Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3635

Appeal PA14-439

Ministry of Health and Long-Term Care

July 22, 2016

Summary: A newspaper reporter made a request to the Ministry of Health and Long-Term Care (the ministry) for a "breakdown of the amount of money each pharmaceutical company has given the provincial government in rebates as part of agreements to have their products listed on the Ontario Drug Benefit Formulary" over a defined period. The ministry's clarification of the request unilaterally modified the language of the request to seek, in part, a list of "drug manufacturers" with product listing agreements with the ministry as of early 2014. One of the notified parties, whose name appears in the list, appealed the ministry's decision to disclose its name to the requester on the basis it is a distributor, and not a manufacturer, of drug products, and thus its name is not responsive to the clarified request. In the alternative, the appellant claimed its name is exempt under sections 17(1)(a) and (b) (third party information) of the *Act*.

In this order, the adjudicator finds, taking into account factors including the language of the original request, the circumstances of the clarification, the content of the responsive record (which includes drug distributors as well as drug manufacturers) and the requester's confirmation of the intended scope of his request, that the appellant's name is responsive to the request. She also finds that neither section 17(1)(a) nor 17(1)(b) applies to the appellant's name. She dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1)(a) and (b), 24; O. Reg. 201/96 to the *Ontario Drug Benefits Act*.

Orders and Investigation Reports Considered: PO-2661, MO-3029, PO-3032, PO-2865, PO-3120, PO-3176, PO-3174.

OVERVIEW:

[1] A newspaper reporter made a request to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "an up-to-date breakdown of the amount of money each pharmaceutical company has given the provincial government in rebates as part of agreements to have their products listed on the Ontario Drug Benefit Formulary."

[2] In a July 22, 2014 letter to the requester, the ministry described the request as having been clarified as a request for the following information:

1. An aggregate annual total payment for all drug manufacturers (by calendar year up to and [including] calendar 2013).

2. A 2009 list of drug manufacturers that had an agreement in place with the ministry as well as a current (early 2014) list.

[3] The ministry identified three responsive records. Record 1 is a listing of aggregate annual total payments from January 1, 2007 to December 31, 2013. Record 2 is a list of drug manufacturers with product listing agreements with the ministry as of early 2014. Record 3 is a 2009 list of drug manufacturers with product listing agreements with the ministry.

[4] Prior to making its decision on access, the ministry notified 120 drug companies whose interests may be affected by disclosure of the records, in accordance with section 28 of the *Act*. After considering the submissions received in response to these notices, the ministry advised all the parties of its decision to disclose the records, in their entirety, to the requester.

[5] One of the notified parties appealed the ministry's decision to disclose Record 2. As a result, it is the appellant in this appeal. In its submissions to the ministry, the appellant took the position that the mandatory exemptions at sections 17(1)(a) and (c) (third party information) of the *Act* apply to the information about it in the records.

[6] During the mediation stage of the appeal process, the appellant confirmed it does not take issue with the disclosure of Records 1 and 3 to the requester. As a result, these records are not at issue in this appeal. The sole record at issue is the one described by the ministry as "a list of drug manufacturers with product listing agreements with the ministry as of early 2014." The ministry also confirmed that none of the other notified parties has objected to disclosure of this record to the requester.

[7] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process for an inquiry under the *Act*. I began my inquiry by seeking the representations of the appellant, as it is the only party objecting to disclosure of the sole record at issue.

[8] In its initial representations to me, the appellant did not address the application of section 17 to the record. Instead, it took the position that the inclusion of its name in the record is in error, as the appellant is a distributor, and not a manufacturer, of a product listed on the Ontario Drug Benefit Formulary. The appellant thus takes the position that its name is not responsive to the request as clarified by the ministry and set out in the ministry's July 22, 2014 letter.

[9] In light of this, I sought the ministry's position on the new issue raised by the appellant — namely, the responsiveness of the information at issue (the name of the corporate appellant) in the record. I provided the ministry with a copy of the appellant's representations and asked it to specify whether it agrees with the appellant's position on the scope of the request giving rise to the appeal, and, if it does not agree, to provide representations on the responsiveness of the information at issue. Although I withheld the appellant's representations from the requester for reasons of confidentiality,[1] I provided the requester with a summary of the appellant's position, and also sought his views on this issue.

