Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3512

Appeal PA10-257

Ministry of Health and Long-Term Care

July 24, 2015

Summary: The ministry received a request for all internal records, relating to a specific drug, that were either generated by personnel in the Ontario Public Drugs Program Division or in association with the listing of that drug on the Ontario Drug Benefit Formulary. The ministry granted partial access to the responsive records. The requester did not appeal the ministry's decision to withhold portions of the information. The pharmaceutical manufacturer of the identified drug appealed the ministry's decision to disclose some of the information. At issue in this appeal is whether some of the information that the ministry is prepared to disclose is actually not responsive to the request, whether some of the information qualifies as "personal information" as defined in section 2(1) of the *Act*, whether some of the information is exempt pursuant to the mandatory exemption for third party commercial information at section 17(1) of the *Act*, and, whether the pharmaceutical manufacturer can claim that the discretionary exemptions at section 18(c) and (d), relating to an institution's economic interest, apply to some of the information that the ministry is prepared to disclose.

In this order, the adjudicator finds that some of the information that the ministry is prepared to disclose is not responsive to the request, that the records do not contain information that qualifies as "personal information," that the mandatory exemption at section 17(1) does not apply, and, that the pharmaceutical manufacturer is not entitled to claim that the discretionary exemptions at section 18(c) and (d) apply to some of the information that the ministry is prepared to disclosed. Accordingly, the adjudicator upholds the ministry's decision, in part, and orders it to disclose the remaining information to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 2(3), 17(1)(a), (b), (c), 18(c), and (d).

Orders Considered: Orders P-257, PO-3032, PO-3174, and MO-1194

Cases Considered: *Merck Frosst Canada Ltd. v. Minister of Health,* [2012] 1 SCR 23, 2012 SCC 3.

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* or *FIPPA*) for access to the following information:

> All internal records/material, including emails, correspondence, memos, etc. relating to [a specific drug] that were either (1) generated by personnel in the Ontario Public Drugs Program Division, or (2) generated in association with the listing or potential listing of [the specific drug] on the Ontario Drug Benefit Formulary/Comparative Drug Index.

[2] The ministry identified the responsive records and, pursuant to section 28(1) of the *Act*, provided the pharmaceutical manufacturer who might have an interest in the records with an opportunity to make submissions on their possible disclosure. The ministry indicated that it intended to grant partial access to the records and identified the portions that it intended to sever pursuant to the mandatory exemption for third party commercial information at section 17(1), and the discretionary exemptions relating to its own economic interests at sections 18(1)(c) and (d) of the *Act*.

[3] The pharmaceutical manufacturer provided submissions to the ministry advising that, in addition to the portions of the records that the ministry was prepared to withhold, it was of the view that there was other information that should also be severed. The affected party claimed that this additional information that should not be disclosed was either not responsive to the request, or that sections 17(1), 18(1), or the mandatory personal privacy exemption at section 21(1) of the *Act* applied.

[4] The ministry issued decision letters to the requester and the pharmaceutical manufacturer, advising that it was granting partial access to the requested records, withholding portions pursuant to sections 17(1) and 18(1)(c) and (d). It also advised that it had severed portions of the records that it had deemed to be not responsive to the request. In its letter to the pharmaceutical manufacturer, the ministry stated:

> After considering your representations, the ministry's decision is to grant partial access to the records …

> The ministry is in agreement to sever non-responsive information as well as to extend section 17(1) to our original severance of section 18(c) and (d) (Drug Benefit Price and Discounted Price).
>
> The ministry cannot agree with the severance you recommended regarding effective dates and dated agreements that have been signed. These dates are not severable under section 17(1) of *FIPPA*. In order for section 17(1) to apply, the information at issue must meet all conditions of section 17(1) noted in the *Act*.
>
> You also recommended severing the names, signatures and positions of the individuals who signed the agreements on behalf of [the affected party]. The ministry intends to release this information. The information is not within the definition of personal information as these individuals were acting in a professional capacity.

[5] The pharmaceutical manufacturer, now the appellant, appealed the ministry's decision to disclose portions of the records. The requester did not appeal the ministry's decision to withhold portions of the records.

[6] During mediation, the appellant provided this office with copies of the records where it had identified the information that it wishes to have withheld. This information consists of all references to pricing and volume discounts, dates, and signatures to the agreement. On the copies of the records, the appellant also identified the attachments to records 11 and 12, in their entirety, as well as the text of an email at page 2 of record 11.

[7] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. The adjudicator formerly assigned to this appeal sought representations from the appellant, the ministry, and the requester. The appellant and the ministry provided representations which were shared, in part, in accordance with this office's sharing procedures set out in the *Code of Procedure* and *Practice Direction 7.* The requester did not provide representations. Reply representations were subsequently sought from, and were provided by, the appellant.

[8] The appeal was then transferred to me to issue a decision. In this order, I uphold, in part, the ministry's decision to disclose portions of the records to the requester. Specifically, I make the following findings:

- the email in record 11 and the majority of the information in the attachments to records 11 and 12 are responsive to the request;

- the records do not contain "personal information" as that term is defined in section 2(1) of the *Act*;

- the mandatory exemption for third party commercial information at section 17(1) does not apply to the information at issue; and,

- the appellant is not entitled to claim the application of the discretionary exemptions at sections 18(1)(c) and (d) to the information at issue in the records.

