Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3275

Appeals PA11-28, PA10-344, PA10-346, PA12-339, PA12-340, PA12-341, PA12-342

Ministry of Health and Long-Term Care

November 6, 2013

Summary: The requester made a request to the ministry for various records relating to the volume discount payments received by the ministry from a number of drug manufacturers. The ministry withheld portions of the responsive information on the basis of the mandatory third party information exemption at section 17(1) and the discretionary economic interests exemption at section 18(1). The requester and several drug manufacturers appealed the ministry's decision to both deny and grant access to the records. The requester also argued that there ought to be additional responsive records. This order allows the appeals, in part, and orders some information disclosed to the requester.

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

Orders and Investigation Reports Considered: PO-3032, PO-3120, PO-3176

Cases Considered: Order 26-1994, *British Columbia Hydro and Power Authority, Re*, 1994 CanLII 1432 (B.C.I.P.C.); Order 2000-05, *Calgary Regional Health Authority* (Alta. IPC).

OVERVIEW:

[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 appellant 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

[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.

> those agreements, the party they were with, the amount of each and 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 appellant indicating that fifty-one responsive pages had been located and that access to the information was granted in part. The ministry withheld 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 appellant advising him that his request contains information relating to third parties and that they 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 appellant 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 appellant appealed the ministry's decision to deny access. That appeal is the subject of PA11-28. Three third parties (now affected parties) also appealed the ministry's decision to disclose information pertaining to the request. These appeals are: PA10-356, PA10-346 and PA10-344. My decision for appeal PA10-356 will be released concurrently in a separate order.

[9] During mediation, the mediator clarified the records at issue. The ministry provided this office with an index of records and five records responsive to part 4 of the appellant's request. Upon review of the index, it was evident that the ministry had responded to parts 1, 2, 3 and 5 of the request by providing a narrative response within the index itself. The mediator sought clarification from the ministry, which advised that there were no responsive records for parts 1, 2, 3 and 5 of the request. The appellant advised the mediator that he believes there should be records responsive to those parts of his request, and accordingly, reasonableness of search was raised as an issue in dispute. With respect to part 4 of the request, the ministry's index indicates that there are no responsive records pertaining to "…the amount of each and the aggregate amount of all those agreements per calendar or fiscal year," because the agreements in

question were not structured to provide this kind of information. The appellant advised the mediator that he believes there should be additional records responsive to part 4 of his request as well.

[10] The appellant also confirmed with the mediator that he had not received a copy of the index of records along with the final decision and he was not aware of the records specifically at issue in this appeal. As the appellant had not received a clear indication of the responsive records or the exemptions being claimed, the appellant requested that the issue of the adequacy of the ministry's decision be added to the scope of the appeal.

[11] Also during mediation, the appellant confirmed that he wished to pursue access to the five records that were identified as responsive to part 4 of his request. Lastly, the appellant agreed to remove part 1 of his request (aggregate payments received in 2009 from June 1, 2009) from the scope of this appeal and deal with this information in another of his appeals, PA11-30-2. Accordingly, any issues relating to part 1 of the request are no longer at issue in this appeal.[2]

[12] My inquiry into these appeals took several stages. Initially, in the inquiry, I sought and received representations from the ministry and three affected parties.

[13] After receipt of representations, I ordered the ministry to provide a new decision to the appellant. In issuing the appellant a new decision, the ministry provided notice to several third parties who had not been notified originally. The ministry's decision set out the information that was at issue that was described in the index of records. After receiving representations from the affected parties, the ministry provided a decision to the appellant and the affected parties that it was granting partial access to the information, withholding information pursuant to sections 17(1) and 18(1) of the *Act*. Subsequent to the ministry's decision, this office received four appeals from the ministry's decision and appeals PA12-339, 340, 341 and 342 were opened.

[14] I then proceeded to seek representations from the ministry and the affected party appellants in those appeals. I received representations from the ministry only. A lawyer for three of the affected parties asked that I rely on the representations sent to the ministry in response to the section 28 notification for the purposes of my inquiry.

[15] Finally, I sought and received representations from the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

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[2] Furthermore, Adjudicator Donald Hale issued Order PO-3120 disposing of the issues in appeal PA11-30-2 on October 18, 2012.

[16] In this order, I partially uphold the ministry's decision and order information disclosed. To be clear, this order only disposes of the issues raised in appeals PA11-28, PA10-344, PA10-346, PA12-339, PA12-340, PA12-341 and PA12-342.

RECORDS:

[17] The information responsive to parts 2, 3 and 5 of the appellant's request is set out on the document called the "Revised Index of Records".