[10] Both the ministry and the requester objected to the appellant's characterization of the scope of the request. The ministry explained that it unilaterally proposed the language of the clarification (to "list of drug manufacturers…"), but submits that the clarified request ought to be read in conjunction with the original request in order to give effect to the requester's intention about the scope of his request. The ministry also clarified that despite the title given to it, the record contains the names of both drug manufacturers and drug distributors, including drug distributors other than the appellant.

[11] The requester confirmed he agrees with the ministry's representations on this issue.

[12] I determined that it was unnecessary to seek further representations from the parties on the issue of responsiveness. However, as section 17 is a mandatory exemption, I invited the appellant to make representations on the application of section 17 as an alternative to its main claim of non-responsiveness, which it did. The thrust of the appellant's section 17 argument is that disclosure of its name in the record will lead to the disclosure, by inference, of the name of a drug product. The appellant claims that in the circumstances of this appeal, the name of the drug product is "product-specific information" of the sort that is protected by section 17(1)(a) and/or (b).

[13] I provided the ministry and the requester with the opportunity to make responding representations on this issue. Only the requester provided brief submissions in response.

[14] In this order, I find that the information at issue — the appellant's name on a list

[1] The parties' representations made during the inquiry, including supplementary and reply representations, were shared with one another in accordance with this office's *Code of Procedure* and *Practice Direction 7*.

of drug companies with product listing agreements with the ministry at a particular point in time — is responsive to the request, notwithstanding the language used by the ministry in its clarification of the request. I also find that neither section 17(1)(a) nor (b) applies to this information. I uphold the ministry's decision to disclose the record, including the name of the appellant, in full. I dismiss the appeal.

INFORMATION AT ISSUE:

[15] At issue is the inclusion of the appellant's name in a three-page record that the ministry originally described, in its decision letter, as a list of "drug manufacturers that had [a product listing] agreement in place with the ministry" as of early 2014.

[16] The ministry has since clarified that the list includes the names of both drug manufacturers and drug distributors.

ISSUES:

A. What is the scope of the request? Is the information at issue responsive to the request?

B. If the information at issue is responsive to the request, does the mandatory exemption at section 17(1)(a) and/or 17(1)(b) apply to it?

DISCUSSION:

A. What is the scope of the request? Is the information at issue responsive to the request?

[17] The appellant takes the position that the inclusion of its name in the record is in error, as this information is not responsive to the clarified request. This is because, the appellant submits, it is not a manufacturer of drugs but rather a drug distributor, and the clarified request makes clear that the requester is only interested in information relating to larger companies that have manufacturing capability rather than information about drug companies more generally. In support, the appellant notes that the drug manufacturer, and not the appellant (who distributes the drug made by the manufacturer) is listed on the Formulary.

[18] The original request was for access to "an up-to-date breakdown of the amount of money each pharmaceutical company has given the provincial government in rebates as part of agreements to have their products listed on the Ontario Drug Benefit Formulary." The request was subsequently clarified as an access request for, in part, "a current (early 2014) list of drug manufacturers that had an agreement in place with the

ministry."[2] The ministry communicated this clarification to the requester in its July 22, 2014 letter.

[19] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[20] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

[21] The appellant relies on the language of the clarification to assert that the requester, by acceding to the clarified request, effectively modified his original request to exclude drug distributors and to narrow his request to names of drug manufacturers only. The appellant argues that the requester's intention in modifying his request must be given meaning, and that doing so means that only names of drug manufacturers can be treated as reasonably relating to the request as clarified. It cites some orders of this office in support of its position, which I will address below.

[22] In my request for representations from the ministry, I asked it to explain how the original request for information relating to "each pharmaceutical company" with a product listing agreement with the ministry came to be clarified as a request for access to information about "drug manufacturers" with such agreements.

