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

ORDER PO-2780

Appeal PA07-263

Ministry of Health and Long-Term Care

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BACKGROUND

This appeal relates to payments made by the Ministry of Health (the Ministry) to community laboratories for services that are insured under the Ontario Health Insurance Plan (OHIP). The maximum amounts to be paid in a fiscal year by the Ministry for insured laboratory services are prescribed in the *Health Insurance Act* (*HIA*).

The Ministry provided the following background information in their representations:

> Community laboratory providers are facilities that at the request of a health professional, carry out tests on a specimen that are helpful to the health professional in diagnosing or treating a patient. These tests are billable to the Ontario Health Insurance Plan ("OHIP"). In 1993 the Ministry, recognizing that it needed to allocate a finite amount of health care dollars effectively, introduced a ceiling ("industry cap") on the total amount payable by OHIP for community lab services carried out in a particular fiscal year.
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> Laboratories were necessarily engaged in battles for market share because each laboratory's share of the total payments is detrimentally affected by increases in billings submitted by other laboratories. Private medical laboratories cannot compete for market share by reducing prices because the fees payable for insured services are fixed by regulation.
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> In 1996 the Ministry and the OAML [Ontario Association of Medical Laboratories] engaged in consultations to address the problem of over-utilization of laboratory services and to create fairness in funding distribution on a geographic basis. The corporate cap payment model arose out of these consultations. Under the corporate cap model, the Ministry only pays each individual laboratory up to its threshold amount ("corporate cap"). A corporate cap is the maximum total amount that a particular lab could be paid by OHIP in a fiscal year. This means that the amount a lab bills over its corporate cap is not funded by OHIP and is therefore absorbed by the laboratory.
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> The Ministry submits that the corporate cap has had the desired effect. The growth of medical laboratory testing is under control, funding of laboratories has stabilized and the incentive for excessive utilization of laboratory services is removed. The positive effects are evidenced by a slowed growth in laboratory testing since the inception of the corporate cap system.

The corporate cap model is set out in Regulation 2/98 (reproduced in Appendix A to this order) which amended Regulation 552. Sections 22.1 through to 22.11 are relevant. These sections prescribe the industry-wide cap and set out the formula for the calculation of the corporate cap. The formula initially requires the calculation of the base year amount which generally represents the laboratories' share of the total amount payable by OHIP in the 1995/1996 fiscal year. Once the base year amount is calculated, the corporate cap amount can be calculated having regard to a number of variables set out in the regulation.

As a practical matter, and as a general rule, if laboratories work above the corporate cap, they are offering a discount for their laboratory services because they will be subject to a claw back by the Ministry of the amounts billed in excess of the corporate cap. Laboratories that work below the corporate cap will face a reduction in the base year amount which will then result in a reduction of their corporate cap amount.

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 relating to the funding of medical laboratories.

Subsequently, the requester and the Ministry had discussions regarding the scope of the request which resulted in the narrowing of the request by the requester. In response, the Ministry issued a decision letter in which it described the narrowed request as follows:

1. The 1993 Memorandum of Agreement between the Ministry of Health and the Ontario Association of Medical Laboratories (OAML) established a $12 million dollar fund to provide grants to the community laboratories. The money was to be provided by the Ministry and administered by the OAML. It was to be used for the restructuring of the industry. It was renewed in agreements between the MOH and the OAML in 1996 and 1998. Could you provide information on what projects these funds were spent on and who the recipients were? I am fairly confident that the OAML received these funds and it seems likely that the Ministry would have a record of how the OAML spent them.

2. I would like the annual gross payments to individual corporate laboratory community providers from 1972 to present. These amounts would exceed the $25,000 amount for notification of awards of contracts under the mandatory post contract award notification policy.

3. I would like a copy of the Coopers and Lybrand study done in 1997, possibly early 1998, which dealt with options for restructuring the laboratory industry and was commissioned by the Ontario Laboratory Services Restructuring Secretariat headed by Dawn Ogram. This is not the Planning Objectives report mentioned in your reply.

4. There was a paper written in 1987 outlining policy options for the Ministry of Health on Specimen Collection Centre licensing that was ordered released in ruling P-884 of the Information and Privacy Commissioner. I would like a copy of that report.

5. I would like to purchase a copy of the Laboratory Review Background paper 'System' which you have found and indicated would cost $36.80. How do I proceed with this?

The Ministry also stated that a search had been conducted in the Laboratories Branch and four records were located that were found to be responsive to the request. Access was granted in full to the records that were responsive to parts 1 and 5 of the request. Access was denied in full to the record responsive to part 2 of the request on the basis that it was exempt pursuant to sections 17(1)(a) and (b) of the *Act*. Access was denied in full to the record responsive to part 3 of the request on the basis that it was exempt pursuant to sections 18(1)(d) and (f) of the *Act*. With respect to part 4 of the request, the Ministry stated that it was unable to locate the responsive record as it was destroyed in accordance with the applicable record retention schedule and was, therefore, no longer available. The Ministry also stated that it required the payment of a fee in the amount of $130.63 before it would disclose the records.

The requester, now the appellant, paid the fee and received the records that the Ministry had decided to disclose, but he appealed the decision to withhold the remaining records.

During mediation, the Ministry issued a revised decision letter. In this letter, the Ministry indicated that while it continued to deny access in full to the record responsive to part 2 under section 17(1)(a) of the *Act*, it was also denying access to this record pursuant to section 18(1)(d) of the *Act*. The Ministry also stated that it had decided to grant access in part to the record responsive to part 3, but continued to deny access to the remaining portions of this record under sections 18(1)(d) and (f) of the *Act*.

As the claim to the application of section 18(1)(d) to the record responsive to part 2 was raised beyond the 35 day time period specified in the Confirmation of Appeal for claiming additional exemptions, the appellant advised that he wished to add the late raising of the discretionary exemption as an issue in this appeal. The appellant also took issue with the Ministry's decision as it relates to part 4 of the request and raised section 23 (public interest override). Therefore, reasonable search and section 23 have been added as issues in this appeal. No further mediation was possible and this file was moved to the inquiry stage of the appeal process.

The Mediator's Report identified the records at issue at the conclusion of mediation as the records responsive to parts 2, 3 and 4 of the request. In the cover letter that accompanied the Mediator's Report, the parties were asked to provide the mediator with their comments in the event that they believed that the report contained any errors or omissions. Although the Ministry commented on the report, the appellant did not do so.

I began my inquiry into this appeal by issuing a Notice of Inquiry to the Ministry inviting it to submit representations on the issues set out in the notice and on any other issues that it decides are relevant. I began the inquiry on the basis that the records responsive to part 1 of the request were not at issue. I received representations from the Ministry. In its representations, the Ministry stated that it intended to issue a second revised decision letter to the appellant

disclosing additional portions of the record responsive to part 3 and confirming its claim that sections 18(1)(d) and (f) apply to exempt the remaining portions.

Also in its representations, with respect to part 4 of the request, the Ministry stated that it found two records that were responsive. The Ministry stated that it intended to grant access in full to the record entitled "Specimen Collection Centre Licensing Policy". It also intended to grant access in part to the record entitled "Revisions to Specimen Collection Centre Licensing Policy". The Ministry claimed that the severed portions of the record entitled "Revisions to Specimen Collection Centre Licensing Policy" were exempt pursuant to section 19 (solicitor-client privilege).

I then issued a Notice of Inquiry to the appellant inviting him to submit representations on the issues set out in the notice and in response to those of the Ministry. A complete copy of the Ministry's representations was shared with the appellant.

The Ministry then issued its revised decision letter granting access to portions of the record responsive to part 3 as follows: pages 2-22, 30-46, 77, Appendix I (1, 2, 3) and Appendix II (1, 2, 3, 4) were disclosed in full; page 1 was disclosed in part; and, pages 23-29 and 47-76 were withheld in full.

Subsequently, the appellant submitted representations in which he stated that he was satisfied with the records disclosed relating to part 4 of the request and, therefore, this part of the request, and the issue of the reasonable search for these records, are no longer at issue in this appeal. However, the appellant also indicated that, contrary to what was set out in the Mediator's Report and in the Notice of Inquiry, he was not satisfied with the disclosure of the records responsive to part 1 of the request. He stated:

> The Ministry indicates that access was granted in full to the information requested. For the record I would like to note that the information provided is partial. I have had discussions with representatives from the Freedom of Information office about obtaining the missing information but I would like to note that this request is still outstanding.

This raises the question of whether the appellant was entitled to raise issues related to part 1 of the request at the adjudication stage. I will consider this below.

A complete copy of the appellant's representations was shared with the Ministry and it was invited to submit representations in reply. I then issued a Notice of Inquiry to the 15 laboratories referred to in the record responsive to part 2 of the request and invited them to submit representations.

The Ministry submitted reply representations in which it addressed the appellant's comments regarding the status of the records responsive to part 1 of the request. The Ministry stated:

> The Ministry respectfully submits that, as indicated in the Notice of Inquiry, Record 1 is no longer at issue in this appeal. The Ministry granted access in full to Record 1 in April of 2007.

Representations were then received from eight of the 15 affected parties. I decided to invite the appellant to submit sur-reply representations with respect to the Ministry's reply and to submit second representations with respect to the affected parties' representations. The affected parties' representations and the Ministry's reply representations were shared with the appellant. While copies of the Ministry representations and the representations of 7 of the affected parties were shared in their entirety, the representations of one of the affected parties were withheld due to confidentiality reasons. To the extent that the representations of this affected party differ in any way from the representations of the other affected parties, I have not referred to them in the body of this order. However, my findings with respect to the affected parties and the exemptions claimed apply equally to them all. In that regard, I note that the representations provided on behalf of the 7 affected parties were essentially the same. Reference to the representations of the affected parties is meant to include all seven.

The appellant submitted sur-reply and second representations. In his representations, the appellant disputes the Ministry's claim that information responsive to part 1 of the request had been provided and that part 1 of the request was no longer at issue. He states:

> I believe that the Ministry is mistaken when they say they have supplied all the information on the fund and would still like to have that information. It is money paid from the public treasury into a fund so I think at least there would [be] a yearly audited statement on the fund as well as documents on payments into the fund and disbursements.

As the appellant's representations regarding part 1 of the request raise issues relating to the scope of the request and the responsiveness of records, I have added those as issues in this appeal.

I decided that the appellant's representations on the application of section 17 in relation to part 2 of the request raised issues to which the affected parties should be invited to reply and, therefore, sent those representations, in their entirety, to the affected parties. The affected parties submitted reply representations.

Following my review of the representations, I wrote to the Ministry and asked a number of specific questions. I received a response to those questions and decided that no further representations were required. However, the appellant received documentation directly from the Ministry that he decided was relevant to this inquiry and consequently he submitted additional representations along with copies of this documentation.

RECORDS:

The records that have been denied in whole, or in part, by the Ministry and that remain at issue are as follows:

- Statement of the gross payments to individual community laboratory providers from 1972 to the date of the request (responsive to part 2 of the request and described in the discussion that follows as Record 2); and

- Portions of page 1 and all of pages 23-29 and 47-76 of the Coopers and Lybrand study prepared in 1997 (responsive to part 3 of the request and described in the discussion that follows as Record 3)

DISCUSSION:

PRELIMINARY ISSUES - LATE RAISING OF DISCRETIONARY EXEMPTION

As noted above, the Ministry claimed the application of the discretionary exemption in section 18(1)(d) to Record 2 during mediation and I have made the late raising of this discretionary exemption an issue in this appeal.