- For part 2, the ministry prepared a chart, "Estimated Savings as a Result of Listing/Pricing Agreements and Generic Pricing under Bill 102", and withheld some of this information. The ministry withheld information under the year columns for both pricing/listing agreement and total savings, with reference to section 18(1)(c) and (d) of the *Act*.

- For part 3, the ministry also prepared a chart, "The OPDP is providing the following summary of how the Government's $260 million in savings in fiscal year 2007-08 was achieved." The ministry withheld information under the headings Total Savings Achieved and pricing listing agreement, with reference to section 18(1)(c) and (d) of the *Act*.

- For part 5, the ministry created a narrative statement and has withheld the overall weighted average percentage, with reference to sections 18(1)(c) and (d).

[18] The information responsive to part 4 of the request is included in five agreements[3] described as the following:

- Agreement between the ministry and two affected parties (31 pages)
    - Partially withheld by the ministry under section 17(1) and 18(1)(c) and (d).
    - The affected party appeals the ministry's decision to disclose other parts of the agreement and takes the position that additional information should be withheld under section 17(1).[4]
    - Specific information withheld:
        - Article 6.1 (section 17(1), 18(1)(c) and (d))
        - Schedule A, B (section 17(1), 18(1)(c) and (d))

[3] As stated above, my decision in Order PA10-356 is dealt with in a separate order.
[4] Subject of appeal PA10-346.

- Agreement between the ministry and one affected party (12 pages)

    - Partially withheld by the ministry under section 17(1) and 18(1)(c) and (d).
    - The affected party appeal's the ministry's decision to disclose other parts of the agreement and all of the amending agreement. The affected party takes the position that additional information in the main agreement and all of the information in the amending agreement should be withheld under section 17(1).[5]
    - Specific information withheld:
        - Article 2, including 2.1, 2.5, 2.6 (section 18(1)(c) and (d)
        - Article 4, including 4.2, 4.5 (section 18(1)(c) and (d))
        - Appendix A (section 17(1), 18(1)(c) and (d))
        - Appendix B (section 17(1), 18(1)(c) and (d))

ISSUES:

A. Does the discretionary exemption in section 18(1) apply to the records?
B. Was the ministry's exercise of discretion in applying section 18(1) proper?
C. Does the mandatory section 17(1) exemption apply to the records?
D. Was the ministry's search for records reasonable?

DISCUSSION:

A. Does the discretionary exemption in section 18(1) apply to the records?

[19] The ministry submits that sections 18(1)(c) and (d) apply to the portions of the records described above. These sections state:

> 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

[5] Subject of appeal PA10-344.

> or the ability of the Government of Ontario to manage the economy of Ontario;

[20] 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.

[21] 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.[6]

[22] The ministry submits that it severed sensitive financial information from the records describing detailed confidential information illustrating payment amounts made by drug manufacturers to the ministry under the various pricing agreements. In addition, the ministry has severed specific contractual provisions and appendices which disclose drug unit pricing and formulae for calculating the amounts of the payments and other related contractual provisions.

[23] The ministry states the following in support of the application of sections 18(1)(c) and (d):

> The payment information severed from the records at issue represents the amount each respective manufacturer will reimburse the ministry in accordance with the provisions of their respective drug Pricing Agreements, for listing its drug products on the Formulary…
>
> If manufacturers had anticipated that such payment information would be disclosed by the ministry, it is reasonable to believe that they would have been less willing to agree to significant payment amounts and other favourable contractual terms, thereby prejudicing the ministry's and the

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

> government's economic and financial interests in the savings that result from such agreements for the province of Ontario.
>
> In one set of submissions provided to the ministry in response to the ministry's issuance of notification to potentially affected third-parties in respect of the records at issue, the relevant third party indicated to the Ministry that disclosure of payment information as well as certain sensitive contractual provisions would have a "chilling effect" on the willingness of manufacturers to enter into such agreements going forward, thereby harming the government's ability to receive significant cost savings. The third-party further indicated that the public disclosure of confidential pricing/payment information under such agreements in Ontario could reasonably be expected to result in competitive pressures in other markets in which the third-party operates commercially.
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> Similar submissions were also received by the ministry by another one of the affected third-parties contacted by the ministry. That third-party also explicitly cited the likelihood that public disclosure of the confidential pricing/payment information regarding the drug unit pricing negotiated by the ministry (as part of a Pricing Agreement) for a single drug product could "set a benchmark" for the price of that certain drug product, thereby enabling other payers (besides Ontario) to vie for similar terms/pricing from the third party. As such, it is reasonable to conclude that those manufacturers would be less willing in the future to negotiate similar Pricing Agreements with the ministry, and to the extent that such agreements were negotiated, the ministry's ability to secure similar savings from the relevant manufacturers would be compromised.

