Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3032

Appeals PA10-276, PA10-283, PA10-285, PA10-293, PA10-300, PA10-302, PA10-304, PA10-306, PA10-308, PA10-313, PA10-315, PA10-317, PA10-319, PA10-322, PA10-324, PA10-326, PA10-329 and PA11-29-2

Ministry of Health and Long-Term Care

January 6, 2012

Summary: The appellant requested payment summaries setting out, by drug manufacturer, the amounts of discount payments made by individual drug manufacturers under the Ontario Drug Benefits Plan, the dates of the ministry's invoices, and the dates when payments were received. The request was submitted to the Ministry of Health and Long-term Care, which denied access to the payment amounts under sections 17(1)(a) and (c) (third party information) and 18(1)(c) and (d) (economic and other interests). The ministry decided to disclose the remaining information in the records.

The appellant appealed the decision to deny access to the payment amounts. A number of drug manufacturers appealed the decision to grant access in part, claiming that sections 17(1)(a) and (c) applied to the information the ministry decided to disclose. Some drug manufacturers sought to apply the discretionary exemptions in sections 18(1)(c) and (d) to the entirety of the records, including parts for which the ministry did not claim it. Some drug manufacturers also sought to apply the mandatory exemption in section 17(1)(b).

The ministry's decision to deny access to the payment amounts under sections 18(1)(c) and (d) is upheld, as is the ministry's decision to disclose the remaining information in the records, consisting of company names, invoice dates and dates upon which payment was received, none of which is exempt under sections 17(1)(a), (b) or (c). The drug manufacturers are not permitted to expand the application of sections 18(1)(c) and (d) to this information, which is, in any event, not exempt under those provisions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1)(a), (b) and (c);18(1)(c) and (d); O.Reg. 201/96.

Orders and Investigation Reports Considered: Orders PO-2865, P-2956, P-257, P-1398, PO-2010, PO-2863.

Cases Considered: *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.); *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.); Order 26-1994, *British Columbia Hydro and Power Authority, Re*, 1994 CanLII 1432 (B.C.I.P.C.); Order 2000-005, *Calgary Regional Health Authority* (Alta. IPC); *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, 2008 CanLii 45005 (Div. Ct.); Order 01-01, *Children and Women's Health Centre of British Columbia, Re*, 2001 CanLii 21555 (B.C.I.P.C.); *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.); *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

OVERVIEW:

[1] The Ontario Drug Benefit Program (ODBP) covers most of the cost of about 3,300 prescription drugs for Ontario residents who qualify for benefits under the *Ontario Drug Benefits Act* (*ODBA*). Eligible individuals include people over 65, residents of long-term care and homes for special care, people who receive professional home care services, people who qualify under the Trillium Drug Program, and individuals on social assistance. In 2009/10, this group consisted of about 2.5 million people, and the ODBP reimbursed over 115 million claims.

[2] Under the *Transparent Drug System for Patients Act, 2006*, which amended the *ODBA*, the Executive Officer of the Ontario Public Drug Programs (the Executive Officer) is empowered to negotiate pricing agreements for drugs that are available for benefits under the ODBP. In this context, the Executive Officer negotiates discounts with drug manufacturers for these products. Agreements have been made with about 98% of brand name drug manufacturers. The discounts are paid by drug manufacturers to the Ministry of Health and Long-term care (the ministry) and provide significant cost savings to the province.

[3] The appellant requested payment summaries for discount payments by drug manufacturers to the ministry under the ODBP from April 2008 through February 2010, showing the payments made by each drug manufacturer. The request was made under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*). The ministry identified responsive records, which consist of a summary for each drug manufacturer showing payment amounts, invoice dates and the dates when payments were received.

[4] The ministry provided notice to the drug manufacturers, many of whom objected to disclosure, in whole or in part. The ministry decided to deny access to the payment amounts under sections 17(1)(a) and (c) (third party information), and 18(1)(c) and (d) (economic and other interests) of the *Act*. It decided to disclose the remaining information in the records.

[5] This access decision produced two types of appeal. As discussed in more detail below, the appellant filed an appeal of the ministry's denial of access, which pertained only to the payment amounts, since that was the only information that the ministry decided to withhold.

[6] Because the ministry decided to disclose the remaining information (the names of drug manufacturers, the dates on which the ministry issued invoices to them, and the dates on which the ministry received payment), it was necessary for drug manufacturers who objected to its disclosure to file a third party appeal. The ministry's decision letter advised them that they were entitled to appeal if they objected to this information being disclosed.

[7] A number of drug manufacturers did file third party appeals of the ministry's decision to disclose their names, as well as the dates of the ministry's invoices and the dates payments were received, claiming that this information is exempt under sections 17(1)(a) and (c), and some drug manufacturers also argued that it is exempt under sections 18(1)(c) and (d).

[8] The claim by some drug manufacturers that sections 18(1)(c) and (d) should be more broadly applied than the ministry chose to do raises the question of whether they are entitled to claim this discretionary exemption for additional information.

[9] For the drug manufacturers who did not file third party appeals, the ministry did not initially disclose the company names, invoice amounts and dates on which payment was received. In Order PO-2956, Analyst Joseph Sommer ordered the ministry to disclose this information about the drug manufacturers who did not appeal. The ministry requested, and received, an extension of the compliance date of Order PO-2956, to permit it to notify the drug manufacturers who had not filed third party appeals and whose information was ordered disclosed. The Ministry complied with the order within the extended time, and with respect to the drug manufacturers who did not file third party appeals, the ministry disclosed the company names, invoice amounts, and dates on which payment was received. For these drug manufacturers, only the payment amounts remain at issue.

[10] During the inquiry into these appeals, this office invited representations from the ministry, the drug manufacturers who appealed, and to the extent possible, from all other drug manufacturers for whom responsive records were located. The appeal was transferred to me to complete the inquiry, and I invited the appellant to provide

representations on the potential application of sections 18(1)(c) and (d) to the payment amounts. I also invited the drug manufacturers who sought to expand the application of sections 18(1)(c) and (d) to explain why they were entitled to claim this exemption for information that the ministry did not claim it for. In the course of the inquiry into these appeals, representations were exchanged in accordance with *Practice Direction 7* issued by this office.

