Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3970

Appeal PA10-345

Ministry of Health and Long-Term Care

June 27, 2019

Summary: The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a specific drug. The ministry identified responsive records and, after notifying the appellant under section 28(1) of the *Act*, issued a decision granting partial access to the records. The appellant, a drug manufacturer, appealed the ministry's decision to disclose parts of correspondence, emails and agreements between itself and the Ontario government. The appeal was put on hold, pending the disposition in a related proceeding. In this order, the adjudicator upholds the ministry's decision and dismisses the appellant's claim that the information at issue is exempt under the mandatory personal privacy and third party information exemptions in sections 21(1) and 17(1). Further, the adjudicator does not allow the appellant to claim the discretionary exemptions in sections 18(1)(c) and (d) (economic or other interests).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended, ss. 2(1) (definition of "personal information"), 2(3), 17(1), 18(1)(c), (d), and 21(1).

Orders and Investigation Reports Considered: Orders PO-3032, PO-2864, PO-2865, PO-3174, PO-3176.

Cases Considered: *Merck Frosst Canada Ltd.* v. *Canada (Health)*, 2012 SCC 3

OVERVIEW:

[1] A lawyer representing an unidentified client submitted a request to the Ministry of Health[1] (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

> Correspondence between [a named drug manufacturer] and the [ministry] and/or the Ontario Public Drugs Program and/or the Minister, Deputy Minister, Assistant Deputy Minister and Executive Officer or others regarding [a named drug].

The ministry located and identified records which it considered responsive to the request. The ministry provided notice to the drug manufacturer [the appellant in this appeal] under section 28(1) of the *Act*. The ministry advised the appellant that it proposed to sever certain information from these records under the mandatory exemption in section 17(1) (third party information) and/or the discretionary exemption in sections 18(1)(c) and (d) (economic and other interests of Ontario) of the *Act*, and because some information is not responsive to the request. In addition, the ministry indicated it would sever the cell phone number of an individual under the mandatory personal privacy exemption in section 21(1). The ministry invited the appellant to provide submissions as to whether any of the other information in the records met the requirements of the mandatory exemption in section 17(1).

[2] The appellant provided submissions in response, and indicated that additional severances should be made in addition to the ministry's severances under sections 17(1), 18(1)(c) and (d) and 21(1). The appellant also identified additional information as not responsive to the request.

[3] The ministry then issued separate decisions to the appellant and the requester indicating it would be granting partial access to the requested records. The ministry decided it agreed with some of the appellant's proposed severances and therefore additional severances were added pursuant to section 17(1) of the *Act* as well as on the basis that some information was not responsive.

[4] The requester did not appeal the ministry's decision to withhold certain parts of the records. As a result, the information in the withheld portions of the records, which includes specific pricing information and a formula for calculating a particular pricing concept, are not at issue in this appeal and will not be disclosed.

[5] The appellant appealed the ministry's decision to disclose some parts of the correspondence, emails and agreements to the requester under the *Act*.

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[1] Formerly known as the Ministry of Health and Long-Term Care.

[6] During the inquiry into this appeal, the adjudicator sought representations from the ministry, the appellant and the requester. He received representations from the appellant only. The file was then assigned to me to complete the inquiry and dispose of the issues on appeal.

[7] In this order, I uphold the ministry's decision to disclose the information at issue, with the exception of information that consists of duplicate information that the ministry withheld from disclosure. I order the ministry to withhold the duplicate information.

RECORDS:

[8] The records at issue consist of correspondence, emails and agreements between the appellant and the Ontario government as set out in the table below. The ministry provided this office with a copy of the records at issue, highlighting in yellow the information withheld from the requester. The appellant objects to the disclosure of some of the information that the ministry decided to disclose.

[9] The appellant provided a copy of the same records in which it replicated the ministry's severances with yellow highlighting and marking in green and red those additional portions of the records which it submits should not be disclosed to the requester.

[10] The appellant has also marked all of the yellow highlighted information with green to indicate that it was opposing disclosure of the same information identified by the ministry. As the requester did not appeal the ministry's decision to withhold this information, I will not be considering access to this information under the *Act*.