[24] The ministry submits that disclosure of the withheld information could reasonably be expected to prejudice its economic interests and, in turn, the government's financial interests. It states:

> ..to the extent that the ODB budget forms a significant part of the provincial budget, any prejudice to the ministry's economic interests in this regard would also have an associated negative impact on the government's overall financial interests. This negative impact is of particular concern in relation to the current economic environment facing the provincial government. Under the current circumstances, both the ministry and the government of Ontario must actively seek out ways to manage current economic pressures while preserving existing benefits provided to Ontarians. Since the ministry relies very heavily on its negotiations with drug manufacturers to control drug costs for the province, the ministry submits that the disclosure of the information at

> issue would be detrimental to the financial interests of the ministry and the government of Ontario.

[25] The ministry then refers to a number of decisions of this office where it was found that sections 18(1)(c) and (d) was found to apply to exempt the following information from disclosure:

- The formula for the calculation of volume discounts paid by manufacturers under volume discount agreements, as well as actual volume discount amounts expressed in numerical values.[7]

- Payment summaries by drug manufacturer, setting out the amounts of discount payments made by individual drug manufacturers to the ministry under the ODB Program.[8]

[26] Lastly, the ministry provided a copy of a letter written by the Assistant Deputy Minister and Executive Officer of the ODB Program. The ministry submits that the letter would provide greater detail and background information of listing and pricing agreements and the ministry's goal in those negotiations. This letter, in particular, highlights the difficulties that arose when the ministry complied with Order PO-2865 to disclose volume discount amounts paid by drug manufacturers to the ministry. The ministry states:

> The impact of the Order was felt immediately by the ministry through uniformly negative responses it received from manufacturers expressing concern about the disclosure of information they considered confidential. The disclosure has prejudiced the ministry's ability to secure savings and ensure price stability through the negotiated agreements described above. In my view, the ministry will not be able to obtain the lowest possible prices for drugs because manufacturers may either refuse to enter into negotiations altogether, or be less willing to offer significant volume discounts.

[27] Most recently, in Order PO-3176[9], Senior Adjudicator Sherry Liang considered whether similar information, which was at issue in Orders PO-2864 and PO-2865, were exempt under sections 18(1)(c) and (d). In finding that the information previously ordered disclosed in Order PO-2865 was exempt, Adjudicator Liang quoted the finding in Order PO-3032 which states:

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[7] PO-2863
[8] PO-3032
[9] Order PO-3176 is the subject of a judicial review application submitted by one of the drug manufacturers.

> …the disclosure pursuant to Order PO-2865 "has in fact resulted in manufacturers becoming more reluctant to enter into pricing negotiations to achieve the kind of savings described above.
>
> I am satisfied that the ministry has provided credible, detailed and convincing evidence that the disclosure of this same type of information pursuant to Order PO-2865 has had a negative impact on the Executive Officer's efforts to negotiate discounts with drug manufacturers, and I am also satisfied that, given the costs involved, further disclosures of this type of information could reasonably be expected to cause not just harm, but significant harm, to the economic interests of the ministry and the financial interests of the government of Ontario.
>
> With respect to the appellant's arguments that the drug manufacturers would still do business with Ontario even if the information is disclosed, that may be true but it is hardly the point. The issue here is not a continuing business relationship, but the ability to continue to effectively negotiate discount pricing. I am satisfied that disclosure could reasonably be expected to interfere with that process, and as a consequence, there is a reasonable expectation of prejudice to the economic interests of the ministry and injury to the financial interests of the government of Ontario.

[28] I agree with the findings in both PO-3032 and PO-3176 and apply it here. The information withheld by the ministry under sections 18(1)(c) and (d) in the agreements is set out above, but includes information that would disclose the actual amount of guaranteed savings/payments to the ministry and the process of how this figure is calculated. Based on the submissions of the ministry and the content of the withheld information, I find that disclosure of this information could reasonably be expected to both prejudice the ministry's economic interests and be injurious to the Ontario government's financial interests. I find that the ministry has provided detailed and convincing evidence that the harms set out in sections 18(1)(c) and (d) could reasonably be expected to occur and that the ministry's ability to negotiate favourable pricing and listing agreements is in the best interests of both the ministry and the government of Ontario. Accordingly, I uphold the ministry's application of sections 18(1)(c) and (d) to the agreements, subject to my finding on the ministry's exercise of discretion contained in the discussion below.

