Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3276

Appeal PA10-356

Ministry of Health and Long-Term Care

November 6, 2013

Summary: The appellant, a drug manufacturer, appealed the ministry's decision to disclose two records in full. The appellant claimed that the mandatory third party information exemption in section 17(1) applied to the information. The appellant also claimed that the discretionary exemption in section 18(1) (economic or other interests) should apply. The adjudicator upholds the ministry's decision, in part, and orders the disclosure of portions of the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1)(a), (c), 18(1)(c), (d), 28(1)(a).

Orders and Investigation Reports Considered: P-257, PO-1694-I, PO-2863, PO-3032

OVERVIEW:

[This appeal is one of a series of appeals arising out of a request for information that is the subject of appeal PA11-28. This order deals with one appeal initiated by an affected party of the ministry's decision arising out of that request.]

[1] The *Transparent Drug System for Patients Act, 2006* amended the *Ontario Drug Benefit Act* (*ODBA*) and the *Drug Interchangeability and Dispensing Fee Act*. Under the *ODBA*, the Ministry of Health and Long-Term Care (the ministry), through the Ontario

Drug Benefit Program, provides coverage for most of the cost of over 3,800 prescription drug products for Ontarians who are eligible for benefits. The amendments to the *ODBA* created the role of the Executive Officer who, among other things, administers the ODB Program.

[2] 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 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.

[3] Pursuant to these agreements, the ministry's price under the ODB Program is lower than the published Formulary price.[1] This listed price is reduced by virtue of a "volume discount" paid by the manufacturers to the ministry. These volume discounts are negotiated by the Executive Officer in listing and pricing agreements with the manufacturers.

[4] The requester made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> 1. Provide the aggregate payments received in 2009 from drug companies until June 1, 2009 under Bill 102 (the *Transparent Drug System for Patients Act 2006*) under the pricing/listing agreements, and any readily available summary analysis done of payments.
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> 2. Provide the government savings made per calendar or fiscal year for 2007 (2006-07), 2008 (2007-08), 2009 (2008-09), projected 2010 (2009-10) under specifically the listing and pricing agreements under Bill 102; or because of generic drug pricing; and any readily available breakdown or analysis of those savings.
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> 3. On May 1, 2009, ADM/CEO Helen Stevenson stated in a memo on page 5 filed in appeals PA08-297, 298, 299 that there was about a $260 million savings in fiscal year 2007-08 – provide the readily available summary documentation of how this figure was calculated and what was left in or taken out of such a calculation.
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> 4. On May 1, 2009, ADM/CEO Helen Stevenson stated in a memo on page 5 filed in appeals PA08-297, 298, 299, that there were "fewer than five previous pricing agreements". Provide the intent or terms of those agreements, the party they were with, the amount of each and

[1] The Formulary price is the price a pharmacist would pay if purchasing the listed drug from the manufacturer and the price that the ministry reimburses the pharmacist for the cost of the drug.

the aggregate amount of all those agreements per calendar or fiscal year.

5. On May 1, 2009, ADM/CEO Helen Stevenson stated in a memo on page 5 filed in appeals PA08-297, 298, 299 that there were volume discounts of "up to 45%". Provide the low end % and average % of volume discounts.

Provide other records released on these above subjects under [the *Act*].

[5] The ministry conducted a search for responsive records and sent a decision to the requester indicating that fifty-one responsive pages had been located and that access to the information was granted, in part. The ministry also decided to withhold information pursuant to the discretionary exemption in section 18 (economic or other interests) of the *Act*.

[6] The ministry subsequently sent a letter to the requester advising him that his request contains information relating to a third party and that certain third parties were being given notice under section 28 of the *Act*.

[7] Following receipt of the third party responses, the ministry issued a final decision to the requester indicating that a decision had been made to grant access, in part, with information severed pursuant to the mandatory section 17(1) exemption (third party information) and the discretionary section 18 exemption. The ministry also noted that the third parties would have 30 days to appeal the decision.

[8] The requester appealed the ministry's decision to deny access and this appeal is the subject of PA11-28 which I am addressing in a separate order. Three third parties (now affected parties), including the appellant in the present appeal, also appealed the ministry's decision to disclose information pertaining to the request.

