Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3694

Appeals PA11-105, PA11-113, PA11-114, PA11-125, PA11-128, PA11-133, PA11-135, PA11-136, PA11-137, PA11-139, PA11-140, PA11-141, PA11-145, PA11-146, PA11-148, PA11-149, PA11-150, PA11-153, PA11-156, PA11-157, PA11-173, PA11-229 and PA11-234

Ministry of Health and Long-Term Care

February 14, 2017

Summary: The requester seeks access to records relating to agreements between the Ministry of Health and Long-Term Care and drug manufacturers about the pricing and listing of drug products on Ontario's Formulary. The ministry denied access to some information under the mandatory exemption in section 17(1) (third party commercial information) and the discretionary exemptions in sections 13(1) (advice or recommendations) and 18(1) (economic interests of the institution) and decided to disclose other information. Twenty-three drug manufacturers appealed the ministry's decision to disclose parts of the records. In this decision, the adjudicator upholds the ministry's decision to apply sections 13(1) and 18(1) to portions of the records. The adjudicator also finds that none of the remaining information qualifies for exemption under section 17(1) and orders that information to be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 17(1) and 18(1)(c) and (d)

Orders and Investigation Reports Considered: PO-2773, PO-2864, PO-3176, PO-3275

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry) provides coverage for most of the cost of over 3,800 prescription drugs for Ontario residents who qualify for

benefits under the *Ontario Drug Benefits Act* (ODBA) through the Ontario Drug Benefit Program (ODBP). Eligible individuals include people over 65, residents of long-term care homes and homes for special care, people who receive professional home care services, people who qualify under the Trillium Drug Program and individuals on social assistance.

[2] Under the *Transparent Drug System for Patients Act, 2006* (Bill 102) which amended the ODBA, the Executive Officer (EO) of the ODBP is empowered to, among other things, keep, maintain and publish a Formulary of drug products designated as benefits under the ODBP and to negotiate pricing agreements for drugs that are listed on the Formulary as benefits under the ODBP. The purpose of these agreements ("pricing agreements") is to generate government cost-savings and obtain value for money in respect of drug products that are listed as benefits under the ODBP.

[3] According to the ministry's website[1], the ministry maintains an electronic version of the Formulary which lists the drug products covered by the ODBP, their manufacturers, the nature of the listing (for example, general benefit or limited use), the drug benefit price and notes about the therapeutic uses of the drug, amongst other things.

[4] Pursuant to these pricing agreements, the ministry's price under the ODBP is lower than the published Formulary price.[2] This listed price is reduced by virtue of a *volume discount* paid by the manufacturers to the ministry. These volume discounts are negotiated by the EO in listing and pricing agreements with the manufacturers.

[5] In general, only drugs that are listed on publicly funded drug plan formularies, such as the ODB Formulary, are widely prescribed to patients, and manufacturers are thus willing to negotiate and enter into listing and pricing agreement with the EO, albeit on certain conditions.

[6] The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> Please provide updated summary lists from April 25, 2008 to present (February 2010) as follows, all of which have previously been provided (and now interpreted broadly to include the total lists:
>
> - Signed Bill 102 agreements tracking sheets
> - Summary of current listing agreements
> - Conditional listing deliverables sheet
> - Conditional listing summaries

[1] http://www.health.gov.on.ca/en/pro/programs/drugs/edition_42.aspx

[2] The Formulary price is the price a pharmacist would pay if purchasing the listed drug from the manufacturer and the price that the ministry reimburses the pharmacist for the cost of the drug.

> If there are recent 2009, 2010 impact lines or briefing notes on these summary listing sheets please provide too.

[7] The ministry notified a number of organizations whose interests may be affected by the disclosure of the records responsive to the request pursuant to section 28 of the *Act* (the affected parties). These affected parties were given the opportunity to provide representations on the application of the mandatory third party commercial information exemption in section 17(1). The ministry received these submissions and issued a final decision to the affected parties and the requester granting the requester partial access to the records. The ministry advised the parties that it withheld portions of the records under section 17(1) and the discretionary exemptions in sections 13(1) (advice or recommendations) and 18(1) (economic and other interests) of the *Act*. It appears that none of the records were disclosed to the requester.

[8] Several of the affected parties, now the appellants, appealed the ministry's decision to disclose portions of the responsive records. All of the appeals related to this request were placed on hold pending the resolution of a judicial review application of an order of this office concerning similar issues and records. The applicant in that judicial reviews subsequently filed a notice of abandonment and these appeals were taken off hold. The requester confirmed that he continues to pursue access to the records at issue.

[9] The appeals were transferred to the adjudication stage where an adjudicator conducts an inquiry under the *Act*. The IPC provided the ministry and the appellants with the opportunity to provide representations in response to the issues set out in a Notice of Inquiry. Some of the appellants submitted representations. Most of the appellants that submitted representations advised that they rely on the ministry's assurance that it will pursue its arguments under section 18 of the *Act* to protect the information that was initially withheld by the ministry as well as additional information in the Agreements Tracking Sheet pertaining to the volume discounts formula. However, a number of the appellants submit that some of the information should be withheld under section 17(1). Finally, a number of appellants identified additional information that they submit should be exempt from disclosure under section 17(1) of the *Act*.

[10] Upon review of the appellant's representations, I invited the original requester and the ministry to submit representations in response to the appellants' positions and the Notice of Inquiry. Some of the appellants' representations were shared with the requester and the ministry in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The requester and the ministry submitted representations.

[11] In its representations, the ministry stated that it decided to apply sections 18(1)(c) and (d) of the *Act* to additional information in the records as well as to some of the information that was previously subject to section 17(1) only. The ministry issued a revised decision to the requester and appellants reflecting this new position.

[12] In light of this new position, I invited the requester to make representations in

response to the non-confidential portions of the ministry's representations. The original requester submitted representations.

[13] In the discussion that follows, I uphold the ministry's decision, in part, and dismiss the appeals.

RECORDS:

[14] The information at issue consists of the withheld portions of the following records:

- Record 1: Signed Agreements Tracking Sheet. The ministry decided to disclose Record 1, in part. Information was withheld under section 17(1), originally. However, in its August 6, 2015 revised decision, the ministry applied sections 18(1)(c) and (d) to the information withheld under section 17(1).