[11] Finally, the appellant identified a number of instances in the records where, in its submission, the ministry failed to sever exactly the same information that it had decided to sever, elsewhere in the records. I have reviewed these additional severances identified by the appellant and find them to be duplicated information.

Record Number	**Description**	**Exemption claimed**[2]	**Finding**
1	Letter dated June 7/07	17, 18, NR	Disclose as set out in ministry's decision
2	Email dated June 13/07 with two attached letters (June	17, 18, NR	Disclose as set out in the

[2] As noted above, the information that the ministry withheld on the basis that it is exempt from disclosure is not at issue.

	13/07 and June 7/07)		ministry's decision; withhold duplicate information
3	Email dated June 15/07	17, 18	Disclose as set out in the ministry's decision
4	Email dated June 15/07 with attached undated latter	17, 18	Disclose as set out in the ministry's decision; withhold duplicate information
5	Email dated June 20/07 with attached letter dated June 7	Email – 17, 18 Letter – 17, 18, NR	Disclose as set out in the ministry's decision
6	Email dated June 20/07	17, 18, 21	Disclose as set out in the ministry's decision
7	Email and attachment	Email – 17, 18, 21, NR Attachment – 17, 18, NR	Disclose as set out in the ministry's decision
8	Email dated June 28/07	17,18, 21	Disclose as set out in the ministry's decision
9	Letter dated June 28/07	17, 18	Disclose as set out in the ministry's decision
10	Email dated June 29/07	17, 18, 21	Disclose as set out in the ministry's decision
11	Letter dated July 3/07 with attached amending agreement No. 1	Agreement – 17, 18, NR	Disclose as set out in the ministry's decision

12	Email dated July 3/07 with attached amending agreement No. 1	Email – 17, 18, 21 Agreement – 17, 18, NR	Disclose at set out in the ministry's decision
13	Email dated July 3/07 with attached amending agreement No. 1	Agreement – 17, 18, NR	Disclose as set out in the ministry's decision
15	First email dated July 3/07 (4:25pm); second email dated July 3/07 (3:11pm) with attached amending agreement No. 1	First email – 17, 18, 21, NR Second email – 17, 18, 21, NR Agreement -17, 18, NR	Disclose as set out in the ministry's decision
16	Email dated July 4/07	17, 18, NR	Disclose as set out in the ministry's decision
17	Email dated July 5/07	17, 18, NR	Disclose as set out in the ministry's decision; withhold duplicate information.
18	Email dated July 5/07	17, 18, NR	Disclose as set out in the ministry's decision; withhold duplicate information.
19	Email dated July 5/07 with attached amending agreement	Agreement – 17, 18, NR	Disclose as set out in the ministry's decision.
21	Email dated July 5/07 with attached amending agreement	Agreement – 17, 18, NR	Disclose as set out in the ministry's decision

22	Mail dated Sept. 6/07	17, 18, NR	Disclose as set out in the ministry's decision
23	Message dated April 23/10	17, 18	Disclose as set out in the ministry's decision
24	Email dated Sept. 6/07	17, 18	Disclose as set out in the ministry's decision
25	Email dated Sept. 6/07	17, 18, NR	Disclose as set out in the ministry's decision
26	Email dated May 7/08	17, 18, 21	Disclose as set out in the ministry's decision
27	Email dated May 7/08	17, 18, 21	Disclose as set out in the ministry's decision
28	Email dated Oct. 6/09	17, 18, 21	Disclose as set out in the ministry's decision
29	Email dated Oct. 5/09 and attached letter	Letter – 17, 18	Disclose as set out in the ministry's decision
30	Email dated Oct. 29/09 and attached letter	Email – 21 Letter – 17, 18, NR	Disclose as set out in the ministry's decision
31	Email dated Nov. 10/09	17, 18, 21	Disclose as set out in the ministry's decision
32	Email dated Nov. 11/09	17, 18, 21	Disclose as set out in the ministry's decision
33	Email dated Dec. 7/09	21	Disclose as set out in the

			ministry's decision
34	Email dated Dec. 17/09	17, 18, NR	Disclose as set out in the ministry's decision
35	Email dated Dec. 17/09	17, 18, 21, NR	Disclose as set out in the ministry's decision
36	Email dated Dec. 22/09	17, 18, 21, NR	Disclose as set out in the ministry's decision; withhold duplicate information.
37	Letter	17	Disclose as set out in the ministry's decision