[9] This order solely addresses the issue identified in the third party appeal PA10-356.

[10] During my inquiry into this appeal, I sought and received representations from the ministry, two affected parties, the original requester and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[11] In this order, I allow the appeal, in part, and order that only portions of one of the records be disclosed.

RECORDS:

[12] The records at issue are a 4-page Letter of Intent from the ministry to the appellant and a 2-page letter from the appellant to the ministry.

ISSUES:

A. Was the ministry required to give notice under section 28(1)(a) for the 4 page letter of intent?
B. Can the appellant claim the discretionary exemption in section 18(1)?
C. Does the mandatory exemption in section 17(1) apply to the records?

DISCUSSION:

A. Was the ministry required to give notice under section 28(1)(a) for the 4 page letter of intent?

[13] The appellant submits that the ministry did not provide it with notice under section 28 of the *Act* regarding the letter of intent at the request stage with respect to this record.

Section 28(1)(a) states:

> Before a head grants a request for access to a record,
>
> > that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information;
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> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

[14] The ministry did not provide notification regarding the letter of intent between itself and the appellant but did provide notice with respect to the appellant's other letter.

[15] In Order PO-1694-I, the former Assistant Commissioner Tom Mitchinson, found that the appellant in that case was entitled to notice under section 28(1)(a) and set out his rationale for determining this issue:

> In my view, use of the word might in section 28(1) creates a low threshold in determining whether notification is required.

> In order to trigger the notification requirements under section 28(1)(a), a head must first have reason to believe that a record **might** contain one of the types of information listed in section 17(1) (i.e. a trade secret or scientific, technical, commercial, financial or labour relations information). If it does, the head must then consider whether disclosure of this information **might** affect the interest of a person other than the person requesting the information. In addressing this second requirement, the head should be guided by the provisions of section 17(1). For example, if the head had reason to believe that the information **might** have been supplied implicitly or explicitly in confidence, then notification is required. Similarly, if the head has reason to believe that disclosure of the record **might** result in one or more of the harms identified in section 17(1), then notification must also be given.
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> If a head concludes that a record **might** contain section 17(1) – type information, and that this information **might** have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1)(a). The potential for harm is a determination that must be made in the individual circumstances of a particular request and, in my view, the notification requirements of section 28 were designed to allow affected persons an opportunity to provide input on this issue before a decision is made regarding disclosure.
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> [emphasis in original]

[16] This rationale has been applied in several decisions of this office and I adopt if for the purposes of this appeal. Having reviewed the four-page letter of intent, I find that some of the information in this record is similar to the information in the other two-page record at issue for which the ministry gave notice to the appellant. This is information that could be characterized as commercial or financial information. Moreover, the ministry would have had reason to find that an individual other than the requester might have interest in the record. Accordingly, I find that the appellant was entitled to notice under section 28(1)(a).

[17] In the present appeal, I conclude that the appellant was entitled to notice by the ministry. However, I find that I do not have to address the issue of an appropriate remedy because the appellant was given the opportunity to make representations on the application of section 17(1) of the *Act* prior to disclosure of the record. Therefore, the appellant has not been prejudiced in this appeal by the ministry's lack of notice since it was afforded the opportunity to make its views on disclosure known to the ministry during the inquiry.

B. Can the appellant claim the discretionary exemption in section 18(1)?

[18] The ministry did not claim the exemption in section 18(1) for these records. Instead, the appellant claims that sections 18(1)(c) and (d) apply to the information at issue. In Order PO-3032, former Senior Adjudicator John Higgins also dealt with the issue of whether the affected party drug manufacturers could raise the application of section 18(1) where the institution had not. In finding that they could not, Adjudicator Higgins stated the following:

> As explained above, the purpose of the section 18 exemptions, broadly stated, is to protect the economic interests of institutions. In this case, it is evident that the ministry took a different view than the drug manufacturers who provided representations on this issue, of the extent to which disclosure of information in the records could reasonably be expected to damage its economic interests.
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> In my view, this is a decision the ministry is entitled to make. As outlined below, the ministry clearly took the views of drug manufacturers into account in its decision to claim sections 18(1)(c) and (d) for payment amounts.
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> Given the purposes of these exemptions, to protect the government's ability to compete in the marketplace and to protect the broader interests of Ontarians, it would only very rarely be appropriate to support a claim for these exemptions by a private party, whose arguments are directed at protecting their own interests, and not those of the government or public.
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> In my view, the circumstances of this appeal do not constitute one of these rare exceptions. The position taken by the drug manufacturers in these appeals is fundamentally concerned with protecting their own interests. Any perceived overlap with the interests of the government or the public arises from arguments that the drug manufacturers' interests would be damaged by disclosure, and that this would have a spill-over effect that could reasonably be expected to be prejudicial to the interests of the government or the public.