- Record 2: Conditional Listing Deliverables Summary Table. The ministry decided to disclose Record 2, in part. Information was originally withheld under sections 17(1) and 18(1)(c) and (d). In its revised decision, the ministry applied sections 18(1)(c) and (d) to the information originally withheld under section 17(1) alone. The ministry also applied sections 18(1)(c) and (d) to withhold an additional portion of the record.

- Record 3: Conditional Listing Summary Table. The ministry decided to disclose Record 3, in part. Information was originally withheld under sections 13(1), 17(1), 18(1)(c) and (d). In its revised decision, the ministry applied sections 18(1)(c) and (d) to the information originally withheld under section 17(1) only. The ministry also applied sections 18(1)(c) and (d) to withhold an additional portion of the record.

PRELIMINARY ISSUE

Late application of sections 18(1)(c) and (d) exemption

[15] The ministry requests leave to raise the exemption in sections 18(1)(c) and (d) for information for which it was not "explicitly raised" previously in its representations. Specifically, the ministry states that sections 18(1)(c) and (d) apply to certain information contained in the three records at issue. The ministry states that the purpose of making this additional claim is to ensure consistency with the position the ministry took with respect to the same or similar records in relation to other access to information requests. The ministry made some confidential submissions in support of its position. Finally, the ministry submits that the requester would not be prejudiced by the additional exemption claim since it applied the section 17(1) exemption to the same information in its original access decision in all but two instances.

[16] In response to the ministry's representations, the requester submits that the new

section 18 claims are overly broad. Specifically, the requester submits that the ministry decision to claim sections 18(1)(c) and (d) to additional information in Record 1 is unwarranted. Further, the requester submits that the ministry's new position with respect to Records 2 and 3 is inconsistent with its position in relation to previous access to information requests and its recent 2015 release of records that provides similar tracking data. In addition, the requester raises a number of public policy arguments against the ministry's decision to "double bank more data" under both sections 17(1) and 18(1) and protect the interest of drug companies.

[17] I invited the ministry to make further submissions in response to the requester's claims. The ministry submits that it appears that the requester is making a number of public interest claims to override the ministry's ability to claim the sections 18(1)(c) and (d) exemptions. The ministry submits that this is not supported by law. The ministry submits that it considered a number of factors in deciding whether to claim the exemptions in sections 18(1)(c) and (d). The ministry confirms that it considered whether there was a general public interest in the information at issue and concluded there was not. The ministry submits that it is primarily manufacturers, their competitors and potential customers who have an interest in knowing the content of the records. In fact, the ministry submits that there is a public interest in protecting public funds by negotiating the lowest possible drug costs.

[18] The IPC's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemptions claims during an appeal. Specifically, section 11.01 states:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[19] The purpose of this rule is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the ministry and to the requester.[3] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[4]

[20] In the circumstances before me, I will allow the ministry to rely on the new

[3] Order PO-1832.
[4] Orders PO-2113 and PO-2331.

exemption claim. Although the claim was raised well beyond the 35-day period referred to in the *Code*, the requester has not directed me to any prejudice that would result from permitting it to be made at this stage. Further, in reviewing the records at issue, I note that the adjudicators in Orders PO-2864 and PO-3176 considered and upheld the application of the section 18(1) exemption to the same or similar information and I accept that the ministry would be prejudiced by not being able to rely on the exemption with respect to the information at issue in these appeals. Furthermore, I find that certain portions, such as the new severance on page 3 of Record 2, contain information that was originally severed in the other records at issue.

[21] Given these circumstances, I allow the ministry to rely on sections 18(1)(c) and (d) in addition to the information it originally claimed section 17(1) alone as well as the two additional portions of Records 2 and 3.

ISSUES:

A. Does the discretionary exemption in section 13(1) apply to the records?

B. Do the discretionary exemptions in sections 18(1)(c) and (d) apply to the records?

C. Should the ministry's exercise of discretion to deny access under sections 13 and 18 be upheld?

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

DISCUSSION:

Issue A: Does the discretionary exemption in section 13(1) apply to the records?

[22] The ministry claims that portions of pages 6, 8, 9 and 10 of Record 3 are exempt from disclosure under section 13(1). Section 13(1) of the *Act* states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retrained by an institution.

[23] In *John Doe v. Ontario (Finance)*[5], the Supreme Court of Canada held that the purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-

[5] 2014 SCC 36 (*John Doe*).

making and policy-making.[6]

[24] *Advice* and *recommendations* have distinct meanings. *Recommendations* refers to materials that relate to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be expressed or inferred.

[25] *Advice* has a broader meaning than *recommendations*. It includes *policy options*, which are lists of alternative courses of actions to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. *Advice* includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[7]

[26] Advice or recommendations may be revealed in two ways:

- The information itself consists of advice or recommendations
- The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[8]

[27] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[9]

[28] Section 13(1) covers earlier drafts of materials containing advice or recommendations, even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).[10]

[29] Examples of the type of information that have been found *not* to qualify as advice or recommendations include factual or background information[11], a supervisor's direction to staff on how to conduct an investigation[12] and information prepared for

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[6] *Ibid.*, at para. 43.
[7] *Ibid.*, at paras. 26 and 47.
[8] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), affirmed [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[9] *John Doe*, *supra* note 5 at para. 51.
[10] *Ibid.*, at paras. 50-51.
[11] Order PO-3315.
[12] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

public dissemination.[13]

[30] Section 13(2) creates a list of mandatory exceptions to the section 13(1) exemption. These mandatory exceptions can be divided into two categories: objective information and specific types of records that could contain advice or recommendations.[14]

[31] The ministry submits that section 13(1) applies to portions of Record 3, specifically the information that contains recommendations provided by the Committee to Evaluate Drugs (CED) to the ministry. The ministry says this is evident from the title of the column "CED Direction" containing the information at issue.

[32] As background, the ministry states that the CED was established for the purpose of providing independent expert advice to the ministry with respect to drugs and pharmaceutical therapies. In this case, the ministry submits that the CED provided advice to the ministry on whether specific drug products should be funded under the ODBP. The ministry submits that these recommendations take into account the therapeutic efficacy and cost-effectiveness of a product.

[33] The ministry refers to a number of IPC's orders, including Order 68, in which the IPC first concluded that the role of the CED (then the Drug Quality and Therapeutics Committee) "as an advisory body to the Minister places it squarely within the scope of entities intended to be covered by subsection 13(1)"[15]. The ministry submits that the IPC confirmed Order 68 in Order PO-2097 and held that section 13(1) applies to the minutes of a CED meeting. Finally, the ministry refers to Order PO-2773 in which the adjudicator found that section 13(1) applies to records that would reveal the advice or recommendations made by the reviewers to the CED if they are disclosed.

