the IPCO of Ontario and the Nova Scotia Supreme Court.
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> . . .
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> if such information were to be made available to [the affected party's] competitors, it could be used against [the affected party], resulting in irreparable harm to the company and its reputation. This damage to the company's goodwill and reputation could conceivably persist for an indefinite time period.

Representations of the Affected Parties

Section 17(1)(a)

The affected party submits that the disclosure of the information contained in the records could reasonably be expected to significantly prejudice its competitive position as the information sought by the requester, one of its competitors, is not made public by any other pharmaceutical company. It argues that harm will result to its competitive position if it is the only such firm to have its confidential information made public. The affected party has also provided me with evidence to substantiate its argument that the disclosure of much of the information in the records will be used by its competitor against it in the marketplace, "in a distorted fashion."

The affected party relies on the decisions of the Commissioner's office in Orders P-1347, PO-1970 and PO-1813, as well as a decision of the Federal Court in *Culver v. Canada (Minister of Public Works and Government Services)* [1999] F.C.J. No. 1641.

Much of the information provided by the affected party with respect to the harms aspect of section 17(1)(a) was submitted in its confidential representations and I am unable to refer to them in the body of this decision.

Section 17(1)(b)

Again, the majority of the affected party's submissions on this aspect of the section 17(1)(b) exemption were made in it confidential representations. The affected party indicates that it is relying on the decisions of the Commissioner's office in Orders P-604 and P-841, as well as another decision of the Federal Court in *Bristol-Myers Squibb Company et al. v. Attorney General of Canada et al.* (decision of Mr. Justice Pelletier dated February 26, 2002).

Section 17(1)(c)

The affected party submits that:

> . . . what makes the loss to [it] and the gain to [the appellant] undue is the fact that [the affected party] will be giving up its proprietary confidential information that it has developed and paid for; while [the appellant] will be obtaining this information at no cost and will be able to use that information to advance sales of its own products and to harm [the affected party's] sales.

The affected party relies on a statement taken from the decision of former Commissioner Sidney Linden in Order 68 where he held:

> Having regard to Ontario's present system for approving new drug products on the Formulary/CDI, I am satisfied that the mere knowledge of an application for a listing could, in itself, result in the types of harm enunciated in subsections 17(1)(a), (b) and (c). Over the years, the participants in this approval process have developed certain expectations as to the appropriate use of the information submitted to the DQTC, and this in turn has created a commercial value in this information. If these expectations were to change as a result of alterations to the approval process, this could result in the elimination of any commercial value to this information and a corresponding removal of this type of information from the scope of exemption under section 17. I understand that an Ontario government task force is currently reviewing procedures relating to the approval of drug products on the Formulary/CDI, and I would urge those involved with this review to consider the appropriateness of making this type of information routinely available to the public.
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> However, in my view, under the current process, the exemption provided by section 17 has been properly applied to the category of severance consisting of information relating to new drug product submissions.

Representations of the Appellant

Section 17(1)(a)

The appellant submits that the information contained in the records is not confidential. It argues that:

> . . . the marketplace for pharmaceuticals is dynamic and competitive and [the affected party] is no more or less vulnerable to competitive pressures than any other pharmaceutical company. Information about competitors and their products is widely known, and flows freely. Mechanisms such as the *ATIA* (the federal *Access to Information Act*) and the *Act* encourage this freedom of information and pharmaceutical companies are experienced in using these mechanisms to obtain information, including information about their competitors and their products. In any case where a party's information is sought to be disclosed, that party could argue that it would be unfair for its information to be disclosed if its competitors' information were not. This argument, in itself, does not provide evidence of significant prejudice to the party's competitive position. [The appellant] submits that the affected parties have not adduced any such evidence at all.

The appellant has also provided me with representations with respect to the outcome of an application to the Ontario Superior Court of Justice brought by the affected party against the appellant seeking an injunction prohibiting the marketing of one of the appellant's drug products. It notes that the application was refused and leave to appeal from that decision was also dismissed with costs. The appellant argues that the allegations of misconduct brought by the affected party against it were found to be groundless.

