Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4278

Appeals PA18-00669; PA18-00670; PA18-00675; PA18-00680; PA18-00681; PA18-00722

Ministry of Health

July 14, 2022

Summary: The Ministry of Health (the ministry) received six related requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information concerning an announced agreement between the Pan-Canadian Pharmaceutical Alliance (pCPA) and the Canadian Generic Pharmaceutical Alliance (CGPA), the Generic Initiative. The information requested included briefing notes, meeting notes, records, reports and studies relating to the agreement, drug pricing discussions, the methodology used to determine generic drug pricing, and information/analysis of the financial or patient impact of the agreement. The appellant also requested a complete copy of the Generics Initiative final agreement. The ministry located responsive records for each of the six requests at issue in this order. Although it provided some information to the appellant, it denied access to the withheld information under the discretionary exemption at section 15(a) (relations with other governments), it also denied access to some of the same information under the discretionary exemptions at section 15(b), 13(1) (advice to government) and 18(1) (economic and other interest of Ontario). The ministry also took the position that some attachments were not responsive to the request in appeal PA18-00675. The appellant raised the issue of a compelling public interest in the disclosure of the withheld information. In this order, the adjudicator upholds the ministry's decision under section 15(a) relating to all of the information in each of the six appeals and also finds that the attachments in appeal PA18-00675 are not responsive to the request. Finally, the adjudicator finds that there is no compelling public interest in releasing the information that is exempt under section 15(a) and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 15(a), 23 and 24.

Cases Considered: *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674.

OVERVIEW:

[1] The Ministry of Health (the ministry) received six related requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) all concerning an agreement announcement between the Pan-Canadian Pharmaceutical Alliance (pCPA) and the Canadian Generic Pharmaceutical Alliance (CGPA). The requests are for information including:

- All briefing notes prepared for the Minister, Deputy Minister and Assistant Deputy Minister for a specified period in relation to the agreement[1]
- A copy of the final agreement, including any appendices, schedules, exhibits or attachments, including any arrangements related to private label generics or regulations with respect to the sale and distribution of pharmaceutical products, between the Pan-Canadian Pharmaceutical Alliance (pCPA) and the Canadian Generic Pharmaceutical Alliance (CGPA) in relation to the agreement[2]
- All meeting notes between a specified period related to the Assistant Deputy Ministers Drug Plan Committee in relation to the agreement[3]
- All meeting notes between a specified period from all Pan-Canadian Pharmaceutical Alliance (pCPA) meetings related to drug pricing discussions in relation to the agreement[4]
- All records, reports, and studies between a specified period regarding the methodology used to determine generic drug pricing for the agreement[5]
- All records between a specified period containing information/analyses of the financial or patient impact of the agreement[6]

[2] For appeal PA18-00669, relating to briefing notes for the minister, deputy and assistant ministers, the ministry located four records responsive to the request. It issued a decision granting partial access to three of the four briefing notes (records 1, 3 and 4), but denying access to one (record 2). The ministry relied on the discretionary exemptions in sections 15(a) and (b) (relations with other governments) and 18(1)(a), (c), (d) and (e) (economic and other interests) to withhold record 2 and most of the

[1] Request in appeal PA18-00669.
[2] Request in appeal PA18-00670.
[3] Request in appeal PA18-00675.
[4] Request in appeal PA18-00680.
[5] Request in appeal PA18-00681.
[6] Request in appeal PA18-00722.

information in records 1, 3 and 4. The ministry disclosed to the appellant the portion of each of records 1, 3 and 4 that contained background information.

[3] In appeal PA18-00670, relating to a complete copy of the agreement, the ministry issued a decision denying access to the pCPA-CGPA Generics Agreement (the agreement). The ministry relied on the discretionary exemptions in sections 15(a) and (b) and 18(1)(a), (b), (c), (d) and (e) to withhold the agreement in its entirety.

[4] For appeal PA18-00675, relating to meeting notes about the assistant deputy ministry's drug plan committee relating to the agreement, the ministry issued a decision granting partial access to four of the five responsive records it located. The ministry relied on the discretionary exemptions in sections 13(1) (advice to government), 15(a) and (b) and 18(1)(c), (d), (e) and (g) to deny access to the withheld records and information.

[5] In appeal PA18-00680, relating to all meeting notes from all pCPA meetings about drug pricing discussions relating to the agreement, the ministry issued a decision denying the appellant access to five responsive records. In its decision, the ministry claimed the discretionary exemptions in sections 13(1), 15(a) and (b) and 18(1)(c), (d), (e) and (g) apply to all five records, and it denied access on this basis.

[6] In appeal PA18-00681, relating to all records, reports and studies regarding the methodology used to determine generic drug pricing for the agreement, the ministry issued a decision denying access to two responsive records, a worksheet and a comparison graphic. The ministry relied on the discretionary exemptions in sections 15(a) and (b) and 18(1)(a), (c) and (d) to deny access to these two records in full.