[34] The ministry submits that the IPC's rationale and conclusions in Order PO-2773 apply equally to the information withheld from disclosure in Record 3. The ministry submits that the information subject to its section 13(1) claim reveals the advice and recommendations of the CED regarding the funding of a drug product under the ODBP and is therefore exempt from disclosure. Further, the ministry submits that the disclosure of this information would reveal or permit accurate inferences to be drawn regarding the advice and/or recommendations the CED provided to the ministry.

[35] The requester submits that the ministry should not be able to claim section 13(1) for "parts of the Conditional Listing Summary Table received in full before by Information Commissioner Order." Further, the requester submits that some of these listings "are not in the same transition listing category". As such, the requester submits that "the severance case for some of this type of tracking data (conditional summaries) differs from other sought data but is now moot."

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[13] Order PO-2667.
[14] *John Doe*, *supra* note 5 at para. 30.
[15] Order 68 at

[36] On my review of pages 6, 8, 9 and 10 of Record 3 and the parties' representations, I uphold the ministry's decision to apply section 13(1). As the ministry states, the CED was established to provide independent expert advice to the ministry with respect to drugs and pharmaceutical therapies. In the case of Record 3, the information subject to the ministry's section 13(1) claim contains specific advice to the ministry relating to the funding of the subject drug product under the ODBP. The title of the column that the information is exempted under section 13(1), "CED Direction", clearly shows that the information contained in that column contains the CED's "directions" or advice relating to the particular drugs being considered.

[37] While it appears that the requester submits that parts of a Conditional Listing Summary Table were disclosed to him and that this information is now "moot", he did not provide me with evidence that the portions subject to the ministry's section 13(1) claim were disclosed to him. Similarly, the requester did not elaborate on his claim that the information is now "moot". Regardless, these factors do not affect a finding of whether the portions subject to the ministry's section 13(1) claim contain advice or recommendations within the meaning of that exemption. Upon review, I find that the information subject to the ministry's section 13(1) claim does contain the CED's advice to the ministry. Therefore, I uphold the ministry's decision to withhold portions of pages 6, 8, 9 and 10 of Record 3 from disclosure under section 13(1), subject to my review of its exercise of discretion, below.

Issue B: Do the discretionary exemptions in sections 18(1)(c) and (d) apply to the records?

[38] 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;

[39] 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*[16] (the Williams Commission Report) provided the rationale for including a "valuable government information" exemption in the *Act*:

[16] Vol. 2[2] (Toronto: Queen's Printer, 1980).

> 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…

[40] 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.[17]

[41] 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) is intended to protect the broader economic interests of Ontarians.[18]

[42] For sections 18(1)(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate risk of harm that is well beyond the merely possible or speculative although it need not provide 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 the seriousness of the consequences.[19]

[43] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[20]

[44] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[21]

Representations

[45] There are three categories of records subject to the ministry's section 18(1) claim: the information that was severed under sections 17(1) and 18 in its original decision; the information that was originally severed under section 17(1) in the original decision but that the ministry now claims to be additionally exempt under section 18(1);

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[17] Orders P-1190 and MO-2233.
[18] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 1104 (ONCA), [1999] 1118 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.).
[19] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52 to 54.
[20] Order MO-2363.
[21] See Orders MO-2363 and PO-2758.

and the information that was not originally claimed to be exempt from disclosure, but that the ministry now claims to be exempt under section 18 of the *Act*.

[46] The ministry submits that the information it claims to be exempt under sections 18(1)(c) and (d) would, if disclosed, reveal precise details of the negotiations that took place between itself and the relevant manufacturers in respect of the listing and pricing agreements reflected in the records at issue. Specifically, the ministry claims that the information newly subject to its sections 18(1)(c) and (d) claim reveals the effective price of a drug product, the particular type of cost benefit arrangement that the ministry negotiated for the particular drug and other "important negotiated contractual terms."

[47] While the ministry states that the information subject to its section 18(1) claim may seem innocuous and merely descriptive in nature, it is highly valuable to a competing manufacturer and/or a third party purchaser negotiating with the specified manufacturers. Similarly, the ministry submits that information about the particular conditions that each manufacturer is prepared to accept in the negotiations with the EO is highly valuable to both the ministry and the appellants. The ministry submits the effective prices and the precise types of benefits and conditions were negotiated in complete confidence and with an explicit expectation that this information would remain strictly confidential.

[48] The ministry states that the drug manufacturing industry is extremely competitive in nature and it is vital to ensure a competitive advantage both in relation to competitors and other entities with whom a manufacturer may enter into similar types of agreements. Given these circumstances, the ministry submits that companies involved in the industry and other entities would be able to use whatever information is publicly available together with the information at issue in this appeal to undermine their competitors. As a result, the ministry submits that concerns over the confidentiality of commercially negotiated terms and payment/pricing information could reasonably be expected to make drug manufacturers more reluctant to enter into agreements that are financially beneficial to the ministry and ultimately the government.

[49] As such, the ministry submits that if the information subject to its section 18(1) claim is disclosed, manufacturers would consider that disclosure a significant breach of their expectation of confidentiality. Moreover, the ministry submits that, in the future, these manufacturers would be less likely to negotiate significant volume discounts because this disclosure would negatively affect their competitive position by establishing a lower benchmark for a given drug product. Therefore, in order to negotiate the lowest possible prices, the ministry submits that it must promote and protect its trusted relationships with manufacturers. The ministry submits that this trust is based on maintaining the confidentiality of the effective price and any associated financial benefit.

[50] The ministry submits that the disclosure of the information it claims to be exempt under sections 18(1)(c) and (d) could reasonably be expected to result in the harms

contemplated by those exemptions. The ministry submits that it "cannot realize the maximum possible cost savings unless effective prices and/or other financial benefits agreed to by drug manufacturers under pricing and listing agreements, as well as the terms of those agreements, remain confidential and are not disclosed." Without these savings, the ministry submits that its economic interests and the Government of Ontario's financial interests will be prejudiced and result in higher drug costs for ODBP recipients.

[51] Finally, the ministry notes that the ODBP budget forms a significant part of the provincial budget. As such, the ministry submits that any prejudice to its economic interests will have an associated negative impact on the government's overall financial interests. The ministry submits that this negative impact is of particular concern in relation to the current economic environment the government faces. The ministry also made a number of representations on the specific portions of the records it claims to be exempt under sections 18(1)(c) and (d). I will consider those arguments in my analysis below.

