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

ORDER PO-2898

Appeal PA08-294-2

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> Provide since October 1, 2006, as part of Bill 102 – the *Transparent Drug System for Patients Act 2006* regime:
>
> > Draft, and final pricing and listing agreements, and agreement amendments with drug manufacturers. The Ministry's web site confirms that 98% of pricing agreements are now in place and that listing and pricing agreements exist for more than 76% of products on the Formulary.
>
> Provide other records released on these above subjects under [the *Act*].

The Ministry located the responsive records and issued an interim decision advising that partial access would be granted to the records requested, with severances made pursuant to section 18(1) (economic and other interests) of the *Act*. The Ministry also provided an interim fee estimate of $5,250.00 and requested a deposit of $2,625.00 in order to proceed with processing of the request.

The requester (now the appellant) appealed the Ministry's fee estimate and this office opened Appeal PA08-294. During the course of mediation, the appellant clarified and narrowed the scope of his request, thereby resulting in a number of revised fee estimates. As part of the final clarification, the appellant narrowed the scope of his request to include only the final pricing/listing agreements for six named manufacturers. The Ministry agreed to issue a final decision with respect to these six named manufacturers.

Upon receipt of the Ministry's final decision, the appellant advised the mediator that he did not wish to continue with his appeal of the fee. Accordingly, appeal PA08-294 was closed. However, the appellant noted that he wished to appeal the Ministry's decision to deny access, and Appeal PA08-294-2 was opened to address that issue.

During mediation of Appeal PA08-294-2, the Ministry provided the appellant with a representative sample of a final listing agreement with a named drug company (the affected party). Only Schedules A, B and C of this representative sample agreement were severed pursuant to sections 18(1)(c) and (d) of the *Act*. The Ministry did not provide notice to the affected party under section 28(1) of the *Act* before disclosing this severed agreement.

The appellant advised the mediator that he wished to pursue access in this appeal to the withheld schedules to this representative sample agreement, and not to the agreements or information pertaining to the other five companies.

During mediation, the appellant also indicated that he believes there is a compelling public interest in disclosure of the severed portions of the agreement, thereby raising section 23 of the *Act* as an issue in this appeal.

As mediation did not resolve the remaining issues in this appeal, the file was transferred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry. As the mandatory third party exemption in section 17(1) of the *Act* may apply to the information at issue in this appeal, I also sent a Notice of Inquiry to the affected party. I received representations from the Ministry and the affected party. I also received representations from Canada's Research-Based Pharmaceutical Companies (Rx&D), a national association representing pharmaceutical companies. Rx&D was contacted by the affected party and provided representations in support of the affected party.

After receiving notification of the disclosure of the severed agreement in the Notice of Inquiry, the affected party filed an appeal seeking a declaration that the Ministry's decision to disclose this severed agreement without providing prior notice to it was unlawful. The affected party sought a declaration to prevent the Ministry in the future from disclosing records that might contain information to which the third party exemption in section 17(1) applies without providing prior notice. As a result, Appeal PA09-235 was opened. Appeal PA09-235 has been placed on hold pending the outcome of a judicial review application of Orders PO-2863, PO-2864 and PO-2865, which concern a similar issue as to the requirement to provide notice to affected parties. This order only addresses Appeal PA08-294-2.

After receipt of representations from the Ministry, the affected party and Rx&D, I sent a Notice of Inquiry to the appellant, enclosing the representations of these parties, except for certain portions of the representations and the supporting affidavit of the affected party. This information was withheld from the appellant due to confidentiality concerns. In response, I received representations from the appellant.

I then sought and received further representations from the Ministry, the affected party and Rx&D on the application of the public interest override in section 23 of the *Act* to the records at issue. The appellant requested a copy of these reply representations, which I provided to him. He then submitted surreply representations on this issue.

RECORDS:

The records remaining at issue consist of Schedules A, B and C of a Listing Agreement listing the affected party's drug on the Ontario Drug Benefit Formulary under the *Ontario Drug Benefit Act* (*ODBA*). The only information severed from this listing agreement is the information in the schedules. Schedule A is the "Drug Benefit Price", Schedule B is the "Calculation of Volume Discount" and Schedule C is the "Terms and Conditions of Listing". These schedules contain information as to the negotiated volume discount amount and the conditions of listing the specific drug. The remainder of the agreement has been disclosed to the appellant.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

As noted, the Ministry claims that the records are exempt under sections 18(1)(c) and (d). These sections read:

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

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.
>
> Apart from premature disclosure of decisions, however, there are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments.
>
> ….
>
> We recommend that the legislation include an exemption for documents whose disclosure would reveal a proposed economic transaction of a governmental institution, if disclosure of the document could reasonably be expected to adversely affect the government's ability to protect its legitimate economic interests. [pp.321-322]

For sections 18(1)(c) and (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.)].