The time limit and procedures for the raising of discretionary exemption claims are set out in Rule 11 of the *IPC Code of Procedure*. The objective of the policy is to maintain the integrity of the appeals process by ensuring identification of discretionary exemptions early in the process. Rule 11 reads:

> 11.01 In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.
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> 11.02 An institution does not have an additional 35-day period within which to make a new discretionary exemption claim after it makes an access decision arising from a Deemed Refusal Appeal.

Section 18(1)(d) is a discretionary exemption that must be raised within 35 days of the issuance of the Confirmation of Appeal by this office. The policy is reflected in the Confirmation of Appeal, a copy of which was sent to the Ministry. It reads:

> Please be advised that, if your institution wishes to claim discretionary exemptions in addition to those set out in your decision letter, you are permitted to do so by August 28, 2007. Should your institution wish to claim these exemptions, you will be required to issue a new decision letter to the appellant with a copy to the Mediator in the form prescribed by the IPC Practices, Number 1.

This office has the power to control the manner in which the inquiry process is undertaken [Orders P-345 and P-537]. This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*, (December 21, 1995) Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.). [See also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.)] Notwithstanding this policy, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

I am satisfied that the Ministry should be entitled to claim the application of section 18(1)(d) to Record 2 despite the fact that it was only raised at the mediation stage of the appeal process. Although I sympathize with the position of the appellant in that he is entitled to receive notice of the claim to any exemptions within the time period set out in the *IPC Code of Procedure*, I note that the appellant had not yet submitted representations on this issue and there is insufficient before me to support a finding that he has been prejudiced in any way by this late raising. I also note that the Ministry had previously claimed, within the prescribed time limit for doing so, the application of section 18(1)(d) to Record 3, and as a result, the potential application of this section was not a new issue in the appeal. The appellant was therefore not taken by surprise by the section 18(1)(d) claim as part of the appeal. I have also taken into account the fact that there have been no delays in this appeal as a consequence of the late raising. For these reasons, I have decided to allow the late raising of the discretionary exemption and I will consider the parties' arguments on the application of this exemption below.

SCOPE OF REQUEST/RESPONSIVENESS OF RECORDS

With respect to part 1 of the request, the appellant states that he believes that additional records must exist that are responsive to the request. The Ministry's position is that it has provided all responsive records. Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
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> . . . . .
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> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Previous orders of this office have found that institutions must give a broad and liberal interpretation to the scope of the request. [See Order P-880, MO-1406, P-134, PO-2175]. In Order P-880 former Adjudicator Anita Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a *fundamental first step* in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. *While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request*.
>
> [T]he purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the Act to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant. [emphasis added]

It is worth repeating here that part 1 of the request is for access to:

> The 1993 Memorandum of Agreement between the Ministry of Health and the Ontario Association of Medical Laboratories (OAML) established a $12 million dollar fund to provide grants to the community laboratories. The money was to be provided by the Ministry and administered by the OAML. It was to be used for the restructuring of the industry. It was renewed in agreements between the MOH and the OAML in 1996 and 1998. *Could you provide information on what projects these funds were spent on and who the recipients were?* I am fairly confident that the OAML received these funds and it seems likely that the Ministry would have a record of how the OAML spent them. [Emphasis added]

The request was further clarified by letter from the appellant to the Ministry dated May 15, 2007 in which the appellant stated that he sought information relating to the amounts paid into the fund, among other things.

The Ministry responded to the appellant's position by letter dated June 27, 2007 with enclosures. The enclosed record was a two part document entitled "Laboratory Restructuring Fund Disbursement Summary with Details" and "Small Research Grants Awarded (2004-2006)". The first part sets out the details regarding who received monies from the fund, a description of the services, the amount paid and the period of time in which the payments were made. It covers a period of time from 1997 to 2004. The second part details the payments made for research and the time when the payments were made. The Ministry provided no information regarding disbursements made between 1993 and 1997 and it provided no information regarding the payments made into the fund.

The appellant subsequently wrote to the Ministry on two separate occasions repeating his request for access to information relating to the amounts paid into the fund.

As noted above, the Mediator's Report included a comment on part 1 of the request. The Mediator stated that the position following mediation was that the Ministry had provided all documentation in response to part 1 of the request and that part 1 was no longer at issue. The report was provided to both parties and they were given an opportunity to comment. Neither the appellant nor the Ministry made any comments regarding part 1 of the request. Following the delivery of the Notice of Inquiry to the appellant, he submitted representations to this office in which, for the first time since the close of mediation, he stated that he had not received all the records responsive to part 1 of the request.

In its reply representations, the Ministry responded to this claim by stating that it had responded to part 1 and it was no longer at issue. The appellant, who was invited to submit sur-reply, stated that he was not satisfied with the information and records previously disclosed. He explained:

> My initial request was for recipients of money paid out of the Laboratory Restructuring Fund which was established in 1993 by agreement between the MOH and the OAML. The Ministry supplied a list of disbursements from 1997 to the present and then further details on these expenditures. The figures provided were not consistent with my understandings from other sources and I did feel they were complete. The 1993 MOH - OAML agreement committed the government to paying twelve million dollars into the fund, the Ministry had detailed disbursements of $3,663,187.99 and I understood that as of 2000 the OAML still held 12 million dollars in the fund. I have consistently raised these issues with the Ministry and during the mediation process. In the first part of the process I made a further written request to the Ministry on May 15, 2007 which included a request for the amount of money paid in the fund - letter attached - and I sent a note on July 9 reiterating my request - also attached. Further, I had made a request for the

> more current agreements between the MOH and the OAML and was hoping that they would provide the specifics needed to make sense of these discrepancies.
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> In late November 2007 I received some documents from the Ministry on their contractual relationship with the OAML and responded promptly refining my request for more information on the Fund: information which I am now sure had not been provided. This request was detailed in a letter to Ms. Medhurst on November 29, 2007 - also attached. The new documents showed that as of November 28, 1996 there was $2,583,154.71 remaining in the fund implying that about 9 million had been spent prior to this date. This document is attached.
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> Despite the fact that the Ministry says the case is closed and full access has been provided it has not supplied the information asked for in my initial request. *No information has been provided on how the money paid into the fund between 1993 and 1996 was spent. All the information provided is for dates after 1997.*
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> *I also have not received any information on how much has been paid into the fund.* And the post 1996 documents make clear that more money was paid into the fund. No information has been provided on how much is still in the fund and how any interest earned by the fund is used. I believe that there was twelve million dollars in the fund in 2000 so the yearly interest would be significant. …
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> I believe the Ministry is mistaken when they say they have supplied all the information on the fund and would still like to have that information. It is money paid from the public treasury into a fund so I think at least there would be a yearly audited statement on the fund as well as documents on payments into the fund and disbursements. [Emphasis added]

Findings and Analysis

It is unfortunate that the appellant did not clarify his position regarding part 1 of the request following the delivery of the Mediator's Report as that may have avoided some confusion on the part of the Ministry as to the status of this part of the request. However, in my view, the appellant's correspondence delivered to the Ministry following the issuance of the Mediator's Report, and subsequently shared with this office during the exchange of representations process, did clarify the appellant's position in that regard. This correspondence supports the appellant's position that he had discussions with the Ministry, independent of the discussions that were taking place with the mediator, regarding part 1 of the request. In these discussions, he advised the Ministry that he was not satisfied with the record disclosed pursuant to part 1 of the request at or near the close of mediation. As noted, a copy of this correspondence was only provided to this office during the inquiry although it appears to have been sent to the Ministry shortly following the issuance of the Mediator's Report.

Applying the approach taken by former Adjudicator Fineberg in Order P-880, noted above, I find that, in order to be responsive to part 1 of the request, information contained in the records must be reasonably related to:

a) The disbursements made by the Laboratory Restructuring Fund between the date of its creation and the date of the request.

b) The amounts paid into the fund between the date of its creation and the date of the request.

Having carefully reviewed the representations, the documentation attached and information provided to the appellant by the Ministry, I am satisfied that despite the comments made in the Mediator's Report, the Ministry understood or should have understood, at the close of mediation that part 1 of the request was still at issue. I am not satisfied that the Ministry has provided the appellant with all of the information that may be in its possession and would be responsive to part 1 of the request. The itemized disbursements provided to the appellant do not provide any information in relation to payments that were made between 1993 and 1997. Nor does the record offer any explanation as to why information relating to disbursements during that time period has been omitted. If no payments had been made from the fund between the signing of the 1993 agreement and 1997, I would have expected the Ministry to provide the appellant with that information. I also note that the information provided to the appellant does not include any information relating to the total payments made into the fund for the period from 1993 to the date of the request. I will order that the Ministry conduct a further search for records responsive to this part of the request in my order provisions below, and make a decision regarding access to any responsive records that it finds.

THIRD PARTY INFORMATION

Record 2 consists of a chart setting out annual payments by the Ministry to community labs for the years 1999/2000 to 2005/2006. The Ministry claims that Record 2 is exempt pursuant to sections 17(1)(a) of the *Act*. The affected parties claim that in addition to section 17(1)(a), section 17(1)(c) also applies to exempt Record 2 in its entirety.

Section 17(1) states, in part:

> 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;

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

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third 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 institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The Ministry and the affected parties state that the payments set out in Record 2 qualify as commercial and financial information. The appellant's representations do not directly address this part of the test.

I am satisfied that the information at issue in Record 2, which is information revealing the gross payments made annually to laboratories by the Ministry between 1999 and 2006, is commercial and financial information. It relates to the selling of services by the laboratories and the purchasing of those services by the Ministry. As that is sufficient to satisfy part 1 of the test for the application of section 17(1), I now turn to consider whether part 2 has been satisfied.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party. [Orders PO-2020, PO-2043]

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. [Orders PO-2018, MO-1706]

As the amounts set out in Record 2 relate to payments made by the Ministry to the affected parties, in my view, it cannot reasonably be argued that this information was supplied by the affected parties and on that basis I find that they are not. Therefore, the issue that I need to determine is whether the disclosure of the information in Record 2 would reveal or permit the drawing of accurate inferences with respect to information supplied by the laboratories.

The Ministry argues that the request for the payments made by the Ministry as revealed in Record 2 is in effect a request for the corporate cap amount applicable to each laboratory. It explains that because a corporate cap amount is derived from a laboratory's "base year amount," which is derived from the gross billings, it is inextricably linked and the disclosure of the corporate cap amount would, therefore, reveal or permit the drawing of accurate inferences with respect to information that was supplied, namely the billings. The Ministry's argument is therefore premised on two assumptions; that the amounts paid equal the corporate cap and that the gross billings, which it claims are supplied, will be revealed by the disclosure of the corporate cap.

The affected parties argue that the disclosure would reveal or permit the drawing of accurate inferences with respect to both the corporate cap and the gross billings of the laboratories. The affected parties' argument is premised on the fact that both the corporate cap and the gross billings are supplied.

In its initial representations, the Ministry states:

> Record 2 contains information revealing annual payments made by the Ministry to individual community labs from 1999 to the 2006, and as such is responsive to the portion of the request for a statement of the gross payments to individual community laboratory providers from 1972 to the date of the request.
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> The "gross payments" requested would represent the payments made by the Ministry to the lab based on the "gross billings" the lab submits to OHIP. However, as described above, the Ministry only pays each individual laboratory up to its "corporate cap", the maximum total amount that a particular lab could be paid by OHIP in a fiscal year, - even if the lab has actually submitted billings to OHIP in excess of its corporate cap amount. *Thus, the request for the gross payments made to each individual lab is in effect a request for the corporate cap amount of each lab.*
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> …
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> The Ministry submits that the "supplied" requirement under section 17 of the Act has been fulfilled with respect to the corporate cap amounts provided to the Ministry by the affected parties.
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> Information may qualify as "supplied" if its disclosure would reveal or permit the drawing of accurate inferences with respect to information actually supplied by a third party [Orders PO-2020, PO-2043]. Community laboratories bill OHIP for insured services that they perform; thus, by submitting all billings to the Ministry, community labs supply the Ministry with their respective total gross billings amounts. The Ministry used the gross billing amounts supplied by labs for fiscal year 1995/1996 to calculate each lab's "base year amount". The base year amount represents each lab's share of the total amount payable by OHIP for community laboratory services in fiscal year 1995/1996.
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> For each fiscal year since, the corporate cap amount of each community laboratory is based on the lab's base year amount and adjusted in accordance with OAML/Ministry Funding Agreements for that fiscal year and preceding fiscal years and Regulation 552 under the *Health Insurance Act*. In other words, a laboratory's corporate cap is directly correlated to and based on the gross billings that the lab submitted to OHIP.
>
> Because a corporate cap is derived directly from a laboratory's base year amount, which is derived from the lab's gross billings supplied to the Ministry, the information is inextricably linked. The disclosure of corporate cap information would therefore reveal or permit the drawing of accurate inferences with respect to information supplied by the laboratories to the Ministry, namely billings made to OHIP.

