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

# ORDER PO-2273

## Appeal PA-020193-1

## 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 records prepared by or for the Ministry in relation to:

> … the possible introduction of a generic pharmaceutical product that would include the active ingredient omeprazole, or omeprazole magnesium and/or claim boiequivalence with [a named drug].

In response, the Ministry identified 10 responsive records and advised the requester that it was granting partial access to one record (Record 1), and denying access to the remaining portions of Record 1 and the other nine records in full on the basis of the exemptions at sections 13 (advice or recommendations), 17 (third party commercial information), 18 (economic interests of government) and/or 21 (invasion of privacy) of the *Act*. The Ministry also provided the appellant with an index describing the responsive records and indicating which exemptions applied to which records.

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

During the mediation stage of the appeal, the appellant indicated that he was not seeking access to the names, addresses and other personal identifiers of individual drug reviewers. As a result, this information and the section 21 exemption are no longer at issue.

Mediation was not successful in resolving the remaining issues, and this appeal was transferred to the adjudication stage of the process. A Notice of Inquiry was sent to the Ministry and two affected parties. Representations were received from all of these parties.

The Ministry and both of the affected parties provided representations on the issues. One affected party (affected party A) provided extensive representations on the issues with respect to the record relating to it (Record 1). The other affected party (affected party B) provided brief representations, identifying that the information contained in the records was the private, proprietary and confidential information of affected party B, which had been submitted to the Ministry on the understanding that it would remain confidential. Affected party B also identified a concern that disclosure of the records may cause competitors to interfere with the process, and may create a competitive disadvantage for affected party B.

I then sent the Notice of Inquiry, along with the non-confidential portions of the representations of the Ministry and affected party A, and a summary of affected party B's position, to the appellant. The appellant also provided representations on the issues.

## RECORDS:

There are ten records at issue in this appeal. They include correspondence (including attachments) between the affected parties and the Ministry's Drug Programs Branch (the DPB),

correspondence between the DPB and a drug reviewer, the drug reviewer's report, and an internal e-mail between DPB staff.

## DISCUSSION:

### THIRD PARTY INFORMATION

The Ministry and the affected parties take the position that the mandatory exemption in section 17(1)(a), (b) and/or (c) applies to the information at issue contained in Records 1-10. Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected parties 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]

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

***Trade secret***

Both the Ministry and affected party A have submitted that the records contain information which qualifies as a "trade secret" for the purpose of section 17(1). Previous orders have defined that term 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.

(See Orders M-29, PO-2010)

Affected party A takes the position that the information contained in Record 1 reveals "trade secrets" belonging to that affected party. It states:

> The [affected party A] information discloses [affected party A's] secret strategy for launching its proposed … product. The Brand Name Drug Manufacturer or potential competitor learning about these plans could pre-empt [affected party A's] product launch with additional marketing efforts, prevent [affected party A] from gaining any significant market share, and thereby cause it significant economic damage….
>
> [Affected party A's] plans … are not known in the marketplace, and [affected party A] has used reasonable measures to protect the secrecy of such plans.

Affected party A then refers in its confidential representations to the specific information which it considers its "trade secret".

The appellant makes no submissions on whether the information reveals a trade secret.

In Order PO-2097, Adjudicator Hale had to decide whether information similar to that at issue in this appeal constituted "trade secrets" for the purpose of section 17 of the *Act*. He stated:

> 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.

I accept the approach taken by Adjudicator Hale. In my view, the information in Record 1 relating to what affected party A refers to as a "secret strategy" for launching it proposed product is not "trade secret" information. The records clearly do not describe the processes or formulas for the manufacturing of a drug, and I am not persuaded that the information at issue discloses any information which can be considered a "trade secret". In addition, affected party A's representations focus on the confidentiality of the information, as well as the possible harm if the specific information is disclosed, rather than on whether the information itself constitutes a "trade secret". In my view, the representations do not support the finding that the information at issue is a "trade secret" for the purpose of section 17(1).

Furthermore, I am not convinced that the information contained in the other records constitutes "trade secret" information for the purpose of section 17. In my view, these records do not "describe the processes or formulas for the manufacturing of the drug produced by one of the affected parties".