[11] In the appellant's representations, he asked that I consider his representations in another appeal, and I have done so.

[12] In their representations, some drug manufacturers either expressly claimed that the mandatory exemption in section 17(1)(b) also applies, or provided representations implicitly making that argument. I will therefore consider whether this section applies, below.

[13] In Order PO-2865, Adjudicator Diane Smith ordered the disclosure of similar information for an earlier time period. The drug manufacturers learned of Order PO-2865 after the information was disclosed, and have brought an application for judicial review of that order. The representations provided to me during this inquiry include evidence provided by the ministry and the drug manufacturers that was not available to Adjudicator Smith, and in particular, information about the reaction of the drug manufacturers to the disclosures made under Order PO-2865.

[14] In this order, I uphold the ministry's initial decision, and in particular, I reach the following conclusions:

- the payment amounts are exempt under sections 18(1)(c) and (d);
- the drug manufacturers are not entitled to raise and rely on sections 18(1)(c) and (d) with respect to information for which the ministry did not claim it;
- the remaining information in the records is not exempt under sections 17(1)(a), (b) or (c), and would not be exempt under sections 18(1)(c) and (d) if I had permitted the drug manufacturers to claim it; and
- the non-exempt information in the records pertaining to the third party appellants is ordered to be disclosed.

[15] As a preliminary matter, I note that the appellant (i.e. the original requester) did not file his appeal within thirty days after the ministry issued its decision letter. Some drug manufacturers submit that they would be prejudiced by allowing the appellant's

appeal to proceed, though most are silent on this issue.[1] As the ministry concedes, its decision letter did not inform the appellant of his right to appeal the ministry's partial denial of access, as required under section 29(1)(b)(iv) of the *Act*. The decision letter was also confusing because it *did* refer to the drug manufacturers' right to appeal the ministry's decision to grant access. The appellant filed his appeal two months after the thirty day deadline, when it became apparent to him that he was not receiving the records. He did this before receiving severed copies of the records pursuant to Order PO-2956. Given this timing, and the defects in the notice the appellant received from the ministry, I have proceeded with the adjudication of this appeal, and I am issuing this order to resolve it. I will not refer to this issue again.

[16] An additional preliminary matter relates to the appeals being placed on hold. This was done initially, pending the resolution of other similar cases. A decision was then made to proceed with these appeals, and notices of inquiry were issued as described above. In their representations, several drug manufacturers, and the ministry, again asked for these appeals to be placed on hold or otherwise held in abeyance pending the outcome of the application for judicial review of Order PO-2865. However, given the additional evidence that became available following the disclosures made pursuant to Order PO-2865 (as described above), which amount to a change in circumstances, I decided to proceed with these appeals.

[17] Another preliminary matter relates to a request by some of the drug manufacturers that Adjudicator Smith should recuse herself on grounds of alleged bias. While I do not agree with these allegations, which were based on her previous decisions in relation to similar records, I observe that any concern in that regard is resolved by the fact that the appeals have been transferred to me.

[18] Another issue that may be dealt with briefly is the argument by several drug manufacturers that some information in the records falls outside the time frame of the request, and is therefore not responsive. It appears that drug manufacturers may have received information responsive to this request, and other requests, when initially notified by the ministry. Some of this may fall outside the time frame identified in the request under consideration here. However, I have reviewed the records that the ministry has produced as responsive in the appeals under consideration in this order, and they do not contain any information of this nature. All of the payment dates fall within the stipulated time frame.

[19] On a procedural note, counsel for a group of drug manufacturers objected that several of her clients were not notified of the request by the ministry or, in one case, by this office. Clearly, notification of requests and appeals under the *Act* is an important matter. However, representations in these appeals were provided on behalf of all of

[1] The thirty-day appeal period is set out in section 50(2) of the *Act*. In this regard, I note that, in any event, I am upholding the ministry's decision to deny access to the payment amounts, which is the only information that is subject to the appellant's (i.e. the original requester's) appeal.

these companies, which I have taken into account in deciding the issues in this order. Given that no further remedy is requested, I will not refer to this issue again.

RECORDS:

[20] The records at issue consist of payment summary sheets for each drug manufacturer who made payments to the ministry under the Ontario Drug Benefit Program between April 2008 and February 2010, showing the name of the drug manufacturer, the amount of each payment, the invoice date and the date each payment was received.

ISSUES:

A. Do the discretionary exemptions relating to "economic and other interests" found in sections 18(1)(c) and (d) apply?

B. Do the mandatory exemptions in sections 17(1)(a), (b) and (c) apply?

C. Should the ministry's exercise of discretion to deny access under sections 18(1)(c) and (d) be upheld?

DISCUSSION:

A. Do the discretionary exemptions relating to "economic and other interests" found in sections 18(1)(c) and (d) apply?

Can the drug manufacturers raise sections 18(1)(c) and (d) for information for which the ministry did not claim them?

[21] As already explained, the Ministry relies on sections 18(1)(c) and (d) for the payment amounts contained in the records. A number of the drug manufacturers who provided representations argue that the records, in their entirety, should be found exempt under these provisions. This raises the question of whether they should be entitled to rely on these exemptions with respect to information for which the ministry did not claim them.

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

> A head may refuse to disclose a record that contains,
>
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[23] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2[2] (the Williams Commission Report) 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 . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[24] 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.[3]

[25] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario," section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[4]

[26] In Order P-257, former Assistant Commissioner Tom Mitchinson considered the question of when an affected party, or a person other than the institution that received the access request, may be entitled to rely on one of the discretionary exemptions in the *Act*. He stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. . . .

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[2] Toronto: Queen's Printer, 1980.

[3] Orders P-1190 and MO-2233.

