



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

Reconsideration Order PO-2958-R

Appeal PA09-429-2

Order PO-2944

Ministry of Health and Long-Term Care



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BACKGROUND:

The appellant made a multi-part request to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to Ontario's pharmaceutical sector.

After conducting an inquiry into the appeal, I issued Order PO-2944 in which I ordered the ministry to disclose to the appellant certain pages from the record, in whole or in part, by March 2, 2011. Further, in that decision, I also found that other pages, in whole or in part, were exempt from disclosure under the mandatory exemptions in sections 12(1) (Cabinet records) and 17(1) (third party information) and the discretionary exemptions in section 13(1) (advice or recommendations) and 18(1) (economic interests) of the *Act*.

On February 3, 2011, I received a reconsideration request from the ministry. In addition, the ministry asked that I stay the operation of the order pending the disposition of its reconsideration request. On February 11, 2011, I granted an interim stay of Order PO-2944 pending this reconsideration order.

DISCUSSION:

THE RECONSIDERATION PROCESS

Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the Code of Procedure state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

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

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

GROUND FOR THE RECONSIDERATION REQUEST

The ministry bases its reconsideration request on the grounds set out in paragraph (c) of 18.01 which addresses situations where there is a clerical error, accidental error or omission or other similar error in the decision. In particular, the ministry notes the following errors:

- In the second paragraph on page 7 of the Order, "all of page 61" is found to be exempt under section 13(1). As outlined on page 10 of the Ministry's submissions, the Ministry claimed the section 13(1) exemption for only part of page 61.

- Contrary to the second paragraph on page 7 (in which all of page 61 is found to be exempt under section 13(1) as noted above), in the last paragraph on page 7, the Order states that portions of page 61 are found not to be exempt under section 13(1).
- Paragraph 7 of page 17 of Order PO-2944 reads as follows, "... the Ministry did not claim additional exemptions for the following pages of the record and I have found them not exempt under section 17(1)(a) and (c), I will order these pages to be disclosed to the appellant: 5 (in part), 6 – 10, 18 – 22, 44, 46, 62 – 64, 98, 104, 112 – 120." As indicated on page 5 of the Ministry's submissions, the Ministry claimed the exemption at section 18(1)(d) to slides: 11 – 14, 16, 17, 23, 24, 26 – 41, 43, 45, 47 – 61, 65 – 71 and 73 – 120 of the record. Since the Ministry claimed the application of section 18(1)(d) to pages 73 – 120 of the record, the statement that the Ministry did not claim additional exemptions in respect of pages 98, 104 and 112 – 120 is in error, and the Ministry respectfully requests that consideration be give[n] as to whether section 18(1)(d) applies to these pages of the record.
- As outlined in pages 17 – 20, the Order considered whether section 18(1)(d) applied to page 32 of the record; however, the Ministry did not claim the exemption at section 18(1)(d) to page 32.
- Although the Ministry assumes that as soon as its decision to apply an exemption to a page of the record is upheld, there is no further consideration given to whether any other exemptions apply to the page of the record, the Order does not expressly confirm this as fact. The result is that the page references in the Order do not correspond to the page references in the Ministry's submissions. For example, as outlined at the top of page 10 of the Ministry's submissions, the Ministry claimed that section 13(1) applied to the following pages: 3 (in part), 24 (in part), 26 – 31, 32 (in part), 34 – 48, 50 – 52, 53 (in part), 55 – 60, 61 (in part), 62, 65 – 71 and 99 – 101. At the bottom of page 4 of the Order, the Adjudicator states that the Ministry submitted that the following pages of the record are exempt under section 13(1): 3 (in part), 24 (in part), 32 (in part), 43 – 48, 50 – 52, 53 (in part), 55 – 60, 61 (in part), 62, 65 – 71 and 99 – 101. The Order does not reflect the fact that the Ministry claimed the application of section 13(1) to pages 26 – 31 and 33 – 42 (although pages 26 – 31 and 33 – 42 were already found to be exempt under section 12).

As the ministry's grounds for reconsideration relate to the application of the exemptions to certain pages of the record, and the appellant and the affected party already had an opportunity to provide representations on these issues during my inquiry, I determined that I did not need to seek additional representations from them. Further, as the ministry had provided its representations on the application of the exemptions during the inquiry, I determined that it was not necessary for the ministry to make additional representations in support of its reconsideration request.