[52] In response to the ministry's representations, the requester submits that the ministry applied sections 18(1)(c) and (d) too broadly. The requester states that he only seeks "very summarized tracking data" that has been previously disclosed to him. In addition, the requester submits that the ministry disclosed similar data in 2015.

Findings

Record 1

[53] In its original decision, the ministry withheld portions of the record under section 17(1) of the *Act*. However, in its August 6, 2015 revised decision, the ministry applied sections 18(1)(c) and (d) to the information withheld under section 17(1).

[54] The ministry seeks to withhold all references in the fifth column of Record 1 to a particular financial term. The ministry submits that various drug manufacturers raised a concern that the disclosure of this financial term would allow knowledgeable individuals to estimate actual price rebates on a per-product basis when coupled with other publicly available sources of information.

[55] The ministry also submits that severing this term is consistent with the rationale applied by the ministry in respect of other relevant records, namely, where information would disclose the *type* of benefit negotiated with a manufacturer.

[56] Finally, the ministry notes that the application of section 18(1) to substantially similar information was upheld by the IPC in Orders PO-2864 and PO-3176.

[57] On my review of the material and submissions before me, I find that this information is covered by the section 18(1) exemption. I find support for this finding in Order PO-3176 which adopted the finding in Order PO-2864 for the same or similar information. In arriving at this finding, the adjudicator in Order PO-2864 stated with

respect to this and other similar information at issue in that appeal:

> Based upon my review of the information at issue in Record 3, I find that disclosure of the information at issue in this record would reveal or could result in the revelation of the volume discount amounts paid by drug manufacturers to the Ministry, the method for calculating these payments and the specific details of the financial and value for money conditions negotiated as consideration for the Ministry entering into pricing and listing agreements with drug manufacturers…..
>
> I find that disclosure of the information at issue could reasonably be expected to discourage drug manufacturers in the future from negotiating large volume discounts and other favourable financial terms with Ontario, for fear of this information being used by other public and private sector customers seeking to negotiate similar discounts with the drug manufacturers [Order PO-2786].

[58] Assistant Commissioner Sherry Liang adopted this approach in Order PO-3176 and applied it to the same information at issue in her appeal. In addition, during her inquiry, Assistant Commissioner Liang received submissions the EO who stated that the disclosures that resulted from Orders PO-2863, PO-2864 and PO-2865 resulted in manufacturers becoming more reluctant to enter into pricing negotiations with the ministry. Given this result, the ministry submitted that the disclosures resulting from Orders PO-2863, PO-2864 and PO-2865 prejudiced the ministry's ability to secure savings and ensure price stability through the negotiated agreements and that the ministry will not be able to obtain the lowest possible prices for drugs because the manufacturers may either refuse to enter into negotiations altogether or be less willing to offer significant volume discounts.

[59] To further support her position, the EO advised Assistant Commissioner Liang that following the disclosures pursuant to Orders PO-2863, PO-2864 and PO-2865, drug manufacturers stated in their negotiations that, due to their concerns about the potential disclosure of volume discount information, they are no longer able to provide Ontario with the same price reduction level they had agreed to in previous agreements. Further, the EO stated that since early 2010, drug manufacturers have been submitting product listing proposals that are not directly related to price in an effort to try and bypass having any sensitive financial information disclosed through an access request. The EO states that when this has occurred, the product listing agreements are more difficult to manage.

[60] In light of this evidence, the Assistant Commissioner Liang stated as follows:

> I accept the submissions of the EO that, following disclosure of this and other financial information through the prior orders, the ministry's ability to secure savings and ensure price stability through the negotiated agreements has been prejudiced, to the detriment of the province's economic and financial interests.

[61] I adopt the findings in Orders PO-2864 and PO-3176 for the purposes of this appeal. I find that the information at issue in Record 1, which is a financial term that is similar to that at issue in Orders PO-2864 and PO-3176, is exempt from disclosure under sections 18(1)(c) and (d) of the *Act*. Upon review of Record 1 and the materials before me, I accept the ministry's submission that the disclosure of this financial term would allow knowledgeable individuals to estimate actual price rebates on a per-product basis when coupled with other publicly available sources of information which would reasonably be expected to result in prejudice to the ministry and the Government of Ontario's economic and financial interests.

[62] Therefore, I find that the information subject to the section 18(1) claim is exempt from disclosure, subject to my review of the ministry's exercise of discretion below.

Record 2

[63] Record 2 is a Conditional Listing Deliverables Summary Table. In its original decision, the ministry identified portions of the record as exempt under sections 17(1) and 18(1)(c) and (d). In its revised decision, the ministry applied sections 18(1)(c) and (d) to the information originally withheld under section 17(1) alone. The ministry also applied sections 18(1)(c) and (d) to withhold an additional portion of the record.

[64] In addition to the general representations summarized above, the ministry submits that the information that it now claims to be exempt from disclosure in Record 2 under sections 18(1)(c) and (d) would, if disclosed, reveal the effective price and/or the type of benefit negotiated between the EO and a manufacturer for a specific drug product. In the confidential portions of its representations, the ministry described in greater detail the information it now claims to be exempt under section 18(1)(c) and (d) in addition to its original section 17(1) claim and the effects of their possible disclosure. In addition, the ministry states that it severed portions of Record 2 in order to maintain consistency with other portions it severed in the same record.

[65] The ministry states that it severed one additional portion of page 3 of Record 2 from disclosure in its revised access decision. The ministry submits that the severance of this information is consistent with the severance of the same information in page 3 of Record 3. The ministry also submits that this information reveals the terms of the confidential price and this term of the agreement is "inextricably linked to the confidential price of the drug product", which was also severed from disclosure in Records 2 and 3.