The Ministry and the affected parties also submit that the records contain information which qualifies as "commercial" or "financial" information within the meaning of section 17(1). Furthermore, as this exemption is mandatory, I must determine whether the information is "scientific" or "technical" information within the meaning of that section. 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]

Affected party A takes the position that Record 1 contains "commercial information" for the purpose of this section, and that the information contains commercial strategies. It relies on Order P-68 to support the position that this information is "commercial information". The Ministry also provides brief submissions in support of the position that this information is both financial and commercial information.

**Findings**

Previous orders of this office have determined that information relating to a Formulary submission qualifies as "scientific", "financial" and "commercial" information for the purposes of section 17(1). (See Orders P-68, P-284, and PO-2097.)

As set out above, the records at issue all consist of correspondence between the DPB and others in relation to the applications made to the DPB by the affected parties with respect to the affected parties' products. I find that the records at issue in this appeal contain "commercial information" within the meaning of section 17(1). Furthermore, I find that certain records (including the

reviewer's report, the internal DPB e–mail message, and Record 8) contain information which qualifies as "scientific" information for the purposes of section 17(1). As well, portions of the records (including a portion of Record 3) contain "financial" information for the purpose of that section. As a result, I find that the first part of the section 17(1) test has been satisfied with respect to all of the records remaining at issue.

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

The Ministry and the affected parties submit that the information contained in the records 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 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 be 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***

In its representations, the Ministry identifies that the information in the records was supplied to it by the affected parties. It also takes the position that the information was supplied "in confidence". It states:

> *The Ontario Guidelines for Drug Submission and Evaluation* (published by the Ministry in 2000) states the following: Except for the reasons supporting DQTC decisions, and technical portions of the reports of the DQTC reviewers, **all other drug submission information from the manufacturer will continue to be *held in confidence* by the Ministry**. It should be noted that with respect to these limited exceptions to confidentiality cited above, this information may be released **solely to the pharmaceutical manufacturer making the submissions**.

The Ministry goes on to state:

> Both the pharmaceutical manufacturer and the Ministry held the expectation of confidence. Due to the sensitive proprietary nature of the information involved, it is reasonable to expect that the information would be held in confidence for an indefinite period of time. As previously mentioned, and as documented by the statements in the Ministry's own publication, information of this genre is always treated as confidential by both [the Ministry] and the affected party.

Both affected parties also submit that the information was provided to the Ministry with an expectation of confidentiality.

The appellant does not provide submissions on this issue, other than identifying that the information contained in Records 4 and 9, which is correspondence from the DPB to the Drug Quality and Therapeutics Committee (DQTC) reviewer, is not supplied by a third party, and therefore fails to meet this part of the three-part test.

Records 1, 2, 3 and 8 are correspondence from the affected parties to the Ministry. In my view, based on the representations of the parties and on the contents of the records, I am satisfied that the information contained in these records, and the attachments to them, were supplied by the affected parties to the Ministry. I am also satisfied that they were supplied to the Ministry in confidence for the purpose of section 17.

In addition, I am satisfied that the information in Records 6 and 7 (which is correspondence from the DPB to affected party B), information contained in the drug reviewer's report (Record 5), and the internal e-mail between DPB staff (Record 10) would disclose information supplied to the Ministry in confidence. These records contain references to the specific information provided to the Ministry by affected party B and, in my view, contain information supplied by that party to the Ministry in confidence within the meaning of section 17(1). (See the quotation from the *Public Government for Private People* Report, cited above)

However, Records 4 and 9 are copies of letters sent to a drug reviewer by the DPB requesting a review of affected party B's product. The portions of these records containing the names, addresses and other personal identifiers of the drug reviewers are no longer at issue in this appeal. Of the remaining information contained in these records, other than the information identifying the specific drug, product and manufacturer, I find that these records do not contain information which was "supplied" to the Ministry by the affected parties for the purpose of section 17(1), nor would their release disclose such information. These letters simply request the reviewer's comments, and do not include the actual submission of the affected party. In order to qualify for exemption under section 17(1), the information must have been supplied by the third party to the institution (see Order PO-2097). In my view, the specific drug, product and manufacturer information was supplied to the Ministry by the affected party; however, once this identifying information (including information that "reveals" this information) is severed from Records 4 and 9, the remaining portions of these records do not contain information supplied by affected party B.