Although eight affected parties submitted representations, their arguments are in essence the same. As noted above, they argue that the information in Record 2 was supplied because its disclosure would reveal or permit the drawing of accurate inferences with respect to information actually supplied by the laboratories, namely the corporate cap assigned to them and their gross billings, which, they argue, is commercially confidential information.

The appellant argues that the information requested in Record 2 does not meet the requirement that the information be supplied. He argues that the information that he is requesting is mutually generated because it reflects payments made pursuant to a negotiated contract for services. He states that there is a contract between the OAML, on behalf of the major laboratories, for the supply of laboratory services in exchange for payment in accordance with the corporate cap scheme reflected in Regulation 552. He states that regardless of the complexity of the contractual arrangement, the essence remains the same and that this payment represents a payment for services rendered pursuant to a contract.

The Ministry submitted reply representations in which it disputes the existence of a negotiated contract. The Ministry states:

> Further, in response to the Appellant's submission that this information is mutually generated in the course of contract negotiations, the Ministry submits that although it negotiates an overall industry wide funding agreement with the [OAML] for the provision of laboratory services, no agreements or contracts are negotiated between the Ministry and individual laboratory corporations with respect to either corporate cap amounts or government payments to individual laboratory corporations.

Findings and Analysis

As noted, the issue remaining for me to determine is whether the disclosure of Record 2 would reveal or permit the drawing of accurate inferences with respect to information supplied by the laboratories. In my view, there is insufficient evidence before me to support such a finding.

I have found below that the disclosure of the gross payment information in Record 2 would not reveal or permit the drawing of accurate inferences about the corporate cap amounts or the gross billings of the affected parties. I have also found that the corporate cap amount and the gross billings do not meet the "supplied" criteria. Therefore, even if it could be argued that the disclosure of Record 2 would reveal either the corporate cap amount or the gross billings amounts, this information is not supplied and the requirements for the application of section 17(1) set out in part 2 of the test have not been met.

What is revealed by the disclosure of Record 2?

I will turn first to consider whether the disclosure of Record 2 will reveal or permit the drawing of accurate inferences about the corporate cap amount or the gross billings amounts as is suggested by the Ministry and the affected parties. In my view, the evidence before me supports a finding that while the corporate cap amounts and the amounts billed and paid *may* be equivalent, they generally are not. Therefore, on their face the disclosure of the amounts billed in Record 2 will not reveal the corporate cap amount or the amounts billed. Further, in my view, the evidence does not support a finding that the disclosure of the information in Record 2 will permit the drawing of accurate inferences with respect to this information.

The Ministry's representations on this issue are at times unclear and contradictory. At one point in its initial representations, it acknowledges that the "gross billing information is not evident from corporate cap amounts". It states:

> The corporate cap amount is the maximum total amount that an individual laboratory corporation could be paid by OHIP in any fiscal year, despite the fact that, as stated above, *individual laboratory corporations' gross billings are generally well above the corporate cap amount*. [Emphasis added.]

Elsewhere, it explains that the amounts paid under the Ontario Health Insurance Plan and set out in Record 2 *are not equal to the amounts billed by the laboratories*. I conclude from this that the gross billings are not equal to the corporate cap amounts and the amounts paid (contained in Record 2) are not equal to the amounts billed. I also conclude from this that the amounts billed annually and the amounts paid annually are not always equivalent to the corporate cap amount.

This finding is consistent with my reading of the regulations which contemplates that laboratories might submit billings that are above or below the corporate cap amount and the laboratories might therefore be paid in amounts that are above or below the corporate cap. Therefore, in any given year, the annual amounts relating to billings, payments and corporate cap may be different. On that basis, I find that the amounts paid to the laboratories do not necessarily reveal the amounts billed or the corporate cap amounts.

Having found that there is no direct correlation between the amounts paid to the laboratories and the amounts billed or the corporate cap amount, the issue remains whether the disclosure of Record 2 would permit the drawing of accurate inferences about the corporate cap amount or the gross billings. The affected parties argue that the disclosure of the information in Record 2, which is "based on annual billings submitted by [the labs]" and is used by the Ministry to calculate the corporate cap amounts would reveal or permit the drawing of accurate inferences with respect to the annual billings amounts or the corporate cap however, they do not explain how that information might be revealed by the disclosure of information in Record 2.

In my view, the disclosure of Record 2 will not automatically reveal the corporate cap amount or the gross billings amount, even when combined with publicly available information about the corporate cap scheme set out in the regulations or any other information. It is not possible to accurately calculate the gross billings or the corporate cap amount with the limited amount of information contained in Record 2. As noted above, the calculation of the corporate cap amount is made in accordance with a formula described in sections 22.1 to 22.11 of the regulation. The formula requires the inclusion of a number of different variables. For example, the amount of the cap is calculated using the formula set out in section 22.3 which is based in part on the laboratory's "base year amount", a term defined in section 22.5. Section 22.5 also sets out a formula for the calculation of the "base year amount." However, the "base year amount" for each laboratory can be varied up or down if either of sections 22.6, 22.7 and 22.8 apply. In addition, section 22.10 sets out how the base year amount might be varied in the event of a merger or amalgamation of a laboratory. Therefore, the "base year amount' is subject to a number of variables that make it impossible to determine the actual billings without further information.

In view of the complexities of the formula, the variables that might be attributed to the circumstances of each individual laboratory, including whether or not they are licensed to perform various services, and the limited amount of information contained in Record 2, in my view there is no reasonable expectation that the disclosure of the gross payments to the laboratories set out in Record 2 will reveal or permit the drawing of accurate inferences with respect to the gross billings or the corporate cap amounts for each individual laboratory.

Do the corporate cap amounts and the gross billings qualify as having been supplied?

More importantly, in addition to finding that the disclosure of this information would not reveal the corporate cap or gross billings amount attributable to the individual laboratories, I also find that the corporate cap amounts and the gross billings are not "supplied" by the laboratories to the Ministry.

As discussed, the corporate cap amounts are calculated pursuant to a complex formula that is set out in Regulation 552. It is not information that is "supplied" by the affected parties. In my view, it is analogous to the surcharge amounts that were at issue in Order P-373 (upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)) where former Assistant Commissioner Tom Mitchinson found that the surcharge amounts levied against employers that do not maintain safe and healthy work environments, or who contravene regulations, which are based on a formula well known in the industry, were not supplied.

Nor do I accept that the gross billings constitute information that is supplied. In the circumstances here, the gross billings are submitted pursuant to a simple and implied contractual agreement between the laboratories and the Ministry. This agreement provides that if insured laboratory services are provided by licensed laboratories, then the laboratory will be paid by the Ministry for those services, upon the production of an invoice or statement of amounts billed, in

accordance with the regulations. I agree with the representations of the appellant that the gross billing amounts are provided by the laboratories to the Ministry pursuant to a contract for services, albeit an implied or unwritten contract. Regardless of the existence of a written contract, there is clearly an agreement, supported by the Regulations, that the affected parties will provide services and, on providing billing information, will be duly compensated. In my view, the affected parties, by submitting billing information in order to be paid pursuant to their agreement with the Ministry, are not "supplying" this information.

There are two exceptions to the general rule about negotiated terms of a contract which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above)].

Although the parties have made no representations on the application of the exceptions to the general rule about negotiated contracts, I have reviewed the evidence before me and I find that there is insufficient evidence to support a finding that the exceptions apply.

Therefore, even if the disclosure of the information in Record 2 would reveal or permit the drawing of accurate inferences regarding the corporate cap amount or gross billings for individual laboratories, the corporate cap and gross billings amounts are not supplied by the laboratories and, therefore, would do not meet part 2 of the test for the application of section 17(1).

I am therefore satisfied that part 2 of the test set out in section 17(1) has not been met.

In confidence

Although not necessary to do so, in the interests of completeness, I now turn to consider the Ministry and affected parties' arguments that the disclosure will reveal information that was supplied in confidence. In order to satisfy the "in confidence" component of part two of the test established by section 17(1), the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;

- 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;

- not otherwise disclosed or available from sources to which the public has access;

- prepared for a purpose that would not entail disclosure [Order PO-2043].

With respect to the requirement that the information be supplied in confidence, the Ministry states that the corporate cap is confidential information and that each laboratory submits its gross billings information to the Ministry with the expectation that it would be treated as confidential. The Ministry also states that it has always treated the corporate cap amount as confidential and that it does not disclose to the OAML any individual corporate cap information.

The Ministry then states:

> Labs do not share this information with other community labs, nor is this information published in the financial reports and statements provided to shareholders and the public by individual lab corporations. In fact, the Ministry submits that the corporate cap of a community laboratory is effectively a confidential informational asset of the corporation.

The affected parties state:

> The information was supplied in confidence as [the labs have] always had an implicit agreement and expectation with the Ministry with respect to the confidentiality surrounding the disclosure of its annual billing, payments and related information. The implied agreement and expectation of confidentiality is based on a consistent course of conduct and history of non-disclosure of individual corporate cap amounts and related information, by the Ministry or by individual lab companies. Furthermore, the Ministry consistently treats and has treated individual lab corporate cap information as confidential and individual corporate billings and cap information is not otherwise disclosed by the Ministry or available from sources to which the public has access.

The appellant disputes the confidentiality of what he has described as the "market share" of the individual laboratories, a term which I understand he equates with the corporate cap amount, (although the Ministry argues, as set out below, that the disclosure of the market share amount does not reveal the "corporate cap".) He states:

> The regulations provide that corporations are paid based on their percent of market share and the actual amount of tests performed. The market share can be adjusted if a company does not meet its quota in a given year; the shortfall would

> be divided between the other companies. For this system to work it is very likely, reinforcing the general knowledge of relative shares and the published information, that all companies involved in the cap would have to know their and other companies' market shares to ensure that the cap was divided up equally and it would also need to know when there was an underage so that each could get its portion of the new share. I know of nothing in the regulation or policy that restricts knowledge of the market shares to only one corporation. The information is provided to the OAML whose Board is comprised of representatives of the major corporations. On the contrary for the system to work well with trust and transparency that the companies are being treated fairly in a matter central to their economic interest, their percent of market share, it would seem essential that at least the OAML be involved in overseeing the establishing of the market share and by extension the individual corporations. It should be also noted that when the regulation was introduced it was the subject of significant litigation and public scrutiny and no where in the process did it mention the confidentiality among the providers. Once again because of the shift of significant money between providers as a result of the introduction process, reading the decision and coverage of these events it seems the market shares of the various companies were known to others. This further supports the argument that no harm could be done by allowing the public access to this government expenditure but to improve policy discourse.