[23] The ministry explains that on receiving the original request from the requester, it determined that it had recently completed a similar access request, and unilaterally proposed the language of the clarification in contemplation of the document it had

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[2] The part of the ministry's clarification referring to aggregate annual total payments (rather than a breakdown of amounts given by each pharmaceutical company) is not at issue in this appeal. The requester did not take issue with the ministry's disclosure of aggregate payment information to him in satisfaction of his request.

[3] Orders P-880 and PO-2661.

generated in response to the earlier request, importing the language it had used in that earlier request. The requester agreed to the clarified request, and the ministry confirmed the clarification its July 22, 2014 letter.

[24] Nonetheless, the ministry submits that the original request demonstrates that the object and intention of the requester in making the original request was to obtain information about all pharmaceutical companies (drug manufacturers and drug distributors) that had agreements with the ministry within the defined time period, including the names of those companies, and not merely information about a subcategory of those companies. The ministry observes that the content of the record it produced in response to this part of the request demonstrates that it did not interpret the request to be limited to drug manufacturers, despite its use of that term in its clarification and in its original description of the record. The ministry asserts that, in fact, the responsive record contains the names of both drug manufacturers and drug distributors — including drug distributors other than the appellant. In these circumstances, the ministry argues, the clarified request must be read together with the original request to accurately define the scope of the information sought by the requester. It therefore submits that the names of all drug companies, including the appellant's, reasonably relate to the request read as a whole, and are therefore responsive to the request.

[25] I sought the requester's view on the divergent positions taken by the ministry and the appellant on the interpretation of his request. In particular, I asked the requester whether the clarified request formulated by the ministry accurately reflects the intended scope of his request.

[26] The requester did not provide submissions on this issue, other than to say he agrees with the position set out by the ministry in its representations.

[27] Although input from the requester would have been helpful, I find a sufficient basis in the material before me, including in the language of the original request and the ministry's account of how the clarification came to be, to conclude that the request includes in its scope the names of drug distributors as well as drug manufacturers.

[28] The language of the original request is unambiguous. In requesting information about "each pharmaceutical company" with a product listing agreement at the relevant time, the requester clearly did not limit his request to information about certain kinds of pharmaceutical companies (namely, drug manufacturers) only. Neither the ministry nor the appellant disputes this. The disagreement between the parties is about the effect of the clarification on the scope of the original request.

[29] To begin, I accept the ministry's account of having unilaterally proposed the language of the clarification based on the language it used in fulfilling an earlier access-to-information request. However, as the ministry indicates, the record it produced as being responsive to both requests actually contains the names of both drug

manufacturers and drug distributors. Based on this, I find persuasive the ministry's contention that in introducing the term "drug manufacturers" in its clarification, it did not intend to unilaterally narrow the scope of the original request, and I accept that the ministry did not produce a record that is limited in this way.

[30] A relevant question, however, is the requester's intention regarding the scope of his own request. As the appellant notes, the requester appears to have acceded to the clarification proposed by the ministry by not objecting to the language set out in the ministry's July 22, 2014 letter. The appellant relies on Order PO-2661, which it says instructs institutions to "respond with records that are responsive to the request as clarified, not return to the original wording" of a request. Accordingly, it says, a responsive record is one that reasonably relates to the clarified, not the original, request.

[31] The original request in Order PO-2661 was for access to the number of times, over a defined period, that a university initiated contact with any security service in respect of its nuclear reactor. The second paragraph of that request specified that the requester was interested in all information at least partially responsive to the request. On receiving the request, the university sought clarification from the requester, which she provided. The university then responded to the requester by advising that there exist no records compiling the number of university-initiated contacts with security services. The requester appealed the university's decision, including on the issue of the university's interpretation of her request.

[32] The adjudicator in Order PO-2661 observed that the university's response provided an answer only to the first paragraph of her original request, and ignored the second paragraph as well as her clarification. In those circumstances, the adjudicator found it necessary to consider the nature and effect of the original request, as well as the clarification to the request. He determined that both the original request and the clarification clearly indicated that the requester was interested in all information about the involvement of security services with the university, including, in the absence of statistical information, any records showing or recording such contacts during the defined period. The adjudicator concluded that the university had failed to properly interpret the scope of the request, and found that, in those circumstances:

> … it was incumbent on the University to respond to the clarified request, rather than returning to the original wording (minus the second paragraph) and proceeding as it did, ignoring the fact that clarification was both requested and received.