Section 18(1)(c): prejudice to economic interests

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

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

For section 18(1)(d) to apply, the Ministry must demonstrate that 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.

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 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

Representations

The Ministry submits that disclosure of the information at issue would reveal the confidential volume discount amounts and other information that relates to the calculation of the volume discount amounts paid by drug manufacturers to the Ministry pursuant to listing or pricing agreements. It states that:

> Through the Ontario Drug Benefit (ODB) Program, the Ministry provides coverage for most of the cost of over 3,300 prescription drug products for Ontarians who are eligible for benefits under the *Ontario Drug Benefit Act* (*ODBA*). Eligible persons include Ontario residents who have valid Ontario health insurance and who belong to one of the following groups:
>
> - People 65 years and over
> - Residents of long-term care homes

- Residents of Homes for Special Care
- People receiving professional home care services
- People who qualify for coverage under the Trillium Drug Program (i.e. have high drug costs in relation to their income)
- People receiving social assistance

In 2008/09, the ODB Program provided prescription drug coverage to approximately 2.4 million people in Ontario and reimbursed over 100 million claims. Government expenditures for the ODB Program for 2008/2009 amount to about $4 billion, which represents approximately 10% of total health care spending…

The *ODBA* confers authority on the Executive Officer [of the Ontario Public Drug Programs] to, among other things, administer the ODB Program; to keep, maintain, and publish the Formulary; to designate drug products as listed drug products (i.e. benefits under the ODB Program); and to negotiate pricing agreements in respect of drug products that are listed on the Formulary as benefits under the ODB Program.

The price that the ODB Program pays for listed drug products is determined in accordance with the *ODBA* and Ontario Regulation 201/96 made under the *ODBA* (the *"ODBA* Regulation")…

The Executive Officer routinely negotiates pricing agreements with manufacturers in respect of brand products that are being proposed by the manufacturer for designation as a benefit under the ODB Program. The very purpose of these agreements ("Pricing Agreements") is to generate government cost-savings and to obtain value for money in respect of drug products that are listed as benefits under the ODB Program…

Consequently, pursuant to these agreements, the effective price paid by the Ministry under the ODB Program is lower than the published Formulary price. The Formulary price reflects what the pharmacist would pay if purchasing the listed drug from the manufacturer, and the amount that the Ministry reimburses the pharmacist for the cost of the drug. But it does not reflect the effective price of the drug for the Ministry. The listed price is reduced by virtue of a "volume discount", expressed as a percentage of the published price, paid by manufacturers to the Ministry for the drug. These volume discounts are negotiated by the Executive Officer in listing and pricing agreements with the manufacturers...

Volume discounts are negotiated by the Executive Officer with each manufacturer, in confidence, and are included in the Schedules of Listing and Pricing Agreements. The information severed from the records at issue in this appeal reveals, or could be used in combination with other information to reveal how much a named manufacturer paid the Ministry as a volume discount amount,