In reply, the Ministry states that the disclosure of the "market share" in the affected parties' annual reports does not amount to disclosure of the corporate cap amount and that even if a laboratory did decided to disclose the corporate cap amount, the Ministry cannot disclose information that it received in confidence. It also states that the litigation to which the appellant refers in his representations did not address the issue of the confidentiality of the corporate cap amounts and repeats that it does not disclose "individual corporation data to the OAML or any other entity."

The affected parties also submitted reply representations disputing the accuracy of much of what is set out in the appellant's representations but without addressing directly the "supplied" or "in confidence" issues. They state:

> The Appellant's consistent mischaracterization of facts brings into question his remaining arguments for the limited release of information before this Commission, and the purpose and intent of his requests.

Findings and Analysis

Having carefully reviewed the representations, I find that there is insufficient evidence to support a finding that the payments made to laboratories, gross billings and the corporate cap amounts for the individual labs meet the "in confidence" portion of the test. I accept the evidence of the appellant regarding the information that is publicly available in relation to the larger laboratories.

Indeed, despite the fact that the Ministry states that this information is not published in financial reports and statements provided to shareholders and the public, I have found information relating to one affected party's share of the industry wide cap published on the internet [see http://www2.standardandpoors.com/spf/pdf/media/CML%20Healthcare%20Income%20Fund%20Assigned%20SR-2%20Stability%20Rating%20-%20Stability%20Summary%2003-Aug-2006.pdf]. Although I agree with the Ministry's argument that the term "market share" is not precisely equivalent to "corporate cap", the reference to an affected party's share of the industry wide cap does reveal the individual corporate cap amount assigned to a laboratory. Therefore, the fact that the share of the industry-wide cap is publicly available information is a factor that I will consider in evaluating the Ministry and affected parties' position that the information was supplied in confidence.

I note that the affected parties were given an opportunity to respond to the appellant's representations regarding the public nature of the "market share" information and they neglected to do so.

Based on the information provided to me and in the circumstances set out above, I find that the Ministry and the affected parties have not satisfied me that the information at issue meets the in confidence portion of the test under section 17(1).

Part 3: harms

Although it is not necessary for me to do so, I now turn to consider the Ministry's and the affected parties' positions regarding the harms that will result from the disclosure of Record 2. In this case, the Ministry has raised the application of sections 17(1)(a) (prejudice to competitive position) and the affected parties are also claiming that section 17(1)(c) (undue loss or gain) applies to the information at issue.

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].

With respect to the harms, the Ministry states:

> Regulation 552 provides that where a laboratory performs under its corporate cap during a fiscal year, the balance of its cap is to be redistributed to the other laboratory corporations in the subsequent fiscal year. As such, the Ministry

> submits that disclosure of record 2, whereby laboratory corporations may become aware of the corporate caps of other laboratories, would change the current cooperative relationship between community laboratories into one of competition, whereby each laboratory would try to drive other laboratories below their corporate cap, with the objective of having some of the unused corporate cap redistributed to its cap in the subsequent fiscal year. The Ministry submits that the small community laboratories would be especially vulnerable where commercial or financial information is disclosed to competitors, and that the resultant competition could drive them out of business.

The Ministry also submits that disclosure of the corporate cap could impact investment in individual laboratories and have a negative impact on shareholder confidence as shareholders may no longer invest in a community laboratory due to the level of risk associated with its OHIP billings that exceed its corporate cap.

The Ministry states:

> Although gross billing information is not evident from corporate cap amounts, the disclosure of corporate cap information, combined with any disclosure of gross billing information or with gross billing information obtained from another source, would reveal the amount of a laboratory's billings over its corporate cap, and could reasonably be expected to have a negative impact on shareholder confidence. Shareholders not willing to invest or wishing to no longer invest in a community laboratory corporation due to the level of risk associated with its OHIP billings over its corporate cap could withdraw investments, potentially to invest in another laboratory corporation with a lower level of risk. Similarly, potential investors may decide not to invest in a particular laboratory whose amount of gross billings over it corporate cap is higher than that of another laboratory's and may invest in the latter instead. Consequently, share values and the competitive position of a community laboratory corporation would be negatively affected.
>
> The effect of disclosure of the requested information would cause economic harm to community laboratory corporations, which, in turn, would have an injurious effect on the provision of laboratory services in Ontario.

With respect to the claim that section 17(1)(a) applies, the laboratories state:

> The information in record 2 can be used to ascertain details related to [the laboratory's] gross billings, corporate cap, lab service volumes, cost structure and operating margins. These details would provide the other community laboratories with a competitive advantage over other labs when planning investments, making operations decisions and implementing regional strategies. This would equally apply to disclosure by the other laboratories.

> The disclosure of record 2 could also reasonably be expected to interfere significantly with [the laboratory's] ongoing contractual or other negotiations with third parties relating to its laboratory operations. For example, disclosure of the details of [the laboratory's] financial operation metrics could negatively impact and significantly interfere with ongoing relationships with arms' length third parties such as lenders, supplies, vendors, landlords and/or potential business partners.
>
> The disclosure of record 2, could allow the determination of certain cost and operating metrics of [the laboratories], including margin performance, profitability, and significant cost items. Future negotiations with major supplies, landlords, and business partners could be significantly prejudiced by the disclosure of the contents of record 2 and the detailed performance metrics which could be then determined, to the detriment of [the laboratories] causing increased costs and direct impact on the essential services [the laboratory] provides.
>
> Additionally, [the laboratory] submits that the disclosure of this information may generally negatively impact the operation of the Ontario laboratory market and its current effective delivery of patient care to Ontario citizens and physicians. The community laboratories, operating confidentially under the corporate cap, support a necessary component of the Ministry's policy of achieving the highest level of healthcare services, including laboratory services, while effectively containing costs and managing the finances of the province. The disclosure of the contents of record 2, by allowing the determination of an individual laboratory's gross billings, corporate cap amounts and related information, and thereby allowing comparison across the industry, will fundamentally alter the competitive landscape of the lab sector in Ontario.
>
> Laboratories which previously have never voluntarily disclosed this information would be forced to react to its release and potentially alter their operating parameters and future plans, for example investment and/or cost containment plans. As such, capital equipment upgrades, clinic refurbishment projects, facility investments, and hiring decisions, as well as individual laboratories' decisions to provide services in excess of their caps, could all be negatively impacted, thereby significantly negatively impacting the future of patient care in Ontario.

With respect to the claim that section 17(1)(c) (undue loss) applies, the affected parties state:

> The disclosure of the information contained in record 2 into the public domain, along with the ability to accurately draw inferences about [the labs] corporate cap, cost structures and operating margins, could lead to erroneous conclusions or misleading reliance by the public, third parties, suppliers or lenders with regard to [the labs] business revenue, profitability potential and operational efficiencies.

> The potential for misinterpretation of the data or its use out of context is significant, as the Appellant has already demonstrated several times as noted in the Ministry's submissions. [The labs] would have to spend a significant amount of management and financial resources to explain the complexities of the lab corporate cap system and to rectify the cost of disruption to [the labs] and the community lab industry in Ontario, including potentially the engagement of professional consultants to develop and implement a marketing and information campaign.
>
> The appellant's argument in response is based, in part, on his understanding that the laboratories are aware of the relative share of the Ontario market of their competitors and of the amounts paid by the Ministry to their competitors on an annual basis. As a result, he claims that no harm will result from the disclosure of the information in Record 2.

The affected parties also submitted reply representations but they did not respond specifically to the appellant's representations on the harm issue other than, as noted above, to question the accuracy of the appellant's representations.

In sur-reply representations, the appellant states:

> There were numerous general concerns raised by the third party respondents that releasing this information would affect their competitive position. The request is for the amount paid to each company by the Government of Ontario which tells us nothing about their internal practices, the types of tests they provide, which areas of service are more profitable, the technology used or their profit margin. How this bit of information could be used to "accurately draw inferences" on cost structures, operating margins, operating profitability or operations efficiencies is not clear and would certainly be no more so in the laboratory industry than in many sectors of the economy where the value of the contracts for goods or services purchased by the government is public knowledge.
>
> Pertinent to this point is the mandatory post contract award notification policy of the provincial government for all contracts for services over one hundred thousand dollars. I expect that all of the laboratories receive significantly more [than] this figure in any given year and the three largest laboratories would all be paid over one hundred million dollars a year. This policy indicates that the government does not think that revealing total value of a contract is significantly harmful to the economic interests of most companies that do business with the Ontario government: many of which operate in much more competitive environments than the laboratories….
>
> It is worth noting that the total amount paid to individual laboratory corporations was made public through the select Committee on Health of the Ontario

> legislature in 1987 (copies of the relevant pages attached). There is no evidence that this release negatively affected any of the companies and I was not able to find any concerns voiced at the time. The Ministry has not always held this information in confidence and even now comes tantalizing close to revealing the data. In April 23, 2005 email the Ministry added this comment: "Note: MDS, CML and Gamma Dynacare provide in excess of 90% of the total laboratory services across the Province, so over 90% of the total industry funding is allocated among these three organizations." This is also in the email attached.
>
> The payments to individual companies reveal nothing about their profit or loss, how they run their internal operations or the technology used. In terms of market share the sector is not competitive in any meaningful sense. The pricing structure is established through negotiations with the OAML, is public and applies equally to all laboratories. There are no specific, detailed or convincing concerns raised on how releasing this information will harm the companies involved.

Findings and Analysis

As I stated in Order PO-2435, the need for "detailed and convincing" evidence of how disclosure of information could reasonably lead to the harms set out in section 17(1) is based in part the need for public accountability in the expenditure of public funds. In that order, I stated:

> Both the Ministry and SSHA [Smart Systems for Health Agency] make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and

states that "necessary exemptions" from this right should be "limited and specific." In Public Government for Private People, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

> …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are

> responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

> The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP [(Ontario's e-Physician Project)], there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

Adjudicator Loukidelis also addressed the cogency of the evidence required to establish harm under section 17(1) of the *Act* in Order PO-2497, upheld on judicial review in *Canadian Medical Protection Association v. Ontario (Information and Privacy Commissioner),* Divisional Court File No. 461/06, where she stated:

> The mandatory exemption for confidential third party information was never intended to be wielded as a shield to protect third parties from competition in the market place, but rather, from a reasonable expectation of *significant* prejudice to their competitive position. I could accept for the sake of argument that some negative market-share consequences to the CMPA could follow with the release of Record 6. However, I am not persuaded by the evidence that the potential for this harm is sufficiently linked with the disclosure of Record 6 to constitute significant prejudice or undue loss as those terms are contemplated by paragraphs (a) and (c) of section 17(1), or to trigger the protection of the *Act*.

I adopt this approach for the purposes of this appeal. I am not satisfied that the Ministry and the affected parties have provided sufficiently detailed and convincing evidence of a reasonable expectation of *significant prejudice* to their competitive position (17(1)(a)) or undue loss (17(1)(c)). In fact, there is a contradiction in the positions taken by these parties. Although the Ministry's and affected parties' representations are based on an expectation of prejudice to the competitive position of the laboratories, the Ministry also argues that the disclosure of the corporate cap amounts would alter the "cooperative relationship" between the community laboratories and threaten the small laboratories which could be driven out of business. In other words, it appears to argue that disclosure will create competition where it does not exist.

However, the corporate cap scheme appears to be designed to encourage the laboratories to provide services at a discounted rate (i.e. to work above the corporate cap amount) in order to capture a greater share of the cap. As their base year amounts increase, their percentage share of the corporate cap may also increase. It is unclear how this circumstance will change if a laboratory has knowledge of the gross payments made to the other laboratories in any given year in the past. It is similarly unclear how disclosure of the amounts paid annually will adversely affect the current environment, whether competitive or cooperative, particularly given the monopoly that the Ministry has and the highly regulated environment in which the laboratories operate. In my view, even if harm will result to the position of the affected parties by the disclosure of the information in Record 2, the evidence before me does not support a finding of significant prejudice to the competitive position or undue loss, as those terms are used in section 17(1).