RECORDS:

[9] As the requester has not appealed the ministry's decision, the portions of the records that the ministry is prepared to sever are not at issue in this appeal. At issue are those portions of records that the ministry intends to disclose, but that the appellant believes should be severed. This information is contained in records 1, 2, 3, 4, 11 and 12, which consist of emails. The emails that make up records 11 and 12 include attachments.

ISSUES:

A. Is some of the information at issue not responsive to the request?

B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Are portions of the records exempt from disclosure pursuant to the mandatory exemption at section 17(1) of the *Act*?

D. Is the appellant entitled to claim the discretionary exemptions at sections 18(1)(c) and (d) of the *Act*? If so, are portions of the records exempt from disclosure pursuant to those exemptions?

DISCUSSION:

A. Is some of the information at issue not responsive to the request?

[10] The appellant submits that some of the information that the ministry is prepared to disclose is not responsive to the request.

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to request for access to records. Section 24(1)(b) requires a requester to "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." Section 24(2) requires

the institution to assist the requester in "reformulating" the request if it does not adequately describe the records sought.

[12] It is a well-established principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1] Additionally, to be considered responsive to the request, records must "reasonably relate" to the request.[2]

Representations

[13] The appellant submits that some of the text of the email in record 11 and all of the information attached to the emails in records 11 and 12 are outside of the scope of the request and should not be disclosed. It submits:

> As noted in [the ministry's] Index of Records, pricing information is non-responsive to the current request, which asks for listing information. Even with the prices removed, the [information attached to records 11 and 12] contains confidential details … provided to [the ministry], which goes beyond the scope of the request. [The appellant] strongly submits that the [attachments to records 11 and 12 are] not encompassed by the current request, and should be excluded.

[14] The ministry maintains its position that the portions of the records that it originally identified as responsive to the request are responsive. However it concedes that the attachments to records 11 and 12 "may not be responsive, in and of themselves, since they are not 'internal documents.'" The ministry submits that it included them because "they were attached to responsive emails." It states: "Whether or not they should be severed as unresponsive portions of a responsive record is an issue the ministry respectfully leaves to the adjudicator to determine, based on the appellant's representations."

[15] In reply, the appellant elaborates on how the agreement and related schedules that are attached to records 11 and 12 do not respond to the request as they are not ministry "internal records." It submits:

> [The attachment to records 11 and 12] is a third party contract that was negotiated between [the appellant] and [the ministry]. The record simply being in the possession of [the ministry] does not render it an "internal record/material." Further, the record was not "generated" by either the Ontario Public Drugs Program Division or the Ontario Drug Benefit

[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

> Formulary/Comparative Drug Index, rather was a product of negotiation between [the appellant] and [the ministry].

[16] The appellant submits that the request makes no mention of "documents relating to drug manufacturers, third parties or contract of the institution," but requests internal ministry communications such as emails, correspondence and memos. The appellant argues that the term "internal" should be deemed to "something beyond a record that is held by [the ministry]." The appellant goes on to submit that a reasonable interpretation of the request "is that it is respect of records/materials that were generated internally (e.g. by [ministry] staff) for an internal purpose (e.g. listing of [the specific drug] on the Ontario Formulary)" and that internal emails between ministry staff should be considered responsive while emails between the ministry and the appellant should not.

[17] The appellant submits that the agreement between the ministry and the appellant attached to records 11 and 12 should be deemed as not responsive to the request since it is not an "internal record" of the ministry, generated internally at the ministry for an internal purpose.

Analysis and finding

[18] In my view, the text in the email that is part of record 11 that has been identified by the appellant and the majority of the information contained in the attachments to the emails in records 11 and 12 (which are copies of a substantially similar document) are responsive to the request. As noted above, the request was for the following information:

> All internal records/material, including emails, correspondence, memos, etc. relating to [a specific drug] that were either (1) generated by personnel in the Ontario Public Drugs Program Division, or (2) generated in association with the listing or potential listing of [a specific drug] on the Ontario Drug Benefit Formulary/Comparative Drug Index.

[19] The email in record 11, portions of which the appellant submits are not responsive to the request, is correspondence between ministry staff. The correspondence between the two ministry staff members forwards a note that was sent to an individual at the appellant company. The email itself is clearly a record that was generated internally, the text of which specifically relates to the listing or potential listing of a specific drug on the Ontario Drug Benefit Formulary. In my view, the fact that some of the text in that internal email was copied from a previously sent email to a party outside of the ministry does not alter the fact that, taking a liberal interpretation, the email that is included in record 11 is an internal record that was generated by personnel in the Ontario Public Drugs Program Division in relation to the listing of the

specified drug on the Ontario Drug Benefit Formulary. Accordingly, I find that it is responsive to the request.

[20] The appellant also submits that the attachments to the emails of records 11 and 12 are not responsive. As explained by the appellant, these attachments are copies of an agreement between the appellant and the ministry. The document attached to record 11 is a "revised version" of an unsigned agreement between the appellant and the ministry that was circulated between ministry staff, and the attachment to record 12 is a copy of that same agreement which has been signed by two of the appellant's officers, but has not been signed by the ministry. Although I acknowledge that the agreements are not, in and of themselves, "generated" or created solely by the ministry, they are referred to and discussed in the emails to which they are attached and form part of the internal correspondence between ministry employees generated for internal purposes. As a result, I find that the majority of the information contained in the attachments to records 11 and 12 are responsive to the request.

