Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3495

Appeal PA08-188

Ministry of Health and Long-Term Care

May 27, 2015

Summary: The Ministry of Health and Long-Term Care received a request for records passing between the ministry and a drug company regarding the listing of a particular product on the Ontario Drug Benefit Formulary in 2007. The ministry denied access to some of the responsive records on the basis that they were properly exempt under the mandatory third party information exemption in section 17(1), the discretionary solicitor-client privilege exemption in section 19 and the discretionary exemptions in sections 18(1)(c) and (d) which protects valuable government information. In this decision, the adjudicator upholds the ministry's decision respecting those records claimed to be exempt under section 19 and, in part, the records claimed to be exempt under sections 17(1) and 18(1)(c) and (d). The adjudicator orders the disclosure of the remaining portions of the records to the requester and finds that there is no compelling public interest which outweighs the purpose of the applicable exemptions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(1)(c) and (d), 19 and 28.

Cases Considered: *Minister of Health v. Merck Frosst Canada Ltd.,* 2009 FCA 166; *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

Orders Considered: PO-3473, PO-3176, PO-2010.

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act)* for access to the following information:

> [C]opies of any and all records relating to communications and/or arrangements of a formal or informal nature between [a named company] or its related companies, and any individual or entity within the Ontario Ministry of Health and Long-Term Care regarding the listing of [a named drug] on the Ontario Drug Benefit Formulary.

[2] The request specified that it included, but was not limited to, certain specific types of correspondence and agreements or arrangements between the named company and certain ministry officials.

[3] The ministry identified 18 responsive records and, after notifying the named company (the affected party) issued decisions to the requester (with notice to the affected party) in which it indicated that it was granting partial access to a number of records, and denying access to certain records or portions of records on the basis of the exemptions in sections 17(1) (third party information), 18(1)(c) and (d) (economic interests), and 19 (solicitor-client privilege) of the *Act.*

[4] The affected party appealed the ministry's decision to disclose certain records and Appeal PA08-103 was opened. This appeal was resolved by Order PO-3473 on March 25, 2015. In addition, the requester (now the appellant) appealed the ministry's decision to deny access to certain records or portions of records and the current appeal, PA08-188, was opened to address those issues.

[5] As stated above, the ministry identified 18 records responsive to the request. Seven of these records were addressed in Order PO-3473, which resolved appeal PA08-103. Of the remaining records, the ministry denied access to six records or portions of records on the basis of the exemptions in sections 17(1) (third party information), 18(1)(c) and (d) (economic interests), and 19 (solicitor-client privilege) of the *Act.* These records are identified by the ministry as records 1, 3, 6a, 9, 9a and 11.

[6] Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the appeal process. The adjudicator originally assigned to this appeal began her inquiry by seeking representations from the ministry and the affected party, initially. The ministry was asked to address all of the issues. The affected party was asked to address the issue of the possible application of sections 17(1)(a), (b) and/or (c) to record 6a only.

[7] Both the ministry and the affected party provided representations. In the affected party's representations, it took the position that the ministry should have notified it under section 28 of the *Act* because it claimed to have an interest in the disclosure of the additional records responsive to the request. The affected party claimed that the ministry should have provided it with an opportunity to also make representations on why these records should not be disclosed. In addition, in its representations the affected party also makes submissions in support of its view that the mandatory exemption in section 17(1) applies to Records 1, 3, 6a, 9a and 11.

[8] The previous adjudicator then sought representations from the appellant. The appellant was invited to respond to the affected party's submissions on the application of section 17(1) to certain records, in addition to the other submissions and issues identified in the Notice. The appellant submitted representations in response. After reviewing them, the previous adjudicator sought representations in reply from both the ministry and the affected party. The parties' representations were shared in accordance with section 7 of the IPC's Code of Procedure and Practice Direction 7.

[8] This file was also subsequently transferred to another adjudicator who sought and received additional representations from all of the parties respecting their positions on a number of issues that addressed certain changes to the interpretation placed by this office on the mandatory third party information exemption in section 17(1). At the time that the inquiry in this file was underway, a number of other appeals involving similar records relating to these and other unrelated parties and the ministry were being adjudicated upon. Because the issues were similar, it was determined that this appeal, and the appeal filed by the affected party (PA08-103), would be placed on hold pending the resolution of those other appeals. After being adjudicated, several applications for the judicial review of those decisions were sought by the parties to them. Once those applications were resolved, the appeals arising from the request in this matter were re-activated. The appeals were then transferred to me for resolution and I issued Order PO-3473 on March 25, 2015.

[9] This order will finally resolve the remaining issues in the appellant's appeal of the ministry's decision to deny access to certain records, in whole or in part. In this order, I have upheld the ministry's decision with respect to portions of records 1, 3 and 11 and records 9 and 9a, in their entirety. The remaining records or parts of records are found to be not exempt, and I will order that they be disclosed to the appellant.

RECORDS:

[10] There are 6 records at issue in appeal PA08-188 which the ministry described in an index of records as follows:

Record No.	Description	No. of Pages	Withhold in Part or in Full	Exemption Claimed
1	Price Agreement December 19, 2006	14	Part	18(l)(c), (d)
3	Amending Agreement 1 May 7, 2007	3	Part	18(l)(c), (d)
6a	Attachment to Record 6	2	Full	17(1)(a), (b), (c)
9	Email Chain between Ministry staff and third party - July 11, 2007	2	Full	19(1)
9a	Attachment to Record 9 Memo dated July 10,	3	Full	19(1)
11	Amending Agreement 2 August 10, 2007	4	Part	18(l)(c), (d)

[11] As I noted above, the affected party submits that the mandatory exemption at section 17(1) also applies to records 1, 3, 9a, and 11.

ISSUES:

A. Should the ministry have notified the affected party of the request for additional records?

B. Are records 9 and 9a exempt from disclosure under the discretionary exemption in section 19 of the *Act*?

C. Are the records exempt from disclosure under the discretionary exemption in section 18(1)(c) of the *Act*?

D. Are the records exempt from disclosure under the mandatory exemption in section 17(1) of the *Act*?

E. Was the ministry's exercise of discretion proper in the circumstances of this appeal?

F. Does the public interest override in section 23 of the *Act* apply to the records?

PRELIMINARY ISSUE

Issue A: Should the ministry have notified the affected party of the request for additional records?

