Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3508

Appeal PA13-500

Ministry of Health and Long-Term Care

July 8, 2015

Summary: The ministry received a request for access to records relating to the submission of an application for inclusion in the drug formulary of a drug product containing a specified active ingredient. The ministry located responsive records and notified the drug manufacturer pursuant to section 28, seeking its views on disclosure. The ministry decided to disclose the records, in part, to the requester. The drug manufacturer, now the appellant, objected to the disclosure of portions of some of the records on the basis that the information was subject to the mandatory third party information exemption in section 17(1). In this order, the ministry's decision to release the information which the appellant objected to disclose is upheld and the undisclosed portions of the records are ordered to be released to the requester.

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

OVERVIEW:

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

> All records under Subsection 11(7) and (8) of the Ontario Drug Benefit Regulations ("Regulations") related to the drug benefit price for all products with [a specified drug product] as the active ingredient, in particular records related to:

1. Any application, certification or other communication submitted by a drug manufacturer (other than GenMed, a division of Pfizer Canada Inc.,) in particular, but not limited to Teva Canada Limited, Apotex Inc., Ranbaxy Pharmaceuticals Inc. and Pharmascience Inc.

2. Any due diligence conducted by or assessment or conclusion made by Ontario Public Drug Programs (OPDP) in relation to the records in paragraph (1) above: and

3. Any communication from OPDP to any drug manufacturer (other than GenMed, a division of Pfizer Canada Inc.) in relation to the records in paragraph (1) above

[2] Pursuant to section 28 of the *Act,* the ministry provided notice to the appellant of the request because it appeared that the appellant might have an interest in certain records responsive to the request. The appellant provided representations to the ministry on October 15, 2013, asserting that three of these records were not responsive to the request and that parts of the other records should be exempted from disclosure, on the basis of section 17(1) of the *Act*.

[3] The ministry subsequently issued an access decision to the appellant on October 29, 2013 and to the requester on October 30, 2013. The ministry's decision to both parties was to grant partial access to the records, citing the mandatory third party exemption at section 17(1) and the discretionary exemptions in section 18(1)(g) (proposed plans of an institution) and section 19 (solicitor-client privilege) and also advised that three records were not responsive to the request.

[4] The appellant appealed the ministry's access decision, and this office opened the current appeal, PA13-500. The requester also appealed the ministry's access decision, and this office opened Appeal PA14-137, which was resolved at the mediation stage of the appeal process.

[5] During the mediation of Appeal PA13-500, clarification was obtained from the ministry with respect to the numbering of the records, and from the appellant as to the scope of their appeal, as well as confirmation from the requester with respect to the records he wished to pursue in this appeal.

[6] The appellant confirmed that it appeals the ministry's decision to disclose certain portions of records 43-46 on the basis that this information is exempt under the mandatory third party exemption in section 17(1). On April 3, 2014, the appellant provided a severed copy of records 43-46 to the ministry, indicating those portions which it did not object to be released to the requester. On April 3, 2014, the ministry

disclosed to the requester a severed copy of records 43-46 (in accordance with the appellant's severances), a severed copy of record 47 [in accordance with the severances made by the ministry under sections 18(1)(g) and 19] and a complete copy of records 48-50. The requester has confirmed that he wishes to pursue access to the information that was not disclosed in records 43-46. Accordingly, I will determine the application of section 17(1) to this limited information, as it alone remains at issue.

[7] I sought and received the representations of the appellant and the requester, initially. A severed version of the appellant's representations were shared with the ministry and the requester seeking their representations on the appellant's arguments made in favour of a finding that the undisclosed information in Records 43-46 is exempt under section 17(1). Portions of the appellant's representations were withheld on the basis that they contain confidential information, in accordance with Practice Direction 7 and section 7 of the IPC *Code of Procedure.* The ministry declined the opportunity to make any submissions. I then sought and received further representations by way of reply and sur-reply from the requester and the appellant, respectively.

[8] In this decision, I uphold the ministry's decision to disclose the remaining information at issue in records 43-46.

RECORDS:

[9] Record 43 - One sentence in paragraph one of a letter dated March 19, 2013 from the ministry to the appellant.

[10] Record 44 and the attachment to Record 46 – The bullet point on page two of a letter dated March 21, 2013 from the appellant to the ministry.

[11] Record 45 – The underlined portion of a second letter dated March 21, 2013 from the appellant to the ministry.

DISCUSSION:

[12] The sole issue for determination in this appeal is whether the undisclosed portions of records 43-46 are exempt from disclosure under the mandatory third party information exemption in section 17(1).

THIRD PARTY INFORMATION

[13] Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

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

[15] For section 17(1) to apply, the party resisting disclosure, in this case the appellant, 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
>
> 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

[16] The appellant argues that the undisclosed information falls within the ambit of "commercial" and "financial" information, as contemplated by section 17(1). It argues that the disclosure of the information at issue in records 43 and 45 would reveal certain commercial decisions made in relation to the identified drug product and the appellant's

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[1] *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.).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

marketing strategy for it. Similarly, it submits that the information in records 44 and 46 concerns a representations and warranty that it has entered into with the ministry and that this term is commercial in nature. These types of information have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[3] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[4]
>
> *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.[5]

[17] The requester suggests that because the information does not relate "solely" to the buying or selling of the appellant's drug product. Rather, he argues that it "exists independently of the purchase or sale of [the drug product]" which the appellant was required to "provide in order for it to obtain a price exemption, rather than relating to [its] buying or selling".

[18] Based on my review of the contents of the undisclosed information in records 43-46, I find that it falls within the ambit of the definition of commercial information for the purposes of section 17(1). While, strictly speaking, the information does not relate "solely" to the buying, selling or exchange of merchandise or services, I find that it does pertain directly to the appellant's decisions around the marketing of its product and the commercial determinations which it made in bringing this product to market. As a result, I find that it satisfies the first part of the test under section 17(1).