[7] Finally, in appeal PA18-00722, relating to all records containing information/analyses of the financial or patient impact of the agreement, the ministry issued a decision granting partial access to one of the six responsive records it located. The ministry relied on the discretionary exemptions in sections 13(1), 15(a) and (b) and 18(1)(c), (d), (e) and (g) to deny access to the withheld records and information. It also denied access to one record on the basis that it was not responsive to the request.

[8] The appellant was not satisfied with the ministry's decisions and appealed all six to the Information and Privacy Commissioner of Ontario (IPC).

[9] The IPC attempted to mediate the appeals. During mediation, the appellant raised the possible application of the public interest override in section 23 of the *Act* in all six appeals.

[10] During mediation, the ministry withdrew its reliance on section 18(1)(b) in appeal PA18-00670.

[11] Also, during mediation in appeal PA18-00675, the ministry advised that it considered all but one of the attachments to the records not to be responsive to the

request and it withheld these attachments from the appellant on that basis. The ministry stated that it withheld the one responsive attachment, 5(h), pursuant to sections 13(1), 15(a) and (b) and 18(1)(c), (d), (e) and (g) of the *Act.* The appellant confirmed that he wished to pursue access to all the attachments withheld as not responsive to this request.

[12] In appeal PA18-00722, the appellant indicated that he was not interested in pursuing access to the record that the ministry identified as not responsive. As a result, that record is no longer at issue in this appeal.

[13] Since a mediated resolution of the appeal was not possible, the files moved to the adjudication stage of the appeal process where a written inquiry may be conducted under the *Act.*

[14] The assigned adjudicator decided to conduct an inquiry and sought representations from the ministry by issuing a Notice of Inquiry in each of the six appeals. At this point, I was assigned carriage of the appeal and I shared the non-confidential parts of the ministry's representations with the appellant pursuant to IPC's *Code of Procedure* inviting the appellant to provide representations on each of the six appeals. The appellant provided one set of representations addressing all six appeals. In reviewing the parties' representations and the records at issue in the appeals, I decided that it was appropriate to issue one order addressing all six appeals.

[15] In this order, I uphold the ministry's decision that the records in all six appeals are exempt from disclosure by section 15(a) of the *Act*. I also find that there is no compelling public interest to override the exemption and dismiss the appeal.

RECORDS:

Records relating to request in appeal PA18-006699

[16] Withheld under sections 15(a) and (b) and section 18(1)(a), (c), (d) and (e):

- Record 1, Evaluation of pCPA Initiative on generic drugs (3 pages)
- Record 2, withheld in full (4 pages), and
- Records 3 and 4, titles withheld (3 pages each).

Records relating to request in appeal PA18-00670

[17] Withheld under section 15(a) and (b) and section 18(1)(a), (c), (d) and (e):

- The sole record at issue is the agreement (11 pages).

Records relating to request in appeal PA18-00675

[18] Withheld under sections 13(1), 15(a) and (b) and section 18(1)(c), (d), (e) and (with all attachments other than 5(h) claimed as non-responsive to the request):

- Record 1, pCPA governing council meeting 3-4 October, 2017 (6 pages) withheld in part, attachments (a) to (k) withheld in full
- Record 2, pCPA executive meeting (2 pages) withheld in part
- Record 3, pCPA executive meeting 27 April 2017 (5 pages) withheld in full
- Record 4, pCPA executive meeting 14 September 2017 (4 pages) withheld in part, attachments (a) to (e) withheld in full
- Record 5, pCPA governing council Meeting 7-8 December 2017 (7 pages) withheld in part, attachments (a) to (n) withheld in full

Records relating to request in appeal PA18-00680

[19] Withheld under sections 13(1), 15(a) and (b) and section 18(1)(c), (d), (e) and (g):

- Record 1 is a set of meeting notes (1 page)
- Record 2 is an email (1 page)
- Record 3 is an email (2 pages)
- Record 4 is an email (3 pages)
- Record 5 is an email (4 pages).

Records relating to request PA18-00681

[20] Withheld under sections 15(a) and (b) and 18(1)(a), (c), and (d):

- an 11-page worksheet described as the December Fallback in the ministry's index of records
- a one-page comparison graphic

Records relating to request PA18-00722

[21] Withheld pursuant to sections 13(1)[7], 15(a) and (b) and section 18(1)(c), (d), (e) and (g):

[7] The ministry claims that section 13(1) applies only to records 3, 4 and 6.

- Record 1 is a data spreadsheet (8 pages) withheld in full
- Record 2 is a data worksheet (11 pages) withheld in full
- Record 3 is an email (2 pages) withheld in full
- Record 4 is an email (6 pages) withheld in part
- Record 6 is an email (8 pages) withheld in full

ISSUES:

A: Does the discretionary exemption at section 15(a) apply to the records?

B: Did the institution exercise its discretion under section 15(a)? If so, should this office uphold the exercise of discretion?

C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 15 exemption?

D: What is the scope of the request in appeal PA18-00675? Are the attachments to the records, excluding 5(h), responsive to the request?