[12] The affected party takes the position that, in addition to notifying it of the request for the seven records at issue in appeal PA08-103, the ministry erred in failing to notify the affected party that there were additional responsive records, as it is required to under section 28(1) of the Act, which reads:

> Before a head grants a request for access to a record,
>
> (a) 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 ; or
>
> (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21 (1) (f),
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

[13] The affected party states that although it received notice of the request for the seven records at issue in Appeal PA08-103 and was able to appeal the decision to disclose these records, it should also have received notice of all of the records at issue in Appeal PA08-188, as these records "meet the required threshold for notice to be provided." The affected party states that these records contain information that it supplied to the ministry in confidence (or would reveal such information), and that the ministry ought to have notified it of the request, and given the affected party the opportunity to provide representations on the possible application of section 17(1) to these records. The affected party reviews these records in some detail, and asks this office to issue a declaration that the ministry's decision to disclose certain records without providing notice was unlawful. The affected party states that a declaration of this nature is necessary to ensure that, in the future, affected parties are not "deprived of the opportunity to make representations."

[14] The affected party also refers to the decision by the Federal Court in *Merck Frosst Canada Ltd. V. The Minister of Health of Canada,* 2006 FC 1201, in which the Federal Court reviewed the issue of notice under the Federal *Access to Information Act* . In that decision at paragraphs 63 and 64 the Federal Court reviewed the

decision by the government body to disclose certain records without notice to an affected party, and found that notice ought to have been given. The affected party relies on this decision in support of its position that notice ought to have been given to it.

[15] I have carefully reviewed the notification issue raised by the affected party. I note that the affected party was given specific notice of the ministry's decision to disclose the seven records at issue in PA08-103. I also note that the affected party has had the opportunity to provide representations on the possible application of section 17(1) to the six records at issue in the current appeal, PA08-188, which have not yet been disclosed. There are five records which are no longer at issue, as they have been disclosed to the appellant, and the affected party was not given the opportunity to provide representations on those records (Records 2, 4, 6, 14 and 15).

[15] I also note that, since the representations were received from the affected party, the Federal Court decision in *Merck Frosst*[1] has been appealed to the Federal Court of Appeal and that court, in reviewing the notification issue, determined that the trial judge erred in his decision, set out in paragraph 64, and found that notification was not necessary.

[16] On my review of the notification issue raised by the affected party, I am satisfied that the ministry properly notified the affected party of the records at issue in appeal PA08-103. In addition, on my review of the records which have been disclosed and for which no notification was given (Records 2, 4, 6, 14 and 15), I am satisfied that the ministry properly decided that these records did not require notification under section 28(1) of the *Act.* They consist of either brief cover letters or other correspondence or an agreement which, on its face, does not meet the requirements in section 17(1).

[17] The remaining records are those which remain at issue in appeal PA08-188. The affected party has had the opportunity to provide representations on the application of section 17(1) to these records, and the application of section 17(1) to those records is addressed in this order. As a result, I will not be separately reviewing the notification issue for those records, as this is a moot issue.

DISCUSSION:

Issue B: Are records 9 and 9a exempt from disclosure under the discretionary exemption in section 19 of the *Act*?

[18] The ministry claims that the discretionary exemption at section 19(a) applies

[1] *Minister of Health v. Merck Frosst Canada Ltd*, 2009 FCA 166.

to exempt records 9 and 9(a), from disclosure. Section 19 of the *Act* states, in part:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

[19] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[20] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[21] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[2] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[3] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[4]

[22] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[5]

[23] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[6] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[7]

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[2] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[3] Orders PO-2441, MO-2166 and MO-1925.
[4] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[5] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[7] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

Branch 2: statutory privileges

[24] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

Representations

[25] The ministry states:

> Record 9 is a chain of email communications between Ministry staff and Ministry legal counsel, in which Ministry staff sought legal advice from their lawyer. The lawyer's opinion, contained in the email to Ministry staff is clearly written in response to the request for advice in the preceding email correspondence.

[26] The ministry acknowledges that the record is described in the index as an email chain between ministry staff and a named company. However, the ministry asserts that the emails have never been disclosed outside the ministry and have been maintained in confidence.

[27] Regarding Record 9a, the ministry states:

> Record 9a was attached to Record 9 (the email chain). It is a legal memorandum that was provided to Ministry staff by a third party . It is the subject of the legal advice which the Ministry staff requested in Record 9, and is thus an integral part of Record 9. The Ministry is not submitting that the advice of a lawyer retained by a third party is solicitor-client privileged per se; rather, the Ministry's exemption claim is based on the fact that this opinion was attached to and formed part of Record 9, which was written by Ministry counsel.

[28] Relying on Order PO-2432, the ministry submits that Record 9a falls within the "continuum of communications" between counsel and client and is, therefore, exempt under section 19(a) of the *Act.*

[29] The appellant provides representations asking that the application of the section 19 exemption to Records 9 and 9a be carefully reviewed, referring to the index which suggests that the email chain has been disclosed to outside parties. The appellant also asks that the confidentiality of the communications be established, and specifically requests that the application of the exemption to Record 9a be established. The appellant also argues that

simply having a record reviewed by counsel does not necessarily exempt the record from disclosure under section 19. Finally, the appellant suggests that, even if Record 9a qualifies for exemption under section 19, other copies of this record which the ministry may have might not qualify under section 19, and asks that this office confirm that this record is not contained elsewhere in the records.

Analysis and findings

[30] I have carefully reviewed Records 9 and 9a, and am satisfied that they qualify for exemption under section 19.

[31] As indicated above, Record 9 consists of an email chain, with Record 9a as an attachment. The final email in the chain consists of an email from a ministry lawyer to a staff member at the ministry (the client) which contains specific legal advice. The email immediately prior to that contains the request from the staff member to the lawyer for specific legal advice on a matter, and attached to that email were two earlier emails and Record 9.

[32] It is clear that the most recent email and the one immediately prior to it qualify for exemption under section 19, as they contain a request for legal advice and the respondent legal advice from the lawyer on the specific matter. I am satisfied that these two emails qualify as solicitor-client communication privilege as they constitute confidential communications between a client and its legal advisor that was used for the purpose of giving legal advice.

[33] Furthermore, I am satisfied that the two attached emails, as well as Record 9a, also qualify for exemption under section 12. The legal advice sought by the client refers specifically to the attached material and the legal advice refers specifically to it as well.