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

***Introduction***

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances.

However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus. [Order PO-2020]

***The Ministry's Representations***

The Ministry provided the following representations with respect to the harms issue, in support of its position that the records qualify for exemption under section 17(1).

**Section 17(1)(a)**

The Ministry takes the position that the disclosure of the information would place the affected parties at a competitive disadvantage. It states:

> … The timing of submissions as well as pricing strategies for use in Formulary listings are highly guarded valuable secrets in the pharmaceutical industry. If released, the affected party would be placed at a competitive disadvantage since this information would be public whereas none of its competitor's similar information is public. Such … information would *assist a competitor in bringing a drug similar to [the named drug] onto the market more quickly and easily than would otherwise be the case*.
>
> It is thus submitted that the company's competitive position in the pharmaceutical industry would be prejudiced.

**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 states:

> Reputation is extremely important in the pharmaceutical industry. Since the information contained within the record 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.*
>
> The [Ministry] 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 the significance of 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. *The overall ability of the Ministry 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 states:

> … disclosure of the record[s] … can be reasonably expected to result in undue loss to the affected third party. Although the magnitude of this loss is not quantifiable, there is a real risk of substantial loss.

The Ministry then refers to the decision of former Assistant Commissioner Irwin Glasberg in Order P-1019 in support of its contention that the affected party would suffer undue loss should the information contained in the records be disclosed.

***The submissions of the Affected Parties***

Affected party A makes submissions in support of its view that section 17(1)(a) and (c) apply to the information severed from Record 1. It states:

> If the manufacturer of [the named drug] learned about the [affected party A] information, it would almost certainly use such information to inflict competitive harm on [affected party A]. …
>
> Similarly, if [affected party A] information were disclosed to potential generic competitors, these competitors would obtain an undue advantage because they would be able to use [affected party A] … information to minimize their regulatory costs of entering the market for [this drug].

Affected party A also provided additional confidential representations in support of its position that the harms in section 17(1)(a) and/or (c) would occur.

Affected party B provided brief representations, identifying its concern that disclosure of the records relating to it may cause competitors to interfere with the process, and may create a competitive disadvantage for affected party B.

### *The Appellant's representations*

The appellant has provided substantial representations in support of its position that the Ministry and/or the affected parties have not provided the type of detailed and convincing evidence necessary to support the possible harms referred to in sections 17(1)(a), (b) or (c). The appellant refers to a number of previous orders in support of its view that, in those instances where the section 17(1) claim for similar records was upheld, the representations were detailed and convincing. It contrasts those findings with the representations provided in this appeal.

With respect to Record 1, in addition to the above, the appellant states that because the manufacturer of the named drug is the only company that has received regulatory approval to market that drug, the affected parties do not have a competitive position that can possibly be prejudiced for the purpose of section 17(1)(a).

### *Findings*

In general, I accept 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 the first two parts of the section 17(1) three-part test. Although I agree with the appellant that the representations of the affected parties, in particular affected party B, are sparse and not particularly compelling, the Ministry has provided me with detailed evidence of a reasonable expectation that disclosure of this information would result in harm to the competitive position of the affected parties in what is clearly a very competitive industry. Furthermore, the nature of the information contained in the records themselves provide evidence in support of the application of the harms identified in sections 17(1)(a) and/or (c).

In addition, I specifically reject the appellant's position that, as there is only one company that has received regulatory approval to market the named drug, the affected parties cannot have a competitive position that can be prejudiced. In my view, this factor supports the notion that other companies are interested in establishing a competitive position in the market, and the potential to do so is sufficient for the application of the possible harms in section 17(1)(a) and/or (c).

The principles set out above have assisted me in making the findings set out below.