[29] Regarding the information withheld on the Index of Records, the ministry concedes that the information withheld which was responsive to parts 2 and 3 of the appellant's request is similar to the information withheld in Order PO-3120. In both appeals, the information withheld is aggregate or summary information representing the ministry's savings for a particular period. In Order PO-3120, Adjudicator Donald Hale considered the finding in Order PO-3032 where the ministry had submitted the

same evidence that he had before him. In allowing the appeal, Adjudicator Hale found the following:

> Having reviewed the evidence provided to me in this appeal, as well as that tendered by the ministry in the appeal that gave rise to Order PO-3032, I am not satisfied that the disclosure of the aggregate payment amounts for 2009 could reasonably be expected to prejudice the economic interests of the ministry or be injurious to the financial interests of the government of Ontario. I do not accept the ministry's position that the further disclosure of a single dollar amount comprising the sum total paid by drug companies under the Ontario Drug Benefits Program could reasonably be expected to result in significant harm to the relationship which exists between the ministry and the drug manufacturing industry which would then lead to a deleterious effect on the ability of the ministry to continue to negotiate the discounts which it has obtained in previous years with drug companies. It is not a secret that drug companies pay discounts to the ministry under the Ontario Drug Benefits Program. In fact, as the appellant points out, the aggregate payment amounts for both 2007 and 2008 were published on the ministry's website. No evidence has been offered to show the harm that resulted from these disclosures.
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> The arguments of the drug companies and the ministry with respect to section 18(1) presuppose that the disclosure of the aggregate payment amount for 2009 will enable one to determine the price paid by the Government of Ontario for a given drug. In this regard, I do not accept the evidence of the ministry in support of the position that the disclosure of the aggregate payment amount for 2009 could enable someone familiar with other publicly-available information (including that disclosed as a result of Order PO-2865) to extrapolate further and determine the amount of individual payments made by a drug manufacturer or the amount paid for any specific drug product. In my view, the evidence provided by the ministry is insufficient to establish how such a calculation is possible or how it could result from the disclosure of the aggregate payment amount.

[30] I adopt Adjudicator Hale's reasoning for the purposes of this appeal and conclude that the ministry has not provided sufficiently detailed and convincing evidence that disclosure of the aggregate/summary information withheld in the portions of the record responsive to parts 2 and 3 of the appellant's request could reasonably be expected to result in the harms set out in sections 18(1)(c) and (d). Neither am I able to discern from the record itself that disclosure of this particular information could reasonably result in the alleged harms. The aggregate/summary information withheld on the record relates to the information of a number of third parties and there is, in my view, no way to extrapolate the individual portion paid by a particular affected party. Accordingly, I am unable to find that the withheld responsive information to parts 2 and

3 of the appellant's request are exempt under section 18(1)(c) and (d). However, I will consider whether section 17(1) applies to this information below, however.

[31] The ministry submits that the information responsive to part 5 of the appellant's request is of a different quality and thus is not subject to the same reasoning applied in Order PO-3120. As stated above, the information withheld in the responsive information to part 5 of the appellant's request is the weighted average percentage volume discount across all of the individually-negotiated pricing/listing agreements between the ministry and the various drug manufacturers. Disclosure of this information, in the ministry's opinion, could reasonably be expected to have serious economic and financial impacts for both the ministry and the government with respect to the negotiation of future pricing/listing agreements.

[32] The ministry submits that disclosure of the average volume discount percentage value could reasonably be expected to impact the relative expectations and bargaining positions of drug manufacturers and others in their volume discount negotiations with the ministry. This would in turn affect the ministry's ability to achieve maximum possible cost savings through future negotiated pricing/listing agreements. The ministry gives the example of a drug manufacturer learning, through the disclosure of the withheld information, that its own volume discount percentage is in excess of the weighted average discount percentage across all agreements, and attempting to pressure the ministry to renegotiate the volume discount percentage. Additionally, that drug manufacturer may be less willing to grant a similar volume discount percentage in future negotiations with the ministry with respect to other drug products.