[34] The ministry states that the material (including Record 9a) was attached to and formed part of Record 9, which was written by ministry counsel and constitutes legal advice. On my review of the record and the representations, I am satisfied that, although these two emails and Record 9a were received from a source outside of the ministry, these records were used by Crown counsel as part of his working papers in relation to the provision of legal advice as part of the confidential solicitor-client relationship as contemplated by *Susan Hosiery,* and thus qualify for privilege on this basis[8].

[35] The ministry also states that the emails have never been disclosed outside the ministry and have been maintained in confidence. In these circumstances, I am satisfied that the ministry has not waived privilege in these records. Furthermore, I confirm that these records are not contained elsewhere in the records at issue in this appeal. Accordingly, I find that Records 9 and 9a qualify for privilege under the solicitor-client communication privilege aspect of section 19.

[8] Order PO-1848-F.

Issue C: Are the records exempt from disclosure under the discretionary exemption in section 18(1)(c) of the *Act*?

[36] The ministry has claimed that the discretionary exemptions at sections 18(1)(c) and (d) apply to Record 6a in its entirety, and to the schedules to Records 1, 3 and 11.

[37] With respect to Records 1, 3 and 11, it should be noted that the ministry initially claimed that these records were exempt in their entirety. In its representations, however, the ministry states that it no longer relies on sections 18(1)(c) and (d) for the bodies of the agreements. Accordingly, I will only review the issue of whether the section 18(1)(c) and/or (d) exemptions apply to the schedules to Records 1, 3 and 11. They consist of the three schedules to three records (a price agreement and two subsequent agreements which amended the price agreement). The schedules set out the specific price amounts agreed to between the parties (the ministry and the third party).

[38] In addition, I find below that portions of Record 6a are exempt from disclosure under section 17(1). Accordingly, I will only consider the possible application of section 18(1) to those portions which I found do not qualify for exemption under section 17(1), specifically pages 4, 5, 6, 9, 10 and 11 of Record 6a.

[39] Sections 18(1)(c) and (d) state in part:

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

[40] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[9]

[41] For sections 18(1)(c) and (d) to apply, the institution must provide detailed and

[9] Toronto: Queen's Printer, 1980.

convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[10]

[42] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[11].

[43] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[12]

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

[44] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[13]

[45] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[14]

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

[46] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[15]

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[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[11] Order MO-2363.
[12] See Orders MO-2363 and PO-2758.
[13] Orders P-1190 and MO-2233.
[14] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[15] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

Record 6a

[47] The ministry states that this record qualifies for exemption under section 18(1)(c) and (d). It states:

> Record 6a consists of proposed contractual terms. This information forms the basis of negotiations between the Ministry and the manufacturer in respect of the effective price (ie: actual drug price) that the Ministry will pay to reimburse pharmacies for dispensing a listed drug product to ODB recipients.
>
> Record 6a was provided to the Ministry in confidence. As such, the Ministry submits that if it were disclosed, manufacturers would be less likely to submit confidential information, including proposed pricing agreement terms, because they no longer could rely on information of this type remaining confidential and not being disclosed outside the Ministry . ...

[48] The ministry submits that disclosure would have a negative impact on its ability to negotiate with manufacturers, as these parties would be less likely to make full and frank disclosures about their products.

[49] After considering the ministry's position and after reviewing the portions of record 6a that remain at issue (namely pages 4, 5, 6, 9, 10 and 11), I am not satisfied that these pages qualify for exemption under section 18(1)(c) or (d). These pages consist of what appears to be duplicate copies of a 2-page attachment. They appear to be a public document relating to the affected party. I find that these pages do not contain any specific pricing information, or any proposed agreement terms. Indeed, the reference to this information suggests that this is public information about the third party, and I find that it does not qualify for exempt under section 18(1)(c) or (d), as disclosure would not result in any of the identified harms.

The schedules to records 1, 3 and 11

Representations

[50] The ministry states, initially:

[T]o 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 has a similar negative impact on the government's financial interests. This negative impact is heightened given the current economic situation. Neither the Ministry, nor

the Government of Ontario, can be regarded as an endlessly deep pocket.

[51] Regarding the schedules to Records 1, 3, and 11, the ministry notes that the formulary drug price is public information. It argues that disclosing the information in the schedules would reveal the price that the ministry actually pays for a drug product, which "would reveal the confidential 'volume discount' that the drug manufacturer provided to the Ministry." In addition, the ministry submits that disclosure of the information in the schedule to record 11 would reveal the mathematical formula used to calculate the volume discount, as well as the resulting price that the ministry paid for a particular drug product. The ministry asserts that this information is considered to be confidential.

[52] In support of its position, the ministry provided a copy of a letter from the Assistant Deputy Minister and Executive Officer of the Ontario Public Drug Programs which describes in greater detail the basis for the ministry 's claim that the schedules should be exempt under these sections of the *Act* . In Order PO-3176, at paragraphs 55 to 63, Senior Adjudicator Sherry Liang summarized similar representations received in that appeal on this issue as follows:

> The EO states that she negotiates a unique pricing agreement with each manufacturer. The discount provided to the ministry by a given manufacturer under the terms of its pricing agreement is strictly confidential, even amongst manufacturers; each manufacturer knows only the terms of its own volume discount pricing arrangement. The EO states that the volume discount and pricing information contained in these agreements is considered by manufacturers to be confidential and proprietary commercial information, and that they have been consistently unwilling to enter into such agreements in the absence of an express assurance of strict confidentiality. Accordingly, each agreement contains a reciprocal contractual requirement to hold the details of each agreement in confidence, as well as a provision under which the ministry acknowledges and agrees that the manufacturer's pricing information was supplied in confidence, and that its disclosure would reasonably be expected to result in competitive or commercial harm to the manufacturer.
>
> The ministry's intention to treat this information as confidential is reflected in O. Reg. 201/96 (the Regulation) which prescribes the limited information about pricing agreements that may be considered "public", specifically, (1) information about the name of the manufacturer, (2) the subject matter of the agreement, and (3) the fact of entering into the agreement. The EO refers to the Ontario Divisional Court decision in

Apotex Inc. v. Ontario Public Dugs Program[16] which interprets "subject matter" as used in this Regulation.