DISCUSSION:

Background

[22] In its representations, the ministry provides some background to the Pan-Canadian Pharmaceutical Alliance (pCPA). It submits that the pCPA is a pan-jurisdictional initiative that is comprised of representatives from all of the publicly funded drugs plans of the Canadian provinces and territories, as well as federal public drug plans.

[23] The ministry submits that the pCPA conducts joint provincial, territorial and federal negotiations for brand name and generic drugs in Canada to achieve greater value for publicly funded drug programs through the combined negotiating power of the participating jurisdictions. It submits that the pCPA is not a distinct legal entity that is separate from its members and represents a collaborative effort of the provinces, territories, and federal government governed by a Memorandum of Understanding ("pCPA governing MOU").

[24] The ministry submits that the pCPA negotiation process does not bind individual jurisdictions. Negotiations are led by one or two provinces on a rotating basis with the lead jurisdiction representing the interests of the jurisdictions that decide to participate in the negotiation (i.e. those that have an interest in publicly funding the drug product

under negotiation). The ministry submits that a successful negotiation culminates in a letter of intent between the manufacturer and the jurisdictions participating in the negotiation with individual jurisdictions retaining authority to make final funding decisions and to decide whether to enter into a separate agreement with the manufacturer that binds the jurisdiction.

[25] The ministry notes that the pCPA office is located in Ontario and staffed by employees of the ministry which is the reason why records in the custody or control of the pCPA office are subject to the *Act*.

[26] The ministry submits that the pCPA has conducted hundreds of drug negotiations since it has been established. It submits that it undertook a unique negotiation with the Canadian Generic Pharmaceutical Alliance (CGPA) with respect to generic drugs, which concluded in a "Generics Initiative". It submits that the pCPA and CGPA entered into a Memorandum of Understanding that sets out the terms of the Generics Initiative ("Generics Initiative MOU").

[27] The ministry notes that generic drugs contain the same active medicinal ingredients as their brand drug counterparts, but are typically lower in cost. It submits that the generic drug industry, therefore, creates a vast opportunity for publicly funded drug plans to achieve lower drug costs for their patient populations. It submits that the CGPA, as noted on their website, are representatives of "a dynamic group of companies who specialize in the production of high quality, affordable generic prescription medicines and active pharmaceutical ingredients. [Their] members and the 11,000 Canadians who work in [their] industry play a vital role in the economy and support a sustainable health- care system by providing Canadians with safe, effective, affordable prescription medicines."

[28] The ministry submits that as a result of their negotiations regarding generic drugs, the pCPA and CGPA entered into the Generics Initiative MOU (Record 1 in appeal PA18- 00669), which was publicly announced. The ministry submits that the press release refers to the aspects of the Generics Initiative that the pCPA and CGPA had agreed to make public at the time, in accordance with the confidentiality provisions of the Generics Initiative MOU.

[29] The ministry submits that, for example, the press release describes, at a high level, the duration of the Generics Initiative (five years), the fact that tendering would not be pursued by the participating jurisdictions for the duration of the Generics Initiative, key goals of the Generics Initiative (i.e. pricing stability and predictability), and the estimated amounts that the Generics Initiative would save participating jurisdictions over the first year of the initiative and the potential amount that it could save participating jurisdictions over five years.

[30] The ministry submits that other details of the Generics Initiative described in the MOU have not been shared with the public to date.

Issue A: Does the discretionary exemption at section 15(a) apply to the records?

[31] Although the ministry claims other discretionary exemptions for some of the information at issue, it claims that section 15(a) applies to all of the withheld information in all of the six appeals.[8]

[32] Section 15 acknowledges that the Ontario government creates and receives records in the course of its relations with other governments. Its purpose is to protect these working relationships between governments,[9] and to allow the Ontario government to receive information in confidence, building the trust required to conduct affairs of mutual concern between governments.[10]

[33] Section 15(a) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

[34] The exemptions found in section 15 apply where disclosure of the record "could reasonably be expected to" lead to one of the harms specified in paragraphs (a) to (c).

[35] Parties resisting disclosure of a record cannot simply assert that the harms under section 15 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 15 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[11]

[36] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[12] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the

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[8] The ministry also claims that some information is not responsive to the request. This is discussed in a separate section in the order.
[9] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.
[10] Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.
[11] Orders MO-2363 and PO-2435.
[12] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

information.[13]

Representations

[37] The ministry makes similar general comments on the section 15 exemption in all appeals.

[38] It submits that the IPC held in Reconsideration Order R-970003 that in order for a record to qualify for exemption under section 15(a), the ministry must establish that:

a. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and

b. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[39] Referring to Order PO-2369-F, the ministry submits that in order to satisfy the second element of section 15(a), there must be detailed evidence that there is a reasonable expectation that intergovernmental relations may be prejudiced by the disclosure.