[4] 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 MO-2233

> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

[27] In response to an invitation to provide representations on this issue, several drug manufacturers did so.

[28] Briefly stated, they submit that:

- they are entitled to raise the potential application of this provision to the records as a whole;
- without knowing what factors the ministry considered in deciding what information to exempt under these sections, they cannot determine whether the ministry appropriately exercised its discretion;
- based on the harm that the ministry will suffer, the severances do not go far enough;
- disclosure would be inconsistent with the application of the mandatory exemption in section 17(1);
- the same reasons for applying sections 18(1)(c) and (d) to the payment amounts apply to the additional information in the records;
- this office should consider whether the ministry appropriately exercised its discretion not to claim sections 18(1)(c) and (d) more broadly;
- whether under section 18(1) or section 17(1), the whole record is at issue in this appeal and should be withheld.

[29] As explained above, the purpose of the section 18 exemptions, broadly stated, is to protect the economic interests of institutions. In this case, it is evident that the ministry took a different view than the drug manufacturers who provided representations on this issue, of the extent to which disclosure of information in the records could reasonably be expected to damage its economic interests.

[30] In my view, this is a decision the ministry is entitled to make. As outlined below, the ministry clearly took the views of drug manufacturers into account in its decision to claim sections 18(1)(c) and (d) for the payment amounts.

[31] Given the purposes of these exemptions, to protect the government's ability to compete in the marketplace and to protect the broader economic interests of Ontarians, it would only very rarely be appropriate to support a claim for these exemptions by a private party, whose arguments are directed at protecting their own interests, and not those of the government or the public.

[32] In my view, the circumstances of this appeal do not constitute one of these rare exceptions. The position taken by the drug manufacturers in these appeals is fundamentally concerned with protecting their own interests. Any perceived overlap with the interests of the government or the public arises from arguments that the drug manufacturers' interests would be damaged by disclosure, and that this would have a spill-over effect that could reasonably be expected to be prejudicial to the interests of the government or the public.

[33] Moreover, as noted in the discussion below, even if I found that the drug manufacturers were entitled to raise a broader claim for exemption under sections 18(1)(c) and (d), I would not uphold it for the information that the ministry decided to disclose.

Are the payment amounts in the records exempt under sections 18(1)(c) and (d)?

[34] In Order PO-2865, Adjudicator Diane Smith found that payment amounts of a similar nature to those that are at issue in this appeal, but for an earlier time period, were not exempt under sections 18(1)(c) and (d) of the *Act*. In reaching this conclusion, she stated as follows:

> The information at issue is the cumulative amounts paid by drug manufacturers to the Ministry, pursuant to their listing agreements, as volume discounts. This information consists of the lump sum quarterly payments made by drug manufacturers to the Ministry, not the specific volume discount negotiated in a listing or pricing agreement by the Ministry for a particular drug as consideration for the Ministry entering into these agreements with drug manufacturers.

On the Ministry's website, it states that Ontario Drug Benefit (ODB) program provides coverage for over 3,200 drug products. During the responsive time period between October 1, 2006 and April 25, 2008, the Ministry invoiced 47 drug manufacturers. Forty-four of these drug manufacturers remitted quarterly payments to the Ministry during this time period. As the payments listed in the records are not broken down per drug product, I find that the information at issue would not reveal the specific financial details of the listing or pricing agreements entered into between the Ministry and the drug manufacturers for individual drugs.

Further, the information at issue does not reveal the actual price paid by the Ministry for a particular drug. It also does not reveal the amount of a volume discount negotiated for a particular drug. Therefore, the information at issue could not be used by other potential bulk prescription drug purchasers as a discount standard or price goal to be obtained from the drug manufacturers in the purchase of particular drug products.

Based on my review of the records, I agree with the appellant that disclosure of the information at issue in the records could not reasonably be expected to attract the harms contemplated in sections 18(1)(c) and (d).

. . .

In this appeal, I find that disclosure of the information at issue could not reasonably be expected to seriously prejudice the Ministry's ability to secure savings on prescription drugs by weakening its bargaining position in negotiations with drug manufacturers. The information at issue does not disclose "confidential pricing information" for drug products, which is a concern of the individual drug manufacturers. The information at issue does not disclose either the volume discount amount or information related to the calculation of this amount for specific drug products. Therefore, I do not accept that disclosure of the information at issue could reasonably be expected to prejudice the economic interests or the competitive position of the Ministry under section 18(1)(c) in its ability to negotiate listing and pricing agreements with drug manufacturers.

Furthermore, as the information at issue does not reveal the specific details of conditions negotiated for a particular drug product, disclosure of this information would not demonstrate to other private sector industries the type of incentives Ontario is prepared to grant to drug manufacturers in order to attract business to Ontario. Therefore, I also do not accept that if this information were available to industry players, that it could reasonably be expected to prejudice the economic interests of the Ministry

> and be injurious to the financial interests of the Government of Ontario under section 18(1)(d) by weakening its negotiating position [Order PO-2569].

[35] The drug manufacturers only learned of Order PO-2865 after the information had been disclosed. Notwithstanding that the records had already been disclosed, some of the drug manufacturers brought an application for judicial review of Order PO-2865 (amongst other orders). The relief sought on the application includes a declaration that the payment amounts in the records that were ordered disclosed should have been found to be exempt from disclosure.

[36] In its representations on sections 18(1)(c) and (d), the ministry repeats some of the representations it provided to Adjudicator Smith in the appeal leading to Order PO-2865, but also refers to the impact of the disclosures made under that order.

