Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3120

Appeal PA11-30-2

Ministry of Health and Long-Term Care

October 18, 2012

Summary: The appellant requested the aggregate total of all discount payments made by individual drug manufacturers under the Ontario Drug Benefits Program for the year 2009. The request was submitted to the Ministry of Health and Long-term Care, which denied access to the aggregate payment amount under sections 17(1)(a) and (c) (third party information) and 18(1)(c) and (d) (economic and other interests). The appellant appealed the decision to deny access to the aggregate payment amounts.

The ministry's decision to deny access to the aggregate payment amounts under sections 18(1)(c) and (d) is not upheld. The disclosure of these amounts could not reasonably be expected to either prejudice the economic interests of the ministry or be injurious to the financial interests of the government of Ontario. In addition, the information is also not exempt under the mandatory third party information exemption in section 17(1).

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

Orders and Investigation Reports Considered: Orders PO-2865 and PO-3032

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> . . . the aggregate payments received in 2009 from drug companies under Bill 102 (the *Transparent Drug System for Patients Act 2006*) under the pricing/listing agreements.
>
> If there are recent media lines or briefing notes on the costs to date of such aggregate payments, please provide, too.

[2] The aggregate payment information was found in a record entitled *"Total Aggregate Payment Summary"* for the year 2009. The ministry notified a number of third parties of the request pursuant to section 28 of the *Act* and received representations from some of them. After considering those representations, the ministry issued a decision letter to the requester, advising that it would grant access to the headings and calendar year indicated on the record. Access to the aggregate payment amount contained in the record was denied, based on the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 18(1) (economic and other interests) of the *Act*.

[3] The requester (now the appellant) appealed this decision to this office. In the appeal letter, the appellant stated:

> I am appealing the Ministry of Health's denial to me of the aggregate payment received in total for 2009 from drug companies under Bill 102… the Ministry failed to provide me with proper appeal notice when they indicated that I would not receive the one figure for the aggregate payment made that does not refer to any one drug company or briefing notes about this total payment received.
>
> I believe the Ministry erred and should not have gone to third parties as none of the parties [sic] individual payments were to be divulged and the financial transaction is going into the public treasury and is not a commercial [transaction].

[4] Appeal PA11-30 was opened and the matter proceeded to the intake stage of the process. During intake, this office advised the ministry that no third party appeals had been filed with respect to this request by the drug companies who had been notified by the ministry pursuant to section 28. As a result of further discussions between the ministry and the Intake Analyst, the ministry issued a revised decision letter to the

appellant and disclosed all of the record to the appellant, with the exception of the aggregate payment amount. The ministry also clarified that the remaining information at issue (the aggregate payment amount) was denied pursuant to sections 17(1)(a) and (c) and 18(1)(c) and (d).

[5] The appellant advised the Intake Analyst both verbally and by letter that he still wished to pursue access to the aggregate payment amount received by the ministry from drug companies in 2009. Accordingly, that is the information at issue. Appeal PA11-30 was then closed, and Appeal PA11-30-2 was opened to address the ministry's denial of access to this information alone. Appeal PA11-30-2 was then streamed directly to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*.

[6] This office provided the ministry and 47 affected party drug companies with a Notice of Inquiry (the Notice), setting out the facts and issues in the appeal and inviting their representations. The affected parties notified are the companies which contributed to the aggregate payment amount received in 2009. The ministry and 14 of the affected parties responded to the Notice with representations. Some of the affected party drug companies also raised the possible application of the mandatory third party exemption in section 17(1)(b) in their representations.

[7] The appellant was also provided with a copy of the Notice, along with the ministry's representations, and was invited to provide submissions on the application of section 18(1)(c) and (d) to the record. The representations provided by drug manufacturers were primarily directed at the application of section 17(1), and were not, therefore, included with the Notice sent to the appellant. Also, to the extent that drug manufacturers commented on section 18 in their representations, their views were consistent with those of the ministry.

[8] The appellant also provided representations in response to the Notice.

[9] On January 6, 2012, Senior Adjudicator John Higgins issued Order PO-3032 in which he upheld the decision of the ministry to deny access to the payment amounts contained in "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." The present appeal is concerned with similar, though far from identical information, the "aggregate payments received in 2009 from drug companies under Bill 102 (the *Transparent Drug System for Patients Act, 2006*) under the pricing listing agreements."

[10] On January 11, 2012, I wrote to the ministry and the appellant and invited them to provide me with submissions on the possible impact of Order PO-3032 on the outcome of the current appeal. Both the ministry and the appellant provided

submissions on the possible application of sections 18(1)(c) and (d) to the record in response to my invitation.