[33] This statement, read in its entirety and in the context of the facts giving rise to the adjudicator's finding, does not support the proposition advanced by the appellant through its selective quotation of Order PO-2661. The adjudicator in that case determined that "the nature and effect" of the request could best be determined by looking at the clarification provided by the requester, rather than at an abridged version of the original request, as the university had done. This is very different than the appellant's implication that a clarification of an original request, rather than the original

request, necessarily defines the scope of the request in all cases.

[34] In my view, Order PO-2661 indicates instead that in order to ascertain the nature and effect of a request — in other words, to give effect to a requester's intention in making the request — this office will take into account all relevant considerations, including the factual context, the language of the request and any subsequent clarification, and other evidence of the requester's intentions.

[35] I find support for taking a contextual approach to the question of scope in section 24(2) of the *Act*, which obliges institutions to assist requesters in reformulating requests that are insufficiently detailed to meet the requirements of section 24(1), and in past orders of this office considering the question of scope. These include Order P-880, in which this office found that the purpose and spirit of freedom-of-information legislation is best served when government institutions adopt a liberal interpretation of a request, and Order P-134, which held that where there is ambiguity about the scope of a request, the matter should be resolved in favour of the requester's view of the request. A contextual approach is also evident in orders determining that the substance of a request, and not merely its form, is a relevant consideration in determining its scope.[4]

[36] I also find instructive in these circumstances Order MO-3029. In that case, an institution sought from the requester a clarification of his lengthy request, and received a clarified response from him that was itself confusing. The institution therefore produced its own clarification identifying the records that it believed the requester was seeking. The adjudicator found it was reasonable in the circumstances for the institution to interpret the requester's lack of response to its clarification as his acquiescence to its interpretation of the scope of his request. Nonetheless, in order to best serve the requester's intention in making his request, the adjudicator determined that the original request, in conjunction with the clarified request, defined the scope of the request and the parameters of the responsive records. All these orders indicate that where the matter is in dispute, this office will adopt the interpretation of the request that best serves the spirit of the *Act*, one of the purposes of which is to provide a right of access to information under the control of institutions in accordance with the principle that information should be available to the public.[5]

[37] In this case, I find that the spirit of the *Act* is best served by interpreting the request in view of the wording of the original request and taking into account the circumstances of the clarification. Although the appellant notes that the requester does not appear to have responded to the ministry's clarification, thereby apparently acceding to it, I do not accept that this means the requester must be bound by the language of the clarification. On this point, I find relevant the requester's confirmation (through his agreement with the ministry's representations on this issue) that he intended the scope of his request to include not only drug manufacturers but also drug distributors — in other words, to cover pharmaceutical companies generally, as

[4] Orders M-493, M-530 and MO-2285, PHIPA Decision 17, and others.
[5] *Act*, section 1(a)(i).

described in his original request. This, combined with the circumstances under which the clarified request came to be formulated — with the ministry's unilaterally importing the language used in a previous request — and the fact the responsive record includes both drug manufacturers and drug distributors, leads me to the conclusion that neither the ministry nor the requester intended to limit the scope of the original request, and that both effectively treated the term "drug manufacturers" as synonymous with the requester's original formulation of "pharmaceutical companies."

[38] I conclude that the appellant's name is responsive to the request. I will accordingly consider, under the next heading, whether it should be disclosed to the requester.

B. If the information at issue is responsive to the request, does the mandatory exemption at section 17(1)(a) and/or 17(1)(b) apply to it?

[39] In the event I find its name is responsive to the request, the appellant takes the position that this information is nonetheless exempt from disclosure on the basis of section 17(1) of the *Act*.

[40] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[6] 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.[7]

[41] The appellant claims that sections 17(1)(a) and/or (b) apply in these circumstances. These sections read:

> 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[.]