[37] The ministry submits:

> These payment amounts reflect actual amounts paid by manufacturers to the Ministry, pursuant to their listing agreements, as volume discounts. These volume discounts are negotiated by the Executive Officer with each manufacturer, in confidence, and are included in the Schedule to listing and pricing agreements. The information severed from the summaries reveals how much each manufacturer has paid the Ministry, on a quarterly basis, in accordance with the negotiated volume discount price for the manufacturer's drugs listed on the Formulary.
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> The Ministry submits that the disclosure of this information could reasonably be expected to prejudice the economic interests, and cause injury to the financial interests, of the Ministry and Ontario.
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> The Ministry submits that to the extent that the ODB budget forms a significant part of the provincial budget, any prejudice to the Ministry's economic interests in this regard has a repercussive, concomitant negative impact on the government's financial interests. This negative impact has been heightened by the current, severe economic situation affecting the Ontario government. . . . Since the Ministry relies heavily on its negotiations with manufacturers to control drug costs, the Ministry submits that the disclosure of the information at issue would be detrimental to the financial interests of the Ministry and the Government of Ontario.
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> . . .

> The volume discounts were negotiated by the Ministry and the manufacturers in complete confidence, with an explicit expectation that the discount amount and resulting payments made to the Ministry at each quarter, as documented in the record, would remain confidential.
>
> As such, the ministry submits that if the summaries were disclosed, manufacturers would consider this a frank breach of their expectation of confidentiality and, in the future, would be less likely to negotiate significant discount amounts, since they can negatively affect the manufacturer's competitive position by establishing a lower benchmark for a given drug product. Since it is obviously in the Ministry's and the government's interest to negotiate as high a volume discount as possible, the Ministry must promote and protect its trusted relationship with manufacturers. That trust is premised, in large part, on maintaining the confidentiality of the volume discount amount. Without that trust, the Ministry's ability to negotiate significant savings in respect of the ODP Program is hampered.

[38] With respect to the impact of the disclosure of payments for an earlier period under Order PO-2865, the ministry submits:

> . . . that the findings and factual conclusions are no longer sustainable, given the drug industry's reaction to, and the media's analysis of the impact of the Ministry's disclosure under Order PO-2865.

[39] The ministry enclosed a memorandum from the Executive Officer with its representations. The Executive Officer points out that ODBP spending for 2009/2010 amounted to $4.5 billion, or approximately 10% of health care spending. In a confidential passage from the memorandum, the Executive Officer indicated the amount of savings during this same period as a result of the negotiated pricing agreements. It is apparent that the ODBP is a significant expense to the government, and that the cost savings that arise from the negotiated agreements have a significant positive budgetary impact for the government of Ontario.

[40] The Executive Officer goes on to state:

> We have negotiated agreements with manufacturers that reduce the price of drugs significantly. Such negotiations and agreements would not be possible if manufacturers were not given a promise of strict confidentiality in respect of the terms of these agreements, and particularly the pricing provisions of these agreements that reflect or reveal volume discount information. As evidence, I would like to draw your attention to the following passage from a letter written by a drug manufacturer to the Ministry:

> [Named Company] entered into full and free negotiations with the Ministry based on the assurance that the details of such negotiations were confidential and the details of the resulting Listing Agreement entered into would also be kept confidential. *If this expectation of confidentiality was suddenly eliminated or severely reduced by the granting of an access request by the IPC or the courts, pharmaceutical companies would be much more reticent to negotiate so fully and freely and the resulting benefits to the public may be delayed or lost forever.* [Emphasis added.]

. . .

In this regard, the Ministry's compliance with Order PO-2685 *has in fact resulted in manufacturers becoming more reluctant to enter into pricing negotiations to achieve the kind of savings described above*. The impact of the Order was felt immediately by the Ministry through the uniformly negative responses it received from manufacturers expressing concern about the disclosure of information they considered confidential. *The disclosure has prejudiced the Ministry's ability to secure savings and ensure price stability through the negotiated agreements described above*. In my view, the Ministry will not be able to obtain the lowest possible prices for drugs because manufacturers may either refuse to enter into negotiations altogether, or be less willing to offer significant volume discounts. [Emphases added.]

My view is based on what occurred after the last disclosure, in addition to a review of the representations made to the Ministry by the affected drug manufacturers in response to the 3rd party notices issued in this appeal. In these representations, drug manufacturers expressed concerns about entering into volume discount agreements in the future, given the risk that their sensitive financial information may be disclosed as a result of the IPC's decision in Order PO-2865.

. . .

In the past year, drug manufacturers have stated in our negotiations with them that, due to their concerns about the potential disclosure [of] volume discount information in response to requests and appeals under the Act, they are no longer able to provide Ontario with the same price reduction level they have agreed to in previous agreements. Their view is that publicly available information about price reductions in Ontario could impact their negotiations with other third parties outside of Ontario.

> This has had a direct impact on our ability to negotiate volume discounts to achieve lower effective prices and reimburse some drug products. It reduces Ontario's ability to leverage its market size to achieve lower prices and therefore affects the ability to manage the cost of the Drug Program.
> . . .

[41] The Ministry's submissions about the reaction of the drug manufacturers to the disclosure made under Order PO-2865 are consistent with the representations provided by drug manufacturers in these appeals.

[42] The Ministry also suggests that specific discount information about particular drugs may be gleaned from the payment amounts in the records, particularly for manufacturers that only supply one drug. Some of the drug manufacturers also make this assertion in their representations.

[43] The appellant disputes this, arguing that this suggestion is "highly misleading and erroneous." In my view, it is not necessary to decide this factual issue in order to determine whether sections 18(1)(c) and (d) apply.

[44] The appellant also seeks to discount several news stories cited by the ministry in its representations. I have not referred to these news stories in this order, and the outcome does not depend on them in any way.

[45] The appellant states that he supports the reasoning in Order PO-2865. He states that the Executive Officer's memorandum, quoted above, "merely makes assertions . . . based on further quotes from unspecified drug company letters generalizing their dislike of releasing invoice payment data. That is insufficient grounds to withhold such invoice payment figures."

[46] The appellant further submits that:

> . . . the [ministry] has never provided hard data that breaks down and proves specific cost savings and it is inadequate to only [make] vague general cost saving claims without any evidence.
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> . . .
>
> In any case, all that is at issue in this appeal is the release of computer printouts of summary invoice payments made by those drug companies to [the ministry] and not all the intricacies of secret deals [the ministry] made with individual drug companies. The public knowing about summary invoice payments is neutral data, and its release is reasonable.