[19] This "rare occasion" approach was first set out by the former Assistant Commissioner Tom Mitchinson in Order P-257 where he considered whether another party, besides the institution, could raise the application of a discretionary exemption. In the present appeal, I find that the appellant has not established that this is a rare exception or occasion when a party other than the institution should be allowed to claim the application of section 18(1). The ministry, in responding to the request, reviewed

the records and claimed the application of section 18 to portions of other records. It chose not to do so in the present appeal.

[20] The ministry has chosen not to claim the application of section 18(1) to the records at issue in this appeal. The appellant has not established that this is a case where it is seeking to claim the exemption to protect the interests of the ministry. Accordingly, I will only be considering the application of section 17(1) to the records.

C. Does the mandatory exemption in section 17(1) apply to the records?

[21] The appellant submits that the harms set out in section 17(1)(a) and (c) would occur if disclosure of the records is allowed. These sections state:

> 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; or

[22] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3].

[23] 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
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[2] *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.).
[3] Orders PO-1805, PO-2018, PO-2184, MO-1706.

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

[24] The appellant submits that the records contain both commercial and financial information relating to the supply of goods by the appellant to the Ontario Drug Program. I find the records contain information relating to the appellant's sale of products to the ministry and the related pricing and payment terms which constitutes both commercial and financial information within the meaning of section 17(1). Thus, part 1 of the test has been met for the application of this exemption.

Part 2: supplied in confidence

Supplied

[25] 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.[4]

[26] 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.[5]

[27] 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.[6]

[28] 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"

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[4] Order MO-1706.
[5] Orders PO-2020, PO-2043.
[6] See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

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.[7]

In confidence

[29] 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.[8]

[30] 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.[9]

[31] The appellant submits that disclosure of the information at issue would permit the requester to accurately infer as to the information which it supplied to the ministry. In particular, the appellant argues that the requester would accurately be able to infer its baseline pricing from the information in the records. The appellant also cites Order PO-3032 in support of its position that payment amounts under a product listing agreement may be considered to be information that was "supplied" to the ministry.

[32] The appellant submits that the information in the two records was also supplied in confidence and refers to section 11 of the Letter of Intent which explicitly refers to the confidentiality of the information contained in the letter. The appellant states:

> [The appellant] protects the confidentiality of the information contained in the PLA's [price listing agreements]. The PLA's are confidential and not

[7] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above).
[8] Order PO-2020.
[9] Orders PO-2043, PO-2371, PO-2497.

> disclosed to third parties without them first entering into confidentiality obligations which prohibit any misuse or further disclosure.

[33] Based on my review of the records, I find that some sections of the letter of intent include pricing information which, if disclosed, could permit the requester to accurately infer the appellant's baseline pricing. On this basis, I find that the portion of the letter of intent dealing with the pricing and payment information was supplied to the ministry for the purposes of section 17(1). I further find that this information would have been supplied with a reasonable expectation of confidentiality as section 11 of the record explicitly sets out the confidential terms of the agreement.

[34] However, I find that the remaining portions of the letter of intent were not supplied by the appellant to the ministry. The rest of the letter of intent sets out the terms agreed to by the appellant and the ministry relating to the provision of the drug to the Ontario Drug Benefits Program. The appellant has not established that it supplied these terms to the ministry; nor did it provide evidence to suggest that disclosure of the terms would lead to the accurate inference of information it supplied to the ministry. Furthermore, I am unable, based on my review of the terms, to discern that this information was supplied by the appellant to the ministry. Thus, I find that these terms were not supplied by the appellant to the ministry for the purposes of section 17(1). As all three parts of the test for the application of section 17(1) must be met, and this portion of the Letter of Intent has not met the test for part 2, I find that it is not exempt under section 17(1).

