Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3097

Appeals PA11-313 and PA11-314

Ministry of Economic Development and Innovation

July 13, 2012

Summary: The ministry received a request for records concerning submissions made to it about changes to Canada's intellectual property regime for pharmaceutical products. The ministry issued a decision letter granting access to the record in full. The organization whose third party information may be contained in the records appealed the ministry's decision. This order upholds the ministry's decision to disclose the record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1).

OVERVIEW:

[1] The Ministry of Economic Development and Trade and the Ministry of Research and Innovation (now the Ministry of Economic Development and Innovation) (the ministry) each received the following request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

> Since January 1, 2010 to present (Jan 11/11) provide communications exchanged by the Minister and senior officials with brand name drug companies, including [a named company] or with the Research-based Pharmaceutical Companies (Rx&D) trade association, or with their lobbyists and representatives; and or discussions/meetings held by the

> Premier and officials with brand name drug companies, including [named company] or with the Research-based Pharmaceutical Companies (Rx&D) trade association, or with their lobbyists and representatives, concerning their desire to have the European Union (EU)'s wishes to have granted increased drug patent regulatory protections in Canada for brand-name drugs as part of negotiations for a comprehensive economic and trade agreement (CETA) between Canada and the European Union.

[2] The requester described changes that the parties are seeking, and requested

> departmental briefings and assessment of such a position and changes. Communications could include emails, correspondence, telephone /blackberry notes, including attachments; and discussions/meetings could include preparatory notes, meeting notes and presentations.

[3] Subsequently the requester clarified the request:

- Correspondence (not emails) directly received from Rx&D or [the named company] between the Ministry (or for Cabinet Office the Premier), Minister's staff, Ministry senior executives (Assistant Deputy Ministers or positions above) for the following 3 sought changes:
    - Up to five years of "restored" patent life to compensate for regulatory delays in the approval process for a new drug (i.e. extending the effective patent protection period)
    - Lengthening the exclusive use of drug trial data for an extra two years period (i.e. lengthening the data protection period), and
    - Providing a described "right to appeal" under the Patented Medicines (Notice of Compliance) Regulations of the Patent Act (i.e. granting new legal tools to fight patent challenges launched by generic manufacturers.
- A letter from the minister if written as this is central to the request.

[4] After notifying the national association representing pharmaceutical companies, Canada's Research-Based Pharmaceutical Companies (Rx&D), the ministry issued a decision to grant access in full to the responsive record.

[5] Rx&D, now the appellant, appealed this decision.

[6] At the end of the mediation stage of these appeals, one record was at issue. These files were transferred to adjudication where an adjudicator conducts an inquiry. Representations were received from the requester and Rx&D and were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*. The ministry did not file representations. Rx&D's representations contain confidential portions, which were not shared with the requester. In this order, I refer only to the non-confidential portions of these representations.

[7] In this order, I uphold the ministry's decision to disclose the record to the requester.

RECORD:

[8] At issue in these appeals is a letter dated September 15, 2010.

DISCUSSION:

Does the mandatory third party information exemption at section 17(1) apply to the record?

[9] 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;
>
> (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

[10] 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.), leave to appeal dismissed, Doc. M32858 (C.A.)]. 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, and MO-1706].

[11] 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

[12] Rx&D submits that the record contains commercial information. This type of information has 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].

[13] Rx&D submits that policy positions records qualify as "commercial information" because they identify positions and information that relate directly to the business environment in which it and its member companies operate. Rx&D states that:

> Given that these issues [in the record] influence the business of the Rx&D member companies, and given the significant role of Rx&D as an advocate for industry interests, the positions of industry clearly constitute "commercial information" for Rx&D and its member companies.

[14] The requester did not provide representations on part 1 of the test.

Analysis/Findings re: part 1

[15] The record consists of a letter to the Premier from Rx&D concerning three changes that they and the EU, as part of trade negotiations with Canada, are seeking to Canada's intellectual property regime for pharmaceutical products.

[16] I agree with Rx&D that the record contains commercial information as it is related to the buying and selling of pharmaceutical drugs in Canada.[1] Therefore, part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

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

[18] 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].

[19] There are two exceptions to this general rule 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* [2008] O.J. No. 3475 (Div.Ct.)].

[20] Rx&D submits that the information was clearly "supplied" by it to the ministry, as it was contained in a letter sent to government.

[21] The requester did not provide representations on this issue.

Analysis/Findings re: supplied

[22] Upon my review of the record, I agree with Rx&D that the information in the letter from Rx&D was supplied by Rx&D to the ministry.

---

[1] Order PO-2528.

In confidence

[23] I will now determine whether the record was supplied to the ministry in confidence.

[24] In order to satisfy the "in confidence" component of part two, 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].

[25] 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 [Orders PO-2043, PO-2371, and PO-2497].

[26] Rx&D states that it has not publicly disclosed the letter, nor is it available from other sources. Rx&D states that the information in the letter was prepared for:

> …the purpose of engaging with government on ongoing issues which are currently still unresolved; it was intended to be taken into account as the view of a stakeholder in the context of an unresolved policy issue. Specifically, the Comprehensive Economic Trade Agreement (CETA) is an agreement that is still in negotiation between Canada and the EU; the three issues identified in the letter [and] in the emails scoped are still under significant debate today. The industry's approach in writing to the Premier and its positions, and the Rx&D employee emails to the government on the discrete issue of the right of appeal, were made in furtherance of a dialogue on ongoing policy matters affecting government. Rx&D did not expect that this strategy and these views would be publicly disclosed.

[27] The requester submits that much is public on the three drug patent issues Rx&D and its members are lobbying for, including the right to appeal and their claims that jobs and innovation will suffer without the changes. The requester points out that the Premier wrote a response to Rx&D's letter (the record) and provided a copy of this response he obtained from an access to information request. He states that Rx&D's:

> …strategy and goals on the three drug patent issues are already publicly known. Third parties adopting positions to a public body should expect their submissions will be made public, especially when they are lobbying the Premier and or his ministers and asking for favourable access and treatment.

[28] Rx&D did not provide representations in reply.

Analysis/Findings re: in confidence

[29] Based on my review of the record and the parties' representations, I find that Rx&D has not established that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information in the letter was provided.

[30] The letter was written to the Premier by Rx&D. Copies of this letter were sent to three ministers, the Minister of Economic Development and Trade and the Minister of Research and Innovation, along with the Minister of Health and Long-Term Care. The requester sought access to this letter from all three involved ministries.[2] There is no indication in the record that it was communicated to the institutions on the basis that it was confidential and that it was to be kept confidential or that it was prepared for a purpose that would not entail disclosure.

[31] The record refers extensively to publicly available information. In addition, the appellant has provided me with a copy of a newspaper article co-authored by the president of Rx&D dated subsequent to the date of the record, which contains information similar to that in the record.[3]

[32] As the information in the record was not supplied to the ministry with a reasonable expectation of confidentiality, part 2 of the test has not been met for the record and I will order it disclosed.

[33] In conclusion, part 2 of the test under section 17(1) has not been met for the record. All three parts of the test must be met for the application of the section 17(1) exemption. Accordingly, there is no need for me to consider whether part 3 of the test has been met.

---

[2] Appeal files PA11-288, PA11-313 and PA11-314.

[3] National Post newspaper article dated April 14, 2011, "Enhancing trade by protecting intellectual property".

ORDER:

I uphold the ministry's decision and order it to disclose the record to the requester by **August 20, 2012** but not before **August 15, 2012**.

Original signed by: July 13, 2012
Diane Smith
Adjudicator