> The bottom line is that the threats conveyed . . . to [the ministry] . . . claiming that drug companies will not do business with the Ontario Government is simply off-base.
>
> Drug companies will always make drug sales to the Ontario government but will always prefer not to operate under the public limelight and want to be away from public scrutiny. It is pure bluff, speculation and intimidation that [drug manufacturers] are not going to provide Ontario with drugs for their public health programs if such data is released. The [ministry] surely knows this but has its own selfish reasons for being erroneously secretive.
>
> . . .
>
> The millions of dollars the Ministry received from specific drug companies, if anything, is embarrassing but not [exemptible]. When the [ministry] receives monies for the public treasury from powerful private interests, it is out of line to then make no public acknowledgement of the specific payments made to it. It gives the appearance and bad impression that such funds are in effect bribes or kickbacks for favourable arrangements received in return. This is harmful to transparency and to good governance free of corruption.

[47] With respect to the last assertion made by the appellant, I note that the ODBP is a program whose existence is publicly known, and more significantly, the negotiation of listing and pricing agreements is made pursuant to the *ODBA*[5] and O. Reg. 201/96. The fact that drug manufacturers pay discounts to the ministry under this program is not a secret, and the appellant's suggestion that these payments might appear to be "bribes or kickbacks" when they are, in fact, negotiated pursuant to duly enacted Ontario legislation, in pursuit of the sound public policy goal of significant savings in the health care budget, is unsustainable and without merit.

[48] I also disagree with the appellant's contention that the Executive Officer "merely makes assertions" about the unhappiness of drug manufacturers following the disclosures made pursuant to Order PO-2865, and that the ministry's representations do not provide sufficient grounds to withhold the payment amounts for which the Ministry claims the section 18(1)(c) and (d) exemptions.

[49] Moreover, I am satisfied that the new information provided by the ministry following the disclosures made pursuant to Order PO-2865 provides a sufficient basis for distinguishing that order.

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[5] as amended by the *Transparent Drug System for Patients Act, 2006*.

[50] Having carefully reviewed the arguments put to me, I am satisfied that disclosure of the payment amounts set out in the records could reasonably be expected to prejudice the economic interests of the ministry and be injurious to the financial interests of the government of Ontario.

[51] In reaching this conclusion, I accept the Executive Officer's extensive and detailed evidence (quoted above) to the effect that the disclosure pursuant to Order PO-2865 "has in fact resulted in manufacturers becoming more reluctant to enter into pricing negotiations to achieve the kind of savings described above."

[52] I am satisfied that the ministry has provided credible, detailed and convincing evidence that the disclosure of this same type of information pursuant to Order PO-2865 has had a negative impact on the Executive Officer's efforts to negotiate discounts with drug manufacturers, and I am also satisfied that, given the costs involved, further disclosures of this type of information could reasonably be expected to cause not just harm, but significant harm, to the economic interests of the ministry and the financial interests of the government of Ontario.

[53] With respect to the appellant's arguments that the drug manufacturers would still do business with Ontario even if the information is disclosed, that may be true but it is hardly the point. The issue here is not a continuing business relationship, but the ability to continue to effectively negotiate discount pricing. I am satisfied that disclosure could reasonably be expected to interfere with that process, and as a consequence, there is a reasonable expectation of prejudice to the economic interests of the ministry and injury to the financial interests of the government of Ontario.

[54] Accordingly, I find that the payment amounts in the record are exempt under sections 18(1)(c) and (d), subject to the discussion of the exercise of discretion, below. For greater certainty, I note that this finding includes the amounts of interest charges and overpayments where noted in the records, as claimed by the ministry.

[55] As a consequence, it is not necessary to decide whether sections 17(1)(a), (b) and (c) apply to the information I have found exempt under sections 18(1)(c) and (d).

B. Do the mandatory exemptions in sections 17(1)(a), (b) and (c) apply?

[56] As already noted, the ministry decided to disclose the remaining information in the records (drug manufacturer's name, invoice dates and dates when payment was received), and a number of drug manufacturers appealed from that decision. For the manufacturers who did not appeal, those portions of the records have been disclosed. For those who did, it remains at issue.

[57] Some of the drug manufacturers who filed third party appeals state in their representations that they only object to disclosure of the payment amounts, which I

have already exempted under sections 18(1)(c) and (d). They do not provide argument or evidence to support the exemption of the remaining information in the records. Accordingly, the remaining parts of the records pertaining to these drug manufacturers are not exempt, and I will order that they be disclosed.

[58] Other drug manufacturers who filed third party appeals do advance a claim that their company names, the invoice dates and the dates payment was received are exempt under sections 17(1)(a), (b) and (c) of the *Act*.[6] Of the 49 drug manufacturers for whom responsive records exist, 17 filed third party appeals, and of these, ten provided representations claiming that the company name, invoice dates and dates when payment was received are exempt. The analysis that follows pertains to this information in the records relating to these ten drug manufacturers.

[59] Sections 17(1)(a), (b) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[60] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[7] 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.[8]

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[6] As already noted, and as referenced below, some also claim that this information is exempt under sections 18(1)(c) and (d).

[7] *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.).

[8] Orders PO-1805, PO-2018, PO-2184, MO-1706.

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

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

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

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

[62] I have carefully reviewed the drug manufacturers' submissions with respect to this information. I will not refer to or reproduce arguments about the payment amounts, as I have already exempted that under sections 18(1)(c) and (d), above. The drug manufacturers' arguments about the company names, invoice dates, and dates when payment was received, may be summarized as follows:

- the information is exempt under sections 17(1)(a), (b) and (c);
- the information in the records is commercial or financial information;
- disclosure of any information in the payment summaries permits the inference of confidential business tactics, strategies and plans of the manufacturers, and this means that information permitting these inferences to be drawn was "supplied";[9]
- disclosure would permit inferences to be drawn about the contents of agreements between drug manufacturers and the ministry;
- all information in the records was either supplied to the ministry or can accurately be inferred from information that was supplied;
- requesters may use multiple requests to amass information that can be cross-referenced; and
- it is impossible to know what information has already been disclosed.