The appellant also points out that the identity of the requester is irrelevant to a determination of possible prejudice to the competitive interests of an affected party under section 17(1). The sole issue to be adjudicated on is whether the exemptions claimed under the *Act* apply to the records at issue.

Section 17(1)(b)

The appellant submits:

> There is no merit to the suggestion that if the Ministry ceased to treat information such as the Records as confidential, such information would no longer be supplied to the Ministry. The Records were filed in support of an application for a Formulary listing. The application process is well-known and prescribed by the *Ontario Drug Benefit Act* and Regulations, and the Ontario Guidelines for Drug Submission and Evaluation. The Records were prepared and filed pursuant to the requirements contained in these laws which are well-known to all industry participants.

> It is submitted that the Commission should not presume that law-abiding pharmaceutical companies would suddenly breach their obligation to provide accurate, full and complete information to the Ministry if they knew that the information might be disclosed. There is simply no evidence before the Commission – apart from bald assertions – that this would be the case. Indeed, the affected parties themselves do not say that they would be any less forthright with the Ministry in such circumstances. Rather, the Commission should presume that pharmaceutical companies will continue to abide by their obligations to supply relevant and necessary information to the Ministry.

Section 17(1)(c)

The appellant refutes the arguments of the affected parties with respect to the reasonable likelihood of the harm in section 17(1)(c) occurring by stating that:

> [the affected party's] argument that it would suffer and [sic] undue loss and [the appellant] would enjoy an undue gain from the disclosure of the Records again relies on speculation that [the appellant] would "use that information to advance sales of its own products and harm [the affected party's] sales." There is simply no evidence that the information contained in the Records would necessarily favour [the appellant] or that if it did, [the appellant] would use it in this way.

Findings with Respect to Part III of Section 17(1) Test

Generally, I find favour with the positions expressed by the Ministry and the affected parties with respect to the harms which could reasonably be expected to follow the disclosure of the information which I have found to be subject to Parts I and II of the section 17(1) test. I find that the affected parties in particular have provided me with convincing and detailed evidence of a reasonable expectation that disclosure of this information would result in harm to their competitive position in what is clearly a very competitive industry. It is clear from the evidence provided to me by all of the parties that pharmaceutical companies view their marketing strategies and the information they provide to the Ministry in support of a Formulary listing application as information worthy of protection from their competitors. These principles have assisted me in making the findings set out below.

Record 2

Record 2 is an internal Ministry document describing and commenting on the affected party's request for a particular treatment of its Formulary application. I find that the disclosure of the information contained in Record 2 could reasonably be expected to result in significant prejudice to the competitive position of the affected party. I am satisfied that the evidence provided to me by the Ministry and the affected parties is sufficiently detailed and convincing to allow such a conclusion to be drawn. As all three parts of the section 17(1) test have been satisfied with respect to Record 2, I find that it is exempt from disclosure under that exemption.

Records 4 and 5

Records 4 and 5 are letters from the Ministry to the affected party setting out the comments made by the Drug Quality and Therapeutics Committee (the DQTC) on the specific information contained in the affected party's application. The letters make very detailed reference to all aspects of the application. I find that the disclosure of these documents could reasonably be expected to prejudice significantly the competitive position of the affected party. In my view, the dissemination of the information in these records by the appellant could reasonably be expected to result in significant economic harm to the affected party. Records 4 and 5 are, accordingly, exempt from disclosure under section 17(1).

Record 8

Record 8 is a letter from the Ministry to the affected party confirming certain agreements with respect to the marketing of the product which was the subject of its Formulary application. I find that the disclosure of this information could reasonably be expected to prejudice significantly the competitive position of the affected party and that Record is, accordingly, exempt from disclosure under section 17(1).

Record 10

Record 10 is a facsimile from the affected party to the Ministry to which is attached a letter from the Commissioner of the Pharmaceutical Advertising Advisory Board. I find that this record contains information relating to the marketing of the affected party's drug product and that the disclosure of this information could reasonably be expected to result in significant prejudice to the affected party's competitive position. As a result, Record 10 is exempt from disclosure under section 17(1).