[66] In Order PO-3176, Assistant Commissioner Liang considered the application of sections 18(1)(c) and (d) to similar information and found as follows:

> I agree that the information at issue in [the record] does not disclose "confidential pricing information", volume discount amounts, or the method for calculating this amount for specific drug products. However, it does disclose the **particular nature of the financial benefit the**

> **ministry obtained** with respect to each particular drug product. Further, it is clear that the parties to the agreements view information about the nature of the particular benefit associated with a particular drug to be covered by the confidentiality provisions of their agreements as well as the terms of the Regulation.[22] [Emphasis added]

[67] Assistant Commissioner Liang further stated that the information at issue in the record before her identifies whether the listing or pricing agreement was based on a volume discount or another type of cost benefit to the ministry. In addition, Assistant Commissioner Liang accepted evidence before her that each of the benefits was negotiated separately and confidentiality between the ministry and a manufacturer. Assistant Commissioner Liang also stated that she had no evidence that the particular type of financial condition attached to the listing of a particular drug is made public. Finally, Assistant Commissioner Liang accepted evidence that disclosure of this information as a result of previous orders has, in combination with other information disclosed, prejudiced the ministry's ability to negotiate agreements to secure savings and ensure price stability, to the detriment of the province's economic and financial interests. Given these circumstances, Assistant Commissioner Liang concluded that the information in the record before her that identified the type of agreement pertaining to the listed drugs and, specifically, the type of financial or other benefit obtained by the ministry through the agreement is exempt under sections 18(1)(c) and (d).

[68] I adopt the analysis in Order PO-3176 in my consideration of similar information at issue in Record 2. The information that is subject to the ministry's sections 18(1)(c) and (d) claims contains the description of the financial and other cost benefits obtained by the ministry through the agreements it negotiated with the various drug manufacturers. As the ministry stated in its representations, this information reveals the pricing details of the negotiations that took place between itself and the relevant manufacturers in respect of the listing and pricing agreements reflected in the records at issue. Further, the ministry has provided detailed arguments outlining the harms that can reasonably be expected to occur should this type of information be disclosed, which I accept. Therefore, I find that the information subject to the section 18(1) claim in Record 2 is exempt from disclosure, subject to my review of the ministry's exercise of discretion below.

Record 3

[69] Record 3 is a Conditional Listing Summary Table. In its original decision, the ministry identified portions of the record as exempt under sections 13(1), 17(1) and 18(1)(c) and (d). In its revised decision, the ministry applied sections 18(1)(c) and (d) to the information originally withheld under section 17(1) alone. The ministry also applied sections 18(1)(c) and (d) to withhold an additional portion of the record.

[70] In addition to the general representations summarized above, the ministry submits that the information in Record 3 it now seeks to withhold under sections

[22] Order PO-3176 at para. 74.

18(1)(c) and (d) reveals the effective price and/or the type of benefit negotiated between the ministry's Executive Officer and a manufacturer for a specific drug product. Specifically, the ministry refers to the portion of page 2 of Record 3 that was originally withheld under section 17(1) alone as information that reveals that the ministry was able to negotiate a confidential effective price for that particular drug. The ministry states that this effective price is not publicly available nor are the details through which this price was negotiated.

[71] Similarly, the ministry seeks to withhold a portion of page 7 of Record 3 because the information reveals that the ministry was able to negotiate a confidential effective price for a particular drug. The ministry states that the effective price is not publicly known nor are the details through which this price was negotiated.

[72] On my review of the ministry's representations and the material before me, I find that the information subject to the ministry's sections 18(1)(c) and (d) claim are exempt under those sections. The information at issue in Record 3 is similar in nature to that withheld under sections 18(1)(c) and (d) in Record 2. As with Record 2, the information subject to the ministry's sections 18(1)(c) and (d) claims in Record 3 contains the description of the financial and other cost benefits obtained by the ministry through the various agreements it negotiated with the drug manufacturers. In other words, the information subject to section 18(1)(c) and (d) in Record 3 identifies "the type of agreement pertaining to the listed drugs and, specifically, the type of financial or other benefit obtained by the ministry through the agreement", which Order PO-3176 found to be exempt from disclosure under those sections.

[73] While the requester submits that the ministry applied sections 18(1)(c) and (d) too broadly and claims that this "very summarized tracking data" should be disclosed to him, I find that the information subject to the ministry's section 18(1) claim to be precisely the type of information that was found to be exempt from disclosure in Order PO-3176. Upon my review of the information subject to the ministry's section 18(1) claim and the evidence before me, I find that this type of pricing information is exempt from disclosure under sections 18(1)(c) and (d). The information at issue consists of pricing information, the type of agreement pertaining to the listed drugs and the type of financial or other cost benefits obtained by the ministry through its agreements with the manufacturers. As well, the ministry provided me with specific and detailed evidence demonstrating the reasonable expectation that the disclosure of this information could result in the harms contemplated by sections 18(1)(c) and (d), namely prejudice to the ministry's economic interests or competitive position and injury to the Government of Ontario's financial interests.

[74] Therefore, I find that the information in Record 3 that is withheld under sections 18(1)(c) and (d) are exempt under those sections, subject to my review of the ministry's exercise of discretion below.

Issue C: Should the ministry's exercise of discretion to deny access under sections 13 and 18 be upheld?

[75] The sections 13(1) and 18(1) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[76] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations. However, this office may not substitute its own discretion for that of the institution.[23]

[77] The ministry submits that it exercised its discretion properly in applying sections 13(1) and 18(1)(c) and (d) to withhold portions of the records. The ministry submits that it took into account relevant considerations and did not take irrelevant considerations into account.

[78] With respect to section 13(1), the ministry considered the Supreme Court of Canada's decision *John Doe v. Ministry of Finance* and decided to apply the exemption for the following reasons:

- To protect and ensure frank and honest analysis, advice and recommendations by CED/expert reviewers, free from pressure – and the threat of pressure – by the pharmaceutical industry;
- To protect the integrity of the ministry's drug submission process;
- The likelihood that only competing drug manufacturers would be interested in the information at issue, and not the general public;
- To protect the ministry's relationship with third party drug manufacturers, all of whom expect that information related to their submissions will remain confidential;
- In many instances, the disclosure of the advice/recommendations would result in the disclosure of the appellants' proprietary information, because of the way the information and the recommendations are intertwined; disclosure of this information would be tantamount to disclosing information that is exempt under section 17(1), a mandatory exemption.

[79] With respect to section 18(1), the ministry submits it took into account the representations of the appellants that were enclosed with the Notice of Inquiry and the "uniformly negative response" of the drug manufacturers in relation to the disclosure of

[23] Section 54(2) of the *Act*.

similar information pursuant to Orders PO-2864 and PO-2865.

[80] In addition, the ministry submits that it considered the fact that there is no general public interest in the information at issue. Rather, the ministry submits that the information at issue relates to primarily private financial interests of the affected manufacturer's competitors and potential customers. Furthermore, the ministry submits that the public interest in receiving the lowest possible drug costs would be protected and promoted by the non-disclosure of this type of confidential information regarding pricing listing agreements and associated volume discounts, to the extent that such confidentiality will encourage manufacturers to continue entering into similar financially-advantageous agreements that benefit the public in the future.