With respect to the impact of disclosure on economic and other provincial interests, the EO states that a significant percentage of Ontario's provincial health care costs are spent on drugs, making drug spending the ministry's highest health care cost after hospital services. She states that the reform of the public drug system has led to over $1.5 billion in cost-savings to the province since 2006. Negotiated pricing agreements contributed significantly to these savings. Further, she states, pricing agreements also provide the government with budgetary certainty. Obtaining volume discounts through enforceable and stable pricing agreements is a measure that has helped the ministry and the province achieve certainty with respect to significant budget expenditures.

The EO states that the negotiations and agreements with drug manufacturers would not be possible if they were not given a promise of strict confidentiality in respect of the terms of the agreements and particular the pricing provisions that reflect or reveal volume discount information.

The EO states that the disclosures as a result of Orders PO-2863, PO-2864 and PO-2865 have resulted in manufacturers becoming more reluctant to enter into pricing negotiations. She states that disclosure has prejudiced the ministry's ability to secure savings and ensure price stability through the negotiated agreements and that, in her 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.

The EO states that following the disclosures, drug manufacturers have stated in their negotiations that, due to their concerns about the potential disclosure of volume discount information, they are no longer able to provide Ontario with the same price reduction level they had agreed to in previous agreements. Further, she states that since early 2010, drug manufacturers have been submitting product listing proposals that are not directly related to price in an effort to try and bypass having any sensitive financial information disclosed through an access request. When this has occurred, it has resulted in product listing agreements becoming more difficult to manage. A price may be proposed with changes to the price in the future, putting more risk on the ministry in making funding decisions.

[16] 2008 CanLII 39429.

> The EO states that if Ontario is required to disclose confidential information regarding volume discount payment amounts that are derived from pricing agreements, as well as the nature of benefits and specific contractual terms agreed to, this province would be the only jurisdiction in Canada required to do so. The rise in ODBP costs that would inevitably result from a decision ordering the disclosure of sensitive pricing information will have a prejudicial impact on the cost of health care in Ontario and the provincial economy at large. Further it will delay and may, in some cases, even prevent access to funding drug therapies under the ODBP, thereby prejudicing patients.
>
> With respect to the information severed from Record 1 of Order PO-2864 (the subject of a late exemption claim), the ministry provided confidential representations. Although I am unable to describe those representations in detail, the ministry's position is that disclosure of this information would reveal to a knowledgeable individual that an agreement conferred a particular type of benefit on the ministry. The ministry states that disclosure of this information would allow knowledgeable individuals to estimate actual price rebates on a per product basis when coupled with other publicly available sources of information.
>
> In its additional set of representations, the ministry addresses the application of sections 18(1)(c) and (d) to portions of Record 3 from Order PO-2864 and the Listing Criteria Record. It submits that the information in Record 3 would allow for the calculation of volume discounts/rebates and relies on its previous submissions about the effect of disclosure of such information on the economic/financial interests and competitive position of the province. With respect to the Listing Criteria Record, the ministry submits that although the information at issue is not volume discount/rebate information, it does describe a "value for money" consideration, disclosure of which would be tantamount to disclosure of volume discount/rebate information and as such, inconsistent with previous decisions. The ministry relies on the same arguments made above, about the impact of disclosure of this information on the economic and competitive interests of the province.

[53] The appellant takes issue with the ministry's position that the three schedules qualify for exemption under section 18(1)(c) or (d).With respect to the exemption in section 18(1)(c), the appellant argues that the exemption does not apply in light of the market for the particular drug to which the records apply. The appellant refers to the nature of this particular drug and its patient population, and the factors peculiar to this case, to support its position that the ministry has not provided sufficiently detailed and compelling evidence to support its position. The appellant also states:

> ... there is no evidence that on balancing access to the largest market in Canada versus disclosure that drug manufacturers will refuse to negotiate volume discounts because these agreements may later be made available to the public . . ..

[54] The appellant also argues that full transparency will benefit all Ontarians, and that confidentiality was certainly not the sole reason the affected party entered the agreements with the ministry. The appellant also asserts that, as the province with the largest market for the identified drug, the ministry would still "be possessed of sufficient bargaining power, if not exclusive or total power to negotiate future agreements with [the third party] and many other companies."

[55] With respect to the application of section 18(1)(d), the appellant also argues that the ministry has not provided sufficiently detailed and compelling evidence to support its position. The appellant also refers to previous orders of this office which have confirmed that it is in the financial interests of the pharmaceutical companies to continue to work with the ministry in listing their drugs, and to negotiate volume discounts. The appellant refers specifically to Orders P0-2528 and P0-2680-R and also argues that not all drug companies support the idea of the confidentiality of this information.

[56] In addition, the appellant provides representations in support of its position that the information at issue should not be secret, but should be transparent. These arguments are best addressed in the portion of this order that addresses the application of section 23 to the records.

Analysis/Findings:

[57] It is evident to me that disclosure of the schedules would reveal how much a named manufacturer paid the ministry as a volume discount amount and other specific financial and value for money conditions a manufacturer agreed to provide to the ministry. I accept that this information could be used by other potential bulk prescription drug purchasers as a discount standard or price goal to be obtained from the drug manufacturers.

[58] I find that the 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 [Order P0-2786]. Furthermore, other drug manufacturers would expect Ontario to negotiate a lower volume discount in the future for their drugs, if it is revealed that Ontario was willing to negotiate a lesser discount for a similar drug with another drug

manufacturer. I find that disclosure of the information at issue could reasonably be expected to seriously prejudice the ministry's ability to secure savings on prescription drugs by weakening its bargaining position in negotiations with other drug manufacturers [Order PO-2780]. I agree with the ministry that disclosure of this information could reasonably be expected to attract the harms contemplated by section 18(l)(c) and (d). In reaching this conclusion, I have considered and adopted the reasoning of Senior Adjudicator Liang in Order P0-3176 which found that:

> . . . I am satisfied that disclosure of the information at issue in Record 1 from Order PO-2864 could reasonably be expected to lead to the harms described in sections 18(1)(c) and (d). I accept the submissions of the EO that, following disclosure of this and other financial information through the prior orders, the ministry's ability to secure savings and ensure price stability through the negotiated agreements has been prejudiced, to the detriment of the province's economic and financial interests.

[59] In conclusion, I find that the ministry has provided the type of detailed and convincing evidence required to demonstrate that disclosure of the information or which it has claimed the sections 18(1)(c) and (d) exemptions could reasonably be expected to prejudice the economic interests or the competitive position of the ministry, and to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of the province. Accordingly, I find that sections 18(1)(c) and (d) apply to the schedules to records 1, 3 and 11.