[33] The ministry submits:

> The weighted average volume discount percentage amount across all pricing/listing agreements was compiled by, and is known only to, the ministry. It is not known to any other person, or any of the relevant individual drug manufacturers. In fact, the concerns described above were the reason the ministry expressly redacted the *actual* numerical amount of the average volume discount percentage from the copy of the record which accompanied its letters to manufacturers under the section 28 third party notice process. As a result, the affected third-party manufacturers were asked to respond to the ministry knowing only the *nature* of this numerical value in part 5 of the record at issue, but not the *actual percentage value* itself.
>
> Even though the numerical average volume discount percentage value in part 5 of the record does not necessarily reflect the actual volume discount percentage of any single volume discount pricing/listing agreement associated with a single identifiable drug manufacturer or a single pricing/listing agreement, the ministry submits that the disclosure

> of this information would, nevertheless, reasonably be expected to impact future negotiations with drug manufacturers , insofar as it could be expected to negatively impact the ministry's ability to achieve maximum possible savings through the mechanism of future pricing/listing agreements.

[34] Lastly, the ministry acknowledges that the appellant's request arose out of the Executive Director's statement in a May 2009 memorandum that states that the ministry had achieved "…volume discounts of 'up to 45%'." The ministry states that despite the disclosure of this maximum volume discount achieved, in the context of the present appeal, the disclosure of the more precise weighted average volume discount percentage value could still reasonably be expected to cause the harms set out in sections 18(1)(c) and (d).

[35] Based on my review of the withheld information and the ministry's representations, I find that the information responsive to part 5 of the appellant's request is exempt under sections 18(1)(c) and (d). I find that disclosure of the weighted average volume discount could reasonably be expected to result in the harms set out in sections 18(1)(c) and (d) even though this figure does not represent the volume discount provided by the ministry to any particular drug manufacturer. It is evident that disclosure of this amount could adversely affect the ministry's ability to negotiate favourable volume discount percentages in current and future negotiations with drug manufacturers. Accordingly, subject to my finding on the ministry's exercise of discretion, I find that this information is exempt under sections 18(1)(c) and (d).

B. Was the ministry's exercise of discretion under section 18(1)(c) and (d) proper in the circumstances?

[36] The sections 18(1)(c) and (d) exemptions are discretionary, and permit 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.

[37] 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.

[38] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office

may not, however, substitute its own discretion for that of the institution [section 54(2)].

[39] In support of its exercise of discretion to withhold the information in the agreements and the information responsive to part 5 of the appellant's request contained in the revised index of records, the ministry submits that it took into consideration the submissions received by the third party drug manufacturers when it initially gave notice. It also took into consideration the strong negative public reaction and objection of a number of drug manufacturers to the previous disclosure of volume discount payment information ordered disclosed under Order PO-2865.

[40] The ministry also took into account that in its view, the proposed disclosure would primarily serve private financial interests, namely the interests of the third parties' potential industry competitors and customers, rather than the general public's interests. The ministry argues that the public's interest in receiving the lowest possible drug costs is actually promoted and protected by the non-disclosure of the payment information, to the extent that confidentiality will encourage manufacturers to continue entering into product listing agreements that benefit the public.

[41] The appellant submits that the ministry erred in its exercise of discretion in applying section 18(1)(c) and (d) to withhold the records. The appellant submits that the Executive Director has made unsubstantiated statements of savings to the public regarding the drug pricing agreements without having to provide the details of the actual savings amounts. The appellant alleges that there is no proof that the drug listing agreements actually amounted to any savings for the public.

[42] Having reviewed the materials before me, including the parties' submissions and the records both withheld and to be disclosed, I find that the ministry properly exercised its discretion to withhold the information in the agreements and on the revised index of records.

[43] I find the ministry's consideration of its ability to negotiate the lowest possible drug costs and the interests to be protected by applying the exemption in section 18(1) are proper considerations in the circumstances. The appellant's concern that the pricing/listing agreements are not providing substantial savings to the public is addressed by the disclosure of the aggregate/summary information which I have found not to be exempt in this appeal.

[44] Accordingly, I uphold the ministry's exercise of discretion under sections 18(1)(c) and (d).

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

[45] I will now consider the application of section 17(1) for the remaining information in the agreements and the information responsive to parts 2 and 3 of the appellant's request contained in the revised index of records. 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

[46] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[10] 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.[11]

[47] 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

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[10] *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.).

[11] 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.

[48] For all the appeals, the ministry indicated in its representations that it would defer to the affected parties on the issue of the application of section 17(1) so it did not address the application of this exemption in its representations.

Part 1: type of information

Listing and pricing agreement

[49] Regarding the listing agreements, the affected parties submit that they contain both commercial and financial information. Two of the affected parties also assert that the records contain trade secret information. The affected parties submit:

- The records contain financial information as it relates to the payment of monies between the ministry and the affected parties.