[81] In response, the requester submits that "the ministry no longer years later has the discretionary option to apply section 13(1) to the Conditional Listing Summary Table". In addition, the requester submits that "section 18 appears to have been applied too broadly and under the threat from a [pharmaceutical manufacturer] judicial review." Finally, the appellant submits that "the public should not be kept almost totally in the dark about summary data on how this important drug product pricing barometer is being agreed to for the vital health care sector."

[82] Based on the submissions before me and upon review of the circumstances in these appeals, I find no error in the ministry's exercise of discretion. The ministry clearly considered a number of relevant factors in its decision to apply sections 13(1) and 18(1) to withhold the information at issue. Furthermore, the ministry considered whether there is a public interest in the information at issue and determined that there is a greater interest in receiving the lowest possible drug costs that will be maintained with the non-disclosure of this type of information. Given the above, I uphold the ministry's decision to apply sections 13(1) and 18(1) to portions of the records.

Issue D: Does the mandatory exemption in section 17(1) apply to the records?

[83] In its original decision, the ministry withheld some information under section 17(1) alone and other information under sections 17(1), 18(1)(c) and (d). However, in its revised access decision, the ministry added sections 18(1)(c) and (d) to the information that was solely subject to its section 17(1) claim. Therefore, the ministry applied section 18(1) to all the information it also withheld under section 17(1). As I upheld the ministry's decision to apply section 18(1)(c) and (d) in full, it is not necessary for me to consider whether that information is also exempt from disclosure under section 17(1).

[84] The appellants agree with the ministry's decision to apply sections 17(1), 18(1)(c) and (d) where it has, but some submit that section 17(1) should also apply to additional information in the records.

[85] Sections 17(1)(a), (b) and (c) 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;

[86] Section 17(1) is designed to protect the confidential *informational assets* of businesses or other organizations that provide information to government institutions.[24] 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.[25]

[87] For section 17(1) to apply, the institution and/or party resisting must satisfy each part of the following three-part test:

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

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

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

[88] The majority of the appellants did not submit representations on the application of section 17(1) to the records, but state that they rely on the ministry's assurance that it will pursue their arguments under section 18 to protect the information that was initially withheld by the ministry as well as additional information it decided to protect. Two appellants (Company A and Company B) object to the disclosure of all the records, claiming the application of section 17(1). The appellants in four appeals object to the disclosure of specific information in the records. I note that the appellants in PA11-125 and PA11-128 submitted that section 17(1) applied to information that I have already found to exempt under section 18(1) and it is therefore not necessary for me to deal

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[24] *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.).
[25] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

with that exemption to this information here. I will deal with the records and related arguments in turn as necessary.

[89] The ministry did not make submissions on the application of the section 17(1) exemption.

Part 1: Type of Information

[90] The IPC defines *commercial information* as information that relates solely to the buying, selling or exchange of merchandise or services.[26] The appellants submit that the information at issue qualifies as commercial information because it relates to the buying and selling of drug products. I accept that the majority of the information at issue, such as the dates of the contracts, the deliverables for the agreements, the specific pricing terms and the types of agreements, qualifies as commercial information because it relates to the buying and selling of drug products.

[91] I note that some of the appellants raised the application of section 17(1) to their company names and the drug product. In Order PO-3275, Adjudicator Stephanie Haly considered this position with regard to similar records and found as follows:

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

[92] I adopt Adjudicator Haly's analysis for the purposes of this appeal and similarly find that the company names and drug product names do not qualify for exemption under section 17(1) and will consider it no further. I find further support for my finding in Order PO-3176, in which Assistant Commissioner Liang found that the company names and drug product names cannot be considered to have been *supplied in confidence* under part two of the section 17(1) test.

[93] Therefore, I find that the first part of the section 17(1) test is satisfied for all the information at issue except the company and drug product names in the records.

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[26] Order P-493.

Part 2: Supplied in Confidence

[94] 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.[27] 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.[28]

[95] The contents of a contract involving an institution and a third party will not normally qualify as having been *supplied* for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than *supplied* by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach has been explained as having its basis in the purpose of section 17(1), which is to protect the *informational assets* of third parties. In this context and having regard to the plain meaning of the words used in section 17(1), this office has not generally accepted that the terms of a contract constitute information *supplied* by a third party to an institution.

[96] The majority of the information subject to the appellant's section 17(1) claim consists of various terms of the contracts between themselves and the ministry, including the dates of the contracts and various deliverables relating to the contract. Therefore, generally, the information that remains at issue would not be considered to have been *supplied* within the meaning of section 17(1) of the *Act*.

[97] Exceptions to this general rule have been described as the *inferred disclosure* and *immutability* exceptions. The *inferred disclosure* exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The *immutability* exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business or a sample of its products.[29]

[98] In order to satisfy the *in confidence* component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[30]

[99] I note that some of the appellants argue that the ministry's intention to treat this information as confidential is reflected in O. Reg. 201/96 (the Regulation) which prescribes the limited information about pricing agreements that may be considered "public", specifically, (1) information about the name of the manufacturer, (2) the

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[27] Order MO-1706.
[28] Orders PO-2020 and PO-2043.
[29] Orders MO-1706, PO-2384, PO-2435 and Order PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, 2008 CanLII 45005 (Div. Ct.).
[30] Order PO-2020.

subject matter of the agreement, and (3) the fact of entering into the agreement. However, in Order PO-3176, Assistant Commissioner Liang made the following comments about the regulation:

> There is no suggestion that [the confidentiality provisions in the Regulation] amount to the type of legislated confidentiality provision to which section 67 of the *Act* gives precedence.[31] I do not suggest that the parties entered into their arrangements with an unreasonable expectation of confidentiality, but simply indicate that the rights under the *Act* apply to the information at issue despite those contractual and regulatory provisions. Whatever the parties may have agreed to between themselves, and despite the provisions of the Regulation, I must give effect to the rights to access under the *Act*. Those rights are, of course, subject to the exemptions under the *Act*, applied on a case by case basis and in accordance with the requirements of a particular exemption. Among other things, the exemption in section 17(1) is, unlike the confidentiality provisions in the parties' contracts, harm-based.
>
> In any event, as described above, the confidentiality provisions of the contracts and Regulation do not prevent the EO from making public information about the fact that she has entered into a listing agreement with a named manufacturer, for a named drug.[32]

[100] I will now consider whether the information at issue in each record was *supplied in confidence* within the meaning of the section 17(1) exemption.