[63] Some manufacturers also provided representations that were found to be confidential by the previous adjudicator assigned to these appeals. Although it is not

[9] Order 26-94, *British Columbia Hydro and Power Authority, Re*, 1994 CanLII 1432 (B.C.I.P.C.); Order 2000-005, *Calgary Regional Health Authority* (Alta. IPC)

reproduced in this order, I have also considered this information in reaching my decision.

Part 1: type of information

[64] The types of information listed in section 17(1) have been discussed in prior orders. "Commercial information" has been defined as information that relates solely to the buying, selling or exchange of merchandise or services.[10]

[65] In my view, the company name, invoice and payment dates are sufficiently linked to the buying and selling of drugs to qualify as commercial information, meeting part 1 of the test.[11]

Part 2: supplied in confidence

[66] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[12]

[67] 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.[13]

[68] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[14]

[69] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[15]

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[10] Order PO-2010.

[11] Some drug manufacturers also argue that this qualifies as "financial information" but it is not necessary to determine this, as part 1 of the test is met by deciding that it is "commercial information."

[12] Order MO-1706.

[13] Orders PO-2020, PO-2043.

[14] Order PO-2020.

[15] This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above at footnote 7. See also Orders PO-2018, MO-1706, and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243; and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, 2008 CanLii 45005 (Div. Ct.)].

[70] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[16]

[71] One of the drug manufacturers argues that this jurisprudence about the meaning of "supplied," and in particular, its exclusion of information that is the product of negotiations, must be rejected because the word "supplied" does not appear in the French language version of the *Act*. This same argument was rejected by the Divisional Court in *Canadian Medical Protective Association v. John Doe*.[17] The Court stated:

> In any event, the French version of s.17(1) may be read in a way that implicitly includes the notion of "supplied", as the purpose of s.17(1) incorporates the idea that the exemption is designed to protect information "received from" third parties, a notion that conforms with the concept of "supplied". Thus, the presence or absence of the verb "supplied" in the French version is not determinative, and the English and French versions may be read harmoniously.

[72] This same manufacturer also alleges that this interpretation is overly narrow; is inconsistent with the legislative history of the *Act*, which counsels against a restrictive application;[18] and is inconsistent with the purpose of avoiding interference with negotiations. I disagree. In addition to being upheld in *Canadian Medical Protective Association*, this approach was also expressly upheld by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[19] In my opinion, this is not a restrictive interpretation, but rather, one that respects the purposes of the section as reflected in the extract from *Canadian Medical Protective Association* that I have just quoted. As well, the legislative history implicitly accepts the requirement that in order to be exempt, information must have been "supplied," given its advice to enact a broad exemption for information "*submitted* by a business to the government . . ." (emphasis added). Moreover, the purpose of avoiding interference with negotiations relates to ongoing or future negotiations, which this interpretation does not affect, since it deals with the contractual results of negotiations that have concluded.

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[16] Orders MO-1706, PO-2384, PO-2435; and Order PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above at footnote 15).
[17] Cited above at footnote 15.
[18] *Williams Commission Report* (cited above at footnote 2), v. 2 at 314.
[19] Cited above at footnote 7.

[73] I now turn to the information that must be examined in order to determine whether part 2 of the test is satisfied. There are three components in the records that I have not already exempted under sections 18(1)(c) and (d). These components are:

- the drug manufacturer's name;
- the dates of the ministry's invoices sent to the manufacturers; and
- the dates upon which payments were received by the ministry.

[74] In my view, none of this information qualifies as "supplied."

[75] It is patently obvious that the dates upon which the ministry issued invoices to collect discount payments from drug manufacturers were not "supplied" to the ministry even if they were issued on dates that were stipulated by way of contract. The ministry issued the invoices itself; no one "supplied" them to it. And if the dates are chosen pursuant to a contractual term, that term is negotiated, and the dates were not "supplied." Nor do the invoice dates permit other information that was "supplied" to be accurately inferred.

[76] I am also not satisfied that the dates when payment was received by the Ministry, which are not necessarily the same as the date of the drug manufacturer's cheque or its letter forwarding the payment, were "supplied." These are the dates upon which, according to the ministry's records, it received payment. This confirms or permits the drawing of an inference that a particular company provided a payment, but in my view, the fact of making a payment or submitting a cheque is not information that was "supplied" to the ministry; it is a payment made pursuant to a negotiated contract.

[77] The drug manufacturers argue that disclosing the dates permits the drawing of accurate inferences about their business activities, practices and strategies, and therefore the date information qualifies as "supplied" within the meaning of section 17(1). In support of this argument, several manufacturers rely on an approach to the term "supplied" set out in Order 26-94 of the British Columbia Information and Privacy Commissioner.[20] In that order, former Commissioner David Loukidelis sets out two exceptions to the general rule that information in a contract will be found to have been the product of negotiations, and therefore not "supplied."[21] He states:

> Information in a negotiated contract may in fact have been "supplied in confidence" by a third party in some cases. I cite two examples, although this is not an exhaustive list:
>
> 1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and

[20] See citation at footnote 9, above.
[21] These exceptions have also been noted by this office. See the authorities cited above at footnote 13.

> 2. Where disclosure of the information in the contract would permit an applicant to make an "accurate inference" of sensitive third-party business information that would not itself be disclosed under the Act.
>
> The "accurate inference" test extends the definition of "supplied" to include information where disclosure of the seemingly innocuous information would allow [the requester] to see into the financial and commercial affairs of [the third party] in ways that are precluded by section 21(1) [the B.C. statute's equivalent of section 17(1)].[22]

[78] A related argument refers to the "mosaic" effect, a concept which relies on the linkage of "seemingly innocuous" information with other already available information.[23] It also relates to the argument referred to above, to the effect that requesters may use multiple requests to amass a database of information that can be cross-referenced, and that it is difficult to know what related information already exists in the public domain.