*Record 1*

Record 1 is a letter from a drug manufacturer to the Drug Programs Branch (DPB) regarding a generic brand of the identified drug. It includes 2 one-page attachments.

Much of the information contained in these three pages has been disclosed to the appellant. The severed portions of information relate to the identity of the drug manufacturer, specified dates, and an item of information relating to the product.

Based on the information at issue, as well as the representations of the Ministry and affected party A, I find that the disclosure of the information remaining at issue in this record could reasonably be expected to result in significant prejudice to the competitive position of affected party A. As all three parts of the section 17(1)(a) test have been satisfied with respect to the information remaining at issue in Record 1, I find that it is exempt from disclosure under that exemption.

*Records 2 and 3*

Records 2 and 3 are letters from a drug manufacturer to the DPB regarding a generic brand of the identified drug. Record 2 contains specific information relating to the progress of the drug manufacturer's application, some details about its history, as well as information regarding the drug manufacturer's position on the product. Record 3 (which includes Record 2, as well as additional financial information, as attachments) also includes information about the application and pricing information. I am satisfied that the disclosure of the information in these records could reasonably be expected to result in significant prejudice to the competitive position of affected party B. As all three parts of the section 17(1)(a) test have been satisfied with respect to Records 2 and 3, I find that they are exempt from disclosure under section 17(1)(a).

*Records 4 and 9*

Records 4 and 9 are correspondence sent from the DPB to the DQTC reviewer requesting the reviewer to undertake a review of the identified product. I have found that, other than the information which reveals the drug, product and manufacturer, these records do not contain information which was "supplied" to the Ministry by the affected parties for the purpose of section 17(1).

With respect to the remaining information, which identifies the specific drug, product and manufacturer, I am satisfied that in the circumstances of this appeal, and due to the nature and confidentiality of this information, the disclosure of this information could reasonably be expected to result in significant prejudice to the competitive position of affected party B, and is exempt from disclosure under section 17(1)(a).

*Record 5*

Record 5 is the DQTC reviewer's report of the drug manufacturer's product. This report includes a detailed technical and scientific analysis of the product based on a number of criteria. In my view, the disclosure of this information could reasonably be expected to significantly prejudice affected party B's competitive position, and it is exempt from disclosure under section 17(1)(a).

*Record 6*

Record 6 is a brief letter from the Ministry to the affected party which identifies the status of the process. Due to the status of the application and the nature of the information contained in this

record, I am satisfied that its disclosure could reasonably be expected to prejudice significantly the competitive position of affected party B. Accordingly, I find Record 6 exempt from disclosure under section 17(1)(a).

*Record 7*

Record 7 is a letter from the Ministry to the affected party setting out the comments made by the DQTC reviewer on the specific information contained in the affected party's application. This letter makes detailed references to a number of aspects of the drug manufacturer's application. I find that the disclosure of this document could reasonably be expected to prejudice significantly the competitive position of affected party B. Accordingly, I find Record 7 exempt from disclosure under section 17(1)(a).

*Record 8*

Record 8 is a letter from the drug manufacturer to the DPB regarding its product. It contains very detailed and specific information about the identified drug in response to correspondence received from the Ministry. Based on my review of this record, including the detailed nature of the information contained in it, I am satisfied that its disclosure could reasonably be expected to prejudice significantly the competitive position of affected party B. Accordingly, I find Record 8 exempt from disclosure under section 17(1)(a).

*Record 10*

Record 10 is an internal DPB e-mail, in which a staff member describes and comments on affected party B's application and the reviewer's comments. I find that the disclosure of the detailed information contained in this record could reasonably be expected to result in significant prejudice to the competitive position of affected party B. Accordingly, I find Record 10 exempt from disclosure under section 17(1)(a).

***Severances***

Previous orders of this office have also reviewed records relating to the process of making applications or submissions to the DPB concerning identified products. In a number of those orders, the decision-makers decided that small portions of information, and certain standard-type letters could be disclosed. (See, for example, Orders PO-2097 and PO-2262.)