Based on my review of the ministry's reconsideration request and its explanation of the errors in Order PO-2944, I determined that the ministry has established the basis for a reconsideration. In particular, I find that I committed the following errors in Order PO-2944:

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- I was contradictory in my finding on page 61 of the record having found that it was both exempt in full and in part under section 13(1).
- I failed to make a finding on the application of section 17(1) to a portion of page 61.
- I failed to consider whether pages 98, 104 and 112 – 120 of the record are exempt under section 18(1)(d).
- I found page 45 of the record exempt under both section 13(1) and 18(1)(d).
- I failed to consider the Ministry's section 17(1)(b) claim to the pages of the record found not exempt under sections 17(1)(a) and (c).

In regard to page 45, I find that it is exempt under section 13(1). As the information was withheld from disclosure in Order PO-2944, I do not need to amend the order provisions to reflect this finding. For the rest of the pages of the record identified above, I will consider the application of the exemptions claimed for them in my discussion below.

However, I find that, contrary to the ministry's reconsideration request, I did consider:

- Whether page 32 of the record was exempt under section 18(1)(d), and
- The ministry's claim of exemption under section 12(1) for pages 26 – 31 and 33 – 42 of the record.

On page 5 of the ministry's initial representations, it claims section 18(1)(d) for pages 26 – 41. Page 32 of the record is included in this page range. On pages 16 and 20 of the order, I subsequently found that both sections 17(1) and 18(1)(d) did not apply to the portion of page 32 which I also found not exempt under section 13(1) of the *Act*. I ordered the ministry to disclose this portion of page 32 to the appellant.

Additionally, the ministry submits that I failed to uphold its claim of section 13(1) to pages 25 – 31 and 33 – 41 of the record. On page 9 of the ministry's initial representations, it claims the application of section 12(1)(b) to pages 25 – 31 and 33 – 41. In Order PO-2944, I upheld the ministry's claim that these pages of the record were exempt under that exemption. As section 12(1)(b) is a mandatory exemption, I first examined whether this exemption would apply to the records as claimed before I proceeded to consider the application of section 13(1). Since I made a finding that these records qualified for exemption under section 12(1)(b), it was not necessary for me to also consider whether they were exempt under section 13(1).

I will now proceed to consider the application of sections 13(1), 17(1) and 18(1)(d) to those pages of the record where they were claimed but not evaluated in Order PO-2944.

ADVICE AND RECOMMENDATIONS

On page 7 of Order PO-2944 I find that page 61 of the record is both fully exempt and exempt in part under section 13(1) of the *Act*. The ministry claims that page 61 is exempt, in part, under section 13(1) but does not identify the specific part of the page for which the exemption is claimed.

In support of its claim, the ministry states:

The Ministry submits that section 13(1) applies to the severed portions of these pages, which clearly reference the more detailed advice given throughout the Record. The severed portions of these pages represent a course of action being proposed to the Minister.

Originally, I determined that all of the information on page 61 was exempt under section 13(1) as the information suggested a course of action that was to be ultimately accepted or rejected by the ministry and disclosure of the information on the page would permit the accurate inference of the advice or recommendation given. However, based on my further review of page 61 and the ministry's submission that only a portion of page 61 is exempt under this exemption, I agree that only a portion of page 61 is exempt under section 13(1) of the *Act*. I find that both the information which discloses the recommended course of action and the information that would permit the accurate inference of the recommended course of action can be severed from page 61.

In Order PO-2944 I reviewed the ministry's exercise of discretion to withhold information under section 13(1), accordingly, I now uphold the ministry's decision to withhold this portion of page 61. I will identify the portion I have found exempt on the highlighted copy of this page provided to the ministry with this reconsideration order.

As the ministry and the affected party also claimed that page 61 was exempt under the mandatory exemption in section 17(1), I will now consider their exemption claim for the remaining portion of page 61.

THIRD PARTY INFORMATION

Section 17(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

For 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 paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

In Order PO-2944, I determined that the ministry and the affected party met parts 1 and 2 of the test for section 17(1); however, I did not make my finding under part 3 of the test.

The affected party provided representations (partially withheld in confidence) in support of their position that disclosure of page 61 of the record could reasonably be expected to both significantly prejudice the competitive position of the affected party and/or result in undue loss to the affected party and undue gain to its competitors. The affected party argues that competitors would appropriate the affected party's knowledge of assessment, costing, financial and pharmaceutical analysis in their own models.