ISSUES:

A. Is the information the appellant identified as not responsive within the scope of the request?

B. Does the mandatory exemption at section 17(1) apply to the information the ministry decided to disclose?

C. Can the appellant raise the discretionary exemptions at section 18(1)(c) and/or

D. (d)? Do these exemptions apply to the information the ministry decided to disclose?

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

DISCUSSION:

Issue A: Is the information that the appellant identified as not responsive within the scope of the request?

[12] The appellant submits that additional information should be withheld as not responsive to the access request. To be considered responsive to the request, records

must reasonably relate to the request.[3] Decisions of this office confirm that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[4]

[13] The appellant submits that the request was for:

> …correspondence between [itself] and the Ontario Ministry of Health and Long-Term Care and/or the Ontario Public Drugs Program and/or the Minister, Deputy Minister, Assistant Deputy Minister and Executive Officer or others regarding [named drug].

[14] The appellant notes that the ministry identified thirty-eight pieces of correspondence between these parties as responsive including thirty-eight emails and numerous attachments. The appellant submits that the attachments are not properly part of the request.

[15] The appellant submits that the ministry withheld information relating to other drugs as not responsive, and it in turn identified information relating to other drugs in Records 10, 35 and 36, which it argues, is also not responsive.

[16] Furthermore, the appellant submits that the requester specifically sought *correspondence* between the appellant and the ministry and this request was clear and unambiguous. The appellant submits the requester did not seek extraneous information including price listing agreements (PLA's), clinical trial information and drug specifications. The appellant states:

> Although the subject matter of the request may be connected to the requester's broader area of interest, that is [named drug], the non-responsive records do not reasonably relate to the request as they are not correspondence…Had the requester been seeking information other than correspondence, the requester could have easily sought it by adding the words *agreement*, *other documents* or *all related information* to the requester.

[17] The appellant submits that even taking a liberal interpretation of the request, the following portions of the records are not responsive to the request:

- Record 4 – clinical trial information
- Record 7 – backgrounder

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[3] Orders P-880 and PO-2661.
[4] Orders P-134 and P-880.

- Records 11, 12, 13, 15, 19 and 21 – PLAs and their appendices (draft and final)

[18] The request is set out above in paragraph 13. Based on my review of the appellant's representations and the records at issue, I accept that portions of the records that relate to other drug products do not reasonably relate to the request and are not responsive to it. Specifically, this is the information identified in Records 10, 35 and 36. I will order the ministry to withhold this information.

[19] However, I do not accept the appellant's submission that records which are not *correspondence* and are either agreements or other types of records which pertain to the drug specified in the request, are also not responsive. Instead of a liberal interpretation, I find the appellant argues the ministry should have taken a strict reading of the request and limited the responsive records to only those that could be characterized as correspondence. In my view, it is not reasonable to expect that a requester will know the types of records in an institution's record holdings and will be able to narrow the request to a particular type of record. Accordingly, a liberal interpretation of the request would permit the identification of records which relate to the subject matter of the request while not requiring adherence to the type of record specified. Thus, I find that Records 4, 7, 11, 12, 13, 15, 19 and 21 are responsive to the request and I will consider the possible application of the exemptions claimed for this information.

[20] For the remaining information identified by the ministry as not responsive, I make no finding on this information as the requester did not appeal the ministry's decision.

Issue B: Does the mandatory exemption at section 17(1) apply to the information the ministry decided to disclose?

[21] The appellant submits that the mandatory exemption in section 17(1) applies to portions of the records at issue and that only certain portions of some records should be disclosed.

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

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

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[23] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[24] For section 17(1) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
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) and/or (c) of section 17(1) will occur.

Part 1: type of information

[25] The appellant submits the information contained in the records relates directly to the buying and selling of pharmaceutical products, which constitutes information subject to protection under the *Act*. I find that the records contain both commercial and financial information in the manner defined in past orders of this office.