Equally, I find that the Ministry's and affected parties' arguments regarding the risk to investment, shareholder confidence and relationships with third party suppliers and other business parties are weak. I note that some of the larger publicly traded laboratories already disclose information relating to their corporate cap amounts and are required by law to provide shareholders with a degree of transparency in relation to their financial status. The Ministry and the affected parties have not provided sufficient evidence to support a finding that disclosure of gross payments by the government to laboratories might jeopardize their investment opportunities.

Further, the Ministry's arguments about the impact on investment and shareholder confidence of disclosure of gross billing information combined with corporate cap amount is pure conjecture as the information at issue in this appeal is neither corporate cap information nor is it gross billing information. The Ministry's and affected parties' position that shareholders and/or the financial investors may not be willing to invest in a laboratory that has gross OHIP billings that exceed its cap equates, in my view, to saying that shareholders and investors should be kept in the dark regarding such financial information. This is not a basis for establishing the type of harm required by section 17(1). Similarly, I do not accept the Ministry's position that that investors may perceive a risk associated with OHIP billings that exceed the corporate cap. In my view, this would be a minor consideration for any investor, and greatly overshadowed by more important issues, such as a company's profitability.

One of the affected parties' concerns is that the "operating metrics of the labs will be disclosed by this information including gross billings, corporate cap, lab service volumes, cost structure and operating margins, margin performance and profitability". They have failed, however, to provide me with the kind of detailed and convincing evidence that supports this position. On the contrary, I am persuaded by the appellant's representations in that regard.

In my view, the affected parties have overstated what has been requested, and what would become public if Record 2 were disclosed. For example, the affected parties state that, "disclosure of the details of …financial operation metrics could negatively impact and significantly interfere with ongoing relationships…" While the term "financial operation

metrics" is not defined, I note that Record 2 contains annual payments made by the Ministry to laboratories; no more, no less. I am not persuaded that disclosure of annual payments will then lead to knowledge of a laboratory's gross billings, corporate cap, cost structure and operating margins, among other pieces of information. Similarly, it is not conceivable to me that the disclosure of the gross payment amounts would result in a company reconsidering "capital equipment upgrades, clinic refurbishment projects, facility investments and hiring decisions…" The affected parties have provided no satisfactory link between the need for confidentiality of gross billings and undertaking these types of endeavours.

Furthermore, I do not accept the position of the affected parties that if they are required to explain to the public the corporate cap structure, the costs associated with that are "undue". In my view, section 17(1) was not intended to protect individuals who conduct business with the government from the costs associated with explaining the nature of their relationship with government. In my opinion, this was not the kind of harm that section 17(1) was intended to protect against.

As noted above, I did not share the representations of one of the affected parties and, in one respect only, its arguments regarding harm were unique to those submitted by the other affected parties. I cannot for confidentiality reasons disclose the nature of the argument; however, I have carefully considered the representations and the harms that the affected party alleges will result from the disclosure of the record. I am not persuaded by the representations and find that they lack the kind of detailed and convincing evidence that would satisfy this part of the test for the application of section 17.

For all of these reasons, I find that the Ministry and the affected parties have not provided me with the detailed and convincing evidence required to find that the disclosure of this information could reasonably be expected to result in the harms set out in either section 17(1)(a) or (c).

I now turn to consider the Ministry's argument that Record 2 is exempt pursuant to section 18(1)(d) and that portions of Record 3 are exempt pursuant to sections 18(1)(d) and (f).

ECONOMIC AND OTHER INTERESTS

The Ministry claims that section 18(1)(d) applies to Record 2. As noted above, it also denies access in part to Record 3 pursuant to sections 18(1)(d) and (f).

Section 18(1) states, in part:

> A head may refuse to disclose a record that contains,
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *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) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(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.)].

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398].

Section 18(1)(d): injury to financial interests

Record 2

The Ministry argues that Record 2 contains sensitive commercial and financial information "in the form of corporate cap amounts" and that its disclosure would prejudice its economic interests and have a detrimental impact on the finances of the government of Ontario. By way of background, the Ministry states:

> In a climate of limited health care dollars and rising health care costs, the Ministry must work to ensure the people of Ontario receive the best possible health care at the lowest possible costs. The cooperative relationship between the Ministry and the laboratory sector for the management of the utilization of laboratory services plays an important role in achieving this goal.

> The corporate cap has been instrumental in establishing a cooperative relationship and approach between the Ministry and laboratory providers to jointly manage the utilization of community laboratory services. Furthermore, it has established the mutual benefit to the laboratories of working cooperatively to ensure the provision of quality laboratory services province-wide and to work with physicians to better manage test utilization. This cooperative relationship is due in part to the fact that each laboratory is secure in knowing what its share of the industry cap would be. In other words, each laboratory is less vulnerable to the activities of the other laboratories. This cooperative relationship is also the result of the fact that each laboratory's cap is confidential.

It argues that the corporate cap payment model described above has stabilized the laboratory services market, brought predictability to the laboratories, ensured effective service delivery and discouraged excessive utilization of laboratory services. It claims that the confidentiality of corporate cap amounts is fundamental to the success of the model and that its disclosure would "negate the positive effect of the model" and allow the "previous problems to return."

It also argues that if such information were disclosed, it is reasonably foreseeable that the government's ability to effectively manage the costs of laboratory services would be jeopardized and the government of Ontario would suffer serious financial loss. In support, it argues:

> First, if each laboratory corporation became aware of the corporate caps and gross billings of other laboratories, and observed that other laboratories were operating much closer to their corporate cap, it would be a disincentive for other laboratories to operate at a higher level and provide services in excess of its corporate cap. As a result, this would invariably reduce the number of lab tests it performs. The Ministry submits that this would result in service reductions, both province-wide and targeted to certain geographic areas.
>
> Second, the Ministry submits that the harms described above with respect to the s. 17(1)(a) claim would have an injurious impact on the ability of the Ministry to manage the economy in relation to ensuring the stability of the provision of laboratory services and the provision of laboratory services throughout the province, with no gaps or reductions in service. Specifically, it is reasonable to expect that disclosure of these records would result in damage to both the tangible and intangible assets of the affected parties. The economic harm caused to community laboratory corporations would in turn have an injurious effect on the provision of laboratory services in Ontario due to reductions or gaps in services and because loss of even smaller community labs would adversely affect the Ministry's ability to provide essential laboratory services.
>
> Third, in addition to having a negative impact on the stability of laboratory services in Ontario, disclosure of corporate cap information would have an injurious effect on the joint management model and/or cooperative relationship

> that has developed between the laboratory provider sector and the Ministry for the management of utilization of laboratory services. The resulting increase in competition between laboratories would be injurious to the provincial government, especially in light of the limited tax dollars available to be spent on health care. Such disclosure would also then have a negative impact on any future funding negotiations with the OAML or with respect to any negotiations for future program initiatives involving laboratory services because the level of trust that has been built up in association with this cooperative relationship would have been seriously impaired. Thus, disclosure of corporate cap information is harmful to the interests of the Ontario Government that Ontarians receive the best possible health and laboratory services for government expenditures.

In summary, the Ministry argues that disclosure of the corporate cap information would lead to less cooperation among laboratory service providers, a less cooperative relationship between the Ministry and laboratory service providers, and the real potential for reduction in laboratory services. This in turn would be injurious to the public and the financial interests of the Ministry.

The appellant argues that the amounts paid to the three largest laboratories operating in the province are publicly known and, as a result, the disclosure of the information in Record 2 will have no effect on the government's ability to manage the economy. He notes that disclosure will add to the public debate about government policy and the laboratory services. With respect to the government's ability to control laboratory costs, he states:

> These costs are controlled by regulation and a negotiated cap with the industry. It is a hard cap and can not be exceeded. The system contains an inbuilt incentive for laboratories to provide service to their maximum or their portion of the cap. Making public how much each earned does not affect this incentive structure, which is laid out in regulation.

With respect to the Ministry's arguments regarding service levels, he states:

> The argument that making this knowledge [public] will reduce service rests on the assumption that most private laboratories are working substantially above their cap, in other words, doing work for free. This strategy does not seem likely for any well-run corporation, and relying on free services to provide essential medical services is also arguably a poor way to ensure that needed medical services are provided.

In reply, the Ministry disagrees with the representations of the appellant relating to the effect of the corporate cap scheme and states that each year most individual laboratory corporations work well above their corporate cap amount although the amount by which they work in excess of the cap varies widely. The Ministry explains that:

> First, there are significant penalties to any individual laboratory corporation that provides services below its corporate cap in any given year. Specifically, the base year amount for a laboratory that provides services below its corporate cap is reduced by the difference between the laboratory's corporate cap amount and the actual level of services provided by the laboratory. Effectively, this would result in a permanent reduction in the laboratory's corporate cap amount.
>
> Second, the 2005-2008 Funding Agreement between the Ministry and the OAML provides that industry net billings must exceed the industry cap by $30 million, $35 million and $40 million in 2005-06, 2006-07 and 2007-08, respectively in order for the industry to be eligible to receive additional specified funding. In the event that additional funding is provided to the laboratory sector to increase the industry cap, the additional funding will be allocated to individual laboratories based on corporate cap share. The Ministry submits that this provides an incentive for individual laboratory corporations to work above their corporate cap amounts.

In sur-reply, the appellant states:

> Similarly, concerns were raised about how releasing this material will undermine attempts at utilization control. The cap is what enforces the quantity of services provided and it was in place and most effective in the three years before 1996; the year some third party respondents chose as a pivotal date for controlling utilization and requiring secrecy on payments. It is hard to imagine how releasing the amount paid to each company by the government for their services would allow one company to challenge and evade the cap set by the legally binding agreement.

Findings and Analysis

Similar to section 17(1), section 18(1)(d) requires "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.)].

I find that the Ministry has not provided me with the kind of detailed and convincing evidence required for the application of section 18(1)(d) to Record 2. I note that the Ministry's arguments regarding the harm that it submits could reasonably be expected to result from the disclosure of the information in Record 2 are premised on the fact that disclosure of the amounts paid will reveal the corporate cap amounts. I have already found that this is not the case. However, even if the disclosure of Record 2 would reveal the corporate cap, then I would still find that the Ministry has not satisfied me that there exists a reasonable expectation of harm.

For example, while I may accept that the implementation of the corporate cap scheme stabilized the markets for the supply of laboratory services, there is insufficient evidence before me to support the conclusion that the disclosure of the gross payments, or indeed the corporate caps themselves, would impact the stability that resulted from the adoption of the new scheme. I am not satisfied that the corporate cap scheme and the consequential stability of the markets are dependent on the confidentiality of the individual laboratory cap amount. It is just as plausible that the cooperative relationship referred to by the Ministry is based on a negotiated industry settlement and the certainty it creates in terms of payments to laboratories as it is on the confidentiality of each laboratory's corporate cap or the amount of annual payments from the government.

I also do not accept the argument that the disclosure of the amounts paid will act as a disincentive for the laboratories to work above the corporate cap amount. As I have said previously, disclosure of the amounts paid does not necessarily reveal the corporate cap. In addition, the incentive to work above the corporate cap is built into the formula because those laboratories that work above the corporate cap may experience an increase in their base year amount which may translate into a higher corporate cap amount depending on the other applicable variables.