- The other non-financial information in the records is commercial and trade secret information.

- The listing and pricing agreements relates to the supply of products by the affected party to the ministry at a set price. As this relates to the exchange of goods for payment it is commercial information for the purposes of section 17(1).

- The agreement was a "novel form of agreement" which was negotiated pre-Bill 102.

[50] The terms, financial, commercial and trade secret information have been defined in past orders as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[51] I accept these definitions for the purposes of this appeal. Based on my review of the information in the records, I find that the agreements contain financial and commercial information for the purpose of section 17(1). The listing and pricing agreements sets out the terms of the agreement between the ministry and the affected party for the supply of drug products under the Ontario Drug Benefit program.

[52] On the other hand, I find that the listing/pricing agreements do not contain trade secret information. The affected party's submissions on "trade secret" do not establish that the records contain either trade secrets relating to the affected party's business or that the agreement itself is a "trade secret". I do not accept the affected party's argument that the agreement is novel and not a commonplace routine contract for the supply of goods and as such constitutes a trade secret. The fact that the ministry entered into price listing agreements is not confidential information.

[53] One of the affected parties submits that its name and the drug product name should also be protected under section 17(1). In my view, the company's name and the name of its drug product do not qualify as trade secret information and only superficially can be considered commercial information. The affected party did not provide evidence to support its argument that its company name or its product name is not generally known, has economic value from not being known, and that it has made reasonable efforts to maintain the secrecy of the names. I find this information is only superficially commercial information as the affected party must have created the name of its company and product name to sell its product in the marketplace. As a result, the company and drug product names alone do not qualify for exemption under section 17(1).

[54] However, as I have found that the agreements contain financial and commercial information, these records satisfy the requirement for part 1 of the test for the application of section 17(1).

Aggregate data on index

[55] The affected parties argue that this is data is commercial and financial information as it relates to aggregate savings and payments information relating to the supply of drug products from the affected parties to the ministry. I accept that the information withheld on the charts responsive to parts 2 and 3 of the appellant's request is financial information for the purposes of section 17(1). The information withheld is dollar amounts of the aggregate savings to the government and, as such, constitutes financial information.

[56] Accordingly, I find that the withheld information on the index satisfies part 1 of the test for section 17(1).

Part 2: supplied in confidence

Supplied

[57] 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.[12]

[58] 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.[13]

[59] 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.[14]

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[12] Order MO-1706.

[13] Orders PO-2020, PO-2043.

[14] 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.).

[60] 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.[15]

In confidence

[61] 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.[16]

[62] 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.[17]

Agreements

[63] Two affected parties argue that disclosure of the agreements would disclose information that was directly supplied by them to the ministry or would permit the accurate inference with respect to the information supplied. The affected parties submit that the following cases are relevant and should be applied in this appeal:

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

- Order 26-94, *Re British Columbia Hydro and Power Authority* where the BC Information and Privacy Commissioner stated the following about the accurate inference test:

> "…information where disclosure of the seemingly innocuous information would allow the OTEU [the requester] to see into the financial and commercial affairs of Westech [the third party] in ways that are precluded by the wording of section 21(1) of the Act."

- Order 2000-005, where the Alberta Information and Privacy Commissioner found the following with respect to the terms in a partnership agreement between the Calgary Regional Health Authority and the third party:

> "The foregoing interpretation of section 15(1)(b) is different from previous orders in which I said that the information supplied must remain relatively unchanged in the agreement, and must also allow an application to make an accurate inference. However, I believe that my current interpretation more closely reflects the commercial reality that, to reach an agreement, a third party must supply a certain amount of information, some of which may actually appear in the agreement, and some of which may be inferred from the agreement."

[64] Specifically, the affected parties also argue the following:

- The references to the price of a product, and contractual commitments would reveal information supplied by the affected party to the ministry.

- The nature of concessions that a company is willing to give, in the context of an agreement related to product supply, is clearly related to the operating philosophy of the business and thus is immutable information provided by the affected party to the ministry.

[65] Both affected parties submit that disclosure would result in the following:

> Disclosure of the information at issue would allow insight into [the affected party's] financial and commercial affairs; it would reveal certain confidential terms of the agreement between [the affected party] and the ministry, namely, that [the affected party] has negotiated an agreement that involves a commitment…This information is not "innocuous", but rather reveals [the affected party's] confidential business strategies in negotiating with the Ontario Public Drug Programs (OPDP), and its

> willingness to enter into certain types of agreements, information which if known would negatively impact [the affected party's] competitive position as others could vie for similar terms with OPDP, to [the affected party's] disadvantage.