Part 2: supplied in confidence

[26] To satisfy part 2 of the test, the appellant must show that the information was supplied to the ministry in confidence, either implicitly or explicitly. I find that some of the records were supplied by the appellant, in confidence, to the ministry.

[27] The requirement that the information was supplied to the institution reflects the

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[5] *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.).
[6] Orders PO-1805, PO-2018, PO-2184, MO-1706.

purpose in section 17(1) of protecting the informational assets of third parties.[7] 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.[8]

[28] 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 a 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.[9]

[29] The appellant argues that this office's treatment of provisions of a contract as mutually generated is incorrect given the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd.* v. *Canada (Health)*,[10] The appellant states:

> In *Merck*, the Supreme Court of Canada noted that whether information was supplied by a third party will often primarily be a question of fact, and the mere fact that a document in question originates from a government official, such as in an internal government email, is not sufficient to bar a claim for exemption.
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> The Supreme Court was clear that: 1) the content, rather than the form, of the information must be considered, and the mere fact that information appears in a document created by the government does not resolve the issue; and 2) the exemption must extend to information that reveals confidential information supplied by the third party, as well as to that information itself.

[30] It is the appellant's position that according to *Merck*, the records are supplied under the *Act*.

[31] Finally, the appellant submits that it directly supplied the information in the records to the ministry during the process of applying for the specified drug to be listed on the Ontario drug formulary and in furtherance of the contractual relationship between itself and the ministry.

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[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited* v. *Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[10] 2012 SCC 3.

[32] The appellant made the same arguments on the application of *Merck* in the appeal that was the subject of Order PO-3174. In that order, Adjudicator Colin Bhattacharjee considered the application of section 17(1) to severed agreements between the ministry and a drug manufacturer. In rejecting the appellant's argument, the adjudicator stated the following:

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

[33] Most recently, the IPC's meaning of supplied was once again tested in *Toronto-Dominion Bank* v. *Ryerson University*[11]. In upholding the IPC's decision, the Court again found the adjudicator's approach (and this office's longstanding approach) reasonable and states:

> …the information at issue in *Merck Frosst* was supplied by an applicant seeking approval of drugs in a regulatory process. The case was not dealing with information disclosed in the course of negotiations for a contract between a government institution and a third party.

[34] In the present appeal, the additional information that the appellant would like withheld in records 11, 12, 15, 19, 21 consist of parts of the agreement between itself and the ministry. This is information that was negotiated between the ministry and the appellant and not supplied by the appellant to the ministry for the purposes of section

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[11] 2017 ONSC 1507, leave to appeal dismissed June 14, 2017, Court of Appeal file no. M47677

17(1). This information can only have been supplied if one of the two exceptions apply to it.

[35] 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 appellant to the ministry. 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.[12]

[36] The appellant submits that the inferred disclosure exception applies to the information in the agreements. In particular, the appellant argues that disclosure of information relating to pricing and payment arrangements agreed upon by it and the ministry would enable the requester to draw accurate inferences about its bargaining position.

[37] I do not accept the appellant's submission. The information described by the appellant as "pricing and payment arrangements" in the agreement is not at issue in the appeal. As indicated above, the ministry withheld and severed both the specific pricing information for the particular drug in dollar amounts and a formula for calculating a particular pricing concept under sections 17(1) and 18(1)(c) and (d) of the *Act*. As the requester did not appeal the ministry's decision, that information is not at issue here.

[38] Moreover, the information at issue in the appeal includes effective dates and references to a particular pricing concept. Having reviewed the records, I find that disclosure of this information would not permit a competitor to draw accurate inferences about any underlying non-negotiated confidential information, such as the appellant's bargaining position or other proprietary business information.

[39] The appellant did not submit that the immutability exception applied to the information at issue and I did not consider this exception to the general rule for the information at issue in the agreements.

[40] Based on my review of the records and representations, I find the information at issue in the agreements to be the product of a mutual negotiation process between the appellant and the ministry. I do not find that the appellant supplied the information in the agreements to the government. While I have reviewed the appellant's submission indicating that it supplied the information *in confidence*, it is not necessary for me to consider that component of part 2 of the three-part test. As I have found that the appellant has failed to satisfy part 2 of the test for records 11, 12, 15, 19 and 21, the

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[12] Orders MO-1706, PO-2384, PO-2435, PO-2497, upheld in *Canadian Medical Protective Association* v. *John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

information at issue in these records does not qualify for exemption under section 17(1).