In addition, I do not agree that the Ministry's ability to effectively manage the costs of laboratory services will be affected by the disclosure of the amounts paid to the laboratories. The Ministry contracts for laboratory services in a highly regulated environment. In my view, based on the information provided to me, it has not been established that the disclosure of these amounts could reasonably be expected to affect the Ministry's ability to continue to regulate that environment and control the costs of laboratory services in the manner that it has done over the last few years. As the appellant has noted in his representations, the information in this record is now historical information. In my view, this reduces the impact that the release of this record will have on the individual laboratories, the industry, its relationship with the Ministry and the economic interests of the Ministry and of the province.

Finally, I agree with the appellant's position rejecting the Ministry's representations regarding a potential reduction in service levels. Laboratory companies are currently aware of the extent of the gap between government payments and their corporate cap. If they are of the opinion that this gap is too great, they already have the option of reducing service levels. This decision does not hinge on whether the amount of government payments is public or confidential.

For all of the above reasons, I find that the Ministry has not provided sufficient evidence to support its argument that the disclosure of Record 2 could reasonably be expected to adversely affect laboratory services in general, the ability of the province to manage laboratory services, and the cooperative relationship that has developed between the laboratories and the Ministry for the management and utilization of laboratory services. The Ministry's representations do not establish a sufficient connection between these alleged consequences and the disclosure of the information.

I find that section 18(1)(d) does not apply to Record 2. As the Ministry has not claimed that any other exemptions apply to Record 2, I will order that the record be disclosed in full in my order provisions below.

Record 3

The Ministry submits:

> The portions of Record 3 that remain at issue contain information about the Ministry's potential strategic direction and decision making with respect to funding of the laboratory sector. Additionally, portions of the record at issue contain an analysis of reimbursement options and recommendations for potential funding systems.
>
> The Ministry submits that disclosure of the remaining portions of record 3 would have an injurious or negative impact on the ability of the Ministry to manage the economy, and therefore claims the discretionary exemption at s. 18(1)(d) of the Act with respect to the portions of record 3 that remain at issue.
>
> Disclosure of the portions of record 3 remaining at issue would reveal information that may have value to the Ontario Government in its future negotiations with the OAML. Moreover, disclosure of this information could be used to anticipate the Government's strategy in subsequent negotiations, thus having a negative impact on the Government's bargaining position in future negotiations with the laboratory sector.
>
> The Ministry further submits that there is usually significant stakeholder consultation prior to the implementation of any major changes in funding and service delivery within the laboratory sector. Disclosure of the balance of the record, with no discussions with the stakeholders, could have an injurious effect on the joint management model or cooperative relationship between the Ministry and the laboratory provider sector for the management of the utilization of laboratory services. As a result, such disclosure could also have a negative impact on any future funding negotiations with the OAML in that the level of trust would be seriously impaired.
>
> As most of the larger community laboratory corporations are publicly traded companies, this information could have the adverse effect of destabilizing the community laboratory sector, if the owners of, or shareholders in, community laboratories feel that the viability of their businesses could be jeopardized if some of the recommendations in the report are implemented. In addition to negatively impacting the competitive position of community laboratories, this could reasonably be expected to interfere with the continuous provision of laboratory services.

The appellant states:

> This commissioned report was not an internal ministry document but purchased using funds administered by the OAML. Given this, it seems likely that the report was made available to the OAML. And in light of the general comments at the beginning of this section is seems likely that the document was intended to provide background information and that possibly the government did (does) not want to release it because it did not like the information that was found. This strongly implies that the document is not an internal paper outlining options for government policy making but a "backgrounder" and should be released.
>
> A final comment that whatever policy relevance it had in 1977 for options on the laboratory system has been long since passed. Since that report the Ministry has tried an RFP approach to restructuring a facilitated model of regional integration and now is just letting the system evolve. The document also pre-dates the major changes in regulations governing the community laboratory sector enacted in 1998. Any immediate relevance this document might have had at that time has been significantly by passed due to the changes in the government approach to the laboratory industry.

In reply, the Ministry states that it commissioned Record 3 at its own expense and that the report was treated as confidential by the Ministry and not provided to the OAML or any other party. The Ministry also states:

> [D]espite changes in Ontario's medical laboratory sector since 1997, the options for restructuring the Ontario laboratory sector contained in record 3 continue to be relevant and may be implemented by the government in the future.

In sur-reply, the appellant states:

> The specifics of this study were contained in information supplied by the Ministry on the Laboratory Restructuring Fund. It was listed in the disbursements from the fund: a copy of which was sent to you by the Ministry in their response to comments on this appeal. For the Ministry to now say that they paid for the study demands at least clarification on the accuracy of the initial document or on why the Ministry felt it necessary to use this third party fund rather than internal funding mechanism to contract for a confidential policy document.
>
> The fact that the document was commissioned by the Restructuring fund even if requested by the Ministry and paid for by that fund would argue that it was likely given to the OAML. The Ministry and the industry may not like the findings of the study but that is not a reason to keep it confidential.

Findings and Analysis

The Ministry disclosed Record 3, a report prepared by Coopers and Lybrand, with the exception of three portions:

- One sentence from page one;
- Pages 23-29; and
- Pages 47 to 76.

I find that, except for a portion of the report, the Ministry has not provided sufficiently detailed and convincing evidence necessary to establish a "reasonable expectation of harm" that disclosure could be injurious to its financial interests.

Pages 47 to 76 set out a number of options and recommendations for the Ministry's consideration. I accept the Ministry's submission that, although the report is now some 12 years old, disclosure of these pages could reveal information that may be of value in future negotiations with the OAML. Similarly, I accept that this information may impact future negotiations and weaken the Government's bargaining position in those negotiations. Although the appellant has argued that there is reason to believe that this report has already been disclosed to the OAML, I have been provided with insufficient evidence to support such a finding and I accept the Ministry's position that this is not the case. As a result, I am satisfied that the disclosure of pages 47 to 76 of Record 3 could reasonably be expected to be injurious to the financial interests of the Government of Ontario, and I will uphold the Ministry's application of section 18(1)(d) to deny access to this information.

However, I am not satisfied that the disclosure of the remaining portions of Record 3 would result in the harms described by the Ministry. The sentence severed from page 1 of the record sets out the intent of the report. Pages 23-29 provides background information on the restructuring of the health care sector, including laboratory services. Having reviewed these sections and carefully considered the representations of the parties, I am satisfied that the information at issue is factual in nature and its disclosure could not reasonably be expected to be injurious to the financial interests of the government or the ability of the government to manage the economy. In arriving at my decision, I have taken into account the age of the record and the changes that have been made to the funding of community laboratories since 1997 that are set out in Regulation 552. Given this, and the factual nature of the information, I have concluded that there is insufficient evidence to support a finding that the harms suggested by the Ministry could reasonably be expected to result from disclosure.

Similarly, I do not accept the Ministry's argument that disclosure of this information could reasonably be expected to have an injurious effect on the joint management model or the cooperative relationship between the Ministry and the laboratory sector. Equally, I am not persuaded that the disclosure of this record could destabilize the community laboratory sector

and have consequential impacts on the level of laboratory services available in the province as the Ministry has not provided sufficiently detailed and convincing evidence to support such a finding. The disclosure of factual, background information that is now 12 years old, and that is most likely already within the knowledge of the laboratory sector already, could not reasonably be expected to result in the harms contemplated by the Ministry.

For these reasons, I find that section 18(1)(d) does not apply to the severed portion of page 1 or to pages 23-29 of Record 3.

Section 18(1)(f): plans relating to the management of personnel

Having found that pages 47 to 76 of Record 3 are exempt pursuant to section 18(1)(d) of the *Act*, I only need to consider the application of section 18(1)(f) to the severed sentence from page 1 and pages 23-29.

In order for section 18(1)(f) to apply, the institution must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or
   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348].

The Ministry states:

> The Ministry submits that the remaining portions of record 3 constitute plans relating to the administration of the Government of Ontario, specifically the laboratory funding system, and as such is claiming the discretionary exemption at s. 18(1)(f) of the Act with respect to the remaining portion of this record.
>
> Record 3 was intended to be used by the Ministry as a planning document, has not yet been put into operation, and has never been made public. The remaining portions of this record contain information relating to the strategic directions of laboratory services in Ontario, including funding allocations and reimbursement options. The funding allocation system currently in place is not one of the options discussed in the report. It is possible that the options considered in the report may

> be reconsidered by the Ministry in light of the Ministry's ongoing transition to a stewardship role.
>
> The Ministry further submits that there is usually significant stakeholder consultation prior to the implementation of any major changes in funding and service delivery within the laboratory sector. Therefore, disclosure of this report could be detrimental to the ability of the Ontario Government to plan and make decisions with respect to the funding of laboratory services in Ontario.

The appellant repeats that the report was not an internal Ministry document but was paid for from funds administered by the OAML and he believes that the report was likely made available to the OAML. He also states that the report was intended to provide background information. He states that the document is not an internal paper outlining options for government policy making but a "backgrounder" and should be released. He also states that given the age of the report it has lost its relevance to government planning and that it is no longer relevant given the changes that have been made to the government approach to the laboratory industry.

Findings and Analysis

I have carefully reviewed the remaining portions of Record 3 and the parties' representations. I find that these portions are not exempt pursuant to section 18(1)(f) of the *Act*. The remaining sections of the record cannot be characterized as a "plan" as that term has been defined in previous orders of this office.

Record 3 is a study which presenting options and recommendations for the funding of the community laboratory sector. I have already determined that the options and recommendations section of the record is exempt pursuant to section 18(1)(d). I find that the remainder of the report is not a "plan" because it is not "a formulated and especially detailed method by which a thing is to be done; a design or scheme." The portions of the report that remain do not contain sufficiently detailed information about strategic directions and recommendations in order to meet the definition of a "plan" in section 18(1)(f). In fact, these sections primarily provide background and factual information to provide context for the options and recommendations section of the report. In these circumstances, I find that section 18(1)(f) does not apply to the severed sentence from page 1 and pages 23-29 of Record 3.

Therefore, I find that Record 3, with the exception of pages 47-76, does not qualify for exemption under section 18(f).

EXERCISE OF DISCRETION

The section 18 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

I have found that the exemptions in section 18 relied on by the Ministry and the affected parties do not apply to Record 2 and apply only in part to Record 3. Having reviewed the parties' representations, I find that the Ministry exercised its discretion by taking into account proper considerations in respect of the small amount of information that I have ordered withheld.

PUBLIC INTEREST OVERRIDE

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. A public interest is not automatically established where the requester is a member of the media [Orders M-773,

M-1074]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

The appellant's arguments regarding the application of section 23 relate primarily to the public interest in the disclosure of Record 2 and much of his argument about the compelling public interest in that record is set out above. However, his public interest arguments do not appear to address Record 3.

The Ministry submits that the public interest lies in withholding Record 2 as its disclosure could reasonably be expected to cause economic harm. It argues, among other things, that the public interest is satisfied by information that is already in the public domain including the industry cap which is set out in the regulation, funding agreements which have been disclosed and by the previous disclosure of other information to the appellant. It also argues that the public interest in expenditures is protected by the mechanisms open to the Office of the Auditor General of Ontario to scrutinize public expenditures.

In reply, the appellant submits that the disclosure of the information in Record 2 will shed light on the government's management of this sector of the economy and more generally on the provision of public services such as health care.

Analysis and Findings

I have ordered that Record 2 be disclosed in full to the appellant, therefore, it is not necessary for me to make a determination on the application of section 23 to that record. However, I wish to note that if I had found for any reason that either sections 17(1) and/or 18(1) applied to Record 2, I would also have found that a compelling public interest exists in the disclosure of the record given that it includes information about the expenditures of a significant amount of taxpayers' funds for health services. With the pressure on health care funding and given the importance of health care issues to the citizens of the province of Ontario, in my view, full disclosure of information that relates to the manner and the amounts that the Ministry expends for health care services is both compelling and in the public interest and outweighs any interests that the affected parties may have in withholding this information.