[40] The ministry submits that all of the records at issue in the six appeals relate to intergovernmental relations. The ministry submits that the records at issue concern the Generics Initiative negotiations which are interjurisdiction and intergovernmental by virtue of being conducted as a collaboration amongst federal, provincial and territorial governments, that administer publicly funded drug plans. It submits that the withheld information in the records contains confidential information about the Generics Initiative. Thus, the ministry submits that all of the withheld information in the records are interjurisdictional, intergovernmental and confidential in nature.

[41] The ministry submits that the generic drug discussions and negotiations were held on a confidential basis as was understood by all participating jurisdictions of the Pan- Canadian Pharmaceutical Alliance (pCPA). The ministry submits that this is evidenced by the fact of that the Generics Initiative MOU sets out the confidentiality requirements of the pCPA and the Canadian Generic Pharmaceutical Alliance (CGPA). The ministry submits that the Generics Initiative MOU references the confidentiality of discussion regarding the Initiative which creates a clear and explicit expectation of confidentiality with respect to information prepared by the pCPA. The ministry submits that this is also evidenced by the confidentiality requirements of the pCPA's governing MOU which speaks directly to the confidentiality of the work conducted by the pCPA.

[42] The ministry submits that the specific discussions among pCPA members with

[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

respect to the Generics Initiative were conducted on an explicitly confidential basis. The ministry submits that this was to allow frank and open discussions about matters of common interest – achieving greater value for publicly funded generic drugs. As such, the ministry submits that the disclosure of the withheld information in the records would reveal the pCPA's confidential discussion, analysis and negotiation with the CGPA and would have a chilling effect on the exchanges of information between the pCPA members and inhibit any future collaborative initiatives regarding other drug funding matters, such as the funding of brand named drugs, among the federal, provincial and territorial governments.

[43] Accordingly, the ministry submits that the disclosure of all of the withheld records could reasonably be expected to prejudice the conduct of intergovernmental relations as pCPA members (the federal, provincial and territorial governments) would be less willing to engage in open, frank and timely negotiations.

Appeal PA18-00669

[44] The ministry submits that record 1 is an evaluation of a previous Generics Initiative conducted by a consultant it retained that was used to inform negotiations for the Generics Initiative that was the subject matter of these appeals. It submits that records 2 to 4 are briefing notes regarding the Generic Initiative MOU that were provided to pCPA members before the MOU was executed. It submits that the briefing notes also include references to the analysis done by the consultant it retained. As such, it submits that the records set out the ministry's confidential analysis and considerations relating to the CPGA's offer during the negotiation and pCPA's recommended negotiating position. The ministry submits that these records were prepared for and shared with pCPA members (including the ministry), all of whom have a very strong interest in maintaining its confidentiality.

Appeal PA18-00670

[45] The record at issue in this appeal is the complete copy of the final agreement between the pCPA and the CGPA, including any arrangements related to private label generics or regulations with respect to the sale and distribution of pharmaceutical products.

[46] The ministry submits that the disclosure of this record could reasonably be expected to prejudice the conduct of intergovernmental relations. It submits that the record sets out the material terms of the Generics Initiative, as understood by the participating members of the pCPA and CGPA, all of whom have a very strong interest in maintaining its confidentiality. In particular, it submits that the record describes the confidential commitments that the federal, provincial and territorial governments have agreed to provide to generic drug manufacturers in exchange for savings with respect to generic drugs. The ministry submits that disclosure of this agreement would reveal the competitive position of the members of the pCPA and inhibit it and the ministry's

future negotiations with drug manufacturers who are not members of the CGPA and involved with the Generics Initiative.

[47] The ministry submits that pCPA members consult with one another when an access to information request is received regarding records relating to the pCPA. It submits that where other pCPA members (for example, the governments of New Brunswick, Saskatchewan and the Northwest Territories) received access requests for the Generics Initiative MOU, they refused to disclose the MOU in full. Furthermore, it submits that the New Brunswick Department of Health refused to disclose the MOU in whole and the Office of the Integrity Commissioner New Brunswick confirmed New Brunswick's Department of Health's "decision to refuse access to … the final agreement between the pCPA and CGPA as announced on January 29, 2018".[14]

Appeal PA18-00675

[48] The ministry notes that the withheld information in records 1 and 5 in this appeal are the meeting notes of the pCPA governing council and disclosure would reveal the pCPA governing council's confidential discussions during negotiation and analysis of the CPGA's offer. It submits that the withheld portions of records 1 to 5 are the meeting notes of the discussions the pCPA governing council had with respect to the Generics Initiative, including which provinces were leading the Generics Initiative negotiations. It submits that the attachment to Record 5 marked "5h" contains the ministry's confidential analysis of the CPGA's offers during the negotiation. The meeting notes and analysis shared amongst pCPA members, all of whom have a very strong interest in maintaining its confidentiality.

Appeal PA18-00680

[49] The ministry submits that records 1 and 3 are meetings notes regarding the confidential discussions between the pCPA and CGPA during the Generics Initiative negotiation and shared with the pCPA members and CGPA, all of whom have a strong interest in maintaining its confidentiality. It also submits that records 3 to 5 are meeting notes regarding the confidential discussions among pCPA members, and the ministry's confidential analysis of the CGPA's offers during the negotiation which was shared with pCPA members, all of whom have a very strong interest in maintaining its confidentiality.