[21] The only information contained in the attachments to records 11 and 12 that I accept is not responsive to the request is found in the appendix to the attached agreements and appears in both copies. Table 1 in the appendix to the attachments to both records 11 and 12 does not relate the specific drug identified in the request. Accordingly, I accept that this information is not responsive to the request and I will order the ministry not to disclose this information to the requester.

[22] I find that the email portion of record 11 and the majority of the information contained in the attachments to records 11 and 12 that are at issue in this appeal, with the exception of the information contained in Table 1 of the appendix to the agreement that makes up the attachments, are responsive to the request.

B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[23] The appellant submits that portions of the records contain "personal information" and that its disclosure amounts to an unjustified invasion of personal privacy pursuant to the mandatory exemption at section 21(1) of the *Act*. In order to determine whether section 21(1) might apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
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> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[24] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[3]

[25] However, sections 2(3) and (4) excludes certain information from the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[3] Order 11.

> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[26] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[4] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[5]

[27] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

Representations

[28] The appellant submits that the names, positions, and signatures of its employees that appear on signature pages found amongst the responsive records constitute personal information as defined in section 2(1) of the *Act*.

[29] The ministry submits that the portions of the records identified by the appellant as subject to section 21(1) do not contain personal information as defined in section 2(1) of the *Act*. It submits that "the names, signatures and position of the identified individuals are their 'business identity' information as per section 2(3) of the *Act*."

Analysis and findings

[30] Although the appellant submits that the names and positions of its employees, as they appear in the responsive records, is "personal information," as noted above, under section 2(3) of the *Act,* personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. Accordingly, I do not accept the appellant's position and find that its employees' names and positions, as found in the records, do not qualify as "personal information" as that term is defined in section 2(1) of the *Act.*

[31] The appellant also submits that the signatures of its employees who prepared the reports constitute their personal information. Previous orders of this office have examined whether a signature amounts to the personal information of an identifiable individual in a variety of different circumstances. Generally, in cases where the

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[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

signature appears in records created in a professional or business context it is not considered to be "about the individual" in a personal sense and, therefore, does not fall within the scope of the definition.[7] However, in situations where identity is an issue and the signature could identify the individual in a personal capacity, it is brought into the scope of the definition of personal information.[8]

[32] More specifically, in Order PO-3174, Adjudicator Colin Bhattacharjee examined this same issue in the context of names, titles and signatures of a pharmaceutical manufacturer's representatives who signed agreements with the Ontario government. In that order, he found that the representatives signed the agreements in a business or professional capacity, not a personal capacity, and that, as a result, the information fell within section 2(3) which excludes such information from the definition of personal information in section 2(1).

[33] I agree with Adjudicator Bhattacharjee's reasoning and find it to be relevant and applicable to the circumstances of this appeal which are substantially similar to those before him. Accordingly, I find that the names and signatures at issue clearly appear in records created in a professional or business context. They are the signatures of employees, signing on behalf of their employer, in the course of their professional duties. In my view, there is nothing in the records that brings the names or signatures of the appellant's employees into the personal realm. Accordingly, I find that the names and signatures of the appellant's employees as they appear in the portions of the records at issue fall squarely within section 2(3) of the *Act* and, as a result, do not qualify as personal information within the meaning of the definition in section 2(1) of the *Act*.

[34] Although the appellant has not claimed that any of the other information contained in the records consists of personal information, as the section 21(1) exemption is mandatory, I have reviewed all of the information that remains at issue in the records to determine whether any of it qualifies. On my review, I find that none of it qualifies as personal information within the meaning of the definition of that term in section 2(1) of the *Act.*

[35] As I have found that the records at issue do not contain any personal information as that term is defined in section 2(1) of the *Act,* the mandatory personal privacy exemption at section 21(1) cannot apply.

C. Are portions of the records exempt from disclosure pursuant to the mandatory exemption at section 17(1) of the *Act*?

[36] The appellant takes the position that the mandatory exemption at section 17(1) of the *Act,* that addresses the disclosure of third party commercial information, applies

[7] Orders P-773, PO-2632, MO-2611, and PO-3174.
[8] Orders P-940, MO-1194 and PO-1699.

to information that the ministry is prepared to disclose. It submits that disclosure of this information could reasonably be expected prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations (section 17(1)(a)), result in similar information no longer being supplied to the ministry (section 17(1)(b)), and/or result in undue loss to itself and an undue gain to a competitor (section 17(1)(c)).

[37] The relevant portions of section 17(1) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (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

[38] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[9] 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.[10]

[39] For section 17(1) to apply, the party resisting disclosure must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[9] *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.).
[10] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[40] The appellant submits that portions of the records that the ministry is prepared to disclose contain information that qualifies as "commercial" and "financial" information. Those terms have been defined in prior orders 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 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.[11]
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> *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.[12]

Representations

[41] The appellant submits that the ministry has applied section 17(1) to portions of the records and that it supports its decision to apply this exemption. However, it also submits that there is still further commercial and financial information in the records that should be exempt.

[42] The ministry submits that it identified all of the information that it believes should be exempt as a result of the application at section 17(1) and had no submissions to make on the additional information that the appellant submits qualifies as commercial and financial information.