I have ordered that a small amount of information be withheld from Record 3. Having considered the parties representations and the nature of the information that I have ordered withheld, I am not satisfied that there exists a compelling public interest in the disclosure of this information. I also find that if a compelling public interest does exist in the information that I have ordered withheld from Record 3, then it does not outweigh the purpose of the exemption.

ORDER:

1. I order the Ministry to disclose record 2 and the severed portions of record 3, with the exception of pages 47 to 76, to the appellant by **June 1, 2009** but not before **May 25, 2009**.

2. I order the Ministry to issue a decision to the appellant in response to part 1 of the appellant's request in accordance with the *Act* treating the date of this order as the date of the request. In particular, the Ministry must provide to the appellant information relating to:

   a) The disbursements made from the Laboratory Restructuring Fund from the date of its creation to 1997 including the details of who received the disbursement, a description of the services rendered and the date of the payments.

   b) The amounts paid into the Laboratory Restructuring Fund from the date of its creation to the date of the request.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the decision letter and the records disclosed to the appellant pursuant to Provisions 1 and 2, only upon request.

Original signed by: April 27, 2009
Brian Beamish
Assistant Commissioner

APPENDIX A

22.1 (1) In sections 22.2 to 22.11,

"base year amount" means, in relation to a medical laboratory, the amount calculated in accordance with section 22.5;

"fiscal year" means the 12-month period beginning on April 1;

"over-threshold laboratory" means a medical laboratory that has a threshold amount for a fiscal year (determined without regard to the operation of section 22.4) that is less than the total amount payable to it under section 22 for insured services provided during the year;

"receiving laboratory" means a medical laboratory that performs tests referred to it by a referring laboratory;

"referring laboratory" means a medical laboratory that refers to a receiving laboratory tests that it is not licensed to perform;

"threshold amount" means, in relation to a medical laboratory, the amount calculated in accordance with section 22.3;

"under-threshold laboratory" means a medical laboratory that has a threshold amount for a fiscal year (determined without regard to the operation of section 22.4) that is greater than the total amount payable to it under section 22 for insured services provided during the year.

(2) Two or more medical laboratories are jointly engaged in providing insured services if they provide the services as a joint undertaking on a fully-integrated basis, whether as partners or otherwise.

(3) Sections 22.2 to 22.11 do not apply with respect to hospital laboratories.

22.2 (1) For the purposes of subsections 17.1 (6) and 17.2 (4) of the Act,

(a) all insured services provided by a medical laboratory are prescribed insured services;

(b) the prescribed period for a medical laboratory is a fiscal year; and

(c) the prescribed amount for a medical laboratory is its threshold amount for the fiscal year..

(2) If the total amount payable under section 22 for insured services provided by a medical laboratory during a fiscal year equals or exceeds its threshold amount, the fee payable for each insured service it performs during the fiscal year is decreased by the percentage that is calculated as follows:

1. Calculate the medical laboratory's threshold amount for the fiscal year.

2. Subtract the threshold amount from the total amount payable to the medical laboratory for the fiscal year.

3. Express the amount calculated under paragraph 2 as a percentage of the total amount payable to the medical laboratory for the fiscal year.

22.3 (1) A medical laboratory's threshold amount for a fiscal year is the amount calculated as follows:

1. Calculate the medical laboratory's base year amount.

2. Express the base year amount as a percentage of the base year amounts of all medical laboratories.

3. Multiply the provincial cap for the fiscal year by the percentage calculated under paragraph 2.

4. Add the amounts, if any, calculated under section 22.4.

(2) The provincial cap applicable for the purposes of calculating threshold amounts for medical laboratories is,

(a) $418,297,741 for the 1997/98 fiscal year;

(b) $424,697,741 for the 1998/99 fiscal year;

(c) $451,297,741 for the 1999/2000 fiscal year; and

(d) $455,603,360 for the 2000/01 fiscal year and subsequent fiscal years.

22.4 (1) This section applies if one or more medical laboratories are under-threshold laboratories for a fiscal year.

(2) For each over-threshold laboratory that is jointly engaged in providing insured services with an under-threshold laboratory, the threshold amount for the fiscal year is increased in accordance with subsection (4).

(3) The threshold amount for a fiscal year for each over-threshold laboratory is increased in accordance with subsection (5). Increases under this subsection are calculated after any increases required by subsection (2) are made.

(4) The amount of the increase described in subsection (2) for an over-threshold laboratory is calculated as follows:

1. Subtract the total amount payable to the under-threshold laboratory under section 22 for insured services provided during the fiscal year from its threshold amount for the year.

2. Allocate the amount calculated under paragraph 1 among the over-threshold laboratories jointly engaged with the under-threshold laboratory in providing insured services during the fiscal year. The allocation is to be made in proportion to their respective threshold amounts for the year (determined without regard to the operation of this section).

3. Increase the threshold amount of each over-threshold laboratory by the lesser of,

i. the amount allocated to the laboratory under paragraph 2, or

ii. the amount that results in the threshold amount being equal to the total amount payable to the laboratory under section 22 for insured services provided by it during the fiscal year.

4. If the threshold amount of one or more over-threshold laboratories is increased by the amount described in subparagraph ii of paragraph 3, for each such laboratory subtract the amount of the increase from the amount allocated to the laboratory under paragraph 2.

5. Add the amounts calculated under paragraph 4.

6. Allocate the amount calculated under paragraph 5 among the over-threshold laboratories whose threshold amount was increased by the amount described in subparagraph i of paragraph 3, in proportion to their respective threshold amounts (determined without regard to the operation of this section).

7. Paragraphs 3 to 6 apply, with necessary modifications, with respect to the allocation of amounts calculated under paragraph 5 until,

i. all such amounts are allocated, or

ii. the threshold amount of every over-threshold laboratory equals the total amount payable to the laboratory under section 22 for insured services provided by it during the fiscal year. O. Reg. 2/98, s. 2.

(5) The amount of the increase described in subsection (3) for an over-threshold laboratory is calculated as follows:

1. For each under-threshold laboratory that is not jointly engaged in providing insured services with an over-threshold laboratory, subtract the total amount payable to it under section 22 for insured services provided during the fiscal year from its threshold amount for the year.

2. Add all amounts calculated under paragraph 5 of subsection (4) that remain unallocated under paragraph 7 of that subsection.

3. Add the amounts calculated under paragraphs 1 and 2.

4. Allocate the amount calculated under paragraph 3 among the over-threshold laboratories that are entitled to an increase under subsection (3), in proportion to their respective threshold amounts (determined without regard to the operation of this subsection).

5. Increase the threshold amount of each over-threshold laboratory by the lesser of,

i. the amount allocated to the laboratory under paragraph 4, or

ii. the amount that results in the threshold amount being equal to the total amount payable to the laboratory under section 22 for insured services provided by it during the fiscal year.

6. If two or more over-threshold laboratories that are entitled to an increase under subsection (3) were jointly engaged with each other in providing insured services during the fiscal year and the threshold amount of one or more of them is increased by the amount described in subparagraph ii of paragraph 5, for each such laboratory subtract the amount of the increase from the amount allocated to the laboratory under paragraph 4.

7. Add the amounts calculated under paragraph 6.

8. Allocate the amount calculated under paragraph 7 among the over-threshold laboratories who were jointly engaged with a laboratory described in paragraph 6 and whose threshold amounts were increased by the amount described in subparagraph i of paragraph 5, in proportion to their respective threshold amounts (determined without regard to the operation of this subsection).

9. Paragraphs 5 to 8 apply, with necessary modifications, until,

i. all amounts calculated under paragraph 7 are allocated, or

ii. the threshold amount of each laboratory receiving an allocated amount under paragraph 8 equals the total amount payable to the laboratory under section 22,

whichever occurs first.

10. If the threshold amount of every jointly engaged over-threshold laboratory to which amounts are allocated under paragraph 8 equals its total amount payable under section 22, determine the amount, if any, that remains unallocated.

11. If the threshold amount of one or more over-threshold laboratories, other than a jointly engaged over-threshold laboratory described in paragraph 6, is increased by an amount described in subparagraph ii of paragraph 5, for each such laboratory subtract the amount of the increase from the amount allocated to the laboratory under paragraph 4.

12. Add the amounts calculated under paragraph 11 and any amount determined under paragraph 10.

13. Allocate the amount calculated under paragraph 12 among the over-threshold laboratories whose threshold amounts were increased by the amount described in subparagraph i of paragraph 5, other than any jointly engaged over-threshold laboratory that ceases to be over-threshold as a result of an allocation under paragraph 8, in proportion to their respective threshold amounts (determined without regard to the operation of this subsection).

14. Paragraphs 5 and 11 to 13 apply, with necessary modifications, until all such amounts are allocated.

22.5 (1) The base year amount for a medical laboratory is calculated as follows:

1. For each physician who authorized insured services that were performed by the medical laboratory during the 1995/96 fiscal year, calculate the total amount payable under section 22 to all laboratories for insured services authorized by the physician for that fiscal year.

2. Express the total amount payable to the medical laboratory for insured services authorized by each physician as a percentage of the amount calculated under paragraph 1 in respect of the physician.

3. For each physician, calculate the total individual unit values of all insured services authorized by him or her and performed by all laboratories during the 1995/96 fiscal year.

4. For each physician, reduce the amount calculated under paragraph 3 by 8.5737 per cent.

5. For each physician, calculate the amount that would have been payable under section 22 for all insured services authorized by him or her and performed by all medical laboratories during the 1995/96 fiscal year. The calculation is to be based upon the total individual unit values for the insured services, as reduced under paragraph 4.

6. For each physician, multiply the amount calculated under paragraph 5 by the percentage calculated under paragraph 2 for the physician.

7. Add the amounts calculated under paragraph 6 for every physician that authorized the insured services that the medical laboratory performed during the 1995/96 fiscal year.

8. For the following medical laboratories, add the amount indicated:

i. Canadian Medical Laboratories Ltd., $397,922.

ii. Flemingdon Medical Laboratories, $1,537,136.

iii. Hospital-In-Common Laboratory Inc., $182,750.

iv. MDS Inc., $2,108,864.

v. Med-Chem Health Care Ltd., $922,003.

9. Add or subtract (as the case may be) the amounts, if any, calculated under sections 22.6 to 22.12.

(2) Despite subsection (1), if no amount was payable under the Plan to the medical laboratory for performing insured services before January 1, 1997, the base year amount for the medical laboratory is calculated as follows:

1. Multiply by four an amount equal to 85 per cent of the total individual unit values for insured services, if any, performed by the medical laboratory from January 1 to March 31, 1997.

2. Add or subtract (as the case may be) the amounts, if any, calculated under sections 22.6 to 22.11.

(3) Except where otherwise provided, a change in a medical laboratory's base year amount made under sections 22.6 to 22.11 applies with respect to the calculation of the threshold amount for the fiscal year in which the change is made and for every subsequent fiscal year.

22.6 (1) This section applies if one or more medical laboratories are under-threshold laboratories for a fiscal year after the 1996/97 fiscal year.

(2) The base year amount of each under-threshold laboratory is decreased by the amount calculated using the formula,

in which,

"A" equals the total of the base year amounts of all medical laboratories for the fiscal year (calculated without regard to the operation of this section),

"B" equals the amount by which the threshold amount for the laboratory in the fiscal year exceeds the total amount payable under section 22 to the laboratory for insured services provided during the fiscal year, and

"C" equals the provincial cap set out in subsection 22.3 (2) for the fiscal year.

(3) The base year amount of each medical laboratory that is an over-threshold laboratory for the fiscal year is increased by the amount calculated using the formula,

in which,

"A" and "C" have the same meaning as in subsection (2), and

"D" equals the amount by which the threshold amount for the fiscal year for the over-threshold laboratory is increased under section 22.4.