Appeal PA18-00681

[50] The ministry submits that disclosure of records 1 and 2 could reasonably be expected to prejudice the conduct of intergovernmental relations because they set out the ministry's confidential analysis of the CPGA's offers during the negotiation. It submits that this analysis was prepared for and shared with pCPA members, all of

[14] Office of the Integrity Commissioner New Brunswick, Report of Findings, Right to Information and Protection of Privacy Act, Matter No: 2018-4823-AP-2618, dated July 31, 2019.

whom have a strong interest in maintaining its confidentiality.

Appeal PA18-00722

[51] The ministry submits that the records at issue in this appeal (Records 1, 2, 3, 4 and 6) contain confidential information about the Generics Initiative, and could reasonably be expected to prejudice the conduct of intergovernmental relations. It submits that the information in records 1 and 2 contain the pCPA's analysis, including analysis of estimated financial savings, with respect to the CGPA's offer during the negotiations. It also submits that records 3, 4 and 6 are emails between pCPA members containing discussion and analysis of savings with respect to generic drugs during the negotiation of the Generics Initiative. The ministry submits that these discussions and analyses were shared with pCPA members, all of whom have a strong interest in maintaining their confidentiality.

The appellant's representations

[52] The appellant provided limited representations on the issues in dispute in this appeal. He submits that throughout the appeal and in its representations, the ministry has raised numerous discretionary exemptions. The appellant notes that the ministry bears the burden of proving that it correctly exercised its discretion including the onus of showing that it considered relevant factors and did not consider irrelevant factors.

[53] The appellant submits that in cases where the discretionary exemption relates to harm to the ministry from disclosure, the ministry also bears the burden of providing "detailed and convincing" evidence that harm will result from disclosure.

[54] The appellant submits that given the requirements of all of the exemptions claimed, the ministry has not met its burden to show that it correctly exercised its discretion and that it has not provided "detailed and convincing" evidence of harm that would result from the disclosure of the records in issue.

[55] The appellant submits that the ministry's argument can be reduced to one thing – that it believes the records are confidential. He submits that the ministry has not provided detailed and convincing evidence of how disclosure of records it considers confidential will results in the harms described. The appellant suggests that there is no evidentiary link between disclosure of the records and the harm claimed by the ministry.

Analysis and finding

[56] The parties submit that the ministry must provide "detailed and convincing" evidence to support its section 15 claim. As I stated above, the law on the standard of proof is clear. In *Ontario (Community Safety and Correctional Services)* v. *Ontario*

(Information and Privacy Commissioner),[15] the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two exemptions under the *Act*, and found that it requires a reasonable expectation of probable harm. In addition, the Court observed that "the reasonable expectation of probable harm formulation… should be used whenever the 'could reasonably be expected to' language is used in access to information statutes."

[57] In order to meet that standard, the Court explained that:

> As the Court in *Merck Fros*st emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground; paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences…

[58] I agree with and adopt this principle for the purposes of this appeal.

[59] In the circumstances of this appeal, based on my review of the records at issue in the six appeals and the parties' representations, I am satisfied that they all qualify for exemption under section 15(a) of the *Act*.

[60] I am satisfied that the withheld information relates to intergovernmental relations. The records in all six appeals contain information that relates to the Generics Initiative, which is an agreement entered into between the negotiating members of the pCPA[16], an alliance comprised of representatives from the publicly funded drug plans across Canada, and the CGPA, a group of companies specializing in generic prescriptions. This information includes an evaluation of an earlier initiative that provincial and territorial members relied upon in their negotiations for the Generics Initiative. It also includes: briefing notes regarding the Generics Initiative MOU, a complete copy of the final confidential agreement relating to the Generics Initiative, meeting notes of the discussions the pCPA governing counsel had with respect to the Initiative, an analysis of the CPGA's offers during negotiations; and, analysis and discussions concerning financial savings.

[61] I have reviewed the information in the records at issue under section 15(a) and the ministry's representations on the harm contemplated by section 15(a). Upon review of this information, I find that there is sufficient evidence to demonstrate that the disclosure of the information at issue could reasonably be expected to result in

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[15] 2014 SCC 31, [2014] 1 S.C.R. 674.

[16] As stated, members of the pCPA include representation from all Provinces, Territories and Federal governments, although all members are not necessarily involved in each Initiative the pCPA undertakes as it is a voluntary process.

prejudice to the conduct of intergovernmental relations between the ministry and other provincial, territorial or federal counterparts who are members of the pCPA. The harms if this information is disclosed is evident on the face of the information in the records itself, although the ministry has also set out how disclosure could harm intergovernmental relations in its representations.