[66] Based on my review of the information remaining at issue, I am unable to find that the information was supplied by the affected parties to the ministry. The affected parties did not provide evidence that the information in the agreements was supplied by themselves to the ministry beyond a simple assertion that disclosure would result in the harm contemplated in section 17(1)(a) or (c). Further, the affected parties' argument that disclosure of the fact that they had entered into a price/listing agreement with the ministry would result in the harm set out in section 17(1)(a) or (c) does not relate to whether the information in the agreement was supplied. In Order PO-3032, former Senior Adjudicator John Higgins, in dismissing the requester's argument that the money paid by the affected parties to the ministry were "bribes or kickbacks", stated the following:

> With respect to the last assertion made by the appellant, I note that the ODBP is a program whose existence is publicly known, and more significantly, the negotiation of listing and pricing agreements is made pursuant to the *ODBA* and O. Reg. 201/96. The fact that drug manufacturers pay discounts to the ministry under this program is not a secret, and the appellant's suggestion that these payments might appear to be "bribes or kickbacks" when they are, in fact, negotiated pursuant to duly enacted Ontario legislation, in pursuit of the sound public policy goal of significant savings in the health care budget, is unsustainable and without merit.

[67] I agree with the rationale set out by Adjudicator Higgins and apply it to the current appeal. The fact that the affected parties negotiated the agreements with the ODBP is not confidential information and disclosure of these agreements would not disclose the affected parties' confidential business strategies used in negotiating with OPDP.

[68] I also find that disclosure of the concessions or terms that an affected party is willing to agree to do not disclose information relating to the affected party's operating business philosophy, which would then constitute immutable information supplied by the affected party to the ministry. Instead, I find that the concessions indicate the terms that the affected party agreed to in order to do business with the ministry and supply the drug product within the terms of the agreement. These terms would vary depending on the parties and type of agreement and are not, therefore, immutable. As such, I find that the terms were not supplied for the purposes of section 17(1).

[69] I find the cases referred to by the parties to be unhelpful in the present appeal. In the BC Information and Privacy Commissioner's decision No. 26-1994, the Commissioner stated the following in finding the "supplied" element had been met, in considering the application of section 21(1):

> There was ample evidence introduced at the inquiry to show that the severed information was supplied by Westech to B.C. Hydro in confidence, both because the information remains relatively unchanged from that originally provided by Westech, and because disclosure of the information would allow the applicant to draw accurate inferences about sensitive third-party business information and business concepts that fall within the protection of section 21(1).

[70] In the present appeal, the affected parties did not provide "ample" or any other evidence which establishes the relationship between the information supplied by them and the terms of the agreement which they would like withheld under section 17(1). Moreover, I am unable to establish this connection from my review of the records themselves. In addition, I am unable to find that disclosure would permit the requester to accurately infer sensitive business information which was "supplied" by the affected parties to the ministry.

[71] Additionally, I find that the Alberta Information and Privacy Commissioner's order in 2000-005 is not helpful to the affected parties' position. The Commissioner's finding of "supplied" was based on his consideration of information supplied between the partners' to the partnership agreement and the evidence presented to him regarding financial information supplied by one of the partners. The facts in the present appeal are not sufficiently similar and again, the affected parties have not provided evidence to establish that the information they would like withheld was supplied by them to the ministry or that it would permit the accurate inference of information supplied.

[72] Accordingly, as I have found the above terms of the agreements, with the exception of the information I have withheld under section 18(1)(c) and (d), not to have been "supplied" for the purposes of section 17(1), the affected parties have failed to establish part two of the test for the application of that exemption. As all three parts of section 17(1) must be established, I find the information in the agreements is not exempt. I will order this information to be disclosed.

Aggregate data on index

[73] The affected parties submit that disclosure of the aggregate data on the revised index would disclose confidential proprietary and commercial information supplied to the ministry. One affected party states:

> [The affected party] supplied the information contained in the records to the ministry with a reasonable expectation that the information would be kept confidential because of the highly sensitive commercial and financial nature of the information and that the information would only be used by the ministry in the course of carrying out its mandate and responsibilities under the Ontario Drug Benefits Program and not disclosed.

[74] Outside of these assertions that the information was supplied, the affected parties do not provide evidence that the aggregate data was supplied by them to the ministry or how the disclosure of the aggregate data would permit an accurate inference of the information supplied.