In my view, different considerations apply in the circumstances of this appeal. A number of the previous orders deal with products which were listed on the drug formulary, and for which certain information had been made public. In this appeal, however, as identified by the appellant, no information regarding the applications and/or products is public. Accordingly, different considerations apply with respect to the possible severing of the records, and I find that, other than the portions of Records 4 and 9 which I have found were not supplied by the affected parties to the Ministry for the purpose of section 17(1), no other portions of the records can be severed and disclosed in the circumstances of this appeal.

In summary, I find that Records 2, 3, 5, 6, 7, 8 and 10 qualify for exemption under section 17(1)(a). I also find that the remaining portions of Record 1, and the information that reveals the identity of the drug, product and drug manufacturer contained in Records 4 and 9, qualify for exemption under that section.

Except for information which reveals the identity of the drug, product and drug manufacturer contained in Records 4 and 9, I have found that the portions of these two records remaining at issue do not qualify for exemption 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 the possible application of those exemptions to the remaining portions of Records 4 and 9.

**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 the remaining portions of Records 4 and 9. 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)

For sections 18(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

***The Ministry's Representations***

The Ministry's submissions on the application of sections 18(1)(c) or (d) refer generally to the information contained in all of the records, many of which I have found to be exempt under section 17(1). The Ministry's representations also identify the economic importance of the drug review process. It states:

> … the economic interests of the [Ministry] are to ensure that the population of Ontario receives optimal care and that the Ministry gets good value for its money for those drugs which the [Ministry] pays for under the various pieces of legislation cited in the request. It is also in the financial interest of the Government of Ontario to ensure that taxpayers' money is spent wisely and that consumers obtain the best possible products and/or services for government expenditures.
>
> The DQTC works at arms length from the government and commercial interests. It is essential to have the best clinical and pharmacoeconomic advice available to the [Ministry] when it is faced with difficult and contentious listing decisions and questions of cost effectiveness, public safety and quality care. This advice is critical to the [Ministry] making decisions about drug listings which, among other matters, meet pharmacoeconomic criteria.

After summarizing the methods by which drug products may be reviewed, the Ministry states:

> In summary, the [Ministry] and the DQTC rely heavily on the independent, expert advice of the reviewers to administer these drug programs in a fiscally accountable and patient-centered manner. Should reviewers decline to participate in this program… it is the view of those in both the [Ministry] and outside that these programs could not continue to operate in a clinically and fiscally responsible manner.

The Ministry goes on to identify the concerns it has in the event that reviewers no longer participate in the process; however, the Ministry also specifically refers to its concern that the disclosure of the *identities* of the reviewers will result in the harms identified. As set out above, the identities of the reviewers is not an issue in this appeal.

***Findings***

As set out above, the only records remaining at issue are portions of Records 4 and 9, which are the letters sent to the drug reviewers engaged by the Ministry to provide their views on the drug product. The identities of the reviewers, and information which reveals the identity of the drug, product and drug manufacturer are not at issue. In my view, the remaining portions of Records 4 and 9 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 remaining portions of these records simply set out (without identifying information) the request to the reviewer to review the drug product, and very general terms under which this review is to take place. In my view, sections

18(1)(c) an/or (d) do not apply to this general information remaining at issue. As a result, I will order the disclosure of the remaining portions of Records 4 and 9.

## ORDER:

1. I uphold the Ministry's decision to refuse access under sections 17(1)(a) to Records 2, 3, 5, 6, 7, 8 and 10, the remaining portions of Record 1, and information which reveals the identity of the drug, product and drug manufacturer contained in Records 4 and 9.

2. I order the Ministry to provide the appellant with copies of those portions of Records 4 and 9 remaining at issue which I have found do not qualify for exemption under sections 17(1) or 18(1) of the *Act* by **June 4, 2004** but not before **May 31, 2004**. For clarity, I have highlighted on the copy of these two records which I am providing to the Ministry's Freedom of Information Co-ordinator along with this order, those portions of Records 4 and 9 which are **not** to be disclosed.

3. In order to verify compliance with the terms of Order Provision 2, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant.

Original signed by: April 30, 2004
Frank DeVries
Adjudicator