[62] It is evident from reviewing the representations, including the confidential portions that were not shared, that any discussion the pCPA conducted relating to the Generics Initiative were held on a confidential basis as understood by all participating jurisdictions. The Generics Initiative MOU sets out the confidentiality requirements, and after my review, I confirm that it set out a clear and explicit expectation of confidentiality with regard to information received, prepared and released by pCPA. I accept the ministry's submission that specific discussion, concerning the Generics Initiative, among pCPA members were allowed to be frank and open about matters of common interest because of the confidentiality assurances, in order to achieve the greatest value for publicly funded generic drugs in its negotiations with CPGA. I accept that disclosure of this confidential information could reasonably prejudice the conduct of intergovernmental relations as pCPA members would be less willing to engage in open and frank discussions if they are under the impression that its own confidential provincial/territorial/federal information would not remain confidential if shared with the pCPA. While the Generics Initiative's negotiation is complete, I accept the ministry's submission that much of the withheld information can and will be used for future negotiations either involving generic drugs or brand name drugs.

[63] As stated, the purpose of the section 15(a) exemption is to protect these working relationships between governments,[17] and to allow the Ontario government to receive information in confidence, building the trust required to conduct affairs of mutual concern between governments.[18]

[64] As submitted by the ministry, pCPA negotiations play an important role in its drug funding process and that of other governments. The pCPA negotiations aim to achieve greater value for publicly funded drug programs by relying on the collective bargaining power of provincial, territorial and federal drug plans. Further, as noted by the ministry in its background to the pCPA, I also considered that members are not bound to negotiate on all initiatives and do so on a voluntary basis with the leads for each initiative changing regularly. As a result, I find that if the pCPA processes are compromised, this could reasonably be expected to be injurious to intergovernmental relations and could likely affect the ministry's ability to achieve the same value-for-money for publicly funded drugs as the pCPA has in the past.

[65] I will now address the specific records in each of the appeals.

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[17] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

[18] Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

Appeal PA18-00669

[66] The ministry withheld record 1, in part, which is a three-page document: Evaluation of pCPA Initiative on Generic Drugs.

[67] I find that this information is exempt under section 15(a) of the *Act*. The information at issue concerns recommendations made by a consultant to pCPA members who relied on that information to inform negotiations for the Generics Initiative. The ministry has disclosed some information but has withheld the consultant's actual evaluation and recommendations. Records 2 to 4 are briefing notes regarding the Initiative MOU that were provided to pCPA members before the MOU was executed which also include references to the consultant's analysis. As such, the records set out the ministry's confidential analysis and considerations relating to the CPGA's offer during the negotiation and pCPA's recommended negotiating position.

[68] Considering the ministry's representations and reviewing the records themselves, I find that disclosure would reveal information that the pCPA will likely use again in other similar negotiations. In my view, disclosure of this information would harm intergovernmental relations because the record contains information that other provincial members used to inform their decision making. Disclosure could have a significant impact on the sorts of information that might be shared in future and impacting the negotiation process and, in turn, impact more than just the pCPA members who are negotiating for lower drug costs in each negotiating members' jurisdiction.

Appeal PA18-00670

[69] The record at issue in this appeal is the complete copy of the final agreement between the pCPA and the CGPA, including any arrangements related to private label generics or regulations with respect to the sale and distribution of pharmaceutical products.

[70] After reviewing this record, I find that it sets out the material terms of the Generics Initiative, as understood by the participating members of the pCPA and CGPA. I agree that it describes the confidential commitments that the participating pCPA members have agreed to provide to generic drug manufacturers in exchange for savings with respect to generic drugs. I find that disclosure of this information could prejudice the conduct of intergovernmental relations as it would reveal the competitive position of the members of the pCPA and impact future negotiations with non-CGPA drug manufacturers.

Appeal PA18-00675

[71] The withheld information in parts of records 1 and 5 are the meeting notes of the pCPA governing council. Disclosure of this information would reveal the pCPA governing council's confidential discussions during negotiation and analysis of the

CPGA's offer. Similarly, the withheld information in part of record 2, record 3, withheld in full and part of record 4 are the minutes to pCPA executive meetings. The attachment to record 5 marked "5h" contains the ministry's analysis of the CPGA's offers during the negotiation shared amongst pCPA members. It is evident when reviewing this information that it contains information that would be used in future negotiations by the pCPA.

Appeal PA18-00680

[72] Records 1-5 were fully withheld in this appeal. Records 1 and 3 are meetings notes regarding the confidential discussions between the pCPA and CGPA during the Generics Initiative negotiation and shared with the pCPA members and CGPA. Record 2 is an email concerning the ongoing negotiations and records 3 to 5 are meeting notes regarding the analysis of the CGPA's offers during the negotiation which was shared with pCPA members. It is evident when reviewing this information that it contains information that would be used in future negotiations by the pCPA.

Appeal PA18-00681

[73] Records 1 and 2, withheld in full, set out the ministry's detailed analysis of the CPGA's offers during the negotiation. This record contains confidential information that was utilized during the negotiation and would likely be used in future negotiations.