[79] While I might be prepared to accept these arguments with respect to the payment amounts, I am not satisfied that they should be upheld with respect to the dates. To begin with, the dates do not appear in a contract, and they were not, in fact, in any sense "supplied" by drug manufacturers to the ministry, as explained above. Nor have I been provided with evidence to demonstrate that disclosing the dates on which the ministry issued invoices or received payment would reveal information otherwise exempt under section 17(1). What could be revealed is the fact that a particular manufacturer participates in the program and has paid discount rebates to the ministry.

[80] In my view, the participation of a drug manufacturer in the discounts program, which would be confirmed by disclosing the manufacturer's name and that the manufacturer was invoiced by or provided payment to the ministry, is not subject to a reasonable expectation of confidentiality. This engages the second requirement under part 2 of the test, that the information be supplied "in confidence."

[81] The executive officer is empowered, under O. Reg. 201/96, as amended, to require manufacturers to enter into agreements with respect to drug products and the ODBP, under which the following information would *not* be confidential:

> i. The name of the manufacturer.
> ii. The subject-matter of the agreement.
> iii. The fact of entering into or terminating the agreement.[24]

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[22] The drug manufacturers also refer to the similar conclusions reached in Order 2000-005 of former Alberta Information and Privacy Commissioner Frank Clark, also cited above at footnote 9.

[23] See Order 01-01, *Children and Women's Health Centre of British Columbia, Re*, 2001 CanLii 21555 (B.C.I.P.C.)

[24] See section 11, item 4, section 12(7) and section 12.1(1), item 7, of O. Reg 201/96, as amended.

[82] Many of the drug manufacturers refer to this provision in support of their argument that information in the records is confidential. As acknowledged by some drug manufacturers in the non-confidential portions of their representations, these provisions also appear in listing and pricing agreements entered into between the ministry and drug manufacturers.

[83] Accordingly, I conclude that the manufacturers' names are not confidential. In my view, these provisions also indicate that the fact of a manufacturer entering into or terminating an agreement with the ministry is not confidential, nor is the agreement's subject matter, to the extent that any of this information might be directly or inferentially disclosed by the records.

[84] In addition, I conclude that it is not accurate to say that the company names have been "supplied." The drug manufacturer's names also appear in contracts with the ministry, which are the foundation of the manufacturer's participation in the discounts program in the first place. The manufacturer's names are part of a negotiated contract, namely a listing and/or pricing agreement.

[85] A number of drug manufacturers argue that disclosing the frequency of payments (which could be inferred from the payment dates) would reveal the type of agreement entered into between the manufacturer and the ministry. I note, however, that one of the items whose disclosure may be required by the Executive Officer is the "subject matter" of the agreement, which would, presumably, reveal what "type" of agreement it is. In my view, therefore, this information, which I found above was not "supplied," is also not confidential.

[86] In this regard, some drug manufacturers also argue that, as a consequence of being able to discern which type of agreement a manufacturer has entered, it would be possible to determine the applicable discount calculation formula, as these have been disclosed elsewhere. This argument is disposed of on the basis that the "type" of agreement is not confidential. In addition, and significantly, I have not been provided with evidence that the discount calculation formulas have been made public. In that regard, I note that in Order PO-2863, Adjudicator Smith ordered disclosure of templates for pricing and listing agreements, but found the discount calculation formulas exempt under sections 18(1)(c) and (d).

[87] In several instances, the records also disclose interest charges or overpayments. The amounts are part of the information that is exempt under sections 18(1)(c) and (d). With respect to the references to these occurrences, however, the information was generated by the ministry, and does not give rise to an accurate inference of information that was "supplied." I therefore find that it was not "supplied."

[88] In summary, therefore, I find that the information I have not exempted under sections 18(1)(c) and (d) – namely, the drug manufacturers' names, invoice dates, and

[89] the dates when payment was received – was not "supplied in confidence." This is sufficient to determine that part 2 of the test is not met, and to conclude that this information is therefore not exempt under sections 17(1)(a), (b) or (c). However, for the sake of completeness, I will also address the arguments put forward by the drug manufacturers with respect to "harms," as they impact this information.

Part 3: harms

[90] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[25]

[91] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[26]

[92] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[27]

[93] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[28]

[94] Most of the evidence and argument put forward under sections 17(1)(a) and (c) concerns the payment amounts, which I have already found exempt under sections 18(1)(c) and (d). While several of the drug manufacturers also state that disclosing the dates of invoices or payments could allow inferences to be drawn about contractual terms, none provides a satisfactory basis for concluding that disclosing this information could reasonably be expected to cause the harms set out in sections 17(1)(a) or (c), namely damage to competitive position or negotiations, or undue loss or gain.

[95] A number of manufacturers argue that simply revealing that a drug manufacturer has made payments to the ministry, or disclosing invoice/payment dates, which would reveal payment time frames, is sufficient to damage a manufacturer's competitive position and negotiations, as this information will be known to other parties with whom it negotiates, and it will not be possible to make different arrangements with them.

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[25] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[26] Order PO-2020.
[27] Order PO-2435.
[28] Order PO-2435.

Similar arguments are made that this will cause "undue loss," or permit other companies to outbid the manufacturer whose information is disclosed.

[96] However, beyond bald assertions of this nature, no explanation is provided as to why the inferential disclosure of a particular payment schedule or time frame, for example, or of the fact that a particular company made payments to the Ministry under an agreement whose existence and subject-matter are publicly disclosable, could reasonably be expected to produce "competitive" harm, or harm to "negotiating position," or could lead to a manufacturer being outbid. There appears to be an assumption that the prospect of harm is self-evident. I disagree. In my view, given the nature of the information under discussion, it is not self-evident that its disclosure could reasonably be expected to produce such harms, nor have I been provided with detailed and convincing evidence to support such a finding.