[11] In this order, I do not uphold the ministry's decision to deny access to the aggregate payment amount paid by drug companies under the Ontario Drug Benefit Program for the year 2009. I find that this information is not exempt from disclosure under sections 17(1)(a), (b) and (c) or 18(1)(c) and (d).

RECORDS:

[12] The record is entitled *"Total Aggregate Payment Summary,"* for the year 2009. The aggregate payment amount is the sole information at issue in this record.

ISSUES:

A: Do the discretionary exemptions at sections 18(1)(c) and/or (d) apply to the information at issue?

B: Do the mandatory exemptions at sections 17(1)(a), (b) and/or (c) apply to the information at issue?

DISCUSSION:

Issue A: Do the discretionary exemptions at sections 18(1)(c) and (d) apply to the information at issue?

General principles

[13] 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;

[14] 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 (Toronto: Queen's Printer, 1980) (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.

[15] For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to either (i) prejudice the economic interests of an institution or the competitive position of an institution; or (ii) 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. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[1]

[16] 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 18 [Orders MO-1947 and MO-2363].

[17] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

Section 18(1)(c): prejudice to economic interests

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

[19] This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires

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[1] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758].

Section 18(1)(d): injury to financial interests

[20] 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.[2]

Representations of the parties

[21] In its initial representations sent in response to the Notice, the ministry argues that despite the aggregate nature of the information, its disclosure would nevertheless prejudice the ministry's economic interests because the drug manufacturers who make the payments which comprise this aggregate amount consider this information highly confidential. The ministry points out that the amount of each payment was negotiated with the drug companies and that they considered this information, in whatever form, to be confidential. It goes on to submit that if the manufacturers involved "had anticipated that even aggregate sums would be disclosed, they would have been less willing to agree to significant volume discount amounts, thereby prejudicing the Ministry's and the Government's economic and financial interests."

[22] The ministry goes on to submit that the information at issue in this appeal, consisting of an aggregate payment amount, taken together with other publicly-available information, could be linked to individual manufacturers. It suggests that this combination of information would "permit a sophisticated requester to calculate, inferentially, and draw accurate conclusions regarding the *individual* volume discounts paid by individual drug manufacturers to Ontario in 2009." Tellingly, however, the ministry does not explain *how* these individual volume discounts could be calculated. It has not provided me with evidence of how the disclosure of an aggregate amount of discount payments for all drugs under the Ontario Drug Benefit Program could be linked to the individual volume discount payments made to the ministry by any individual drug company or the amount of the volume discount payment made with respect to any individual drug product.

[23] Rather, the ministry states that concerns on the part of the drug companies that their competitors may be able to gain some competitive advantage through the use of this information may make them reluctant to enter into agreements that are financially

[2] 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.

beneficial to the ministry and, ultimately, the government of Ontario. The ministry notes that payments made under the Ontario Drug Benefit Program represent a substantial source of revenue for the province and that any negative impact on that revenue flow would have serious deleterious consequences for the government and its economic and financial interests.

[24] In the representations which I received from the drug companies in support of their contention that the records are exempt under section 17(1)(b), they generally take the position that if the aggregate information at issue in this appeal is disclosed, they will be less inclined to negotiate similar discounts with the government of Ontario in the future. For example, one of the affected party drug companies submits that in addition to its concerns about other private and public drug plans in Canada seeking similar discounts in exchange for the listing of its drugs on their formularies, it is also concerned about the impact which the disclosure of the aggregate payment amount would have world-wide. It states:

> Our client's biggest concern is how this issue would play out beyond Canada's borders in respect of both public sector and private sector purchasers. Quebec has already introduced a "most favoured nation" status concerning drug prices. Other provinces might follow suit through legislation or other strategies. And with US legislators currently trying to curb prescription drug prices, the timing of disclosure could be especially problematic for our client and other brand manufacturers.
>
> . . .
>
> The Ministry is keenly aware that our client will avoid jeopardizing its bargaining position vis-a-vis other customers with whom it may be engaged in price negotiations, either concurrently or in the future. Our client will be less likely to negotiate discounts with the Ministry because, if disclosed, they can negatively affect our client's competitive position by establishing a lower benchmark for a given drug product. The Ministry may wind up spending more and negating some of its savings it is currently trying to achieve on drugs.