Appeal PA18-00722

[74] The ministry withheld records 1-3 and 6 in full and record 4, in part. The withheld information in records 1 and 2 contain the pCPA's analysis, including analysis of estimated financial savings, with respect to the CGPA's offers during the negotiations. Similarly, the withheld information in records 3, 4 and 6 are emails between pCPA members containing discussion and analysis of savings with respect to generic drugs during the negotiation of the Generics Initiative. These records contain confidential information that was utilized during the negotiation and would likely be used in future negotiations.

Conclusion

[75] Accordingly, I find that section 15(a) applies to the records in each of the six appeals and are exempt from disclosure, subject to my finding on the ministry's exercise of discretion and whether there is a compelling public interest in disclosure that outweighs the purpose of the section 15 exemption. Having found that the withheld information in the six appeals is exempt from disclosure under section 15(a), it is not necessary for me to consider whether the same information is also exempt under sections 13(1) and 18(1).

Issue B: Did the institution exercise its discretion under section 15(a)? If so, should this office uphold the exercise of discretion?

[76] The section 15(a) exemption is discretionary and permits 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.

[77] 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
- it fails to take into account relevant considerations.

[78] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations. The IPC may not, however, substitute its own discretion for that of the institution.

[79] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the Act, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[80] The ministry submits that it properly exercised its discretion in applying section 15(a) to the records and did not exercise its discretion in bad faith or for an improper purpose. The ministry submits that it considered relevant factors and did not take irrelevant factors into account in exercising its discretion in applying s. 15(a). It submits that those factors include:

- The importance of protecting and ensuring frank and open discussions regarding drug funding matters among pCPA members
- The confidentiality provisions of the pCPA Governing MOU and the Generics Initiative MOU
- The disclosure of the marked portions would reveal the pCPA's confidential negotiating position and analysis of the CGPA's offer with respect to generic drugs
- The pCPA's mandate is to achieve greater value for publicly funded drug programs through the combined negotiating power of pCPA members and the disclosure of the marked portions could reasonably be expected to prejudice the conduct of the pCPA.

[81] The appellant submits that it is the ministry that bears the burden of proving that it correctly exercised its discretion which includes the onus of showing that it took into account relevant factors and did not take into account irrelevant factors. The appellant did not address which factors the ministry should have considered in addition to the factors the ministry indicated that it did consider.

Finding

[82] Based on my review of the withheld information, the parties' representations and the circumstances of these appeals, I find that the ministry did not err in exercising its discretion to withhold information under section 15(a) of the *Act*.

[83] I am satisfied that the ministry did not exercise its discretion in bad faith or for

an improper purpose. In considering the factors that the ministry submits it considered, I am satisfied that it considered relevant factors and did not consider irrelevant factors in the exercise of its discretion. The ministry considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal. Accordingly, I find that the ministry took relevant factors into account and I uphold its exercise of discretion in these appeals.

Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 15(a) exemption?

[84] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[85] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[86] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[19]

[87] A public interest does not exist where the interests being advanced are essentially private in nature.[20] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[21]

[88] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[22]

[89] Any public interest in *non*-disclosure that may exist also must be considered.[23] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[24]

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[19] Order P-984.
[20] Orders P-12, P-347, P-1439.
[21] Order MO-1564.
[22] Order P-984.
[23] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[24] Orders PO-2072-F, PO-2098-R and PO-3197.

[90] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[25]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[26]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[27]
- the records do not respond to the applicable public interest raised by appellant.[28]

[91] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[92] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[29]

Representations

[93] The ministry submits that as confirmed by the Ontario Court of Appeal in *Ministry of Finance v. John Higgins*,[30] two requirements must be satisfied in order for section 23 to apply:

> (1) there must be a compelling public interest in disclosure, and
>
> (2) this compelling public interest must clearly outweigh the purpose of the exemption. The IPC has defined "compelling" as "rousing strong interest or attention or feeling of admiration".

[94] The ministry notes that it had not been provided with reasons from the appellant as to why there would be a compelling public interest in disclosure of the withheld information. However, it submits that in the event that the IPC were to find that there is a compelling public interest in the disclosure of the records, this interest does not clearly outweigh the purpose of the exemption under section 15(a).

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[25] Orders P-123/124, P-391, M-539.
[26] Orders P-532, P-568.
[27] Order P-613.
[28] Orders MO-1994 and PO-2607.
[29] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[30] (IPC) [1999] O.J. No. 484 (C.A.).

[95] The ministry submits that there is a compelling public interest in exempting the records from disclosure for the following reasons:

- The pCPA and CPGA have made public in a press release certain aspects of the Generics Initiative. The ministry submits that the information disclosed in the press release was carefully selected to mitigate the harms it describes in its representations.

- The importance of achieving greater value for publicly funded drug programs, including the ministry's publicly funded drug programs, through the combined negotiating power of pCPA members.

- The records would reveal the pCPA's negotiating position, the CGPA's confidential offer to the pCPA and the pCPA's confidential analysis of the CGPA's offer during the Generics Initiative negotiation.

- The disclosure of marked portions could reasonably be expected to prejudice the conduct of the pCPA.

- The disclosure of the withheld information portions would reveal the CPGA's confidential offer and discussions during negotiation and as a result inhibit future negotiations with the CGPA.