The ministry submits that the harm in section 17(1)(b) could reasonably be expected to occur if the record is disclosed¹. The Ministry states:

... if the Ministry cannot protect the confidentiality of the proprietary information of consultants retained by the Ministry, where that information is contained in a record in the Ministry's custody or control, consultants will be less likely to provide us with the detailed, technical information that will facilitate the Ministry's policy development and decision making. The Ministry further submits that this harm is ultimately a harm to the public in that the Ministry would not have the benefit of the best information available when it decides on policy development and implementation.

Based on my review of the record, including page 61, I find that neither the affected party nor the ministry has provided sufficiently detailed and convincing evidence of the harm anticipated in

¹ The Ministry submits that section 17(1) applied to the entire record, except pages 4, 6-10, 15, 18-22, 44 and 46.
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any of the subsections of section 17(1). The affected party did not provide evidence to substantiate its claims, outside its blanket assertion of harm. Without such evidence, I am unable to find that on the record's face, it is apparent how the affected party's competitors could use the information to either prejudice the affected party's competitive position or to profit from the disclosure.

Similarly, I do not uphold the ministry's claim of section 17(1)(b) to the record. The affected party was contracted under a Service Level Agreement to provide the record which relates to the restructuring of the Ontario Drug Program and a change in government policy. I do not accept the ministry's argument that future consultants will refuse to provide detailed confidential information to the government if the responsive information in this appeal is disclosed.

In Order MO-2274, Adjudicator Frank Devries in dealing with information submitted for a proposed project found that:

I am not persuaded that disclosing the information in the remaining records could reasonably be expected to result in similar information no longer being supplied to the Town in the future, as contemplated by section 10(1)(b). In my view companies doing business with public institutions, such as the Town, understand that certain information regarding how the institution plans to carry out its obligations will be public.

I concur with that rationale and apply it here. The ministry has not provided me with sufficiently detailed and convincing evidence that it could reasonably be expected that the affected party and other consultants would not supply similar information to the ministry in the future.

I find that disclosure of the remaining portions of page 61 could not be expected to result in the anticipated harms set out in sections 17(1)(a), (b) or (c). Further, I find that section 17(1)(b) does not apply to the record. I will now consider whether the remaining portion of page 61 and the other pages of the record listed above (pages 98, 104, 112 – 120) are exempt under section 18(1)(d).

ECONOMIC AND OTHER INTERESTS

The ministry claimed that section 18(1)(d) applies to pages 73 – 120 of the record. In Order PO-2944, I found pages 98, 104, 112 – 120 were not exempt under section 17(1), but failed to consider whether these pages are subject to section 18(1)(d). Further, as I have found that the remaining portion of page 61 is not exempt under section 13(1) or 17(1), I will now consider whether this information is exempt under section 18(1)(d). This exemption states:

A head may refuse to disclose a record that contains,

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;

As the ministry did not make specific representations on the application of the exemptions to the pages of the record at issue, I will refer to their earlier representations, which I set out in Order PO-2944. I have also included the appellant's representations on this exemption.

In support of its section 18(1)(d) claim, the ministry explains that in its attempt to deal with the challenge of managing Ontario Drug Benefit costs and to ensure its sustainability it contracted with the affected party to provide, "... expert analysis as to ways in which the Ministry could be better able to manage the current and future financial aspects of Ontario's public drug program."

The ministry further submits that the record provides recommendations and analysis on the following issues which would improve the value for money that Ontario pays for drugs:

[From page 2 of the Record]

- How do Ontario drug benefit costs compare to other jurisdictions?
- Where in the value chain are surplus margins being captured?
- What are the major opportunities to increase value for money given the current economics of generic manufacturers and pharmacies?
- How have other jurisdictions in similar situations managed the transition?

The ministry states the following about the portions of the record for which it claimed section 18(1)(d):

... [these] include extremely detailed cost breakdowns, profit pool breakdowns (including estimates of margin levels) and economic and financial analyses, all of which feed into the overall recommendation as to the best overall integrated solution to meet the Ministry's twin goals of value and implementability [sic].

The ministry argues that disclosure of this information would permit its stakeholders (i.e. drug manufacturers, wholesalers and pharmacists) to use the information to strategically aim their business, marketing and pricing strategies to circumvent the ministry's attempts to use the cost saving measures recommended by the affected party. Accordingly, the ministry submits that disclosure would be injurious to the Government's ability to manage the economy of Ontario, to the extent that OPDP affects a significant part of that economy² and thus the information in the record is exempt under section 18(1)(d).