Record 12

Record 12 is a letter from the affected party to the Ministry advising it of a name change for the affected party's product. I find that the disclosure of this information could not reasonably be expected to result in any of the harms contemplated by section 17(1). Record 12 is not, accordingly exempt under this exemption.

Records 13, 14 and 15

These records set out the actual application documents with amendments submitted by the affected party with its request for a Formulary listing. The records contain information relating to the application itself and the marketing strategy to be employed by the affected party. In my view, the information contained in these records qualifies for exemption under section 17(1)(a) as their disclosure could reasonably be expected to result in significant prejudice to the competitive position of the affected party. Records 13, 14 and 15 are, therefore, exempt from disclosure under section 17(1).

Record 16

Record 16 is a covering letter from the affected party to the Ministry attaching additional copies of various application information and certain authorizations granting the Ministry the ability to access information maintained about the affected party by Health Canada. I find that section 17(1) has no application to these documents as their disclosure could not reasonably be expected to result in the harms contemplated by this exemption.

Records 17 and 18

Records 17 and 18 contain specific financial information provided by the affected party to the Ministry regarding the marketing and sale of its drug product. I find that I have been provided with sufficient evidence to demonstrate that the disclosure of the information contained in these records could reasonably be expected to prejudice significantly its competitive position in the marketplace. I find that Records 17 and 18 are, accordingly, exempt from disclosure under section 17(1).

Record 19

Record 19 is a covering letter from one of the affected parties to the Ministry to which were attached a number of additional documents. I find that the disclosure of Record 19 could not reasonably be expected to result in the harms contemplated by section 17(1).

Records 20 and 21

Records 20 and 21 are communications from the affected party to the Ministry containing detailed financial information relating to the marketing of its product. I find that the disclosure of this information could reasonably be expected to result in significant prejudice to the competitive position of the affected party. These records are, accordingly, exempt from disclosure under section 17(1).

Records 27 – 31

Records 27 to 31 represent the actual reviewer's reports prepared by members of the DQTC who evaluated the affected party's application for a Formulary listing for its product. The reports include detailed analyses of the affected party's application including a review of the drug's efficacy, technical make-up, the marketing strategies to be employed in its distribution and the potential savings to the Ontario Drug Plan should it be accepted. In my view, the disclosure of this information could reasonably be expected to significantly prejudice the affected party's competitive position. The reviews themselves contain information that was created by the affected party to assist the reviewers in evaluating the application from many perspectives; scientific, technical, commercial and financial. I find that in the competitive realm of the pharmaceutical industry, this information could be adapted by the affected party's competitors to the detriment of the affected party in any number of ways, particularly with respect to various marketing strategies. I find that these records are properly exempt from disclosure under section 17(1).

By way of summary of my discussion of the application of section 17(1) to the records at issue, I find that Records 2, 4, 5, 8, 10, 13, 14, 15, 17, 18, 20, 21 and 27 to 31 qualify for exemption under this exemption. Records 1, 3, 6, 7, 12, 16, 19 and 22 to 26 do not qualify under section 17(1). As the Ministry has also applied the discretionary exemptions in sections 18(1)(c) and (d) to these records, I will now review this aspect of the appeal.

ECONOMIC AND OTHER INTERESTS

As noted above, the Ministry has claimed the application of sections 18(1)(c) and (d) to the information contained in Records 1, 3, 6, 7, 12, 16, 19 and 22 to 26. These exemptions 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;

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

To establish a valid exemption claim under section 18(1)(d), the institution must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Ministry's Representations

The Ministry's submissions do not refer specifically to the application of sections 18(1)(c) or (d) to the records remaining at issue. Rather, they refer generally to the information contained in all of the records, many of which I have found to be exempt under section 17(1). In addressing the nature of the economic interests of the Ministry and the financial interests of the Government of Ontario, the Ministry submits that:

> In these times of fiscal and economic restraint, the Ministry must work to ensure that the people of Ontario receive the best possible health care at the lowest feasible costs. An important component of this is that the most cost-effective drugs are listed on the Formulary/CDI so that maximum value is achieved for the funds spent. It is especially important for those taxpayers (such as senior citizens and lower-income individuals) that depend on drugs listed on the Formulary that their limited tax dollars are spent prudently. Thus, it is in the interests of the Ontario Government that residents receive the best possible health services and pharmaceuticals for government expenditures.
>
> The Ministry submits that disclosure of the records (1-8, 10 and 12-31) would prejudice its economic interests in that the operation of the drug submission and Formulary listing system would be impeded and compromised. Pharmaceutical companies typically submit all of the necessary records to the DPB of the Ministry in the strictest confidence, and rely on the fact that this confidence will not be breached. If these records were to be disclosed, pharmaceutical companies would lose trust in the good faith of the government with respect to the maintenance of confidentiality.
>
> This expectation is reasonable due to the nature of the records at issue. As previously discussed, these records contain highly confidential trade secrets as well as scientific, technical, commercial and financial information as defined by the *Act*. Furthermore, there is information in some of the records that, if publicly disclosed, could be deliberately misused in order to create the impression that the drug product is unsafe or ineffective. In addition, some of the data in the records, if taken out of context or presented in isolation by an unscrupulous competitor, could be used to infer that the marketing campaign for [the specified drug product] was fraudulent or misleading.
>
> It is reasonable to expect that disclosure of these records would result in damage to both the tangible and intangible assets (i.e. its reputation in the industry) of [the affected party. As a result, it is highly unlikely that this company would desire to participate in the Formulary/CDI drug submission process of the MOHLTC in the future. It thereby follows, that if a well-known pharmaceutical company such as [the affected party] suffers a serious breach of confidentiality, resulting in the loss of valuable trade secret and sensitive scientific/technical, commercial and financial information, few, if any other pharmaceutical companies will be willing to be involved in dealings with the Ontario Government.

> The MOHLTC submits that this scenario described above would be extremely injurious to both the financial interests of the Government of Ontario and to the Government's ability to manage the economy of the province.
>
> . . . [the Ministry has provided me with a set of financial projections which are confidential in nature and were not shared with the appellant at the Inquiry stage of the appeal.]
>
> On its own, a savings loss of this magnitude would be injurious to the provincial government, especially in the light of the present climate of fiscal restraint. However, as previously noted, it is likely that disclosure of the confidential information of one drug company would lead to a "ripple effect" throughout the industry, whereby few, if any pharmaceutical companies would be willing to commit the time, money and resources necessary to complete the drug Formulary submission process. The MOHLTC submits that such a resulting outcome would be extremely injurious to the financial interests of the Government of Ontario as well as to the ability of the Government to manage the economy.

The Appellant's Representations

The appellant points out that in order for the exemptions in sections 18(1)(c) or (d) to be upheld, I must be provided with evidence which is "detailed and convincing" in order to demonstrate a "reasonable expectation of probable prejudice". It adds that "Evidence of harm that is merely speculative or potential is insufficient to satisfy this burden."

In response to the submissions of the Ministry, the appellant submits that:

> . . . the arguments of the Ministry are alarmist, overstated and devoid of merit. The suggestion that pharmaceutical companies would cease to make submissions for their drugs to be listed on the Formulary is absurd, since most pharmaceutical companies depend heavily on the Formulary for sales revenue and the long-term success of a drug. Indeed, based on [the appellant's] experience, approximately fifty percent of the revenue listed on the Formulary may come from public payers (i.e. reimbursement from the provincial government). Ethical pharmaceutical companies also recognize that a Formulary listing is critical to ensuring equal access to quality medicines by the elderly and by patients on social assistance. The suggestions that pharmaceutical companies would simply 'refuse' to deal with government and regulatory authorities in the future therefore lacks credibility in light of the highly complex regulatory and financial environment in which pharmaceutical companies operate on a daily basis and their significant revenue dependency on the Formulary.