[41] For the remaining information, I find that all of the records, except for records 9, 23, 24 (in part), 26, 27 and 34 (in part) contain information that was supplied by the appellant to the ministry for the purposes of section 17(1). For records 9, 23, 24 (in part), 26, 27 and 34 (in part), I find that the appellant has not established that the information it seeks to withhold under section 17(1) was supplied by it to the ministry. Accordingly, as all three parts of the test must be met, I find that records 9, 23, 24 (in part), 26, 27 and 34 (in part) are not exempt under section 17(1).

[42] For the remaining records, I am prepared to find that the information was supplied for the purposes of section 17(1) and I must now consider whether this information meets the *in confidence* portion of part 2 of the test.

[43] In order to satisfy the in confidence component of part two, the party resisting disclosure must establish that they had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[13]

[44] The appellant submits that during its negotiations with the ministry for the listing of the named drug and its subsequent correspondence relating to its contractual relationship with the ministry, it engaged in confidential communications with the ministry. The appellant submits that it does not disclose its confidential information or provide it to anyone outside the company unless there are appropriate written or verbal confidentiality agreements in place.

[45] The appellant submits that it had a reasonable expectation that any communication supplied to the ministry relating to its contractual relationship would be maintained in confidence by the ministry. The appellant further submits that it had a reasonable expectation that the draft, final and amended versions of the product listing agreement (PLA) relating to the named drug would also be maintained in confidence. Furthermore, the appellant argues that the Regulation[14] prescribes the information that the ministry may disclose regarding a PLA it has with a drug manufacturer. The appellant submits that the ministry, as per the regulation, is not permitted to disclose the specific terms of a PLA.

[46] The Assistant Commissioner considered similar arguments in Order PO-3176 and found that the provisions in the regulation did not override the requirements of the *Act*. Assistant Commissioner Liang states:

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[13] Order PO-2020.
[14] O. Reg 201/96.

> 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 *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' contract, harm-based.

[47] I adopt the Assistant Commissioner's approach for the purposes of this appeal. The appellant did not specifically address the records when making its representations and thus did not provide representations on whether the records were supplied in confidence. Accordingly, I find that the appellant had a reasonable expectation of confidentiality when it supplied the information to the ministry for all of the records remaining at issue except for records 6, 8, 24(in part) and 28. For these records, there is nothing on their face which establishes that the appellant had an implicit or explicit expectation of confidentiality. As these records do not meet part 2 of the test, they are not exempt under section 17(1).

[48] I will now consider part 3 of the test for the information that met parts 1 and 2 of the test, comprised of the information in records 2, 3, 7 – 9, 11 – 13, 15, 19, 21, 23, 29, 31, 32, 34(in part) and 35.

Part 3: Harms

[49] The appellant must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[15] The appellant should provide detailed evidence to demonstrate harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[16] The failure of the appellant to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances.

[50] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1).[17]

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[15] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[16] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.
[17] Order PO-2435.

Representations

[51] The appellant submits that disclosure of the information at issue could reasonably be expected to result in the harms set out in sections 17(1)(a), (b) and (c). In particular, the appellant submits that disclosure of the commercial and financial information contained in the records including references to the PLA, effective date, pricing, method of calculation and specific type of listing or pricing arrangement entered into or discussed between the appellant and the ministry could reasonably be expected to result in the following:

- significant prejudice to the appellant's competitive position
- significant interference with negotiations between the appellant and other parties, including other provincial governments, hospitals and other customers
- result in undue gain to the appellant's competitors

[52] The appellant submits that disclosure of the effective date, pricing and method of calculation to its competitors would significantly prejudice the appellant's competitive position and impact negotiations with the appellant's customers. Consequently, the appellant submits that disclosure of the information would result in similar information no longer being provided to the ministry. The appellant notes that it is in the public interest that similar information continues to be supplied by the appellant to the ministry.