Analysis and finding

[43] Having reviewed the information at issue, which relates to the listing of a specific drug on the Ontario Drug Benefit Formulary, I accept that it is sufficiently linked to the buying and selling of drug products for it to qualify as "commercial information" as that term is contemplated in section 17(1).

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[11] Order P-1621.
[12] Order PO-2010.

[44] I do not find, however, that any of the information at issue qualifies as "financial information." None of the information that is before me contains specific information about money and its use or distribution including cost accounting methods, pricing practices, profit and loss data, or overhead and operating costs. Any financial information contained in the records has been severed by the ministry and is not at issue in this appeal. From my review, any information that could be said to relate to pricing that appears in the information remaining at issue is very general in nature and makes no reference to specific financial figures. Accordingly, I do not accept that the information at issue consists as "financial information" as that term is contemplated by section 17(1).

[45] As I have found that all of the information at issue amounts to "commercial information" the first part of the section 17(1) test has been established.

Part 2: supplied in confidence

[46] In order to meet part 2 of the test under section 17(1) the party resisting disclosure, in this case, the appellant, must provide sufficient evidence to establish that the information at issue was "supplied" to the ministry "in confidence," either implicitly or explicitly. I will address each of these components separately.

Supplied

[47] 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.[13] 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.[14]

[48] 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. In other words, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not, therefore, considered to have been "supplied." This approach has been upheld by the Divisional Court in *Boeing Co. V. Ontario (Ministry of Economic Development and Trade),* and a number of other decisions.[15] Most recently, it was once again upheld by

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[13] Order MO-1706.
[14] Orders PO-2020 and PO-2043.
[15] *Supra,* note 9. See also, Orders PO-2018, and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 (Div. Ct.) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct) (*CMPA*). See also *HKSC Developments L.P. v.*

the Divisional Court in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*.[16]

[49] 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.[17] The immutability exception applies 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.[18]

Supplied – representations

[50] In its representations on whether the information at issue was "supplied" for the purposes of part 2 of the section 17(1) test, the appellant refers to the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd. v. Minister of Health.*[19] The information at issue in the *Merck* decision was notes prepared by Health Canada scientists regarding a drug company's submissions to the federal government. The appellant submits that in *Merck* the Court "noted that whether information was supplied by a third party will often primarily be a question of fact, and the mere fact that a document in issue originates from a government official, such as an internal government email, is not sufficient to bar a claim for exemption." The appellant further submits:

> The Supreme Court was clear that: 1) the content, rather than the form, of the information must be considered, and the mere fact that information appears in a document created by the government does not resolve the issues; and 2) the exemption must extend to information that *reveals* confidential information supplied by the third party, as well as to that information itself (*Merck,* at para. 158).

[51] The appellant submits that in light of the Court's decision in *Merck* this office's previous approach of finding that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" by a third party for the purposes of subsection 17(1) is incorrect and should be revisited.

Infrastructure Ontario and Information and Privacy Commissioner of Ontario, 2013 ONSC 6776 (Can LII) and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

[16] 2015 ONSC 1392 (CanLII), upholding PO-3311.

[17] Order MO-1706, cited with approval in *Miller Transit*, *supra* note 15 at para. 33.

[18] *Miller Transit*, *supra* note 15 at para. 34.

[19] 2012 SCC 3 [*Merck*].

Supplied – analysis and finding

[52] The argument that the decision in *Merck* conflicts with this office's approach of finding that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" by a third party for the purposes of subsection 17(1) should be revisited has been previously addressed by this office. In Order PO-3074, Adjudicator Bhattacharjee found that the Supreme Court of Canada's finding in *Merck* did not provide a basis to overturn this office's approach to the supplied test in section 17(1). In that order, he states:

> I am not persuaded by the appellant's line of argument. In the appeal before me, the records at issue are severed agreements between the Ontario government and a drug manufacturer. In *Merck*, the Supreme Court was not considering whether the third party information exemption in the federal Access to Information Act applies to a contract or agreement between a drug manufacturer and the government. Instead, the records at issue were reviewers' notes prepared by scientists retained by Health Canada to evaluate a drug, and correspondence between *Merck* and Health Canada.
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> Because the records at issue in *Merck* did not include a contract, the Supreme Court's analysis and findings on the "supplied" test in section 20(1)(b) of the federal Access to Information Act, do not in any way address whether the provisions of a contract should generally be treated as mutually generated, rather than "supplied" by the third party. This was not an issue that was before the Supreme Court and not one that it discussed, either directly or indirectly. In my view, the appellant's suggestion that the *Merck* decision essentially overturns the IPC's jurisprudence on the meaning of "supplied" in section 17(1) of FIPPA is unfounded.

[53] Adjudicator Bhattacharjee's reasoning was subsequently adopted and followed by Adjudicator Jennifer James in Order PO-3499.

[54] Although this office has already addressed and dismissed the argument regarding the application of *Merck*, in my view, it is not applicable in the context of this appeal. The information at issue consists of 6 internal emails between ministry staff, two of which contain attachments which are copies of an unexecuted agreement between the appellant and the ministry. As the information does not include an executed contract, this office's approach that the contents of a contract will not normally be considered to have been "supplied" for the purposes of part 2 of the section 17(1) test is not relevant in the current analysis. Rather, I must determine whether, on its face, the information was supplied by the appellant to the ministry.