[42] In particular, the appellant appears to claim that the disclosure of its name in a list of pharmaceutical companies with product listing agreements with the ministry at a specified point in time will lead to the disclosure, by inference, of the name of a drug

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[6] *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.) (*Boeing Co.*).
[7] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

product, and that this disclosure by inference could reasonably be expected to give rise to the harms in paragraphs (a) and/or (b).

[43] For either of section 17(1)(a) or (b) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

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

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

[44] For the reasons that follow, I conclude that the information at issue does not meet parts two and three of three-part test.

[45] The appellant begins with an overview of product listing agreements, which it notes this office has addressed in a number of previous orders. Product listing agreements are negotiated agreements between drug suppliers and the ministry for the reimbursement of some prescription drug products listed on the Formulary. The Formulary sets the provincial standard for price, quality and interchangeability of drug products. Through the Ontario Drug Benefit Program, the ministry covers most of the costs of prescription drugs listed on the Formulary for Ontario residents who qualify for benefits under the *Ontario Drug Benefits Act*. Through the volume discounts negotiated with drug suppliers under product listing agreements, the ministry obtains a reduction in the published Formulary price for drug products designated for benefits under the Ontario Drug Benefit Program. The discounts paid by drug suppliers to the ministry under these agreements generate significant cost savings to the province.

[46] The appellant refers to Orders PO-3032, PO-3120 and PO-2865, which involved requests for access to information contained in product listing agreements. The appellant submits that these orders demonstrate that product-specific information in product listing agreements (as opposed to information about drug products in the aggregate) has a long history of protection by the IPC. Based on this, the appellant submits that its name, from which it argues the name of a particular drug product can be inferred, is product-specific information of the sort this office has established should be protected from disclosure.

[47] I do not find these orders stand for the broad proposition that any product-specific information is exempt from disclosure under the *Act*. In Order PO-3032, this office found that the amounts of discount payments made by individual drug manufacturers were properly withheld under section 18(1)(c) and (d) of the *Act*. The adjudicator in Order PO-2865 considered similar types of records, but there ordered disclosure of the payment amounts. Order PO-3032 was decided after the release of

Order PO-2865, and with the benefit of additional evidence provided by the ministry of the impact of the disclosures that were made pursuant to Order PO-2865. The adjudicator in Order PO-3032 was satisfied that the new information provided a sufficient basis for distinguishing the earlier order, and, based on the evidence before him, concluded that the payment amounts were exempt from disclosure.

[48] As the appellant notes, this office has applied the reasoning in Order PO-3032 to find exempt information that would reveal specific discount payment amounts made by individual drug suppliers to the ministry pursuant to their product listing agreements.[8] By contrast, this office has ordered the disclosure of aggregate amounts of discount payments made by drug manufacturers, on the basis this information does not reveal specific payment amounts made by individual drug companies.[9] In particular, in Order PO-3120, cited by the appellant, the adjudicator found that the aggregate amount of all discount payments made by individual drug companies was not exempt under either section 17(1) or sections 18(1)(c) and (d).

[49] These orders turn on the sensitivity of revealing specific financial or other benefits negotiated between the ministry and individual drug companies under product listing agreements. The appellant draws on these orders to extrapolate that any product-specific information (including the identity of a product), and not merely specific payment amounts, must qualify for exemption under the *Act*. I do not accept that these orders, nor any other orders of which I am aware, establish that the name of a drug supplier or drug product is exempt under section 17(1), which is the only claim that has been advanced in this case. I will, however, consider the appellant's argument to this effect by addressing whether this information meets the three-part test for the application of section 17(1), next.

Part 1: type of information

[50] The information at issue is the appellant's name, which appears in the record as the appellant is a distributor of drug products that had a product listing agreement with the ministry at the relevant time. I accept that this information is sufficiently linked to the buying, selling or exchange of merchandise or services (in this case, a drug product) to qualify as "commercial information" as that term has been defined by this office.[10]

Part 2: supplied in confidence

[51] The requirement that the information be "supplied" to the institution reflects the

[8] Orders PO-3176, PO-3275, PO-3276.
[9] Orders PO-3120, PO-3275.
[10] Order PO-2010, and many others.

purpose in section 17(1) of protecting the informational assets of third parties.[11]

[52] 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.[12]

[53] 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.[13]

[54] 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.