[53] The appellant states:

> If the PLA's or related information are disclosed, [the appellant] would be much less inclined to enter into a PLA with a provincial government, since such information would be at risk of disclosure simply because [the appellant] negotiated and entered into a PLA.
>
> The disclosure of the [appellant's] confidential information could then be used by a competing drug manufacturer, brand or generic, to [the appellant's] detriment.
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> It is clearly in the public interest for the government of Ontario to enter into pricing agreements for discounts on drug products, since those pricing agreements reduce the cost the Ontario Public Drug Program that pays for drug products for eligible individuals, such as senior citizens.

[54] The appellant repeats its argument that during its negotiation with the ministry for a PLA, it supplied information to the ministry that would disclose its confidential information. It notes the original agreement contains a confidentiality clause expressly confirming the ministry's covenant to maintain its information confidential. The appellant argues that, if this office orders disclosure of its confidential information this

would be "contrary to the express confidentiality provisions in [its] agreements with the government."

[55] Finally, the appellant provided an affidavit in support of its position that the company would not enter into future PLAs with the ministry if its confidential information is disclosed pursuant to the *Act*. The affiant states:

> To date, [the appellant] is not aware of its PLAs, the terms of its PLAs, or the discussions leading up to the PLAs being publicly disclosed by any provincial government. Similarly, [the appellant] is not aware of any provincial government, to date, disclosing information similar to the confidential [appellant] information.
>
> As a result, [the appellant] is taking a "wait and see" approach in respect of PLAs. If a provincial government were to disclose the [appellant's] confidential information, or information similar to it, then [the appellant] would be much less inclined to enter into a PLA with that provincial government, and potentially even other provincial governments. This is because the [appellant's] confidential information, or information similar to it, would be at risk of being disclosed merely due to [the appellant] negotiating and entering into such a PLA.

[56] The appellant notes that it is not possible to withhold its confidential information during PLA negotiations in maintenance of the pharmaceutical supply agreements.

[57] Regarding harm to its competitive position, the appellant submits that by providing details of the PLA, its existence and terms, or the appellant's pricing and listing proposals would provide competitors insight into the appellant's bargaining position. This information would be used by competitors to the disadvantage of the appellant. In particular, competitors could undercut the appellant in future situations more effectively and "…actually prevent [the appellant] from obtaining a listing on a provincial formulary."

[58] The appellant submits that disclosure of its confidential information would also be beneficial to its customers including provincial, federal and territorial formularies, hospitals and government formularies outside Canada as such entities could use this information to their benefit when negotiating with the appellant. These entities could compel the appellant, "or its related entities" to offer better terms than what might be otherwise achieved.

[59] Finally, the appellant submits that the ministry has withheld information relating to pricing and effective dates in an agreement in Records 36 and 37 and asks that I order the ministry to withhold similar information to be consistent with the ministry's decision.

Finding

[60] As stated above, the failure of the appellant to provide detailed evidence of harms set out in section 17(1) will not necessarily defeat its claim so long as I can infer harm from the surrounding circumstances.

[61] The appellant has not provided record-specific arguments regarding the reasonable expectation of harm from the disclosure of the information it claims is exempt under section 17(1). Instead, I have reviewed the records and considered the appellant's general arguments on the harm to its competitive position and harm to the public interest as set out in section 17(1)(b) if the additional information is disclosed.

[62] Based on my review of the information the appellant would like withheld and considering the appellant's arguments, I find that the harms are not established. As stated above, where the appellant has identified information withheld by the ministry that was missed in the records, I will order this information to be also withheld under section 17(1). However, for the additional information identified by the appellant, for example, general information relating to pricing or the existence of an agreement, I do not accept that the harms in disclosure set out in section 17(1) could reasonably be expected to result. To be clear, at issue in this appeal is the additional information that the appellant would like withheld which I characterize as snippets of information from emails, correspondence and the agreement. I find that the appellant has not established that disclosure of these snippets of information could reasonably be expected to result in the harms set out in section 17(1).