[55] Recognizing that, as in the current appeal, the information at issue in the *Merck* decision was not an agreement, in my view, there is no reasoning in that decision that conflicts with the principles developed by this office in considering the "supplied" requirements of section 17(1). The Court emphasized that the mere fact that the information appears in a government document does not, on its own, resolve the issue of whether it is covered by the exemption. The Court affirmed that the exemption must be applied "to information that reveals the confidential information supplied by the third party, as well as to that information itself." This is entirely consistent with the manner in which this office has applied the exemption at section 17(1).

[56] The information at issue in the emails that comprise records 1, 2, 3, and 4 is exactly the same. It consists of a single statement, repeated verbatim in each email, that describes something that was communicated to the ministry by the appellant. It is not information that was generated by the ministry, nor is it information that was mutually generated by the ministry and the appellant. Accordingly, in my view, this information can appropriately be described as information that was "supplied" by the appellant to the ministry.

[57] At issue in records 11 and 12 is a text portion of the email in record 11 and copies of the unexecuted agreement between the ministry and the appellant attached to both records. The text portion of the record 11 email was clearly not supplied by the appellant as it is an email from ministry staff to one of the appellant's representatives. As the copies of the agreement are both unexecuted it is unclear at what stage the negotiations with respect to the terms is at and which terms where proposed by the ministry, which were proposed by the appellant, and, which are the product of mutual negotiation. The appellant's representations do not provide specific evidence pointing to which portions of the record contain information that it supplied during the course of negotiations. Although, given the nature of negotiations and the subject matter of the agreement, I accept that some of the information that was likely supplied by the appellant, it is also likely that some of it was not. In the absence of specific evidence I cannot make a finding with respect to which portions can be said to have been "supplied" and which cannot. However, in light of my findings on the harms in part 3 of the section 17(1) test, it is not necessary for me to make a final determination on this issue.

In confidence

[58] 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.[20]

[20] Order PO-2020.

[59] 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.[21]

In confidence - representations

[60] With respect to whether the information was supplied "in confidence" to the ministry, the appellant submits that it had a reasonable expectation that the information would be maintained in confidence by the ministry.

[61] The appellant acknowledges that the regulations under the *Ontario Drug Benefit Act* provide a condition for entering into an agreement where certain information about the agreement may be made public by the ministry, including the subject-matter of the agreement. The appellant states that, as a result of these types of provisions in the regulations that govern its agreements with the ministry, there cannot be a reasonable expectation of confidentiality over the name of the manufacturer or the fact of entering into such agreements. However, it submits that any reference to the "subject matter" of the agreements in the regulations is limited to disclosure of the fact that it is a listing or pricing agreement. It also submits that the "subject matter of the agreement" cannot reasonably be construed as extending to the release of the actual agreement itself.

[62] The appellant submits that, in Order PO-3032, former Senior Adjudicator Higgins interpreted the term "subject matter of an agreement" to include the "type" of agreement and held that since such information may be revealed by the executive officer under item 4 of section 11(1) in O. Reg. 201/96 made under the *Ontario Drug Benefit Act,* that information is not confidential and is, therefore, not subject to section 17(1) of the *Act*. However, the appellant submits that this interpretation of "subject-matter" ignores the purpose of the section 17(1) exemption, which is to protect the informational assets of third parties from disclosure. It submits that the interpretation of

[21] 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.

"subject matter" cannot be stretched to include the release of actual portions of the agreement itself.

In confidence - analysis and finding

[63] The appellant's representations appear to focus on how, due to the existence of a confidentiality provision in O. Reg 201/96 made under the *Ontario Drug Benefit Act*, it had a reasonably held expectation that the information at issue would be held by the ministry in confidence.

[64] In Order PO-3174, Adjudicator Bhattacharjee determined that those confidentiality provisions do not prevail over the *Act*. Consequently, he found that they do not limit the ministry from disclosing information from agreements between pharmaceutical manufacturers and the Ontario government under the *Act*, subject to the application of the discretionary and mandatory exemptions found therein.

[65] I acknowledge that the appellant hasn't specifically alleged that the confidentiality provisions in O. Reg. 201/96 of the *Ontario Drug Benefits Act* override the provisions of the *Act*, however, its representations appear to suggest that due to these confidentiality provisions it had a reasonable expectation that "actual portions" of the agreement would not be disclosed. As disclosure of information contained in such agreements under the access to information regime set out in the *Act* is separate and distinct from disclosure under the *Ontario Drug Benefits Act*, I do not accept the appellant's argument that as a result of the existence of these confidentiality provisions it had a general and reasonably held expectation of confidentiality with respect to the disclosure of any of the information relating to such agreements under the *Act.*

[66] As noted above, records 1, 2, 3, and 4 are emails and the portions that are at issue consist of a single statement that is repeated in each email that describes something that was communicated to the ministry by the appellant. The appellant does not specifically address whether it supplied this specific information to the ministry "in confidence" and such expectation is not explicit in any of the records. Additionally, on the face of the records, it is not clear to me whether it is the type of information for which it would be reasonable to assume the appellant had an implicit expectation of privacy. Without evidence in that respect, I cannot make a determination on whether the appellant can be said to have had a reasonably-held implicit expectation of confidence with respect to the potential disclosure of that information. However, in light of my determination in part 3 of the section 17(1) test, I find that it is not necessary for me to make a finding with respect to whether the information at issue in records 1, 2, 3 and 4 was supplied "in confidence" by the appellant.