[97] One of the drug manufacturers provides a very specific argument concerning harm in the context of section 17(1)(c), stating that if it becomes known that a drug manufacturer has paid rebates to Ontario, this may result in a perception of non-compliance with commitments to other provinces, and could lead to legal action, including inquests, inquiries, investigations and potential lawsuits. An example of an inquiry on this subject from another province was provided. However, this manufacturer also states that its agreements with the ministry do not constitute a breach of its contractual obligations with other parties, nor of the legislative or regulatory scheme in other provinces. In my view, the concerns raised here, which depend on a reasonable expectation of undue loss, are speculative. Detailed and convincing evidence to support a reasonable expectation of undue loss has not been provided. In addition, section 17(1)(c) refers to "undue" loss or gain. In my view, any loss resulting from violation of agreements with other parties would not qualify as "undue."

[98] Another argument raises the possible application of section 17(1)(b), which applies where disclosure could reasonably be expected to "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." However, the rationale advanced is, in effect, that drug manufacturers will cease to do business with the government under the ODBP if the information in the records is disclosed. This argument does not refer to the flow of *information* to the ministry, which is the harm addressed under section 17(1)(b). For this reason, I find that section 17(1)(b) does not apply. I would also reiterate my finding, above, that none of the information in the records was, in fact, "supplied" to the ministry in the first place.

[99] In a further apparent reference to section 17(1)(b), some manufacturers refer to a chilling effect on "full and complete disclosure" of their business information to the ministry in the future. Without any further explanation of how this could reasonably be expected to occur with respect to the manufacturer's names, the invoice dates or the

dates when payment was received, which I found, above, were not "supplied" to the ministry in the first place, this argument must also be rejected.

[100] Accordingly, I am not satisfied that the disclosure of the drug manufacturer's names, the invoice dates or the payment dates could reasonably be expected to produce the harms enumerated in sections 17(1)(a), (b) and (c), and part 3 of the test is also not met.

[101] Having found that parts 2 and 3 of the test are not met, I find that the drug manufacturer's names, the invoice dates or the payment dates in the records are not exempt under section 17(1).

[102] As already noted, some drug manufacturers claim that this information is also exempt under sections 18(1)(c) and (d). The rationale for this is that, because of the harm that would be caused to their business interests by its disclosure, future negotiations with the ministry under the ODBP would be prejudiced. In the analysis of part 3 of the test under section 17(1), above, I have concluded that the evidence does not support a finding that disclosure of drug manufacturers' names, the invoice dates or the payment dates in the records could reasonably be expected to cause harm to the drug manufacturers' competitive position or negotiations, or a finding that disclosure could reasonably be expected to lead to undue loss. In reaching that conclusion, I applied the evidentiary standard of "detailed and convincing" evidence that also applies under sections 18(1)(c) and (d). In doing so, I have found that the factual foundation that is also the basis for the drug manufacturers' section 18(1) (c) and (d) claims is not sustainable. Accordingly, if I had allowed the drug manufacturers to rely on sections 18(1)(c) and (d) with respect to their names, the invoice dates and the dates when payment was received by the ministry, I would not have upheld its application.

C. Should the ministry's exercise of discretion to deny access under sections 18(1)(c) and (d) be upheld?

[103] The section 18 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.

[104] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[105] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[29] This office may not, however, substitute its own discretion for that of the institution.[30]

[106] The ministry submits that it exercised its discretion properly, taking relevant factors into consideration. In particular, it considered the response of the drug manufacturers to the release of information pursuant to Order PO-2865, and the lack of general public interest in the information it proposed to withhold, namely the payment amounts. Rather, according to the ministry, disclosure would serve the private interests of the drug manufacturers' potential competitors and customers.

[107] It is evident from the ministry's submissions regarding sections 18(1)(c) and (d), extensively reproduced above that, in deciding to rely on this exemption, it took into account the significant public interest in non-disclosure that exists in this case, given the economic importance of preserving the government's ability to continue to negotiate discounts with drug manufacturers for drugs that are included in the ODBP.

[108] The appellant refers to his difficulty in appealing the ministry's decision to deny access. I have addressed that issue in the "Overview" section, above, and the appeal has proceeded. In my view, that is not a relevant factor with respect to the ministry's exercise of discretion and has, in any event, been addressed.

[109] The appellant also alleges that, as the person who is negotiating the agreements, the Executive Officer should have "recused herself" from being the decision-maker on his access request. This apparent allegation of conflict of interest or bias is not explained or supported further. I note that the Executive Officer was, at the relevant time, also Assistant Deputy Minister. Absent any further evidence or information on this point, I do not accept this argument.

[110] Having reviewed the parties' representations, I find that the ministry's exercise of discretion to deny access to the payment amounts under sections 18(1)(c) and (d) was proper. While there may be some public interest in knowing the severed information, it is evident that the ministry's decision was based on its view that there is a strong public interest in non-disclosure in order to preserve the government's ability to negotiate discounts with manufacturers of drugs that are included in the ODBP.

[111] In that regard, I note that although the appellant did not expressly raise the public interest override found in section 23 of the *Act* in these appeals, he does refer to transparency interests in this kind of information. In my view, for the reasons articulated in my analysis of sections 18(1)(c) and (d), and of the exercise of discretion,

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[29] Order MO-1573.
[30] Section 54(2) of the *Act*.

the public interest in non-disclosure is more compelling than any public interest in disclosure of the payment amounts that have been withheld from disclosure.[31]

[112] For all these reasons, I uphold the ministry's decision.

ORDER:

1. I uphold the ministry's decision to deny access to the payment amounts in the records, and to disclose the remaining information.

2. I order the ministry to disclose the remainder of the records for which third party appeals were filed by sending a copy of the records to the appellant no later than **February 13, 2012** but not earlier than **February 8, 2012.**

3. In order to verify compliance with the terms of this order, I reserve the right to require a copy of the records that are provided to the appellant pursuant to order provision 2.

Original signed by: January 6, 2012
John Higgins
Senior Adjudicator

[31] See *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).