[63] Regarding records 2, 3, 7 – 9, 11 – 13, 15, 19, 21, 23, 29, 31, 32, 34 and 35, as the appellant has claimed the application of section 18(1) to this information, I will proceed to consider whether it should be permitted to argue that these records should be exempt under that discretionary exemption.

Issue C: Can the appellant raise the discretionary exemptions at sections 18(1)(c) and/or (d)? Do these exemptions apply to the information the ministry decided to disclose?

[64] As noted above, the ministry's decision was to withhold information in the records under sections 17(1) and 18(1)(c) and (d). This information is not at issue because the requester did not appeal the ministry's decision with respect to that information.

[65] The appellant claims, in this appeal, that additional information should have been withheld under the sections 18(1)(c) and (d) exemptions. The appellant submits that it should be able to claim these sections for the information or the ministry should exercise its discretion and claim these sections for the additional information.

[66] The purpose of section 18 of the Act 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[18], explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.

[67] Sections 18(1)(c) and (d) state:

> A head may refuse to disclose a record that contains,
>
> > (c) Information where the disclosure could reasonable 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.

[68] 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.[19] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[20]

[69] The appellant submits that drug listing and pricing agreements entered into by the ministry and drug manufacturers benefits the Ontario government by supplying it with less expensive drug products. Furthermore, the ministry competes with its counterparts in other provinces for the best prices that can be obtained. Accordingly, the appellant states:

> Thus, the correspondence outlining the negotiations, terms, strategy and pricing, including references to the PLAs themselves and its terms,

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[18] Vol. 2 (Toronto: Queen's Printer, 1980) (The Williams Commission Report).
[19] Orders P-1190 and MO-2233.
[20] Order P-1398 upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order

> impacts both the economic interests and competitive position of the ministry, and the economic interests of the Government of Ontario.

[70] The appellant argues that the ministry should extend its claim of sections 18(1)(c) and (d) to the portions of the emails, letters and attachments as they disclose confidential information exchanged between the ministry and the appellant. The disclosure of this information would harm the ministry's bargaining position when attempting to secure similar arrangements with pharmaceutical manufacturers in the future.

[71] The appellant also argues that the application of sections 18(1)(c) and (d) should apply to the additional information in Records 11 – 13, 15, 19 and 21 that discloses the existence of the PLA and confidential effective dates. The appellant submits that disclosing this information will negatively affect the ministry's competitive position (as well as the government's economic interests) in respect of the particular drug.

[72] Finally, the appellant submits that even if the ministry does not exercise its discretion to claim sections 18(1)(c) and (d) to the information at issue, I should permit it to claim the discretionary exemption itself. The appellant states:

> …[the appellant] itself may rely upon subsections 18(1)(c) and (d) of the *Act* to all of the information that [the appellant] seeks to exempt from disclosure under subsection 17(1) of the *Act*. Although the IPC has generally held that the section 18 exemption may only be relied upon by the government, in limited circumstances it is appropriate for a third party to rely on a section 18 exemption.

[73] The appellant goes on to cite Order PO-3032 as standing for the proposition that where an institution's actions would clearly be inconsistent with the application of a mandatory exemption provided by the *Act*, a third party should be permitted to rely on a discretionary exemption.[21] The appellant states:

> Should the IPC disagree that some of this information was *supplied* by [the appellant] *in confidence* to the government, because the information is contained in an agreement *mutually generated* by [the appellant] and the government, it is submitted that [the appellant] may rely upon the exemption provided in subsections 18(1)(c) and (d) to exempt the disclosure of this information. As previously stated in these submissions, disclosure of such information is ultimately inconsistent with the spirit of the mandatory section 17 exemption against disclosure of confidential information revealing [the appellant's] bargaining position in respect of

[21] Order PO-3032 at para. 26.

> drug supply agreements, regardless of the form in which that information is ultimately disclosed.

Finding

[74] This office has dealt with the issue of whether a third party can claim a discretionary exemption in order to exempt information from disclosure. This office's approach is set out in Order P-1137 as:

> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected party could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[75] Based on my review of the appellant's representations and the information it seeks to withhold, I find that the appellant has not established that this is one of those unusual cases where it should be permitted to claim the section 18 exemption.