The appellant also takes issue with the Ministry's submissions respecting the "misuse" of the information contained in the records, arguing that this evidence is insufficient to meet the burden of proof as it is speculative, not detailed and convincing.

Findings with Respect to the Application of Sections 18(1)(c) and (d) to Records 1, 3, 6, 7, 12, 16, 19 and 22 to 26

Records 1, 3, 6 and 7

These documents, each of which are entitled "Notice of Drug Submission Status", address various administrative matters surrounding the affected party's application for the inclusion of its drug product on the Formulary. The matters referred to in each of these documents relate to "housekeeping" and form rather than the substance of the actual application. In my view, the disclosure of the contents of these records could not reasonably be expected to in any way prejudice the economic interests of the Ministry or result in injury to the financial interests of the Ontario Government or its ability to manage the Ontario economy. As a result, sections 18(1)(c) and (d) have no application to these records. As no other exemptions have been applied to these documents and they are not subject to any mandatory exemptions, I will order that they be disclosed to the appellant.

Records 12, 16 and 19

Records 12, 16 and 19 are correspondence of a "housekeeping" nature from the affected party to the Ministry addressing issues surrounding the submission process, as opposed to the actual content of the application itself. Again, I find that sections 18(1)(c) and (d) have no application to the information contained in these records.

Records 22 to 26

Records 22 to 26 are the letters sent to each of the drug reviewers engaged by the Ministry to provide their views on the drug product submitted for addition to the Formulary by the affected party. Again, these documents do not contain any information whose disclosure could reasonably be expected to result in the harms contemplated by sections 18(1)(c) and (d). The appellant has indicated that he is not interested in obtaining the names of the drug reviewers which appear on these records. As a result, I will order the disclosure of Records 22 to 26 with the personal identifiers of the drug reviewers severed.

ADVICE OR RECOMMENDATIONS

The Ministry takes the position that Records 32 and 33 to 46 are exempt from disclosure under section 13(1) of the *Act*, which reads:

> 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.

In Order 94, former Commissioner Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order 68, former Commissioner Linden made the following comments regarding the status of the DQTC in the context of whether records created by it fall within the ambit of section 13(1). He found that:

> the DQTC is an advisory body created by Order in Council pursuant to section 9 of the *Ministry of Health Act,* supra. Section 9 reads as follows:
>
> > The Lieutenant Governor in Council or the Minister may appoint committees to perform such advisory functions as are considered necessary or desirable in order to assist the Minister in the discharge of his duties.
>
> In my view, the role of the DQTC as an advisory body to the Minister places it squarely within the scope of entities intended to be covered by subsection 13(1).

The former Commissioner went on to comment on the application of the section 13(1) exemption to certain records created by the DQTC as part of its legislative mandate. He concluded:

> As far as the records containing comments or discussions by the DQTC and the names of manufacturers where recommendations for inspection of facilities were discussed by the DQTC are concerned, in my view, they meet the requirements for exemption under subsection 13(1). In all instances, the severed information fits into one or the other of these categories of records. In my view, these are precisely the types of information intended to be the subject of a claim for exemption under subsection 13(1).

Record 32

Record 32 are the minutes of a meeting of the DQTC held on October 11, 2000 at which time the affected party's drug product was discussed and evaluated by members of the Committee. The minutes reflect the concerns and findings of the members of the Committee, as well as their conclusions with respect to their position on whether the product ought to be listed on the Formulary. I find that Record 32 qualifies for exemption under section 13(1) as its disclosure would reveal the advice and recommendations of the DQTC members to the Ministry regarding the inclusion of the product on the Formulary.

The appellant takes the position that the exceptions to the section 13(1) exemption which are found in sections 13(2)(a), (k) and (l) of the *Act* apply to the information in Record 32. These sections state:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
>
> (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

The appellant submits that Record 32 contains substantial factual information pertaining to the affected party's drug product, "including references to published studies, and clinical and pharmacoeconomic data substantiating the safety, efficacy and clinical utility of [the product]."