² In its earlier representations, the ministry notes that drug costs have risen more than 140% since 1997, making it the fastest growing health care costs in Canada. Ten percent of Ontario's provincial health care costs are spent on drugs, making drug spending the ministry's highest health care cost after hospital services. The ministry submits that drug costs are one area where budget growth consistently outpaces overall provincial economic capacity.

In conclusion, the ministry submits that because of rising drug costs and limited financial resources, it must balance competing interests in the policy development process. To that end, the ministry states:

... the stated purpose of section 18(1)(d) is to protect the Ministry's ability to manage the economy of Ontario; the Ministry submits that to achieve this purpose, the Ministry must control ever-rising drug costs, and to do so, it must reform the public drug system. The Ministry submits that its intended reform will essentially be hampered or obstructed by the disclosure of the Record.

The appellant submits that without disclosure, the public will lack the necessary information to meaningfully debate the issue of Ontario drug program reform. The appellant states:

This could lead to non-acceptance of the reforms by system stakeholders. Non-disclosure of the record would undermine the public confidence in the Ontario Public Drug Programs...

Further, the appellant submits that the ministry has not provided detailed and convincing evidence of the anticipated harm in section 18(1)(d), and further disclosure would advance Ontario's economic interests.

In Order PO-2944, I accepted that disclosure of portions of the record would be injurious to the financial interests of the Government of Ontario or its ability to manage the economy of Ontario. Furthermore, I accepted the ministry's representations that drug costs account for a large portion of the province's health care costs. Similarly, in the present decision, I find that disclosure of pages 98, 104, 112 – 117 of the record are exempt under section 18(1)(d) as disclosure of this information could reasonably be expected to be injurious to the financial interests of the Government of Ontario and its ability to manage the economy of Ontario. I accept that these pages contain information which, if disclosed, may affect the province's ability to manage the provincial drug program as the information relates to the implementation of the recommended course of action.

However, I find that the remaining portion of page 61 as well as pages 118 – 120, do not qualify for exemption under section 18(1)(d). I find that disclosure of this information could not 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. Neither the information on these pages nor the ministry's representations provide sufficiently detailed and convincing evidence to establish that this information is exempt.

The remaining portion of page 61 describes either the outcome of the affected party's recommendation or its implementation in generalized terms. Pages 118-120 refer to information in other jurisdictions. I find that none of this information would result in the government's

stakeholders circumventing the ministry's cost savings attempts as recommended by the affected party.

In summary, I find that page 61 (in part) and pages 118 – 120 are not exempt under section 18(1)(d) and should be disclosed to the appellant. As no other exemptions were claimed for these pages of the record, I will order that they be disclosed to the appellant.

Pages 98, 104, 112 – 117 are exempt under section 18(1)(d) of the *Act*. In Order PO-2944 I considered the ministry's exercise of discretion to withhold the records under section 18(1)(d), accordingly, I now uphold the ministry's exercise of discretion and find that these pages of the record are exempt from disclosure.

ORDER:

1. I amend order provision 1 of Order PO-2944 to uphold the ministry's decision to deny access to the following pages of the record, including those pages already identified:

1 – 4, 5 (in part), 11 – 14, 15 – 17, 24 (in part), 25 – 31, 32 (in part), 33 – 42, 43, 45, 47, 48, 49, 50 – 52, 53 (in part), 54, 55 – 60, 61 (in part), 65 – 71, 98, 99 – 101, 104, 112 - 117

2. I amend order provision 2 of Order PO-2944 and order the ministry to disclose the following pages of the record, along with the pages already identified, by providing the appellant with a copy of these pages by **April 19, 2011** but not before **April 14, 2011**. For clarity, I have provided the ministry with a copy of page 61 of the record with the information to be withheld highlighted (Pages 5, 24, 32 and 53 were provided with Order PO-2944). To be clear, the information highlighted should **not** be disclosed to the appellant.

5 (in part), 6- 10, 18 – 22, 23, 24 (in part), 32 (in part), 44, 46, 53 (in part), 61 (in part), 62 – 64, 73 – 97, 102 - 103, 105 - 111, 118 – 120

3. In order to ensure compliance with Order Provision 2, I reserve the right to require the ministry to provide me with a copy of the pages of the record provided to the appellant.

Original signed by: _____
Stephanie Haly
Adjudicator

March 15, 2011 _____