> and what other financial and "value for money" conditions a manufacturer agreed to in its confidential negotiations with the Executive Officer.
>
> The Ministry submits that if the severed information were disclosed, manufacturers would consider this a frank breach of their expectations and, in the future, would be more reluctant to negotiate significant volume discounts. The disclosure of this information can negatively affect the manufacturer's competitive position since the information could be used by other provinces and private sector companies negotiating with the manufacturers as a low benchmark price for the manufacturer's given drug products. Since it is obviously in the Ministry's and the government's interest to negotiate as high a volume discount amount as possible, the Ministry must promote and protect its trusted relationship with manufacturers. That trust is premised, in large measure, on maintaining the confidentiality of the volume discount amount, the value for money conditions in the listing and pricing agreements, and the actual details of the negotiations. Without that trust, the Ministry's ability to negotiate significant savings in respect of the ODB Program is hampered. The Ministry submits that it would not realize the cost savings that could potentially be achieved if the volume discount amounts remained confidential and were not disclosed. Without those savings, the Ministry's economic interests, and the Government's financial interests will be prejudiced, and will result in higher drug costs for ODB recipients.
>
> The Ministry submits that the severed information contained in Schedules A and B, is exempt under sections 18(1)(c) and (d) because this information would reveal to the appellant the **actual volume discount amount** paid by the manufacturer, as well as the conditions of listing the drug product at the volume discount [emphasis in original].
>
> In addition, Schedule C describes other, value for money conditions accepted by the manufacturer in its negotiations with the Executive Officer. Although these latter conditions do not reflect the volume discount amount payable by the manufacturer under a given agreement, they were used to leverage the discount amount, and many involve financial commitments by the manufacturer that would have been used to negotiate a more favourable discount amount.
>
> The Ministry submits that the information in Schedule C reveals the mechanics of the negotiations that took place between the Ministry and the manufacturer and the disclosure of these details would interfere with the Executive Officer's ability to use certain incentives and strategies in future negotiations with manufacturers, since the Ministry could not provide assurances of confidentiality in respect of these details. This, in turn, would reduce ODB savings that might otherwise be achievable if the Ministry could assure manufacturers that the details of their negotiations would remain confidential…

The Ministry submitted letters from certain drug manufacturers in support of its representations that pricing information should not be disclosed.

In further support of its representations, the Ministry submitted a letter from its Assistant Deputy Minister (ADM), who is also the Executive Officer of the Ontario Public Drug Programs. In this letter, the ADM affirms the information provided by the Ministry in its representations. She also states that:

> …As Executive Officer, one of my primary functions is to negotiate agreements with manufacturers regarding the Drug Benefit Price of listed drug products. Since the [public drug system reform in 2006], pricing agreements have been signed with 98% of brand name drug manufacturers…
>
> My goal is to secure the best possible price for the Government. In cases where I enter into agreements with manufacturers for a volume discount, the negotiations typically result in agreement over a price published in the Formulary and a confidential volume discount that leads to the "effective price" the Ontario Government actually pays for the drug. For example, the published Drug Benefit Price of a drug on the Formulary may be $1.00 and the confidential volume discount provided by the manufacturer is $0.50. This would mean that when a pharmacy supplies that drug to an ODB-eligible person and submits a claim to the Ministry, the Ministry would pay the pharmacy the Drug Benefit Price of $1.00, as that is the published price at which the manufacturer is required under the *ODBA* to sell the product. However, the manufacturer subsequently reimburses the Ministry $0.50 in accordance with the pricing agreement and the volume discount mechanism. As a result of the manufacturer's discount, the effective price paid by Ontario for the drug would be $0.50. Obtaining such volume discounts from manufacturers is extremely important for the Ministry and, concomitantly, for the Government of Ontario. Manufacturers are unwilling to offer such discounts, however, without agreement from the Ministry that the discounted amount be kept confidential...
>
> I negotiate a unique pricing agreement with each manufacturer. The discount provided to the Ministry by a given manufacturer under the terms of its pricing agreement with the Ministry is strictly confidential, even amongst manufacturers; each manufacturer knows only the terms of its own volume discount pricing arrangement with the Ministry.
>
> …Manufacturers do not want their pricing agreements with the Ministry to be made publicly available. It is my understanding that this is to avoid jeopardizing their bargaining position vis-à-vis other purchasers and third party payers with whom they may be engaged in price negotiations, either concurrently or in the future…
>
> I have negotiated agreements with manufacturers for volume discounts that reduce the price of drugs by up to 45%. Such negotiations and agreements would not be possible if manufacturers were not given a promise of strict confidentiality in respect of the terms of these agreements, and particularly the pricing provisions of these agreements that reflect or reveal volume discount information…