[67] Records 11 and 12 include attached copies of the unexecuted agreement. In my view, provided that it can be said that this information was "supplied" to the ministry, and even if the appellant was aware that the contents of executed contracts are

generally disclosed under the *Act,* I accept that, given the fact that the agreements were unexecuted, the appellant can be said to have had a reasonable and implicitly held expectation that the information contained in these records would not be disclosed. Accordingly, I accept that the "in confidence" component of part 2 of the section 17(1) test has been met for these records.

Part 3: harms

[68] For the third party of the section 17(1) test to be established, 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.[22]

[69] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from 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.*[23]

[70] 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).[24]

Representations

[71] The appellant takes the position that disclosure of the information at issue would result in several of the harms identified in section 17(1) of the *Act.* With respect to the harms identified in sections 17(1)(a) and (c) it submits:

> Information regarding pricing, dates, and the specific type of listing or pricing arrangement entered into between [the appellant] and [the ministry] will cause harm to [the appellant] if disclosed to the requester. Specifically, if disclosed, this information is reasonably expected to:
>
> i. significantly prejudice [the appellant's] competitive position;

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[22] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[23] Order PO-2435.
[24] Order PO-2435.

ii. significantly interfere with negotiations between [the appellant] and other parties, including other provincial governments, hospitals and other customers; and

iii. result in undue gain to [the appellant's] competitors.

[72] The appellant also submits that the harms contemplated by section 17(1)(b) could reasonably be expected to occur:

> In addition, the disclosure provided in the records can reasonably be expected to result in similar information no longer being provided to [the appellant], albeit in the public interest that similar information continues to be supplied, as enunciated in subsection 17(1)(b) of the *Act*.
>
> Should the IPC determine that confidential information disclosed through the bargaining process, including the terms and conditions of a pharmaceutical supply agreement between the government and a pharmaceutical manufacturer, is subject to disclosure to requesters, [the appellant] and other pharmaceutical manufacturers will be reluctant to negotiate such agreements with the government in the future….
>
> As it is clearly in the public interest for the government of Ontario to enter into pricing agreements for drugs on terms favourable to the government, [the appellant] submits that the mandatory exemption in subsection 17(1)(b) of the *Act* also applies to exempt the records from disclosure.

[73] It concludes its representations on this issue by acknowledging that this very same argument was rejected by Senior Adjudicator Higgins in Order PO-3032. However, it states that it disagrees with this decision and submits that it:

> …must disclose confidential information during the negotiation of agreements with the government, including pricing information which becomes incorporated into the final agreement. It is not possible to negotiate pharmaceutical supply agreements without the manufacturer providing such confidential information to the government. In light of the threat to [the appellant's] competitive position should such confidential information be disclosed, it is reasonable to expect that [the appellant], as well as other manufacturers, will cease to pursue future supply agreements with the Ontario government.

Analysis and findings

[74] The appellant argues that if the information that remains at issue were disclosed, the harms identified in sections 17(1)(a), (b), and (c) could reasonably be expected to

occur. That is to say, its competitive position would be prejudiced, its negotiations would be interfered with, it would suffer an undue loss, and similar information would no longer be supplied to the ministry.

[75] First, I find that the appellant has not provided the requisite detailed and convincing evidence to support a conclusion that the harms contemplated by either sections 17(1)(a) or (c) have been established. The appellant's representations on these harms are very general in nature. It states that information regarding pricing, dates, and the specific type of listing or pricing arrangements entered into between it and the ministry could reasonably be expected to significantly prejudice its competitive position, significantly interfere with its negotiations with various third parties and result in an undue gain to its competitors. It provides no further explanation as to how the disclosure of the specific information that remains at issue could reasonably be expected to result in the harms in section 17(1)(a) or (c).

[76] The ministry has found that section 17(1) applies to some of the information in the records, including pricing information and any formulas or calculations relating to pricing. That claim has not been appealed by the requester and therefore, there is no dispute over the fact that it will not be disclosed. The records at issue amount to emails and unsigned agreements, and includes various dates, references to pricing concepts, the names, titles and signatures of the appellant's representatives who signed or were to sign the agreement. In my view, it is not evident on its face how the disclosure of the specific information that remains would permit a competitor to draw accurate inferences about any underlying non-negotiated confidential information, such as the appellant's bargaining position or other proprietary business information.

[77] The appellant's representations do not point to specific information in the records or even the types of information contained in the records that they believe could be of assistance to its competitors. They do not provide evidence to demonstrate or explain how the disclosure of any of the specific information at issue could reasonably be expected to prejudice its competitive position within the meaning of the harm contemplated by section 17(1)(a); nor do they explain or provide examples of how the disclosure of any of the specific information in the records could reasonably be expected to give rise to an undue loss or gain as considered by section 17(1)(c). There appears to be an assumption that the prospect of harm is self-evident. I disagree. In my view, given the nature of the information, it is not self-evident that its disclosure could reasonably be expected to produce such harms, nor have I been provided with detailed and convincing evidence to support such a finding.