- The importance of determining the proper response to the offer from the CGPA for the Initiative.

- To protect and ensure frank and honest analysis and advice to the ministry.

[96] The appellant submits that if it is found that the ministry has satisfied the burden relating to the discretionary exemptions, the public interest override applies to all of the records in issue. He submits that there is a compelling public interest in receiving more information for all of the records in issue. He submits that the records relate to prescription drug prices in Ontario, and across Canada, which necessarily affects all individuals in the Province and beyond.

Analysis and finding

[97] After my review of the records and the parties' representations, I find that there is no compelling public interest in the disclosure of the information that would outweigh the purpose of the section 15(a) exemption.

[98] In his representations, the appellant submits that there is a compelling public interest in the withheld information that is exempt under section 15(a) because the information relates to prescription drug prices in Ontario and Canada which affects all Ontarians and beyond.

[99] The appellant does not address the information the ministry has already publicly released relating to the Generics Initiative. Nor does the appellant provide submissions about why there might be a compelling public interest in the withheld information that is not addressed by the information that has already been released. While I am prepared to accept the appellant's position that there is a public interest in prescription drug prices, I find the appellant has not established that there is a compelling public interest in the withheld information.

[100] Despite the appellant's suggestion that there is a public interest in drug prices for Ontarians, I agree with the ministry that there is a more compelling public interest in non-disclosure of the information in the six appeals. As discussed, disclosure of that information would reveal the pCPA's negotiating position, the CGPA's confidential offer to the pCPA and the pCPA's confidential analysis of the CGPA's offer during the Initiative negotiation and would inhibit future negotiations with the CGPA and non-CGPA drug manufacturers.

[101] In its representations, the ministry speaks to the importance of achieving greater value for publicly funded drug programs, including the ministry's publicly funded drug programs, through the combined negotiating power of pCPA member. I have upheld its reliance on section 15(a) finding that disclosure of the withheld information could affect interprovincial relations, the sharing of information going forward, future negotiations with the CGPA and future negotiations on other shared initiatives, for effective cost saving.

[102] As a result, I find that the appellant has not established that there exists a compelling public interest in disclosure of the withheld information that would outweigh the purpose of the section15(a) exemption.

Issue D: What is the scope of the request? Are the attachments to the records in appeal PA18-00675, excluding 5(h), responsive to the request?

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

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[104] 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.[31]

[105] To be considered responsive to the request, records must "reasonably relate" to the request.[32]

Representations

[106] The ministry claims that certain information it located is not responsive to the request in appeal PA18-00675. As noted, in that appeal, the appellant requested:

> All meeting notes between a specified period related to the Assistant Deputy Ministers Drug Plan Committee in relation to the agreement

[107] The ministry submits that the appellant initially asked for meeting notes related to the "Assistant Deputy Ministers Drug Plan Committee" in relation to Generics Initiative MOU. After seeking clarification, the ministry submits, the appellant clarified that he was asking for "meeting minutes, notes taken by staff during meetings and memos generated from meetings."

[108] The ministry submits that it asked the appellant for clarification as to what committee he was referring to with respect to the "Assistant Deputy Minister Drug Plan Committee" because there is no such committee within the pCPA. The ministry submits that the requestor did not provide any further clarification. As such, the ministry submits that it took a broad view and interpreted "Assistant Deputy Minister Drug Plan Committee" to mean the "pCPA Governing Council" as the Assistant Deputy Ministers of the participating jurisdictions of the pCPA mostly make up the membership of this Council and that best fit the description in the request.

[109] As noted, the ministry submits that the pCPA Governing Council is represented by an individual responsible for the public drug plan in their own jurisdiction. The ministry submits that the pCPA Governing Council leads the pCPA and the pCPA office and engage in knowledge sharing on jurisdictional priorities, issues and concerns that impact the Canadian health system, identify and direct initiatives that require collective leadership and action. It submits that the pCPA Governing Council would discuss the pCPA's many initiatives, one of which was the Genetics Initiative.

[110] The ministry submits that the portions of Records 1 to 5 are marked as non-

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[31] Orders P-134 and P-880.
[32] Orders P-880 and PO-2661.

responsive because they do not reasonably relate to the request. The ministry submits that the pCPA Governing Council discussed several topics within its mandate during its meetings. It submits that the severed portions do not contain information relating to the Generics Initiative, rather they contain information relating to other business of the pCPA.

[111] The appellant does not address the ministry claims that the information it identified as not responsive are not responsive to the request.

Finding

[112] I have reviewed the attachments at issue in PA-00675, I find that the portions of records 1 to 5 that are marked as non-responsive do not reasonably relate to the request. The information in these attachments do not contain information relating to the Generics Initiative agreement, rather they contain information relating to other business of the pCPA; as such, these severed portions do not reasonably relate to the request.

ORDER:

I uphold the ministry's decisions and the appeals are dismissed.

Original Signed by: July 14, 2022

Alec Fadel
Adjudicator