> Any reluctance on the part of manufacturers to enter into flexible negotiations over the pricing of their drug products is detrimental to Ontarians, both as ODB recipients and as taxpayers. In terms of ODB recipients, this would mean the Government will be less able to continue to provide access to current and new drugs; and for all Ontarians, this would mean that more tax dollars will be spent on higher drug costs. Drug Programs as a whole would lose potential savings which would no longer be available for reinvestment in the system.
>
> The disclosure of confidential volume discount information could [also] reasonably be expected to also have a detrimental effect on Ontario's competitive position.
>
> Due to the size of its market share, Ontario has, historically, been able to secure better prices from manufacturers than smaller provinces. However, this competitive advantage would be lost if Ontario were the only province in Canada required to disclose confidential pricing information. This is because the confidential pricing information, in and of itself, has inherent value for drug manufacturers because it reveals their proprietary information and, in particular, sets a benchmark for the price of a drug product. If that information is disclosed, it would have a direct, negative impact on the manufacturer's ability to negotiate higher prices with other provinces or the private sector purchasers, and potentially other countries. Manufacturers refuse to make their pricing information publicly available precisely because doing so would effectively undermine their ability to negotiate a higher price for drug products from other potential purchasers. They do not want to be "tied" to the same price for all other purchasers of their products.
>
> Although manufacturers are currently keen to negotiate with Ontario because of the large size of Ontario's drug market, they may be less willing to negotiate pricing arrangements that are advantageous to Ontario for fear that the arrangement will be used by other potential buyers as a discount standard or achievable price goal. In other words, knowing that their pricing discounts will be made public will discourage manufacturers from negotiating large volume discounts when dealing with Ontario.

The appellant did not provide direct representations respecting the application of sections 18(1)(c) and (d), other than to state that the information at issue should not be secret, but ought to be transparent. These arguments are best addressed in the portion of this order that concerns whether section 23 applies because there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1) exemption.

Analysis/Findings

I find that disclosure of the information at issue in the records would reveal the volume discount amount paid by the affected party for the drug covered by the listing agreement at issue and the specific details of the financial and value for money conditions negotiated as consideration for the Ministry entering into this listing agreement with the drug manufacturer.

I also find that disclosure of the information at issue in the records could reasonably be expected to give rise to the disclosure of the method for calculating the volume discount amounts for other drugs which have been negotiated as consideration for the Ministry entering into listing agreements with drug manufacturers (see Order PO-2863).

In Order PO-2865, I ordered the disclosure of the amount of the lump sum quarterly payments paid to the Ministry by drug manufacturers for drugs listed on the Formulary. Unlike the information that I ordered disclosed in Order PO-2865, the information at issue in this appeal reveals the specific volume discount amount paid by a drug manufacturer to the Ministry, the method for calculating these payments and the specific details of the financial and value for money conditions negotiated as consideration for the Ministry entering into the listing agreement. The information at issue in this appeal is the same type of information that I ordered withheld in Order PO-2863.

Based on my review of the records, I agree with the Ministry that disclosure of the information at issue in the records could reasonably be expected to attract the harms contemplated in sections 18(1)(c) and (d). The information at issue reveals how much a named manufacturer has agreed to pay the Ministry by way of a volume discount amount for a particular drug, as well as what other specific financial and value for money conditions the manufacturer agreed to provide to the Ministry. This information could be used by other potential bulk prescription drug purchasers as a discount standard or price goal to be obtained from the drug manufacturers.

I find that disclosure of the information at issue could reasonably be expected to discourage drug manufacturers in the future from negotiating large volume discounts and other favourable financial terms with Ontario, out of concern that this information could be used by their other public and private sector customers seeking to negotiate similar discounts with the drug manufacturers [Orders PO-2863 and PO-2786]. Furthermore, other drug manufacturers would expect Ontario to negotiate a lower volume discount in the future for their drugs, if it is revealed that Ontario was willing to negotiate a lesser discount for a similar drug with another drug manufacturer. I find that disclosure of the information at issue could reasonably be expected to seriously prejudice the Ministry's ability to secure savings on prescription drugs by weakening its bargaining position in negotiations with drug manufacturers [Order PO-2780].

In reaching my conclusion as to the applicability of sections 18(1)(c) and (d) to the information at issue in the records, I have considered the reasoning of Adjudicator Catherine Corban in Order PO-2569, where she stated that:

> …disclosure would demonstrate to other private sector industries seeking [the Financial Contribution that Ontario was prepared to make in support of a specified project] "how far Ontario is prepared to go in order to attract business to Ontario". Considering the information contained in the records, I accept that disclosure of this information would undermine Ontario's ability to negotiate competitive financial contribution packages with respect to business ventures. I accept that disclosure of this information would not only give an indication of how much Ontario might be willing to contribute to Bombardier's competitors in the aerospace industry but that would also set a benchmark for other large

> industry sectors in their attempts to negotiate financial contribution packages for comparable projects. Even for projects that could not be considered comparable, in my view, knowledge of Ontario's contribution would allow other industries to make an educated guess as to what Ontario's bottom line might be for their projects. Therefore, I accept that if this type of information were available to industry players, it could reasonably be expected to prejudice the economic interests of the Ministry and would be injurious to the financial interests of the Government of Ontario, by weakening its negotiating position.