(4) A change in base year amounts made under this section applies with respect to the calculation of threshold amounts for the fiscal year following the year in which the circumstance described in subsection (1) exists, and for every subsequent fiscal year.

22.7 (1) The base year amount for a medical laboratory is increased by the amount calculated under subsection (2) if the laboratory becomes licensed to perform, and begins to perform, one or more of the following tests during the 1995/96 or 1996/97 fiscal year:

1. Antithrombin III assay (L373).

2. C-peptide Immunoreactivity (L346).

3. Dehydroepiandrosterone Sulphate (L347).

4. Free T-3 (L607).

5. Free Testosterone (L608).

6. 1,25 Dihydroxy Vitamin D (L605).

7. 25 Hydroxy Vitamin D (L606).

8. Immunoperoxidase technique (L731).

9. Leukocyte phenotyping by monoclonal antibodies (L685 or L686).

10. Methenalbumin (L171).

11. Oxalic Acid — U (L184).

12. Plasminogen assay (L433).

13. Total Haemolytic complement (CH 50 non-kit) (L530).

14. Thyroglobulin (L609).

(2) The amount of the increase is calculated using the formula,

in which,

"A" is the total individual unit values (based on the unit values in effect on April 1, 1997) for all the tests listed in subsection (1) that were performed by or on behalf of the Hospital-in-Common Laboratory Inc. during the 1995/96 fiscal year, and

"B" is the total individual unit values of the tests listed in subsection (1) performed by the medical laboratory from April 1 until June 30, 1997 expressed as a percentage of the total individual unit values of the tests performed during that period by all medical laboratories entitled to an increase under subsection (1).

22.8 (1) This section applies with respect to a referring laboratory and a receiving laboratory,

(a) if during the 1995/96 fiscal year the referring laboratory referred certain tests to the receiving laboratory; and

(b) if during the 1995/96 or 1996/97 fiscal year,

(i) the referring laboratory becomes licensed to perform those tests and begins to perform them instead of referring them to the receiving laboratory, or

(ii) the referring laboratory begins referring the tests to a related laboratory instead of the receiving laboratory.

(2) The base year amount for the referring laboratory is increased, and the base year amount for the receiving laboratory is decreased, by 85 per cent of the total amount that would have been payable under subsection 22 (4) for tests referred by the referring laboratory that were performed by the receiving laboratory during the 1995/96 fiscal year..

(3) A change in the base year amount made under this section applies with respect to the calculation of threshold amounts for the 1996/97 fiscal year and for every subsequent fiscal year.

(4) For the purposes of subsection (1), two medical laboratories are related if they are controlled (within the meaning of subsection 1 (5) of the Business Corporations Act) by the same person.

22.9 (1) This section applies with respect to a referring laboratory and a receiving laboratory,

(a) if, during the 1995/96 fiscal year, the receiving laboratory performed tests that were referred by the referring laboratory;

(b) if, on or after April 1, 1997, the receiving laboratory ceases to perform some or all of the tests referred by the referring laboratory; and

(c) if neither the referring laboratory nor a related laboratory is licensed to perform the tests when the receiving laboratory ceases to perform some or all of them.

(2) The base year amount for the receiving laboratory is decreased, and the base year amount for all of the medical laboratories described in subsection (3) is increased, by the amount calculated as follows:

1. With respect to the type of test that the receiving laboratory ceases to perform, determine the total amount that would have been payable under subsection 22 (4) for tests of that type referred by the referring laboratory that were performed by the receiving laboratory during the 1995/96 fiscal year.

2. Multiply the amount calculated under paragraph 1 by 85 per cent.

(3) The increase is apportioned among the following medical laboratories as follows:

1. If the referring laboratory refers the tests to other medical laboratories and one receiving laboratory performs all the tests referred, the base year amount for the receiving laboratory is increased by the amount calculated under subsection (2).

2. If the referring laboratory refers the tests to other medical laboratories and two or more medical laboratories perform the tests, the amount calculated under subsection (2) is allocated between them, and the base year amount of each is increased, in proportion to the total amount payable to each of them respectively for the tests.

22.10 (1) This section applies if a written agreement in effect between two medical laboratories provides that,

(a) one of them (the "managing laboratory") will manage and operate all or part of the laboratory business of the other of them (the "contracting laboratory"); or

(b) one of them (the "managing laboratory") will perform insured services referred by the other of them (the "contracting laboratory").

(2) The agreement must have been in effect on March 31, 1996 or it must replace such an agreement, although the replacement agreement may involve a different managing laboratory than the one that was a party to the agreement in effect on March 31, 1996..

(3) If the agreement terminates on March 31, upon its termination the base year amount for the managing laboratory that was a party to the agreement in effect on March 31, 1996 is decreased in the fiscal year after the agreement is terminated, and the base year amount for the contracting laboratory is increased, by the amount calculated as follows:

1. Calculate 85 per cent of the total amount that would have been payable under subsection 22 (4) to the managing laboratory for insured services performed during the 1995/96 fiscal year by the managing laboratory under the agreement then in effect.

2. Calculate 85 per cent of the total amount that would have been payable under subsection 22 (4) to the contracting laboratory for all insured services performed by it during the 1995/96 fiscal year.

3. If the amount calculated under paragraph 1 is greater than or equal to the amount calculated under paragraph 2, the amount calculated under paragraph 1 is the amount of the increase or decrease, as the case may be, in the base year amount..

(4) If the agreement terminates on a date other than March 31, upon its termination the base year amount for the managing laboratory that was a party to the agreement in effect on March 31, 1996 is decreased in the fiscal year in which the agreement is terminated and in the following fiscal year, and the base year amount for the contracting laboratory is increased in each of those years, by the amounts calculated as follows:

1. Calculate the amount of the increase or decrease that would be payable if the agreement terminated on March 31.

2. Multiply the amount calculated under paragraph 1 by the following fraction:

The resulting amount is the amount of the increase or decrease, as the case may be, in the fiscal year in which the agreement is terminated.

3. Subtract the amount calculated under paragraph 2 from the amount calculated under paragraph 1. The resulting amount is the amount of the increase or decrease, as the case may be, in the following fiscal year.

(5) Despite subsections (3) and (4), if the contracting party enters into an agreement with another medical laboratory within 60 days after the expiry of the agreement referred to in subsection (1),

(a) the base year amount for the contracting laboratory shall not be increased as provided by subsection (3) or (4); and

(b) the base year amount for the other medical laboratory shall be increased by the amount that the base year amount for the contracting laboratory would have been increased under subsection (3) or (4)..

(6) Upon the termination of an agreement described in subsection (5), the base year amount for the contracting laboratory is increased and the base year amount for the other medical laboratory is decreased as provided by subsection (3) or (4).

22.11 (1) This section applies,

(a) when one medical laboratory (the "transferring laboratory") transfers its interest in one or more laboratories (the "transferred facilities") licensed under the Laboratory and Specimen Collection Centre Licensing Act to another medical laboratory (the "acquiring laboratory") and ceases to hold a licence under that Act for the transferred facilities;

(b) when one medical laboratory becomes controlled (within the meaning of subsection 1 (5) of the Business Corporations Act) by another medical laboratory or two medical laboratories become controlled by the same person;

(c) when two or more medical laboratories amalgamate; or

(d) when the trustee in bankruptcy or receiver and manager appointed over a medical laboratory (the "trustee") sells assets of the medical laboratory.

(2) In the circumstances described in subsection (1) (a) and only if both medical laboratories agree, the base year amount for the acquiring laboratory is increased and the base year amount for the transferring laboratory is decreased by the amount calculated as follows:

1. Calculate 85 per cent of the total amount payable under subsection 22 (4) to the transferring laboratory for insured services performed at the transferred facilities in the fiscal year before the transfer of interest in the facilities occurs.

2. Calculate 85 per cent of the total amount payable under subsection 22 (4) to the transferring laboratory for the same fiscal year.

3. Express the amount calculated under paragraph 1 as a percentage of the amount calculated under paragraph 2.

4. Multiply the base year amount of the transferring laboratory by the percentage calculated under paragraph 3.

(3) In the circumstances described in clause (1) (b) and only if both medical laboratories agree,

(a) the base year amount for one of the medical laboratories is increased by the amount of the base year amount for the other medical laboratory; and

(b) the base year amount for the other medical laboratory is reduced to zero.

(4) When two or more medical laboratories amalgamate and only if the amalgamating laboratories agree,

(a) the base year amount for the amalgamated laboratory is increased by the base year amount for each of the amalgamating laboratories; and

(b) the base year amount for each of the amalgamating laboratories is reduced to zero.

(4.1) In the case of the sale of assets described in clause (1) (d),

(a) the base year amount for the medical laboratory whose base year amount is to be increased under the terms of the agreement of purchase and sale is increased by an amount equal to the base year amount of the medical laboratory whose assets are being sold; and

(b) the base year amount for the medical laboratory whose assets are being sold is reduced to zero.

(5) The base year amount is transferred as of April 1 in the fiscal year in which the event described in subsection (2), (3), (4) or (4.1) occurs.

(6) Subsection (2) does not apply to the transfer of interests in facilities that are part of a sale of assets described in clause (1) (d).

22.11 (1) This section applies,

(a) when one medical laboratory (the "transferring laboratory") transfers its interest in one or more laboratories (the "transferred facilities") licensed under the Laboratory and Specimen Collection Centre Licensing Act to another medical laboratory (the "acquiring laboratory") and ceases to hold a licence under that Act for the transferred facilities;

(b) when one medical laboratory becomes controlled (within the meaning of subsection 1 (5) of the Business Corporations Act) by another medical laboratory or two medical laboratories become controlled by the same person;

(c) when two or more medical laboratories amalgamate; or

(d) when the trustee in bankruptcy or receiver and manager appointed over a medical laboratory (the "trustee") sells assets of the medical laboratory.

(2) In the circumstances described in subsection (1) (a) and only if both medical laboratories agree, the base year amount for the acquiring laboratory is increased and the base year amount for the transferring laboratory is decreased by the amount calculated as follows:

1. Calculate 85 per cent of the total amount payable under subsection 22 (4) to the transferring laboratory for insured services performed at the transferred facilities in the fiscal year before the transfer of interest in the facilities occurs.

2. Calculate 85 per cent of the total amount payable under subsection 22 (4) to the transferring laboratory for the same fiscal year.

3. Express the amount calculated under paragraph 1 as a percentage of the amount calculated under paragraph 2.

4. Multiply the base year amount of the transferring laboratory by the percentage calculated under paragraph 3.

(3) In the circumstances described in clause (1) (b) and only if both medical laboratories agree,

(a) the base year amount for one of the medical laboratories is increased by the amount of the base year amount for the other medical laboratory; and

(b) the base year amount for the other medical laboratory is reduced to zero.

(4) When two or more medical laboratories amalgamate and only if the amalgamating laboratories agree,

(a) the base year amount for the amalgamated laboratory is increased by the base year amount for each of the amalgamating laboratories; and

(b) the base year amount for each of the amalgamating laboratories is reduced to zero.

(4.1) In the case of the sale of assets described in clause (1) (d),

(a) the base year amount for the medical laboratory whose base year amount is to be increased under the terms of the agreement of purchase and sale is increased by an amount equal to the base year amount of the medical laboratory whose assets are being sold; and

(b) the base year amount for the medical laboratory whose assets are being sold is reduced to zero.

(5) The base year amount is transferred as of April 1 in the fiscal year in which the event described in subsection (2), (3), (4) or (4.1) occurs.

(6) Subsection (2) does not apply to the transfer of interests in facilities that are part of a sale of assets described in clause (1) (d).