Issue D: Are the records exempt from disclosure under the mandatory exemption in section 17(1) of the *Act*?

[60] Both the ministry and the affected party claim that the mandatory exemption in section 17(1) of the *Act* applies to Record 6a. In addition, the affected party takes the position that section 17(1) also applies to the agreements which form Records 1, 3 and 11. Section 17(1) reads, 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 ;

[61] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions[17]. 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[18].

[62] For section 17(1) to apply, the institution and/or the affected 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.

[63] Under section 53 of the *Act,* where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. In cases where section 17(1) has been claimed, the affected party shares the onus in establishing the application of this exemption to the records to which it has been applied. Additionally, under section 28(1) of the *Act,* where an institution seeks to disclose a record or part of a record where section 17(1) may apply, the burden of proof that the record or part of the record falls within that mandatory exemption lies upon the individual or entity resisting that disclosure, in this case, the affected party.

Part One: Type of Information

[64] The affected party submits that the information contained in records 1, 3, 6a and 11

[17] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] OJ. No . 2851 (Div. Ct.).
[18] Orders P0-1805, P0-2018, P0-2184, M0-1706.

qualifies as commercial and/or financial information. The ministry submits that in addition to the types of information identified by the affected party, Record 6a also contains scientific information. However, this is not borne out of my review of the contents of these records. These terms have been defined in previous orders of this office as follows :

> *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 P0-2010]. 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 P0-201O].

[65] The records at issue in this appeal pertain to the affected party's efforts to market its drug through the Formulary. Accordingly, I am satisfied that records 1, 3, 6a and 11 all contain commercial information as defined above. In addition, I find that portions of record 6a also contain financial information as this record refers to specific prices.

Part Two: Supplied in Confidence

[66] In order to satisfy part 2 of the test, the ministry and/or the affected party must establish that the information was "supplied" to the ministry by the affected party "in confidence", either implicitly or explicitly.

Supplied

[67] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[19]

[68] 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.[20]

[69] The contents of a contract involving an institution and a third party will not

[19] Order MO-1706.
[20] Orders PO-2020 and PO-2043.

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.[21]

[70] 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 third party to the institution.[22] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[23]

In Confidence

[71] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[24]

[72] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[25]

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[21] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[22] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[23] *Miller Transit*, above at para. 34.
[24] Order PO-2020.
[25] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[73] I have found above that the schedules to records 1, 3 and 11 are exempt under ·section 18(1)(c) and (d). The portions of these three records remaining at issue are the agreements themselves (without the schedules). The affected party takes the position that these three agreements qualify under section 17(1). It states:

> ... the specific (ie: non-"boiler-plate ") terms of the agreements between the Executive Officer and [the affected party] were "supplied in confidence" by [the affected party] in that disclosure of the specific terms would provide the requester and others with the ability to infer [the affected party's] confidential business strategies and plans regarding provision of the listed drug products covered by the agreements.

[74] I have carefully considered the affected party's position that the information contained in the body of these agreements was "supplied" by it to the ministry. All three of these records are clearly agreements entered into between the affected party and the ministry. As identified above, 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). Previous orders have consistently held that 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 (Orders P0-2018, M0-1706).

[75] However, as indicated above, there are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. I have carefully considered the terms of the contracts identified and described in the confidential portions of the affected party's representations. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made ·with respect to under lying 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

[76] I apply the same reasoning to the body of the agreements that comprise records 1, 3 and 11. These records are mutually agreed contracts between the ministry and the affected party, and I am not satisfied that the provisions of these agreements were supplied by the affected party to the ministry for the purposes of the second part of the test for the application of the section 17(1) exemption. In my view, these provisions were mutually agreed to, and not supplied for the purpose of section 17(1).

[77] Accordingly, I find that these three agreements do not qualify for exemption under section 17(1), and I will order that they be disclosed. As all three parts of the

three part test under section 17(1) must be met, I find that these three records do not qualify for exemption under section 17(1). As a result, there is no need to review the possible application of the other parts of the test to these three records and I will order that they be disclosed.

Record 6a

[78] Both the ministry and the affected party take the position that Record 6a was supplied by the affected party to the ministry, and that it was supplied in confidence. The appellant asks that I carefully review the record to ensure that it meets this part of the test.

[79] I have carefully reviewed record 6a, which is identified by the affected party as a "confidential proposal" that it submitted to the ministry. On my review of this record and the parties' representations, including the confidential representations, I am satisfied that record 6a contains information which is of a different character than that in records 1, 3 and 11. I find that record 6a contains information that was supplied to the ministry by the affected party as part of its efforts to engage in the ministry in a commercial transaction for the purchase of its products.

[80] Furthermore, based on representations of both the ministry and the affected party, as well my own review of the contents of record 6 (to which record 6a was attached), I am satisfied that record 6a was supplied to the ministry by the affected party with an explicit expectation of confidentiality. It is clear from the material before me that the affected party expressly stated that record 6a was being supplied to the ministry in confidence. I further find that this expectation of confidentiality on the part of the affected party was reasonably held.

[81] Accordingly, I find that record 6a was supplied in confidence to the ministry by the affected party within the meaning of that term in section 17(1) and that the second part of the three part test has been met for this record.

Part Three: Harms

[82] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[26]

[83] 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

[26] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[27]

[84] In applying section 17(1) to government contracts, 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).[28]

[85] The affected party and the ministry take the position that disclosure of record 6a would result in the harms identified in section 17(1)(a) of the *Act .* The affected party states:

> Disclosure of the confidential proposal will cause harm to (the affected party's] competitive position and interfere with [the affected party's] contractual and other negotiations in Ontario and in other jurisdictions in Canada and internationally, both with respect to [the named drug] and with respect to other drugs ....
>
> ... If released to the requester, [the affected party's] confidential and proprietary business strategies and business plans would be disclosed.
>
> Knowledge of the terms of [the affected party 's] proposal to the OPDP would provide [the affected party 's] competitors with valuable base-line information to use in structuring proposals to compete against [the affected party], both with respect to (the named drug] and with respect to other drug products. This will provide a competitive advantage to [the affected party's] competitors in future negotiations, and will prejudice (it's) competitive position by placing (the affected party) in an inferior position to its competitors, who will now have a benchmark for the terms included in (the affected party's) proposals.