[55] I do not accept that the appellant's name qualifies as information that was supplied to the ministry in confidence within the meaning of section 17(1). This is so even if I were to accept the appellant's argument that disclosure of its name would reveal the name of the drug product that is the subject of its product listing agreement with the ministry, because I also do not accept that the identity of the drug product was supplied to the ministry in confidence. The appellant's arguments do not assist it in making out this claim.

[56] The appellant's representations under this heading focus on the payment amounts negotiated in its product listing agreement with the ministry, asserting there is "no question" that these payments were actually supplied by it to the ministry. The information at issue in this appeal is not the specific payment amounts, but rather the appellant's name in the record, so that the question at hand is whether its name can be said to have been "supplied" to the ministry "in confidence." As I will discuss later, I

[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] Order PO-2020.

also do not accept the implicit argument that the amounts of specific payments from the appellant to the ministry under their product listing agreement can be inferred from disclosure of the appellant's name.

[57] The appellant's name is at issue in this appeal because it is one of the pharmaceutical companies that had a product listing agreement with the ministry at a particular point in time. I find no basis for the conclusion that the appellant's identity as a counterparty to an agreement with the ministry is information that it supplied to the ministry, or that it had an expectation of confidentiality in respect of its participation in the agreement. As both the ministry and the appellant acknowledge, the product listing agreement itself provides that certain details of their agreement, including the appellant's name and the subject-matter of the agreement, may be made public in the ministry's sole discretion.[14] I also observe that Regulation 201/96 to the *Ontario Drug Benefits Act*, setting out conditions for the designation of listed drug products, allows the ministry to make public certain information about these agreements, including the counterparty's name and the subject-matter of the agreement.[15] While I note that these contractual and regulatory provisions do not prevail over the rights of access in the *Act*,[16] I find them relevant in considering whether the appellant had a reasonable expectation of confidentiality in the fact of its having entered into a product listing agreement with the ministry.

[58] Moreover, I expect that the appellant's name would appear in the product listing agreement itself, a negotiated contract that the appellant acknowledges is of the sort that this office has found will not normally qualify as having been "supplied" for the purpose of section 17(1).[17] I do not accept that the name of the appellant as one of the

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[14] While the product listing agreement between the ministry and the appellant is not at issue in this appeal, and was not before me, both parties refer to it in their representations. The ministry cites section 4.3 ("Details of Volume Discount to be Made Public") of the agreement, which, among other things, specifies that permitted disclosures include the name of the "distributor." The appellant refers to Article VI, and the definition of "Confidential Information" in the agreement, which the appellant reports encompasses all information except aggregate program data, the appellant's name, the subject-matter of the agreement and the fact of entering into or terminating the agreement. (The appellant does not comment on the references in the agreement to the disclosure of a drug distributor's name.)

[15] See item 4 of section 11(1), section 12(7) and item 7 of section 12.1(1) of O. Reg. 201/96 to the *Ontario Drug Benefits Act*.

[16] The adjudicator in Order PO-3176 reached the same conclusion regarding the interaction between the *Act*, the provisions of a product listing agreement and O. Reg. 201/96 (see paragraph 111 of that order). This office has separately considered the effect of the above-noted sections of O. Reg. 201/96 on the *Act* in Order PO-3174, concluding that the "confidentiality provisions" of O. Reg. 201/96 do not prevail over the *Act*. See particularly paragraphs 17-23 of Order PO-3174.

[17] This approach was approved by the Divisional Court in *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.); and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII). See also: *Grant Forest Products Inc. v. Caddigan,* 2008 CanLII 27474; *Canadian Medical Protective Association v. Loukidelis,* 2008 CanLII 45005; *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario*, 2012 ONSC 3496 (CanLII); *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (Can LII); and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392 (CanLII).

parties to the agreement qualifies as information in the negotiated agreement that it "supplied" to the ministry within the meaning of section 17(1). This finding accords with past orders of this office that have rejected attempts by drug manufacturers to withhold their names on the basis of section 17(1).[18] Other than referring to its different status in its arguments on the issue of responsiveness, the appellant has not explained how its identity as a drug distributor, rather than a drug manufacturer, makes its name sensitive in a way that distinguishes this case from those orders.