The Ministry argues that section 13(2)(a) does not apply simply because Record 32 may contain **some** factual data. It relies on the decision of former Commissioner Linden in Order 24 in which he held that:

> What constitutes 'factual material'? In my view the overwhelming majority of records providing advice and recommendations to government would inevitably contain some factual information. However, I feel that this is not sufficient to meet the requirements of subsection 13(2)(a). The institution submits, and I agree, that 'factual material' does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and

> recommendations contained in the record. The clearest example would be an appendix or schedule of factual information supporting a policy document.
>
> In this case, the factual information in the records is interwoven with the advice and recommendations and cannot reasonably be considered a separate and distinct body of fact. As such, it does not meet the criteria of 'factual material' under subsection 13(2)(a), and the mandatory exception provided by that subsection is not available to the requester in the circumstances of this appeal.

In my view, the principles enunciated by the former Commissioner in Order 24 are equally applicable to the present appeal. In Record 32, the factual information relied upon by the reviewers is inextricably intertwined with the advice and recommendations being provided to the Ministry. In my view, it is not possible to separate the factual information from the advice and recommendations in Record 32 and I find that the exception in section 13(2)(a) has no application to it.

The appellant submits that the DQTC qualifies as a:

> . . . committee or body attached to the Ministry which has been established for the purpose of undertaking inquiries and making reports or recommendations to the Ministry" on such matters as the criteria to evaluate therapeutic efficacy, the ongoing evaluation and monitoring of pharmaceuticals, and the provision of advice with respect to pertinent issues based on the best available evidence……..

within the meaning of the exception in section 13(2)(k). It argues that the minutes, reviewer reports and correspondence reflect these recommendations, and constitute "reports" within the meaning of the *Act*.

The Ministry responds by indicating that, in its view, the minutes of a DQTC meeting which constitute Record 32 do not constitute a "report" for the purposes of section 13(2)(k). It relies on a finding by Senior Adjudicator David Goodis in Order PO-1709 in which he considered whether certain records qualified as "reports" under the *Act*. He found that:

> The word "report" is not defined in the *Act*. However, it is my view that in order to satisfy the first part of the test i.e. to be a report, a record must consist of *a formal statement or account of the results* of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact. [Orders 200, M-265, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.)]

The Ministry argues that the minutes which constitute Record 32 is not a "formal statement or account" and does not, accordingly, qualify as a "report" for the purposes of section 13(2)(k).

I agree with the position taken by the Ministry with respect to the characterization of Record 32. I find that this record does not qualify as a "report" within the meaning of section 13(2)(k) as it

does not consist of a "formal statement or account of the results of the collation and consideration of information". As such, I find that the exception in section 13(2)(k) has no application to Record 32.

The appellant also argues that:

> Records such as reviewers' reports contain the reasons for the Ministry's decision to list [the affected party's product] on the Formulary and on the pricing of [the product] and thereby constitute reasons for a final decision or ruling based on the exercise of discretionary power within the meaning of section 13(2)(l).

The Ministry counters by indicating that Record 32 does not contain reasons for a final decision or ruling of an officer of the Ministry made during or at the conclusion of the exercise of discretionary power, as is required by the exception in section 13(2)(l). I agree that the contents of Record 32 do not reflect the reasons for a final decision or ruling by a Ministry official. Rather, they simply outline the DQTC members' recommendations with respect to the listing of the affected party's drug product. I find that section 13(2)(l) has no application to Record 32.

By way of summary, I find that Record 32 is exempt from disclosure in its entirety under section 13(1) and that none of the exceptions in section 13(2) apply.

Record 33

Record 33 consists of certain hand-written notes taken by a Ministry employee referring to the affected party's drug product and another, unrelated product. The author of the notes, the Director of the Drug Programs Branch of the Ministry, sets out certain conclusions reached by the DQTC about the Formulary application from the affected party and has recorded them in the notes which comprise Record 33. I find that this document contains the conclusions and findings of the DQTC to the Ministry and that it constitutes advice and recommendations within the meaning of section 13(1) and that none of the exceptions contained in section 13(2) apply. As a result, I find that Record 33 is exempt under section 13(1).