[86] The affected party then provided me with confidential representations in support of its position which refers to the specifics of the information in the record. The affected party also refers to previous orders of this office, including Orders P0-2097 , P0-2273 and P0-2528 in support of its position that the disclosure of record 6a would significantly prejudice its competitive position or interfere significantly with the affected party's contractual or other negotiations.

[87] The appellant argues that the affected party's representations on record 6a are general in nature, and do not highlight what information in the record will prejudice its position. However, the confidential portions of the affected party's representations which

[27] Order PO-2435.
[28] Order PO-2435.

addressed this issue in detail were not shared with the appellant because disclosure would have had the effect of disclosing the contents of the record.

[88] I have carefully reviewed the affected party's representations and record 6a. On my review of the information, I am satisfied that portions of record 6a qualify for exemption under section 17(a) of the *Act.* Specifically, I am satisfied that disclosure of the first three pages of this confidential proposal, as well as the disclosure of Exhibit B, would result in the harms identified in section 17(1)(a) of the *Act.* Given the particular circumstances resulting in the provision of this confidential proposal to the ministry, I am satisfied that disclosure of its terms would reveal the affected party's confidential and proprietary business strategies and business plans which could reasonably be expected to cause harm to the affected party's competitive position, both in Ontario and in other jurisdictions.

[89] However, I am not satisfied that all of the pages qualify for exemption. Pages 4, 5, 6, 9, 10 and 11 of record 6a include, in part, what appears to be two duplicate copies of a 2-page attachment. This attachment appears to be a public document relating to the affected party, and does not contain any specific pricing information or terms which would reveal the affected party's confidential and proprietary business strategies and business plans. Accordingly, I find that disclosure of these pages could not reasonably be expected to result in any of the harms identified in section 17(1).

[90] I uphold the ministry's decision to deny access to pages 1, 2 and 3, as well as Exhibit B of record 6a, however.

Issue E. Was the ministry's exercise of discretion proper in the circumstances of this appeal?

[91] I will now determine whether the ministry exercised its discretion under sections 18(1) and 19, and if so, whether I should uphold this exercise of discretion.

[92] The section 18(1) and 19 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.

[93] 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

[94] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order M0-1573]. This office may

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

[95] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, M0-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[96] In her affidavit, the ADM explained that as the Executive Officer of the Ontario Public Drug Programs she exercised discretion on behalf of the ministry to not release

the information at issue for the following reasons:

> Under the *Act,* the principle of the public's right of access to government information must be balanced against the purpose of the exemption under which the information may be withheld. Accordingly, only the Schedules to Records 1, 3 and 11 are being withheld.... Although there may be a generalized public interest in the disclosure of the information contained in the Schedules, its disclosure would primarily serve private interests -- those of competing drug manufacturers. Typically, requests for information of the type at issue in this appeal are made by competitors of the drug manufacturers named in the records, and the goal of a competitor's request is to serve its own private commercial interest, not the public interest.
>
> Knowing the difference between the listed Drug Benefit Price for a given drug and the "effective price" paid by the Ministry would demonstrate the extent of the savings the Ministry has achieved for Ontario taxpayers and how the Ministry has promoted efficiencies in Drug Programs. Considered from this perspective , the Ministry could benefit from the public disclosure of this "good news" item.
>
> In my view, however, the public interest is best served in this case by not disclosing this information, in order to preserve the overriding public interest in the Government's ability to control drug costs for the benefit of Ontarians, and to ensure that the Government is able to make a wide array of necessary drug products available to vulnerable ODB recipients. This is consistent with the principles set out in the ODBA, which aims to meet the needs of Ontarian s as patients, consumers and taxpayers; to achieve value-for-money; and to ensure the best use of resources at every level of the system.
>
> Consequently, if the disclosure of the information at issue would in any way discourage drug manufacturers from agreeing to provide significant volume discounts to the Ministry through negotiated agreements , this would prejudice the public interest. Higher costs for ODB Program benefits necessarily prejudice the Ministry's and the province's financial interests which, in turn, has a direct, negative impact on taxpayers.
>
> The extent to which transparency is reduced by not disclosing information that relates only to the calculation of volume discount amounts is small when compared to the greater benefit of ensuring the Government's ongoing ability to manage the costs of the ODB Program.

[97] The ADM also identifies the following factors:

> Disclosure of the information would undermine the principles set out in section 0.1 of the ODBA, and the legislative underlying the entire statutory scheme.
>
> Disclosure of the information would be inconsistent with the intent of the ODBA Regulation, which expressly sets out what aspects of these agreements should be made public.
>
> I have exercised my discretion carefully; only the Schedules to the agreements are being withheld since they could be used by the requester to calculate the volume discount amount. The body of the agreements are being disclosed.
>
> This approach is consistent with other Canadian jurisdictions in treating volume discounts provided by drug manufacturers as highly confidential information .
>
> Drug manufacturers were unanimous in their view that pricing information is confidential and should not be disclosed for the reasons described in certain letters which were attached to her submission.
>
> To determine other value for money conditions underlying the agreements has been severed. Most of the information requested by the appellant has already been disclosed to him, including the body of the pricing and listing agreement templates.

[98] The appellant asks that I carefully review the ministry's exercise of its discretion to apply sections 18 and 19 to the records at issue. The appellant also refers to certain factors which it believes ought to have supported the disclosure of the records. Some of these are referred to in its confidential representations. Other factors relate to the public interest, which is addressed below. In addition, the appellant refers to additional factors which ought to have been considered including its identity and that the statements by drug manufacturers regarding the impact of disclosure ought not to be given much credence.

Analysis/Findings

[99] I found above that disclosure of certain information could reasonably be expected to cause economic harm to the ministry and the Province of Ontario under section 18(1) or qualifies for solicitor-client privilege under section 19(1).

[100] Having considered all of the circumstances of this appeal, I am satisfied that the ministry exercised its discretion in a proper manner under sections 18(1) and 19, taking into account relevant considerations and not taking into account irrelevant considerations, in withholding the information at issue. I also note that the ministry has carefully considered the information in the records, and applied these exemptions to only certain, discreet portions of the records. On my review of the records and the representations, I find that the ministry's exercise of discretion was reasonable and I uphold the claimed exemptions in sections 18(1) and 19.

Issue F. Does the public interest override in section 23 of the *Act* apply to the records?

[101] I will now determine whether there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) and 18(1) exemptions.