[59] The appellant refers to the "inferred disclosure" exception to the general rule concerning contracts in support of its claim that other sensitive information — namely, the identity of the drug product it distributes — can be inferred from disclosure of its name, and that its name therefore ought to be withheld. This exception applies where disclosure of 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.[19]

[60] Even if I were to accept that the name of the drug can be inferred from disclosure of the appellant's name (which the appellant says is probable because it was the only one of its products that was subject to a product listing agreement during the relevant period), I do not accept that the name of the drug qualifies for exemption under section 17(1), for similar reasons for which I found the appellant's name does not qualify.

[61] First, it is unclear to me that the identity of the drug product that is the subject of the agreement for its supply to the ministry at a volume discount is "non-negotiated confidential information" within the meaning of the exception. Like the appellant's name, which I found to be a component of the negotiated agreement between the ministry and the appellant, I expect that the supply of the particular drug product was a matter of negotiation between the parties that was formalized by way of the product listing agreement executed by them. I also note that previous orders have rejected drug manufacturers' attempts to exempt the names of drug products on the basis of section 17(1).[20] As above, the appellant has not explained how its identity as a drug distributor, rather than a drug manufacturer, makes the name of the drug product it distributes sensitive in a way that distinguishes it from the names of drug products that were sought to be withheld by drug manufacturers.

[62] The appellant also proposes that the disclosure by inference of the drug product will reveal the purpose for which it made discount payments to the ministry (namely, to lower the ministry's effective cost for that particular product), and that it reasonably expected the ministry to maintain the confidentiality of this purpose of its payments. I find no reasonable basis for this expectation in the circumstances. While the appellant relies on Article VI of the product listing agreement in support of its claim of an

[18] Orders PO-3032, PO-3176, PO-3275.
[19] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[20] PO-3176, PO-3275.

expectation of confidentiality of this information,[21] as I observed above, the agreement itself does not amount to a confidentiality provision that prevails over the *Act*.[22] In any case, I observe that the Ontario Drug Benefit Formulary, an electronic version of which is available online,[23] is a resource listing, among other things, drug products covered by the Ontario Drug Benefit Program, searchable by generic as well as brand name. A cursory search of the Formulary yields a number of cases where a drug manufacturer is linked to only one drug product. This calls into question the appellant's claim that specific drug products that are the subject of product listing agreements are supplied to the ministry in confidence.

[63] Lastly, in arguing under this heading that "there can be no question that" the appellant's payments to the ministry under the product listing agreement were supplied by it to the ministry, it is possible that the appellant is making an argument that the specific payment amounts can somehow be inferred from disclosure of its name. (The appellant does not elaborate on this argument anywhere else in its representations.) If this is the appellant's claim, I reject it. Although the appellant states that the identity of the drug product should be protected to the same degree as the amount of specific payments (because its disclosure would give rise to the same harms), the appellant has not provided sufficient evidence to show how payment amounts can be inferred from the disclosure of its name or the name of the drug product, or how these payments would qualify as underlying non-negotiated confidential information of the sort covered by the inferred disclosure exception. The orders cited by the appellant that upheld the denial of access to specific payment amounts were decided on the basis of section 18(1), a discretionary exemption that may be claimed by the institution, and not section 17(1). As noted, the ministry has not claimed that section 18(1) applies to the information at issue, and, in fact, its decision was to disclose the names of all drug distributors and drug manufacturers with product listing agreements with the ministry during the relevant period.

[64] Overall, I am not satisfied that the appellant has established that its name, or the name of the drug product which it claims can be inferred from disclosure of its name, or the specific payment amounts (if this is also its claim), is information that was "supplied in confidence" within the meaning of section 17(1).

[65] As all three parts of the three-part test must be met in order for section 17(1) to apply, this finding is sufficient to dispose of the issue. However, for the sake of completeness, I will also address the appellant's brief arguments on the harms from disclosure.

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[21] See footnote 14.