[75] Due to the nature of the information as aggregate or summary information of the total savings received or the estimated savings as a result of pricing and listing agreements, the information reflects the total savings from a number of pricing and listing agreements and drug manufacturers. The information cannot be said to have been supplied to the ministry as the ministry itself generated the total figure that is set out on the record, by presumably calculating a total based the amount received from each of the many relevant drug manufacturers. Adjudicator Hale, in Order PO-3120 found the following with respect to the "supplied" element for similar data:

> After considering the arguments raised by this issue, I find that the aggregate payment amount does not reveal any information supplied by the drug companies to the ministry. In my analysis of this issue, I am mindful of the nature of the actual information at issue in this appeal, the aggregate payment amount representing a composite total of payments received from a large number of sources. Even if each of the component parts which make up the aggregate amount could be said to have been "supplied" to the ministry within the meaning of section 17(1), the same cannot be said for the aggregate amount. This dollar figure was arrived at as a result of the ministry compiling a total figure from the many amounts paid by the drug manufacturers as part of their participation in the volume discount scheme. This amount represents the sum total of the amounts received by the ministry as part of this program, and not the actual individual payments made by each manufacturer participating in it.

[76] I agree with Adjudicator Hale's reasoning and find it applies to the information before me. The information at issue is aggregate or summary data where the ministry has generated the figures in the tables based on payments received from a number of drug manufacturers so that no one drug manufacturer could claim to have actually "supplied" the information at issue.

[77] Accordingly, as this information has not been supplied, it does not meet part two of the test for the application of section 17(1). As all parts of the test must be

established, I find that the exemption in section 17(1) does not apply to the aggregate summary information responsive to parts 2 and 3 of the appellant's request and withheld on the revised index. I will order this information to be disclosed.

D. Was the ministry's search for records reasonable in the circumstances?

[78] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[18] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[79] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[19] To be responsive, a record must be "reasonably related" to the request.[20]

[80] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[21]

[81] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[22]

[82] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[23]

[83] The ministry submits that the appellant's request was unambiguous and did not require clarification in order to conduct a search for responsive records. In support of its search for responsive records, the ministry submitted an affidavit from the Director of the Drug Program Services Branch (DPSB). The affiant swears that he did the following:

- Reviewed the request and assigned appropriate DPSB staff members to search for existing, identifiable records.

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[18] Orders P-85, P-221 and PO-1954-I.
[19] Orders P-624 and PO-2559.
[20] Order PO-2554.
[21] Orders M-909, PO-2469, PO-2592.
[22] Order MO-2185.
[23] Order MO-2246.

- The assigned staff members included: Senior Pharmacists from the Drug Submissions Unit; Senior Economist from the Pharmaceutical Services Coordination Unit; an Administrative Assistant from the Pharmaceutical Services Coordination Unit; and the Senior Pharmacist on behalf of the DPSB.

- The assigned staff was directed to search for paper and electronic records from sources including: file cabinets, folders, electronic files and any data sources that might yield responsive records.

- Content experts within the DPSB conducted a search of the relevant file directors, files and data fields to identify data sources which could have been potentially responsive.

- Based on the search, records totalling 51 pages of records were located with regard to part 4 of the appellant's request.

- No specific identifiable or unique records were found to exist to the other parts of the appellant's request.

- With respect to the four remaining parts of the request, DPSB staff analyzed and summarized data from various data sources, including information from non-responsive records, and compiled them into the narrative and associated summary tables.

- The narrative responses and summary tables were included as part of the ministry's Index of Records.

[84] The ministry submits that there are no records that would have been destroyed during this time frame.

[85] The appellant did not submit representations supporting his belief that additional responsive records should exist.

[86] Based on my review of the ministry's representations, I uphold the ministry's search as reasonable and dismiss this part of the appeal.

ORDER:

1. I order the ministry to disclose portions of the agreements to the appellant by providing him with a copy of the records by **December 12, 2013** but not before **December 6, 2013**. I have enclosed a highlighted copy of the agreements with the ministry's copy of the order identifying the information that <u>should not</u> be disclosed.

2. I also order the ministry to disclose portions of the revised index of records to the appellant by providing him with a copy of the records by **December 12, 2013**, but not before **December 6, 2013**. I have enclosed a highlighted copy of the index of records with the ministry's copy of the order identifying the information that should not be disclosed.

3. I uphold the ministry's search as reasonable and dismiss this part of the appellant's appeal.

4. In order to verify compliance with order provisions 1 and 2, I reserve the right to require the ministry to provide me with a copy of the records sent to the appellant.

Original signed by: November 6, 2013
Stephanie Haly
Adjudicator