[76] As noted by the appellant, the ministry's decision to withhold information in the records already references the application of sections 18(1)(c) and (d). The fact that the ministry had turned its mind to the protection of its competitive interests and the government of Ontario's economic interests when it reviewed the records at issue indicates to me that it should not be required to consider whether to apply sections 18(1)(c) and (d) to the additional information identified by the appellant.

[77] Furthermore, I also do not accept the appellant's argument that the ministry's decision not to extend its claim of sections 18(1)(c) and (d) to the additional information at issue is clearly inconsistent with the mandatory third party information exemption in section 17(1). As set out above, I have found that the information at issue is not exempt under section 17(1). Instead, I find as former Senior Adjudicator John Higgins did that, the appellant's arguments on the application of sections 18(1)(c) and (d) are largely to protect its own interests and not that of the ministry or the province.[22]

[78] Accordingly, I find that the appellant cannot claim sections 18(1)(c) and (d) for the information that the ministry has decided to disclose.

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[22] Order PO-3032.

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

[79] The appellant submits that the names, positions and, signatures of its employees that appear on the signature pages of the PLA at Records 13 and 21 constitute personal information and are subject to the mandatory personal privacy exemption at section 21(1). As section 21(1) can only apply to personal information, I must determine whether the names, titles and signatures of the appellant's employees constitutes their personal information within the meaning of the *Act*.

[80] Section 2(1) defines personal information as recorded information about an identifiable individual and contains a non exhaustive list of examples of personal information in paragraphs (a) to (h). Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[23]

[81] However, section 2(3) of the *Act* excludes specific information from the definition of personal information. It states:

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

As such, I find that the names and titles of the appellant's representatives clearly fit within section 2(3) because this information identifies these individuals in a business and professional capacity. Moreover, since I find this information is the business and professional information relating to these individuals, this information cannot qualify for exemption under the personal privacy exemption in section 21(1).

[82] Similarly, I find that the signatures of the appellant's representatives is also not personal information relating to an identifiable individual. As Adjudicator Bhattacharjee found in Order PO-3174 when dealing with similar information:

> The IPC has found that whether a signature is personal information depends on the context in which it appears. In cases where the signature is contained on records created in a business, professional or official context, it is generally not "about the individual" in a personal sense, and would not normally fall within the scope of the definition.

I agree with this rationale and apply it in the present appeal. I find that the signatures, found on the letters, invoices and agreements at issue, are not the personal information of those individuals in the records at issue. Instead, the signatures were placed on these records in a business and professional context and thus disclosure would not

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[23] Order 11.

reveal something personal about these individuals. As the signatures are not personal information, they cannot be exempt under section 21(1).

[83] The appellant submits that the ministry should notify the individuals whose signatures will be disclosed. This argument was also made in Order PO-3174 and Adjudicator Bhattacharjee determined that the ministry was not required to give notice under section 28(1)(b) of the *Act* because the signatures are not personal information and section 28(1)(b) only requires notification if the head of an institution is granting access to a record that contains personal information and disclosure might constitute an unjustified invasion of privacy under section 21(1)(f). Accordingly, I find that notice does not have to be given in the circumstances.

[84] The appellant has also identified the cell phone number of one of its employees that appears was inadvertently left in the record and not severed. For the sake of consistency as the ministry has severed this cell phone number elsewhere, I will order this information severed from the records and it should not be disclosed to the requester.

ORDER:

1. I uphold the ministry's decision, in part. I order the ministry to disclose the information by **August 2, 2019** but not before **July 26, 2019**, with the exception of the information referred to in order provisions 2-4.

2. For records 10, 35 and 36, I order the ministry to withhold the non-responsive information I have identified on the highlighted copy of these records.

3. For records 2, 4, 17, 18, and 36, I order the ministry to withhold the information on these records that it has already withheld in other records. I have provided the ministry with a highlighted copy of these records identifying this information.

4. For Record 38, I order the ministry to withhold the cell phone number which it withheld elsewhere in the records.

5. In order to verify compliance with this order, I reserve this right to require the ministry to provide me with a copy of the records sent to the requester pursuant to order provision 1.

Original signed by | June 27, 2019

Stephanie Haly
Adjudicator