Record 1

[101] As stated above, Record 1 is titled *Signed Agreements Tracking Sheet* and lists pricing and listing agreements by manufacturer. It contains columns indicating the manufacturer, contract number, the effective date of the agreement, the date the agreement was signed by the EO and whether it is a listing, pricing or amending agreement. The final column of the table shows the date of the Formulary Update relevant to the agreement. I note that some of the information contained in the records does not pertain to pricing and listing agreements, but to other types of agreements.

[102] While the ministry decided to grant the requester full access to Record 1 originally, as indicated above, it made a late claim under the section 18(1) exemption for specific information in one column and I upheld the claim.

[103] As stated above, the appellants take a number of different positions with regard to the disclosure of the records. However, none of the appellants that object to the disclosure of information contained in Record 1 made specific representations on this

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[31] In Order PO-3174, this office recently found that the confidentiality provision in the Regulation does not prevail over the *Act*.
[32] See *Apotex Inc. v. Ontario Public Drugs Program*, 2008 CanLII 39429.

record.

[104] Company A and Company B object to the disclosure of any information relating to themselves or their products. These appellants submit that the disclosure of any information would allow the requester to determine the particular drug to which the particular product listing agreement applies and the point in time in which any payments were made. Further, these parties submit that the disclosure of the information at issue would allow the requester to draw accurate inferences with respect to the baseline pricing information actually supplied to the ministry in connection with the negotiations of the agreements and amendments.

[105] A third appellant, Company C, objects to the disclosure of the name(s) of their drug product(s). Company C submits that the information may be considered as being supplied if its disclosure would reveal or permit the drawing of inferences with respect to its commercial terms and pricing. However, as discussed above, I found that this information is not exempt from disclosure under section 17(1).

[106] Finally, a fourth appellant, Company D objects to the disclosure of the contract number(s) and type(s) of agreement(s) in Record 1. This appellant submits that the disclosure of this information would allow the requester to determine the deliverables that were supplied to the ministry, such as savings guarantees, grants and education programs with respect to a particular drug to which the product listing agreement applies and the point in time that such deliverables were supplied. In addition, Company D submits that the information at issue would, if disclosed, allow the requester to draw accurate inferences with respect to the baseline pricing information actually supplied to the ministry in connection with the negotiation of and entry into the product listing agreement and amendments thereto, and the listing of its products on the Formulary.

[107] Assistant Commissioner Liang considered similar arguments to a substantially similar record in Order PO-3176. In that decision, Assistant Commissioner Liang did not accept that information about the dates or types of agreements could reveal details of volume discounts or rebate arrangements between the ministry and the appellants:

> There are only several "types" of agreements referred to. The ministry's representations, as well as those of some companies, state that the EO negotiates a unique pricing agreement with each manufacturer. Disclosure of the type of agreement falls far short therefore of revealing the specific financial terms of the agreement.

[108] Assistant Commissioner Liang considered the remainder of the information in the record before her and found that the ministry had the authority to disclose the fact that an agreement was entered into or terminated (which presumably would include the dates of the agreement), the type of agreement and the drug product covered by the agreement. Upon review of the record, the representations of the parties, the Regulation and relevant jurisprudence, Assistant Commissioner Liang found that none of the information in this record could be considered the confidential propriety

informational assets of a drug manufacturer. Moreover, Assistant Commissioner Liang found that none of this information could be used to infer confidential proprietary business information or immutable information about the companies.

[109] I adopt Assistant Commissioner Liang's analysis for the purposes of Record 1, which is substantially similar to the record she considered in the analysis above. Based on my review of Record 1, I find that the majority of the information contained therein consists of information that is contained in the contracts, such as the effective dates and the type of agreement. As such, I find that the information cannot be considered to have been supplied as it would have been negotiated by the parties to the agreement. Furthermore, with the remainder of the information, such as the contract number, I find that none would be considered the confidential proprietary information assets of the appellant.

[110] I have reviewed the appellant's representations and find that they did not provide me with detailed information on how the disclosure of the information they claim to be subject to section 17(1) could be used to infer the specific financial terms of the product listing agreements or other confidential proprietary business information or other immutable information about the appellants. As such, I find that this information was not supplied for the purposes of section 17(1) of the *Act*. Based on my review of Record 1 and the parties' submissions, I uphold the ministry's decision to disclose this record in full with the exception of the information withheld under section 18(1).

Record 2

[111] Record 2 is a Conditional Listing Deliverables Summary Table. The table lists drug products, the manufacturers, the dates of the conditional listing agreements, listing dates and information about fiscal and other deliverables. In its original decision, the ministry claimed the application of the section 18(1) to portions of the record, specifically, information under the column "deliverables" as well as other specific entries. The ministry also claimed the application of section 17(1) to certain specific entries. In its revised decision, the ministry claimed section 18(1) to an additional portion of the record and the information it originally withheld under section 17(1). I upheld the ministry's section 18(1) claim.

[112] As with Record 1, none of the appellants that claim section 17(1) to portions of Record 2 made representations on the specific information that remains at issue in this record.

[113] Company A and Company B submit that all information relating to them contained in Record 2 was supplied to the ministry in confidence. Company A and Company B did not make specific representations regarding the information at issue in this record. As I have already summarized Company A and Company B's general arguments in my discussion of Record 1 above, I will not summarize them again here.

[114] Company C originally raised the application of section 17(1) to a specific portion found under the Deliverables column. However, the ministry accepted Company C's

claim regarding this information and applied sections 18(1)(c) and (d) to that information. I upheld the ministry's section 18(1) claim to this information and, therefore, do not need to consider whether that information is additionally exempt under section 17(1).

[115] Company D submits that the information contained in Record 2 is exempt from disclosure, with the exception of its name, the name of its products, the agreement effective dates and formulary listing dates. Of the information that remains at issue in Record 2, Company D appears to take issue with the ministry's decision to disclose information relating to timeframe and other deliverables in the contract(s). Company D did not make specific representations regarding the information at issue in this record. As I have already summarized Company D's general arguments in my discussion of Record 1 above, I will not summarize them again here.