[78] Accordingly, in the circumstances of this appeal, I find that I have not been provided with the requisite detailed and convincing evidence to establish that either of the harms identified in section 17(1)(a) or (c) have been established.

[79] I also find that the harm set out in section 17(1)(b) has not been established. The appellant submits that if confidential information, including the terms and conditions of agreements between the government and pharmaceutical manufacturers is subject to disclosure, pharmaceutical manufacturers "will be reluctant to negotiate such agreements with the government in the future."

[80] This same argument was addressed by Senior Adjudicator Higgins in Order PO-3032. In that order, he stated:

> Another argument raises the possibility of section 17(1)(b), which applies where disclosure could reasonably be expected to "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." However, the rationale advanced is, in effect, that drug manufacturers will cease to do business with the government under the ODBP if the information in the records is disclosed. This argument does not refer to the flow of *information* to the ministry, which is the harm addressed under section 17(1)(b). For this reason, I find that section 17(1)(b) does not apply….

[81] I agree with the reasoning expressed by Senior Adjudicator Higgins and find that it is equally applicable in the current appeal. While the appellant acknowledges that this argument was rejected in Order PO-3032, it respectfully disagrees with that outcome. However, it does not provide any further explanation as to how this harm could reasonably be expected to occur with respect to the specific information at issue in this appeal. I am not satisfied that I have been provided sufficiently detailed and convincing evidence to conclude that the disclosure of any of the remaining information, which does not contain any pricing information, could reasonably be expected to result in the pharmaceutical manufacturers cease to do business with the ministry in the future. Accordingly, I find that the harm described in section 17(1)(b) has not been established.

[82] In summary, I am not satisfied that the appellant has established that the disclosure of the information that remains at issue could reasonably be expected to result in any of the harms enumerated in sections 17(1)(a), (b), or (c) of the *Act* and find that part 3 of the section 17(1) test has not been met. As all three parts must be established for information to be exempt under that section, I find that section 17(1) does not apply to the information at issue.

D. Is the appellant entitled to claim the discretionary exemptions at sections 18(1)(c) and (d) of the *Act*? If so, are portions of the records exempt from disclosure pursuant to those exemptions?

[83] The present appeal is a third party appeal. That is, the appellant is not the requester, but a third party who is appealing the information that the ministry is prepared to disclose. In the circumstances of this appeal, the ministry has severed portions of the information pursuant to the discretionary exemptions at section 18(1)(c) and/or (d) of the *Act*, however, the appellant claims that these discretionary exemptions apply more broadly than they have been applied by the ministry and that they apply to exempt information that the ministry is prepared to disclose.

[84] Sections 18(1)(c) and (d) 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 or the ability of the Government of Ontario to manage the economy of Ontario;

[85] 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[25] (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.

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

[86] 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.[26]

[87] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario," section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians. [27]

Representations

[88] The appellant submits that the application of sections 18(1)(c) and (d) should be extended to cover the portions of the emails in records 1 to 4 that are at issue as they disclose confidential information exchanged between the ministry and the appellant regarding a potential price increase. The appellant submits that the disclosure of this information "would harm the ministry's bargaining position when attempting to secure similar arrangements with pharmaceutical manufacturers in the future." It also submits that disclosure of the information in the attachments to records 11 and 12 "will reveal information about [the ministry's] bargaining position in respect to [certain drugs], thereby affecting [the ministry's] competitive position (and the government's economic interest in respect of negotiating future agreements with [the appellant] or other manufacturers involving [the identified drugs]."

[89] The appellant submits that it is entitled to rely on section 18(1)(c) and (d) and claim that it applies to all of the information that is at issue. It submits that although this office has generally held that the section 18 exemption may only be relied upon by an institution, in limited circumstances it is appropriate for a third party to rely on a section 18 exemption. It submits:

> Order PO-3032 discussed the circumstances in which it is appropriate for a third party to rely on an exemption other than those provided in sections 17 and 21:
>
> > This could occur in a situation where it becomes evidence that disclosure of a record would affect the rights of an individual, or <u>where the institution's actions would be clearly</u>

[26] Orders P-1190 and MO-2233.

[27] 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

> inconsistent with the application of a mandatory exemption provided by the *Act*. [Emphasis added by appellant]
>
> As previously mentioned the [information] that [is] revealed in [the portions of the records at issue] comprise [the appellant's] information assets that are utilized in bargaining with the government for drug supply agreements.
>
> Should the IPC disagree that such information was "supplied" by [the appellant] "in confidence" to the government, because the information is contained in an agreement "mutually generated by [the appellant] and the government, it is submitted that [the appellant] may rely upon the exemption provided in subsections 18(1)(c) and (d) to exempt the disclosure of this information. As previously stated in these submissions, disclosure of such information is ultimately inconsistent with the spirit of the mandatory section 17 exemption against disclosure of confidential information revealing [the appellant's] bargaining position in respect of drug supply agreements, regardless of the form in which that information is ultimately disclosed.

[90] The ministry not only takes the position that sections 18(1)(c) and (d) do not apply to the information that remains at issue, but also that, as a third party, the appellant is not entitled to raise the possible application of these discretionary exemptions.