In conclusion, I find that the Ministry has provided the kind of detailed and convincing evidence required to demonstrate that disclosure of the information for which it has claimed the sections 18(1)(c) and (d) exemptions could reasonably be expected to prejudice the economic interests or the competitive position of the Ministry, and 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 the province. Accordingly, I find that sections 18(1)(c) and (d) apply to the information for which it has been claimed.

EXERCISE OF DISCRETION

I will now determine whether the Ministry exercised its discretion under section 18(1), and if so, whether I should uphold this exercise of discretion.

The section 18(1) 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

Concerning section 18(1), the ADM explained her exercise of discretion as the Executive Officer of the Ontario Public Drug Programs to not release the information at issue as follows:

> Under the *Act*, the principle of the public's right of access to government information must be balanced against the purpose of the exemption under which the information may be withheld. Accordingly, only very limited information was severed from the various records. For example, the only information severed from the template agreements at issue … is Schedule B... Although there may be a generalized public interest in the disclosure of information about pricing and listing agreements, the disclosure of the detailed information at issue in these appeals would primarily serve private interests - - those of competing drug manufacturers. Typically, requests for information of the type at issue in this

appeal are made by competitors of the drug manufacturers named in the records, and the goal of a competitor's s request is to serve its own private commercial interest, not the public interest.

Knowing the difference between the listed Drug Benefit Price for a given drug and the "effective price" paid by the Ministry would demonstrate the extent of the savings the Ministry has achieved for Ontario taxpayers and how the Ministry has promoted efficiencies in Drug Programs. Considered from this perspective, the Ministry could benefit from the public disclosure of this "good news" item.

In my view, however, the public interest is best served in this case by not disclosing this information, in order to preserve the overriding public interest in the Government's ability to control drug costs for the benefit of Ontarians, and to ensure that the Government is able to make a wide array of necessary drug products available to vulnerable ODB recipients. This is consistent with the principles set out in the *ODBA*, which aims to meet the needs of Ontarians as patients, consumers and taxpayers; to achieve value-for-money; and to ensure the best use of resources at every level of the system.

Consequently, if the disclosure of the information at issue would in any way discourage drug manufacturers from agreeing to provide significant volume discounts to the Ministry through negotiated agreements, this would prejudice the public interest. Higher costs for ODB Program benefits necessarily prejudice the Ministry's and the province's financial interests which, in turn, has a direct, negative impact on taxpayers.

The extent to which transparency is reduced by not disclosing information that relates only to the calculation of volume discount amounts is small when compared to the greater benefit of ensuring the Government's ongoing ability to manage the costs of the ODB Program.

Disclosure of the information would be inconsistent with the intent of the ODBA Regulation, which expressly sets out what aspects of these agreements should be made public.

I have exercised my discretion carefully; only information that could be used by the appellant to calculate the volume discount amount, or determine other value for money conditions underlying the agreements has been severed. Most of the information requested by the appellant has already been disclosed to him, including the body of the pricing and listing agreement templates.

The appellant did not provide direct representations respecting the Ministry's exercise of discretion.

Analysis/Findings

The sections 18(1)(c) and (d) exemptions seek to protect the economic interests of institutions or the Government of Ontario. I found above that disclosure of the information at issue could reasonably be expected to cause economic harm to the Ministry and the Province of Ontario under section 18(1).

Having considered all of the circumstances of this appeal, I am satisfied that the Ministry exercised its discretion in a proper manner under section 18(1), taking into account relevant considerations and not taking into account irrelevant considerations, in withholding the information at issue. The information at issue is significant to the Ministry, and disclosure could increase the Ministry's costs in delivering a substantial and important program. Therefore, I find that the Ministry's exercise of discretion was reasonable and I uphold the claimed exemptions in sections 18(1)(c) and (d).

In addition, as I have found that sections 18(1)(c) and (d) apply to the information at issue in this appeal, it is not necessary for me to consider the affected party's claim that the mandatory third party information exemption at section 17(1) applies to this information.

PUBLIC INTEREST OVERRIDE

I will now determine whether there exists a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1) exemption.

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.