[116] Company E claims that two portions in the deliverables column of Record 2 were *supplied in confidence* to the ministry. Company E submits that it directly supplied the underlying confidential commercial information to the ministry. In addition, Company E submits that the disclosure of these portions would allow parties to accurately infer underlying non-negotiated confidential information, namely its unique listing model supplied to the ministry for the product. Company E submits that this model is immutable and not susceptible to change and is the only model under which it could make the product available for listing in this context.

[117] Upon review of Record 2, I find that the majority of the information that remains at issue was not *supplied in confidence*. In particular, the information relating to the timeframes and other deliverables was not in itself *supplied* by any third party and clearly represents negotiated terms.[33] Furthermore, I find that none of the appellants provided me with specific details about how this information would, if disclosed, be used to reasonably infer proprietary business information or the pricing arrangements between themselves and the ministry. Therefore, I find that this information does not meet part 2 of the section 17(1) test and uphold the ministry's decision to disclose this information to the requester.

[118] The only exception to my finding is the information relating to Company E that can be found on page 8 of Record 2, which I accept contains information that that would, if disclosed, allow parties to infer its unique listing model supplied to the ministry. I find that part two of the section 17(1) test has not been satisfied for Record 2 with the exception of the information relating to Company E on page 8. I will consider whether this information meets the third requirement of the section 17(1) test, below.

Record 3

[119] Record 3 is a Conditional Listings Summary chart. The chart lists drug products, manufacturers, the previous status of the contract, the CED Direction, the summary of conditions in the agreements and the CED Liaison. The ministry claimed sections

[33] See Order PO-3176 at paras. 134-135 for similar finding regarding timeframes in a similar record.

18(1)(c) and (d) to the majority of the information in the column summarizing the conditions in the agreements and discrete portions of the CED Direction column. In addition, the ministry claimed section 13(1) to certain portions of the CED Direction column. I upheld the ministry's decision to apply sections 13(1) and 18(1) to Record 3 and do not need to consider whether these portions are additionally exempt under section 17(1).

[120] As with Records 1 and 2, Company A and Company B submit that all information relating to them contained in Record 3 was supplied to the ministry in confidence. Company A and Company B did not make specific representations regarding the information at issue in this record. As I have already summarized Company A and Company B's general arguments in my discussion of Record 1 above, I will not summarize them again here.

[121] Company D submits that the information in the following columns is exempt from disclosure under section 17(1): previous status, CED Direction and Summary of Conditions in Listing Agreements. Company D did not make specific representations regarding the information at issue in this record. As I have already summarized Company D's general arguments in my discussion of Record 1 above, I will not summarize them again here.

[122] Company F submits that the notation in the CED Direction column is exempt from disclosure under section 17(1) of the *Act*. Company F submits that disclosure of the information in this column would readily allow accurate inferences to be drawn regarding confidential information it supplied to the ministry. Company F states that the CED undertakes its evaluations and makes its recommendations on the clinical and economic value of a drug product based largely on information that is provided to the CED directly by the manufacturers of the drug products. Further, Company F submits that the manufacturers provided this information to the CED prior to and separate and apart from the information that is mutually generated by the parties during the negotiation of the listing agreement itself. Company F submits that the information in the CED Direction column would allow accurate inferences to be drawn about the price that was included in the submissions made by the manufacturer to the CED.

[123] Upon review of Record 3, I find that the information that remains at issue was not *supplied in confidence*. In particular, the information relating to the previous status of these agreements and the summary of conditions in the listing agreements represents negotiated terms. Furthermore, I find that Company A, Company B and Company D did not provide me with specific details about how the information that relates to them would, if disclosed, be used to reasonably infer proprietary business information or the pricing arrangements between themselves and the ministry. Finally, with regard to the information relating to Company F, I find that I have not been provided with sufficient information demonstrating how the information that relates to it would, if disclosed, allow inferences to be drawn about the specific price that was included in the submissions it made to the CED or ministry. Therefore, I find that all of this information does not meet part 2 of the section 17(1) test and uphold the ministry's

decision to disclose this information to the requester.

Part 3: Harms

[124] The only information that remains at issue under section 17(1) is the information relating to Company E that can be found on page 8 of Record 2.

[125] To meet this part of the test, Company E must provide sufficient evidence to 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 information at issue and the seriousness of the consequences.[34]

[126] The need for public accountability in the expenditure of public funds is an important reason behind the need for sufficient evidence to support the harms outlined in section 17(1).[35] 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 the harms in the *Act*.[36]

[127] Company E refers to previous IPC orders such as Order PO-2863, PO-2528 and PO-1813 that established that disclosure of conditions relating to commercial agreements will give rise to harms which section 17(1) is intended to protect against. While Company E acknowledges that the IPC provided heightened protection for pricing-related information in agreements, "the same rationale for protecting such information pursuant to section 17 extends to the protection of other material terms and conditions of commercial agreements, including a unique model pursuant to which a particular product is made available for listing."

[128] Company E submits the disclosure of the information that remains at issue on page 8 of Record 2 would provide its competitors with information regarding strategy for listings for its product and how its business for that product is structured and operates. Further, Company E submits that disclosure of this information would give competitors an opportunity to see and undercut its confidential model.

[129] In addition, Company E submits that disclosure of this information will further prejudice and interfere with its ability to negotiate such other listing agreements on reasonable terms in a normal commercial manner and result in agreements no longer being entered into.

[130] Based on my review of the information relating to Company E on page 8 of Record 2, I am not satisfied that it qualifies for exempt under section 17(1) of the *Act*. While I appreciate Company E's concern with the disclosure of its "unique listing model", the information at issue is not that model. The information relating to Company

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[34] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.
[35] Order PO-2435.
[36] Order PO-2435.

E is not detailed and does not reveal the underlying negotiation strategy or terms of its arrangements with the ministry. Further, I do not accept Company E's submission that the section 17(1) protection should apply to this information with the same rationale for protecting pricing-related information in agreements. The information that remains at issue is not analogous to the pricing-related information that the IPC previously found to be exempt from disclosure. Furthermore, I find that Company E did not provide me with sufficient evidence to demonstrate a reasonable expectation that the harms enumerated in section 17(1) would result from the disclosure of this information, either on its own or in combination with information that is publicly available.

[131] In conclusion, I find that section 17(1) does not apply to the remaining records at issue in this appeal.

ORDER:

I uphold the ministry's decision and dismiss the appeals. I order the ministry to disclose the records, with the exception of the information I found to be exempt under section 13(1) and 18(1), by **March 22, 2017** but not before **March 15, 2017**.

Original signed by: February 14, 2017
Justine Wai
Adjudicator