[35] I further find that the second record, the letter from the appellant to the ministry, contains information that was supplied by it to the ministry. The letter sent by the appellant to the ministry refers to a discussion between the appellant and the ministry and a possible agreement arising from that discussion. I find that it contains commercial information supplied by the appellant to the ministry. I also find that the appellant would have had an implicit expectation of confidentiality in this letter, as it relates to the possible price listing agreement between itself and the ministry.

[36] Accordingly, I find that portions of the letter of intent and the entire two-page letter were supplied in confidence and as such meets the requirements for part 2.

Part 3: harms

[37] 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.[10]

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[10] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[38] 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.[11]

[39] 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).[12]

[40] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[13]

[41] The appellant submits that the harms set out in sections 17(1)(a) and (c) could reasonably be expected to occur should disclosure occur. The appellant relies on the arguments made by the ministry in Order PO-2863 in support of its position that sections 18(1)(c) and (d) applied to exempt volume discount in price listing agreements from disclosure. The appellant submits:

> In PO-2863, the ministry submitted that disclosure of 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.
>
> In finding that the ministry would have difficulty entering into product listing agreements in future if payment information were disclosed, the adjudicator in that matter appears to have accepted these arguments and the harms that would accrue to drug manufacturers, finding that:
>
> > the information about how much a named manufacturer paid the ministry as a volume discount amount and what other specific financial and value for money conditions a manufacturer agreed to provide to the ministry could be used by other potential bulk prescription purchasers as a discount standard or price goal to be obtained from the drug manufacturers.

[11] Order PO-2020.
[12] Order PO-2435.
[13] Order PO-2435.

The adjudicator further stated:

> 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, for fear of this information being used by their other public and private sector customers seeking to negotiate similar discounts with the drug manufacturers.
>
> For the reasons set out above, production of the Disputed Records would permit the requester to deduce [the appellant's] confidential baseline prices and use this to its competitive advantage. The necessary corollary to this is that [the appellant] would suffer undue loss, in terms of lost profits, while public, private and other purchasers would enjoy undue gain.

[42] The appellant did not provide further evidence of the harm in section 17(1).

[43] I find that the appellant has not established that disclosure of much of the information in either of the records could reasonably be expected to result in the harms in sections 17(1)(a) or (c). The appellant submits that I should apply the ministry's arguments in support of the application of sections 18(1)(c) and (d) to related information as evidence of possible harm in this appeal. This argument does not aid the appellant's case. The ministry did not claim the application of sections 18(1)(c) and (d) to the records at issue in the present appeal. In fact the ministry's decision was to disclose both records in full. Clearly, the ministry did not foresee a harm to its own economic interests and did not make an argument similar to that in Order PO-2863 that the appellant would suffer harm to its competitive position should the information be disclosed. I find this is especially true with respect to the two-page letter sent from the appellant to the ministry that does not contain any volume discount pricing or pricing information at all. The finding in Order PO-2863 does not establish the necessary detailed and convincing evidence of harm required in sections 17(1)(a) and (c) with respect to the records at issue in the present case.

[44] However, I am prepared to find that disclosure of the volume discount information set out in sections 4, 5 and 6 of the 4-page Letter of Intent could reasonably be expected to significantly prejudice the appellant's competitive position. Disclosure of this information would disclose the appellant's baseline pricing that could be used against the appellant by its competitors or other customers and potential customers. The remaining terms set out in the letter of intent do not disclose any pricing or volume discount information. I find that disclosure of this information could not reasonably be expected to either prejudice the appellant's competitive position or cause it undue loss and as such is not exempt under sections 17(1)(a) and (c).

ORDER:

1. I order the ministry to disclose portions of the letter of intent and all of the two page letter to the requester by providing him with a copy of these records by **December 12, 2013,** but not before **December 6, 2013**. I have enclosed a highlighted copy of the letter of intent with the ministry's copy of the order identifying the information that should not be disclosed.

2. In order to verify compliance, I reserve the right to require the ministry to provide me with a copy of the records sent to the requester.

Original signed by: November 6, 2013
Stephanie Haly
Adjudicator