[102] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[103] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[104] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[29]

Compelling public interest

[105] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s

[29] Order P-244.

central purpose of shedding light on the operations of government.[30] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[31]

[106] A public interest does not exist where the interests being advanced are essentially private in nature.[32] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[33]

[107] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[34]

[108] Any public interest in *non*-disclosure that may exist also must be considered.[35] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[36]

[109] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[37]
- the integrity of the criminal justice system has been called into question[38]
- public safety issues relating to the operation of nuclear facilities have been raised[39]
- disclosure would shed light on the safe operation of petrochemical facilities[40] or the province's ability to prepare for a nuclear emergency[41]

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[30] Orders P-984 and PO-2607.
[31] Orders P-984 and PO-2556.
[32] Orders P-12, P-347 and P-1439.
[33] Order MO-1564.
[34] Order P-984.
[35] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[36] Orders PO-2072-F, PO-2098-R and PO-3197.
[37] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[38] Order PO-1779.
[39] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.
[40] Order P-1175.
[41] Order P-901.

- the records contain information about contributions to municipal election campaigns[42]

[110] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[43]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[44]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[45]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[46]
- the records do not respond to the applicable public interest raised by appellant[47]

[111] The appellant takes the position that there exists a compelling public interest in the withheld portions of the records, and that section 23 applies. It states:

> The means by which lower cost generic drugs come to market in Canada is a long and difficult one. In addition to all of the science involved in developing a bioequivalent formulation, the *Food and Drugs Act,* the *Food and Drugs Regulations,* the *PM(NOC) Regulations* and all of the various provincial pricing statutes and regulations (including in Ontario alone the ODBA and DIDFA, as amended by the *Transparency Act)* must all be navigated before a generic product can be marketed successfully. Each generic company in Canada must chart its own course through these steps, all for the privilege of competing with one another. This effort provides lower priced medicines to Canadians and can save the public health care system in Canada hundreds of millions of dollars per year (or more). Early generic market entrants, in turn, are rewarded with a larger share of the generic market. There is thus an incentive on all sides

[42] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[43] Orders P-123/124, P-391 and M-539.
[44] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[45] Orders M-249 and M-317.
[46] Order P-613.
[47] Orders MO-1994 and PO-2607.

> (except that of the patent holder) to foster and encourage generic competition immediately upon patent expiry.
>
> Unfortunately, the difficulty associated with bringing a generic product forward in Canada makes this desirable situation a rare occurrence....

[112] The appellant refers to and quotes from a 2007 document prepared by the PMPRB entitled "Non-Patented Prescription Drug Prices Reporting," which identifies that the prices for branded drugs (as opposed to generic ones) usually increased after the expiry of the patent, whereas prices for generic drugs were lower. The report then states:

> While it is clear that considerable savings to drug plans occurred as a result of patent expiry and the entrance of generics to a number of markets, the impact was limited by the fact that no generics entered the largest off-patent markets. In addition, generic prices tended to be 50% to 65% of the brand price even over time, and the more expensive brands continued to enjoy sizeable market shares.

[113] The appellant then states:

> Slow uptake of generic products is precisely the opposite of what legislation like the *Patent Act,* and the *PM(NOC) Regulations* are supposed to foster. They are also precisely the opposite of why provincial legislation like the ODBA, DIDFA and *Transparency Act* were introduced. All of the relevant legislation, and indeed common sense, tell us that patent monopolies are to be endured by the public (not appreciated) and that once they have run their course, a combination of regulation and market forces should give the public a valuable and meaningful choice among options.
>
> Disclosure under [the *Act*] is considered on a case-by-case basis. In this case, at least one member of the public, [the appellant], is particularly affected by the dealings between [the affected party] and the Ministry. The fact that [the appellant] is, to this point, only one of two members of the public that have gone to the trouble of satisfying the regulatory requirements necessary to bring a generic product to market should not distract this tribunal from the public nature of the issues at stake on this appeal.
>
> [The appellant's] efforts, and efforts like them, are free to be undertaken by any member of the public and ultimately will be in this and other situations... It is through the efforts of generic pharmaceutical companies that lower cost medicines become available,

which in the case of medicines for the mentally ill takes on an additional "public" character (as the costs of such medicines are disproportionately born by the publicly-funded Formulary scheme) . Generic company efforts, and those like them, that attempt to lower the costs of such medicines should be encouraged...

Similarly, the impugned records are of an inherently "public" character and disclosure of them would "serve to inform or enlighten people about the activities of their government and its agencies," to say nothing of their use of public funds ....

As discussed elsewhere, there is no compelling public reason not to disclose [the affected party's] pricing agreements with the Ministry, or the manner in which they came to be, in the facts of this particular case. [The affected party's] tentative threat about being reluctant to enter into such agreements in the future is an empty one, particularly for a drug such as [the named drug] which, because of the patient population, is sold largely through the Formulary. In this case at least, that fact will ensure that [the affected party] and others continue to deal with the province.

The purposes of sections 17 and 18 of [the *Act*] are to protect third party and valid government information respectively. Assuming that the impugned records in this case qualify for exemption from disclosure ..., it is not information of a kind that ought to be concealed, coming as it does at the cost of open competition. Stifling competition is not a purpose to which sections 17 and 18 of [the *Act*] were meant to be put.

Maintaining the clandestine [nature] of the impugned records also contravenes the *Transparency Act,* which was introduced for the explicit purpose of strengthening the Ontario drug benefits system by making it more transparent. Recognized principle 0.1(5) of the ODBA now states that "[f]unding decisions for drugs are to be made on the best clinical and economic evidence available, and will be openly communicated in as timely a manner as possible." Complete transparency for all companies, should that be the ultimate effect of this tribunal 's decision, will only accord with the explicit and stated purposes of the ODBA, the statute from which emanates the Formulary , the Ontario Drug Benefit Program and many other expressions of the Provincial Legislature 's will.

Disclosure in this situation will foster a more competitive environment

> for [the named drug] in Ontario. It will recognize and be consistent with the will of Parliament in terms of encouraging competition among viable generic alternatives to expensive branded medicines.

[114] The appellant also relies on affidavit evidence to support its arguments on the public interest, and also refers to additional information in the confidential portions of its representations in support of its position that this information ought to be disclosed.