Analysis and findings

[91] The broader purpose of the section 18 exemption is to protect the economic interests of government institutions such as the ministry, not private sector companies, such as the appellant. Nevertheless, the appellant takes the position that it is entitled to claim sections 18(1)(c) and (d) to information to which the ministry has not applied those exemptions.

[92] Accordingly, before turning to whether the exemptions at section 18(1)(c) and/or (d) might apply to the information at issue, I must first address the issue of whether the pharmaceutical manufacturer can rely on the section 18(1) exemption with respect to information for which the ministry did not make such a claim.

[93] In Order P-257, former Assistant Commissioner Tom Mitchinson considered the question of when an affected party, or a person other than the institution that received the access request, may be entitled to rely on one of the discretionary exemptions in the *Act*. He stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. . . .
>
> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

[94] Subsequently, in Order PO-3032, Senior Adjudicator John Higgins dealt with the raising of discretionary exemptions by affected parties in a context similar to the current appeal. In Order PO-3032 a number of pharmaceutical manufacturers claimed that the section 18(1) exemption applied more broadly than was claimed by the ministry. In that order, Senior Adjudicator Higgins stated:

> …[T]he purpose of the section 18 exemptions, broadly stated, is to protect the economic interests of institutions. In this case, it is evidence that the ministry took a different view than the drug manufacturers who provided representations on this issue, of the extent to which disclosure of information in the records could reasonably be expected to damage its economic interests.
>
> In my view, this is a decision the ministry is entitled to make. As outlined below, the ministry clearly took the views of drug manufacturers into account in its decision to claim sections 18(1)(c) and (d) for the payment amounts.
>
> Given the purposes of these exemptions, to protect the government's ability to compete in the marketplace and to protect the broader economic interests of Ontarians, it would only very rarely be appropriate to support a claim for these exemptions by a private party, whose arguments are

> directed at protecting their own interests, and not those of the government or the public.
>
> In my view, the circumstances of this appeal do not constitute one of these rare exceptions. The position taken by the drug manufacturers in these appeals is fundamentally concerned with protecting their own interests. Any perceived overlap with the interests of the government or the public arises from arguments that the drug manufacturers' interests would be damaged by disclosure, and that this would have a spill-over effect that could reasonably be expected to be prejudicial to the interests of the government or the public.

[95] I agree with Senior Adjudicator Higgins' reasoning in Order PO-3032 and adopt it for the purposes of the current appeal.

[96] In my view, the circumstances before me do not amount to one of the rare exceptions contemplated by Senior Adjudicator Higgins' which would permit the application of the section 18(1)(c) and (d) in the manner suggested by the appellant. The appellant in this appeal, also a pharmaceutical manufacturer, argues that if the mandatory exemption at section 17(1) is found not to apply, it should be entitled to rely upon section 18(1)(c) and (d) for that information, because the disclosure of such information is inconsistent with the mandatory exemption which protects against the disclosure of the appellant's confidential information. In my view, this argument demonstrates that the appellant is primarily concerned with protecting its own interests; it has not provided any evidence to suggest that the disclosure of the information at issue could reasonably be expected to be prejudicial to the economic or financial interests of the government of the public.

[97] Moreover, the ministry, who is, in my view, the party that is in the best position to judge whether the harms described in sections 18(1)(c) and (d) could reasonably be expected to result from the disclosure of the information, has applied those exemptions to portions of information in the responsive records. Prior to making the decision to disclose portions of the records it sought and received representations from the appellant on the disclosure of the responsive information. Therefore, the ministry has clearly had the opportunity to consider the appellant's views on the disclosure of the information, and has concluded that disclosure of this information would not give rise to the harm to Ontario's economic or financial interests as contemplated by those sections.

[98] Also, during the inquiry stage, in its representations in response to those submitted by the appellant, the ministry continues to take the position that the section 18(1) exemption does not apply more broadly than the way in which it was initially applied. Clearly, the possible application of the discretionary exemptions to the portions of the records at issue has been considered by the ministry and it has exercised its discretion not to rely on them.

[99] I find that the current appeal does not present circumstances that would amount to a rare exception to the general presumption that affected parties are not entitled to raise the possible application of the discretionary exemptions at section 18(1). Accordingly, I find that the appellant cannot claim sections 18(1)(c) and (d) for any of the information that remains at issue in the records. As a result, it is not necessary for me to determine whether section 18(1)(c) or (d) applies to any of the information that remains at issue and the ministry is not required to exercise its discretion to extend these exemption to that information.

ORDER:

1. I uphold the ministry's decision to disclose the records, in part, and order it to disclose the remaining information by sending it to the requester by **August 28, 2015** but not before **August 24, 2015**. Specifically, the ministry is to disclose to the requester all of the information that it was prepared to disclose at the outset of this appeal, with the exception of the non-responsive information in Table 1 of the appendix to the agreement, copies of which are attached to records 11 and 12. For the sake of clarity, I have enclosed a copy of records 11 and 12, as previously severed by the ministry, indicating in green the additional non-responsive portions that should not be disclosed.

2. The ministry's decision to withhold parts of the agreements was not appealed by the requester. Consequently, I reiterate that the ministry must not disclose that information to the requester.

3. In order to verify compliance with the terms of this order, I reserve the right to require a copy of the records that are provided to the requester pursuant to order provision 1.

Original Signed By: July 24, 2015
Catherine Corban
Adjudicator