Record 34

Record 34 is an e-mail notifying certain Ministry staff of a meeting. I find that this record does not contain any advice or recommendations within the meaning of section 13(1). As no other mandatory exemptions apply to the information in Record 34, I will order that it be disclosed to the appellant.

Record 35

Record 35 is a series of e-mails relating to the staff meeting referred to in Record 34 and include a brief synopsis of the subject matter for discussion. I find that Record 35 does not contain any advice or recommendations within the meaning of section 13(1). I will also order that it be disclosed to the appellant.

Record 36

Record 36 is identical to page 2 of Record 17, which I found to be exempt under section 17(1). I find that Record 36 also qualifies for exemption under the mandatory exemption in section 17(1).

Records 37 and 39

Records 37 and 39 are identical copies of a series of e-mail messages passing between Ministry staff with respect to a request made under the *Act* for certain information (not the request which gave rise to the present appeal). I find that Records 37 and 39 contain specific advice and recommendations from a public servant as to how the Ministry ought to proceed with its processing of this request. Records 37 and 39 are, accordingly, exempt from disclosure under section 13(1).

Record 38

The Ministry suggests that the disclosure of the contents of Record 38, a series of short e-mails between Ministry staff, could allow the reader to infer certain recommendations from Ministry staff. I disagree and find that this document does not contain any advice or recommendations for the purposes of section 13(1) and will order that it be disclosed to the appellant.

Record 40

Record 40 is an e-mail from the Director of the Ministry's Drug Program Branch to a number of other staff persons containing very specific advice as to a course of action to be followed. I find that the information contained in Record 40 qualifies as advice or recommendations for the purposes of section 13(1) and that it is exempt under that section.

Records 41, 42 and 44

These records contain a series of e-mail exchanges between Ministry staff addressing the Ministry's response to a letter received from a representative of one of the affected parties. The letter itself forms part of the e-mail exchange, along with a suggested course of action to be taken by the Ministry in reply. In my view, these records contain advice and recommendations within the meaning of section 13(1) as they set forth a suggested course of action to be followed by the Ministry. As a result, I find that they qualify for exemption under section 13(1).

Record 43

Record 43 is an e-mail exchange between Ministry staff and the Director of the Drug Program Branch. The communications involve addressing certain concerns about confidentiality raised by the Director regarding the disclosure of certain information pursuant to the request under the *Act* referred to in Records 37 and 39. I find that Record 43 is properly exempt under section 13(1) as it contains advice and recommendations from one public servant to another in the course of the deliberative process with respect to a suggested course of action on this confidentiality issue.

Record 45

Record 45 is an e-mail from a Ministry staff person to the Director following her conversation with a representative of the affected party. Record 45 does not contain information which qualifies as "advice or recommendations" for the purpose of section 13(1). I find that this record does not, accordingly, qualify for exemption under that section.

Record 46

Record 46 is an exchange of e-mails relating to a change of name for the affected party's drug product. I find that this record conveys certain factual information and does not contain any information which qualifies as advice or recommendations under section 13(1). I find that this exemption does not, therefore, apply.

By way of summary, I find that Records 33, 36, 37, 39, 40, 41, 42, 43 and 44 qualify for exemption under section 13(1). The information contained in Records 34, 35, 38, 45 and 46 does not, however, fall within the ambit of this exemption and I will, accordingly, order that it be disclosed.

ORDER:

1. I order the Ministry to disclose Records 1, 3, 6, 7, 12, 16, 19, 22 to 26, 34, 35, 38, 45 and 46 to the appellant by providing him with copies no later than **February 19, 2003** (35 days) but not before **February 14, 2003** (30 days).

2. I uphold the Ministry's decision not to disclose Records 2, 4, 5, 8, 10, 13, 14, 15, 17, 18, 20, 21, 27 to 31, 32, 33, 36, 37, 39, 40, 41, 42, 43 and 44.

3. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: January 15, 2003
Donald Hale
Adjudicator