[115] In its reply representations, the ministry responds to a number of the public interest arguments made by the appellant. The ministry begins by identifying that the appellant only has a significant private interest in the disclosure of the records at issue. It reviews previous decisions of this office which confirm that, in order for section 23 to apply there must be a public interest in disclosure, and then reviews what it believes to be the reasons why the appellant is seeking access to the records. It then submits that the interest in disclosure is "essentially private in nature." The ministry then states that [the appellant] "has not demonstrated the existence of a public interest in the disclosure of the records over and above its primarily private interest. . . Even if the IPC were to find that a public interest exists, the ministry submits that it is not a 'compelling' one. The appellant has provided no evidence of the public's 'rousing strong interest' in the ministry's pricing agreements with the affected party in this appeal."

[116] In addition, for the first time in his representations the appellant argues that the information in the records should be disclosed to ensure that meaningful discounts are being achieved by the ministry. He submits that:

> The issue of the process whereby Ontario's discounts drugs it buys for the formulary by way of drug company agreements and side deals set up by the Ministry is of significant public interest. ..

[117] In response, the ministry submits that:

> ...a public interest does not exist in the records simply because they relate to the expenditure of public funds. To find otherwise would mean that every record relating to the expenditure of public funds would be subject to disclosure under section 23, because neither sections 17 or 18 would apply to protect the confidentiality of the records. This would effectively distort the application of the *Act ...*

[118] It then goes on to add that the appellant has failed to demonstrate that there is a public interest in the disclosure of the actual records at issue in this appeal. The details of contractual arrangements that the ministry has with particular companies is not of general public interest. By contrast, if there were

allegations in the media that the ministry was misspending public funds or not obtaining value-for-money in its contractual arrangements with particular drug manufacturers, the issue might very well be different. In addition, the ministry submits that much of this information can be characterized as relating to cost-savings, not cost expenditures. It argues that what the appellant wants to know is not how much public money the ministry spent, but rather, how much money it received under certain contractual arrangements.

[119] Further, the ministry argues that the Legislature's intention regarding the level of transparency and openness that should apply to agreements between the ministry and drug manufacturers is clearly evidenced in the amendments it made to section 1.2(2) of the *ODBA* which prescribes what information must be listed on the Formulary. The ministry complies with these requirements by ensuring that the listed price being offered by a manufacturer, which is the maximum price paid by the ministry, is properly subject to public scrutiny.

[120] Finally, the ministry submits that it consulted directly with the drug industry about what level of transparency would allow the Government to not only control the cost of drugs for the benefit of Ontarians, but also ensure public accountability. As a result of these informed consultations, the Legislature chose not to require the disclosure of negotiated volume discounts under the Formulary. This is also clearly evidenced in the ODBA Regulations, which provide, at section 12(7) :

> If required by the executive officer, the manufacturer of the product shall enter into an agreement with the executive officer that specifies any volume discount or other amount that may be payable by the manufacturer to the Minister of Finance, and shall agree that the executive officer may make public the following information, and that information only, with respect to the agreement:
>
> 1. The name of the manufacturer.
>
> 2. The subject-matter of the agreement.
>
> 3. The fact of entering into or terminating the agreement.

[121] As noted in the evidence provided by the ministry from the Executive Officer of the Ontario Public Drug Programs [the ADM], the public interest is, in fact, best served by not disclosing these records

> . . . since disclosure would discourage other drug manufacturers from agreeing to provide significant volume discounts to the Ministry. As a

> consequence, disclosure would actually adversely impact the Ministry's ability to control drug costs for Ontarians ...

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

[123] In response to the National Post article, the ministry submits that:

> ... this article demonstrates that there is a forum to address public interest considerations regarding Ontario's drug pricing scheme, and that the public interest does not extend to the detailed information about actual drug pricing contained in the records at issue in this appeal (Orders P-123 and P-124).
>
> ...the following facts outlined in the article support the Ministry's previous submissions that there is in fact a public interest in not disclosing the information at issue in this appeal:
>
> - Quote from the Executive Officer [the ADM] confirming that non-disclosure of drug pricing is unavoidable because the drug industry has indicated that it will not enter into negotiations if the results were to become public;
>
> - Quote from the Executive Officer acknowledging that although not 100% transparent, the current drug pricing system saves the Government tens of millions dollars, which are re-invested in the public drug system.

[124] For these reasons, the ministry submits that the single National Post article provided by the appellant is not sufficient evidence of a "compelling" public interest in the detailed drug pricing information and formulas that are actually at issue in this appeal.

Analysis/Findings

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

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

[127] In my view the public information already available serves to inform the public about many of the specifics of the listing and pricing agreements. Records 1, 3 and 11 are a Pricing Agreement and two amendments. I agree with the Ministry that it has provided sufficient information to satisfy whatever public interest there may be in these agreements, without revealing information that both the Executive Officer and the manufacturer considers highly confidential that is contained in the Schedule to them.

[128] Furthermore, I am not persuaded that any public interest that may exist in the disclosure of the information in records 1, 3 and 11 would outweigh the purpose of the section 18 exemption. As identified above, sections 18(1)(c) and (d) serve the purpose of protecting the ability of institutions to earn money in the marketplace . These exemptions recognize that institutions sometimes have economic interests and compete for business with other public or private sector entities, and provide discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions. I have found that disclosure of information could reasonably be expected to result in the harms contemplated by sections 18(1)(c) and (d). I am not satisfied that there exists a public interest in the disclosure of the pricing information contained in Schedule A to records 1, 3 and 11 that clearly outweighs the sections 18(1)(c) and (d) exemptions.

[129] The public interest override provision cannot apply to the contents of records 9 and 9a, which I have found to be exempt from disclosure under section 19.

[130] Finally, I find that the public interest that may exist in the disclosure of those portions of record 6a, pages 1, 2, 3 and Schedule B, which I have found to be exempt under section 17(1) has been satisfied by the other disclosures which have been made by the ministry and as a result of this order. I must point out as well that the passage of time has diminished the significance of any public interest that may once have existed in the disclosure of this particular information.

[131] Accordingly, in the circumstances, I am not satisfied that the public interest override applies to the withheld portions of the records for which sections 17(1), 18(1) or 19 were claimed.

ORDER:

1. I uphold the ministry's decision to deny access to Schedule A of Records 1, 3 and 11, pages 1, 2 and 3 and Schedule B to Record 6a and Records 9 and 9a, in their entirety, from disclosure.

2. I order the ministry to disclose the remaining portions of Records 1, 3, 6a and 11 to the appellant by providing him with copies by **July 2, 2015**, but not before **June 26, 2015.**

Original signed by: May 27, 2015
Donald Hale
Adjudicator