[22] Confidentiality provisions in other statutes which prevail over the *Act* use specific language to that effect, or are identified in the *Act*. See section 67 of the *Act*.

[23] https://www.formulary.health.gov.on.ca/formulary/.

Part 3: harms

[66] To establish that either section 17(1)(a) or 17(1)(b) applies, the party resisting disclosure must provide evidence about the potential for 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.[24]

[67] For section 17(1)(a) to apply, the appellant must demonstrate that the disclosure of its name could reasonably be expected to prejudice significantly a competitive position or to interfere significantly with contractual or other negotiations. In its representations under this heading, the appellant states that it is "self-evident (as opposed to speculation)" that the disclosure (by inference) that it paid a volume discount on a particular drug product could interfere with its negotiations with other bulk purchasers of the drug. In support, the appellant cites Order PO-3032, in which, it says, this office accepted the negative impact of disclosing the fact that particular drug products were being supplied at less than the Formulary price.

[68] As noted, the adjudicator in Order PO-3032 upheld the ministry's decision to withhold under sections 18(1)(c) and (d) the amounts of discount payments made to the ministry by individual drug suppliers. Besides the fact that the information at issue in this appeal differs from that withheld in Order PO-3032, section 18(1) involves different considerations than those at play in section 17(1). For one, section 18(1) does not require the information sought to be withheld to have been "supplied in confidence" by a third party to an institution. In addition, the adjudicator in Order PO-3032 arrived at his conclusion based on the evidence provided by the ministry, including directly relevant evidence on the actual impact of the disclosure of similar information. While the appellant states that it relies on the submissions made by the ministry in Order PO-3032, I do not find that the ministry's submissions in that case, addressing the specific circumstances and specific information at issue there, can be imported to this appeal to support the appellant's arguments for withholding different information, in different circumstances, and based on a different section of the *Act*.

[69] As I reject this argument, and do not otherwise accept that the risks of harms under section 17(1)(a) are self-evident, I reject the appellant's claim under this section.

[70] For section 17(1)(b) to apply, the appellant must demonstrate that disclosure of its name could reasonably be expected to result in similar information no longer being supplied to the ministry, where it is in the public interest that similar information continue to be so supplied. The appellant simply asserts that if the purpose of its payments under the product listing agreement is disclosed (by inference), "then it is likely such information will no longer be supplied." It again relies on the ministry's evidence provided to the adjudicator in Order PO-3032, and particularly this extract from the ministry's evidence in that case:

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

> Such negotiations and agreements would not be possible if manufacturers were not given a promise of strict confidentiality in respect of the terms of these agreements, and particularly the pricing provisions of these agreements that reflect or reveal volume discount information.[25]

[71] The appellant has not explained the significance of this extract, or related the ministry's submission in that case to the appellant's specific claim in this case that its name is exempt under section 17(1)(b). In light of the different circumstances in Order PO-3032, and the appellant's failure to explain the relevance of those findings on my consideration of the different issues here, this argument fails to establish a reasonable expectation of the potential for harm in section 17(1)(b).

[72] I conclude that the appellant has not met parts two or three of the test for application of sections 17(1)(a) and (b).

[73] Lastly, the appellant argues that if section 17(1) is found not to apply to the information at issue, it should be withheld under other grounds. In particular, it states that, due to the appellant's "position of vulnerability" of having only one product on the Formulary during the relevant period, "the Ministry was under a duty, at law and in equity," not to disclose information that could reveal the true purpose of its payments to the ministry under the product listing agreement.

[74] This argument has no bearing on my determination of issues under the *Act*.

[75] I dismiss the appellant's appeal.

ORDER:

1. I uphold the ministry's decision to disclose the information at issue to the requester.

   As it appears the ministry has not yet disclosed any information in the record to the requester, I order the ministry to disclose the record, in full, by **August 29, 2016** but not before **August 24, 2016.**

2. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the requester.

[25] Order PO-3032, at paragraph 40, quoting from the representations of the ministry's Executive Officer of the Ontario Public Drug Programs.

Original Signed by: July 22, 2016

Jenny Ryu
Adjudicator