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 and 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].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above]. 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 existence of a compelling public interest alone is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Representations

The Ministry submits that:

> …a public interest does not exist in the records simply because they relate to the expenditure of public funds. To find otherwise would mean that every record relating to the expenditure of public funds would be subject to disclosure under section 23, because neither sections 17 or 18 would apply to protect the confidentiality of the records. This would effectively distort the application of the *Act*…
>
> Furthermore, the details of a single contractual arrangement that the Ministry has with one company is not of general public interest. By contrast, if there were allegations in the media that the Ministry was misspending public funds or not obtaining value-for-money in its contractual arrangements with a particular drug manufacturer, the issue might very well be different. However, in this case, the record relates to confidential volume discount information, and an effective drug price that the Ministry negotiated with this one manufacturer to achieve cost-savings. Thus, while the appellant may have a private interest in the details of the volume discounts, the Ministry submits that there is no compelling public interest simply because they relate, generally, to the expenditure of public funds.
>
> Moreover, the Ministry submits that much of this information can be characterized as relating to cost-savings, not cost expenditures. What the appellant wants to know is not how much public money the Ministry spent, but rather, how much money it received under certain contractual arrangements.
>
> The Legislature's intention regarding the level of transparency and openness that should apply to agreements between the Ministry and drug manufacturers is clearly evidenced in the amendments it made to the *ODBA* [section 1.2(2)]…
>
> This provision prescribes what information must be listed on the Formulary. The Ministry complies with these requirements by ensuring that the listed price being offered by a manufacturer, which is the maximum price paid by the Ministry, is properly subject to public scrutiny.

Furthermore, the Ministry consulted directly with the drug industry about what level of transparency would allow the Government to not only control the cost of drugs for the benefit of Ontarians, but also ensure public accountability. As a result of these informed consultations, the Legislature chose not to require the disclosure of negotiated volume discounts under the Formulary. This is also clearly evidenced in the ODBA Regulations, which provide:

> … 4. In addition to the applicable conditions under paragraphs 1, 2 and 3, if applicable, and if required by the executive officer, the manufacturer of the product shall enter into an agreement with the executive officer that specifies any volume discount or other amount that may be payable by **the manufacturer to the Minister of Finance, and shall agree that the executive officer may make public the following information, and that information only, with respect to the agreement**.
>
> i. The name of the manufacturer.
>
> ii. The subject-matter of the agreement.
>
> iii. The fact of entering into or terminating the agreement [Emphasis in original].

...As noted by the Executive Officer of the Ontario Public Drug Programs [the ADM] …the public interest is, in fact, best served by not disclosing these records since disclosure would discourage other drug manufacturers from agreeing to provide significant volume discounts to the Ministry. As a consequence, disclosure would actually adversely impact the Ministry's ability to control drug costs for Ontarians…

The affected party submits in its non-confidential representations that:

> Listing agreements are entered into by the [ODB Program] to save costs and obtain other benefits from pharmaceutical companies for listed drug products. Disclosure of listing agreements between the Executive Officer of the [ODB Program] and pharmaceutical companies will work contrary to the public interest by jeopardizing the [ODB Program's] ability to enter such agreements.
>
> It is furthermore essential to realize that several mechanisms already exist within the regulatory framework applicable to prescription drugs to ensure that such drugs not only are clinically effective, but also cost effective. A compelling interest has been found not to exist where another public process or forum has been established to address public interest considerations.
>
> Most significantly, patented drug prices are regulated for all of Canada by the Patented Medicines Prices Review Board (PMPRB), an independent quasi-judicial federal body. The PMPRB's stated mandate is to protect consumers and

> contribute to Canadian health care by ensuring that prices charged by manufacturers for patented medicines are not excessive. The PMPRB establishes maximum allowable prices that may be charged by patentees for prescription drugs. The "factory gate" price of [the named drug] is regulated by the PMPRB, with the effect that the price of [this drug] to any payer in Canada cannot exceed the maximum price established by the PMPRB.
>
> In addition, when assessing the relative costs and benefits of listing a particular drug product, the province has available to it the studies generated by the Canadian Agency for Drugs and Technology ("CADTH" - formerly "CCOHTA")…
>
> It is apparent that the [ODB Program] effectively uses its bargaining power to negotiate favourable terms and conditions for the supply of drug products by manufacturers such as [the affected party], including the ability to terminate such agreements when the [ODB Program] determines that reimbursement of a particular drug product is no longer in the interests of ODB patients…

In its representations, Rx&D supports the affected party's position that there is no "compelling public interest" in the disclosure of records relating to product listing agreements. It submits that:

> There is no public harm in refusing to disclose the information that is at issue. Indeed, Rx&D suspects that there would be significant public harm in disclosing the information, as Canada would be out of step with other jurisdictions in their practices, as Rx&D understands them to be, relating to the disclosure of this commercial and highly sensitive information. Rx&D further believes that if such information is disclosed, there is significant risk for Ontario that there would be higher prices for products, and fewer product listings, resulting in less access to needed drugs by patients…
>
> Pricing and market access are issues of great importance to the innovative industry represented by Rx&D. If information that was clearly submitted to the Ontario government in confidence and with the expectation that it would be held in confidence were now disclosed, Rx&D submits this would be devastating for the industry, and would affect the investment climate with a negative effect on its members. Confidence in both Ontario and Canada as a place to do business would decline, with resulting uncertainty and potential job losses.

The appellant states that the information in the records should be disclosed to ensure that meaningful discounts are being achieved by the Ministry. He submits that:

> …the issue of public drug program pricing in the [drug named in the records] or other such agreements is and remains one of enormous public interest. A significant number of Ontario residents (figures the Ministry cited here as 2.4 million people) are covered under the Ontario Drug Benefit Program where Bill 102 agreements are engineered. Other Ontario residents not so covered by [ODB Program] have higher and fuller drug prices that are not discounted are also then

> affected and interested in being informed about such pricing and arrangements. As well, [the named drug] is used by sufficient people to be of more than of a passing minor interest.
>
> This is a compelling public interest issue because the public wants to know and be reassured that the government is obtaining good value for its drug purchases, especially when such products as [the named drug] are sufficiently prescribed, and expensive enough and escalate in price…
>
> The public using such prescription drugs as [the named drug] wants sufficient evidence that this is an effective mechanism to help manage and not mismanage drug pricing. They cannot rely simply on Ministry's claims that this management tool and approach is effectively lowering [this drug's] pricing and is free of conflicting terms and conditions.
>
> The public also has a stake in knowing how safe drugs purchased by the government like [the named drug] are and that economic considerations do not outweigh safety considerations in the attempts to seek and secure a discounted drug price for [this drug].

The appellant provided me with a newspaper article published in the National Post entitled "Drug Firms Revamp Pricing". In his letter that accompanied the article, he stated that the article confirms that Ontario drug pricing scheme is too secretive, such secrecy can lead to questionable deal-making and that such a scheme creates a two-tier drug pricing scheme, leaving many in Ontario on private plans and without coverage paying higher prices.

In response to the National Post article, the Ministry submits that:

> …the following facts outlined in the article support the Ministry's previous submissions that there is in fact a public interest in not disclosing the information at issue in this appeal:
>
> - Quote from the Executive Officer [the ADM] confirming that non-disclosure of drug pricing is unavoidable because the drug industry has indicated that it will not enter into negotiations if the results were to become public;
>
> - Quote from the Executive Officer acknowledging that although not 100% transparent, the current drug pricing system saves the Government tens of millions dollars, which are re-invested in the public drug system.
>
> Conclusion
> For these reasons the Ministry respectfully submits that the single National Post article provided by the appellant is not sufficient evidence of a "compelling" public interest in the detailed drug pricing information and formulas that are actually at issue in this appeal…

The affected party submitted detailed representations in response to the National Post article. It submits in particular that:

> Certain statements in the article imply that confidential agreements between drug manufacturers and provincial drug plans will lead to patients without drug plan coverage paying higher prices for prescription drugs…
>
> In fact, agreements with drug plans such as the Ontario Formulary would not be expected to have any impact on the "factory gate" price of a prescription drug (i.e. the price that is paid by pharmacies or wholesalers for a patented drug, often referred to as the "list price"). This price is regulated by the PMPRB, which sets a maximum non-excessive average price that may be charged to direct customers, such as pharmacies, wholesalers, and hospitals, for a patented medicine…
>
> In a rebate situation, a payment is made to a provincial drug plan (or another entity such as a private drug plan) to defer some of the costs the drug plan has incurred to reimburse covered patients. These payments are made at a point in time after the sale to reimbursed patients in the marketplace and therefore do not affect the price paid at the pharmacy level. The same or a similar price is still being paid by both covered and non-covered patients at the pharmacy level.
>
> As regards the suggestion that confidentiality creates a two-tiered system, there is nothing to prevent public and private drug plans from exercising their purchasing power to negotiate favourable terms and conditions for listing of drug products in a manner similar to Ontario. The article confirms this is in fact occurring – "Nova Scotia, Saskatchewan, Manitoba and B.C. have since followed suit to varying degrees, university and private sector analysts say. The Western provinces and territories announced in June plans to set up a joint drug-buying program". Ironically, the one factor that could jeopardize the negotiations referred to in the article is compelled disclosure of the terms of the agreements.
>
> The article raises a concern that the confidentiality of agreements between drug manufacturers and provincial drug plans makes it difficult for Common Drug Review ("CDR") to carry out its mandate of providing provincial drug plans with guidance regarding the cost-effectiveness of new products because – "nobody knows what the final price is" (attributed in the article to Neil MacKinnon).
>
> To the extent that confidentiality impacts the CDR recommendation process, it is a factor that works against drug manufacturers. In the absence of knowledge regarding payments and rebates provided to provincial drug plans by drug manufacturers, CDR would be more likely to recommend against listing of a drug product, since its cost-effectiveness profile would not appear to be as positive. Stated otherwise, the CDR is more likely to recommend that a product be listed if the net cost of coverage is actually lower than it appears, due to an agreement reached between a drug manufacturer and a provincial drug plan.

> CADTH (the federal body that administers CDR) has in fact addressed this problem by permitting drug manufacturers to submit to CADTH, on a confidential basis, a price that is net of reductions or benefits given to drug plans, as a means to aid in the CDR assessment…
>
> Even if some public interest in disclosure could be identified [in the newspaper article], there certainly is no "compelling" public... In particular, there is no issue as to public safety, excessiveness of drug pricing, or appropriateness of listing decisions. All of these considerations are addressed by other processes and by other forums, none of which has been challenged as being inadequate to address the public interest…
>
> Listing agreements are entered into by the [ODB Program] to save costs and obtain other benefits from pharmaceutical companies for listed drug products. Disclosure of listing agreements between the Executive Officer of the [ODB Program] and pharmaceutical companies will work contrary to the public interest by jeopardizing the [ODB Program's] ability to enter such agreements…

In surreply, the appellant disagrees with the other parties' submissions and asserts that drug pricing is impacted by listing agreements.

Analysis/Findings

The appellant's representations on the question of a possible public interest in the withheld portions of the records raises broad public accountability issues regarding access to contracts entered into by publicly-funded institutions. Even though there is generally a significant public interest in obtaining access to agreements entered into by institutions, I am not satisfied that there exists a compelling public interest in disclosure of the information at issue in the records in the present appeal.

Although the appellant claims that the volume discounts scheme leaves many in Ontario on private plans and without coverage paying higher drug prices, I am not satisfied that even if this is the case that disclosure of the information at issue would significantly aid in remedying this situation. The information at issue reveals how much the Ontario government pays for a particular drug purchased in bulk from a drug manufacturer for its ODB program. This pricing information does not relate to the pricing of the same drug purchased by private interests.

In my view, the information already disclosed serves to inform the public about many of the specifics of listing agreements. The only information severed from the listing agreement is the schedules which contain information as to the negotiated volume discount amount and the conditions of listing the specific drug product.

I have found that disclosure of information could reasonably be expected to result in the harms contemplated by sections 18(1)(c) and (d). I am not satisfied that there exists a public interest in the disclosure of the information at issue that clearly outweighs the purpose of the sections 18(1)(c) and (d) exemptions. These exemptions serve the purpose of protecting the ability of institutions to earn money in the marketplace and recognize that institutions sometimes have

economic interests and must compete for business with other public or private sector entities. These exemptions provide institutions with discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

The information sought to be disclosed in the context of this appeal is not relevant to public health and safety, which is monitored by the drug approval process. In the circumstances of this appeal, the relevant decision making body, the ODB Program has full disclosure of all relevant information required to make the listing decision for the specific drug named in the records, including the recommendations received by CDR regarding clinical and cost effectiveness. I agree with the Ministry that it has provided sufficient information to satisfy whatever public interest may exist in this agreement, without revealing information that both the Executive Officer and the affected party, the drug manufacturer, consider highly confidential.

Accordingly, in the circumstances, I am not satisfied that the public interest override found in section 23 of the *Act* applies to the withheld portions of the records.

ORDER:

I uphold the Ministry's decision to deny access to the records on the basis of the exemptions in section 18(1)(c) and (d) and dismiss the appeal.

Original signed by: June 28, 2010
Diane Smith
Adjudicator