Part 2: supplied in confidence

Supplied

[19] 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.[6] Information may qualify as "supplied" if it was directly supplied to an institution by a

[3] Order PO-2010.
[4] Order P-1621.
[5] Order PO-2010.
[6] Order MO-1706.

third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[7]

[20] The appellant argues that it was the source of the information as part of its submission in favour of inclusion of its drug product on the Formulary. The requester disputes that the information was supplied at all because the terms that are reflected in these communications "form part of an overreaching bargain" between the ministry and the appellant, and cannot, therefore, be said to have been supplied.

[21] I find that the nature of the information at issue leads to the conclusion that it was supplied by the appellant to the ministry. The information being conveyed in the records relates to certain stipulations and events which were within the appellant's knowledge only. Such information can only have come to the ministry if it were supplied by the appellant.

In confidence

[22] In order to satisfy the "in confidence" component of part two, the party resisting disclosure, in this case the appellant, must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[8]

[23] 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.[9]

[24] The appellant submits that, "[G]iven the commercial competitiveness of Ontario Formulary designations for newly approved drug products, there is a strong inference of

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[7] Orders PO-2020 and PO-2043.
[8] Order PO-2020.
[9] 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.

a reasonable expectation of confidentiality for a manufacturer's drug submission seeking that a product be designated on the Ontario Formulary."

[25] The requester argues that the appellant's expectation of confidentiality, if any, was not reasonably held, pointing out that neither the *Drug Benefit Act* nor the regulations provide that information of this type is held in confidence by the ministry. It also notes that the accompanying documentation that was submitted by the appellant was not marked as "Confidential" and that the ministry did not subsequently agree to maintain the confidentiality of the information. The requester also presents arguments in favour of a finding that the information is not confidential based on its status as the "manufacturer of the original product" because it "would be the counterparty to" any cross–licensing agreement with the appellant.

[26] In its reply submissions, the requester also provides detailed reasons setting out why it believes that the information in the records is already publicly-available. In its sur-reply submissions however, the appellant refutes these arguments and clearly demonstrated to me that the information does not form part of any publicly-available document. I will not, therefore, consider these submissions further.

[27] I am satisfied, based on the appellant's representations that it provided the information remaining at issue to the ministry with a reasonably-held expectation of that it would be treated confidentially. The information pertains to certain commercial terms which it has entered into and it is reasonable to expect that it was provided to the ministry in confidence, particularly in light of the intense competition which exists in this industry. As a result, I find that the second part of the three-part test under section 17(1) has been satisfied with respect to the remaining information at issue.

Part 3: harms

[28] The party resisting disclosure, in this case the appellant, 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.[10]

[29] 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.*[11]

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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 PO-2435.

[30] The non-confidential portions of the appellant's representations are very brief and essentially mimic the language of the *Act*. In its confidential representations, however, the appellant has provided more detailed submissions regarding this aspect of the section 17(1) exemption.

[31] The appellant has provided what amount to two separate submissions with respect to the harms component of the section 17(1) exemption, addressing the two types of information that remain at issue in the records. In the first category, which addresses the appellant's request to the ministry for a particular designation for its drug product, it argues that the disclosure of this type of information would enable a competitor to anticipate its strategy in respect of the appellant's future drug products inclusion on the Ontario Formulary. It posits a fact scenario in which it argues how a competitor might use this information to its detriment, whereby disclosure would lead to it "tipping its hand" to a competitor in a future submission.

[32] Based on my review of the confidential representations of the appellant, I am unable to agree that disclosure of the type of information that remains undisclosed in records 43 and 45 could reasonably be expected to result in the type of harm contemplated by section 17(1). The appellant has put forward a fact situation which it argues would result in harm to its competitive position. However, I find that it has failed to provide me with convincing evidence as to how the disclosure of *the undisclosed information in records 43 and 45* could reasonably be expected to give rise to the harms in section 17(1). I find that the scenario described by the appellant does not enable me to understand how the disclosure of this information would result in harm to its competitive position or cause it undue loss. As a result, I find that the third part of the test under section 17(1) does not apply to the undisclosed information in records 43 and 45 and it does not, therefore, qualify for exemption on that basis.

[33] The second category of information relates to a representation and warranty which the appellant may or may not have provided to the ministry with respect to an arrangement with another manufacturer. It argues that the existence, or non-existence of such a relationship would be of commercial importance to its competitors which could then be relied upon to undermine its competitive position. I note that the requester is the company referred to in the appellant's representations, and that it would be aware of the existence or non-existence of any such arrangement. While disclosure to the requester amounts to disclosure to the world, the requester is already in a position to disclose the terms of any such arrangement, if it exists, to other competitors in the industry.

[34] Accordingly, I do not accept the appellant's arguments with respect to the information in records 44 and 46. I find that the appellant has not provided me with the necessary "detailed and convincing" evidence of the harms set out in section 17(1) with respect to the undisclosed information in records 44 and 46 and I will order that it be disclosed to the requester.

[35] I uphold the ministry's decision to disclose the remaining information in records 43, 44, 45 and 46 and dismiss the appeal.

ORDER:

1. I dismiss the appeal and uphold the ministry's decision to disclose the information in records 43, 44, 45 and 46 claimed by the appellant to be exempt under section 17(1).

2. I order the ministry to disclose this information to the requester by no later than **August 13, 2015** but not before **August 10, 2015**.

3. I reserve the right to require the ministry to provide me with copies of the records that are disclosed to the requester pursuant to order provision 2.

Original Signed By: July 8, 2015
Donald Hale
Adjudicator