[25] The gist of the argument here appears to be that disclosure of the information will, in the short run, affect the drug companies' competitive interests because it will reveal the benchmark for given drug products. Further, in the long run, this will lead drug companies to avoid negotiating discounts with the ministry because of the risk of disclosure, which will harm Ontario's ability to achieve savings on drug costs. I find it significant, however, that the affected party drug company has not provided an evidentiary link between the disclosure of the actual information at issue in this appeal, a single dollar figure representing all the amounts paid as discounts by all of the participating drug companies, and the harm which is alleged. Its submissions do not

establish how disclosure of this dollar figure will lead to a lower benchmark for a **given drug product** and consequently, the unwillingness to negotiate further discounts. The affected party drug company has, therefore, failed to demonstrate how one of its competitors or a public/private sector purchaser could make use of this single figure to extract a stronger negotiating position which would in some way negatively impact on it, or the government of Ontario, as is required under sections 17(1) and 18(1).

[26] I note that there are 47 drug companies which offer varying rebate discounts to Ontario with respect to many, many drug products. The aggregate payment amount was calculated as the total amount paid by all of these drug companies for all of the products that are included in the Ontario Drug Benefits Program.

[27] The appellant points out that the aggregate payment amounts sought for 2009 was disclosed for the years 2007 and 2008, without the negative consequences posited by the ministry occurring. The appellant relies on four arguments favouring the disclosure of the aggregate amount for 2009:

1. The system under which drug companies charge "full prices" and then pay the difference between that price and the "wholesale price" back to the ministry in the form of a "rebate" is questionable.

2. As the appellant surmises that the aggregate amount for 2009 would be greater than the amounts paid in 2007 and 2008, some of that increase may "mask higher drug prices being charges by drug companies" rather than meaning that higher volume discounts were achieved. This is a matter of public concern, according to the appellant.

3. The fact that the payments made in 2009 likely exceed those in 2007 and 2008 reflects the "Ministry's too ready acceptance of drugs being placed on the provincial formulary that have little or no proven health benefit but which offer drug companies profits and for which the Ministry obtains rebate monies."

4. The rebate amounts paid by the manufacturers can be used as a tax deductible expense that has the effect of lowering provincial and federal tax revenues.

[28] On January 6, 2012, Senior Adjudicator John Higgins issued Order PO-3032 which upheld the ministry's decision to deny access under sections 18(1)(c) and (d) to payment amounts received by the ministry from drug companies which were contained in "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." On January 11, 2012 I invited the appellant and the ministry to make representations on the possible impact of Order PO-3032 on the current appeal, due to

the similarities in the type of records and exemptions claimed. I received representations from the both the appellant and the ministry in response.

[29] The ministry chose to respond to my invitation to comment on the impact of Order PO-3032 on the current appeal by stating that:

> Order PO-3032 recognizes and affirms the significant public interest in maintaining the confidentiality of the same kind of information that is at the heart of this Appeal, namely information regarding volume discount payments made by drug manufacturers to the Ministry under negotiated pricing agreements (pursuant to the powers of the Executive Officer of the Ontario Public Drug Programs under the *Transparent Drug System for Patients Act, 2006.*)
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> . . .
>
> Senior Adjudicator Higgins concluded 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.' . . . In particular, he concluded that in light of the submissions provided by the Ministry concerning the overwhelmingly negative reactions of drug manufacturers to the disclosure of similar drug payment information required by [Order] PO-2685, such disclosure of payment information 'has had a negative impact on the Executive Officer's efforts to negotiate discounts with drug manufacturers, and . . . 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.'

[30] The ministry also argues that while the payment information in that case was directly attributable on its face to individual drug manufacturers, it is analogous to the aggregate payment information relating to all manufacturers at issue in the appeal before me. The ministry further asserts that "the disclosure of the aggregate 2009 payment information should be considered in light of the drug payment information previously disclosed by the Ministry pursuant to prior IPC orders as well as other publicly available information." Based on the submissions which it received from the drug manufacturers, the ministry submits in both its original submissions and those provided with respect to the impact of Order PO-3032 that:

> . . . payment information attributable from individual manufacturers (as well as potentially to individual drugs for manufacturers with drug pricing agreements covering only one drug product) can be accurately and inferentially derived from the 2009 aggregate volume discount payment

> information by sophisticated individuals in combination with other available sources of information.

[31] On this basis, the ministry urges that I adopt the reasoning set out in Order PO-3032 where it was found that disclosure of the information at issue "would permit the potential for individuals to inferentially determine volume discount payment amounts" and asks that I make a similar finding with respect to the information at issue in this appeal.

[32] The ministry also asks that I accept the findings of Senior Adjudicator Higgins in Order PO-3032 respecting the "significant public interest in non-disclosure . . . given the economic importance of preserving the government's ability to continue to negotiate discounts with drug manufacturers" with respect to the information contained in the records at issue in that appeal, and apply it to the records in this appeal. The ministry submits that the disclosure of even the aggregate amounts would jeopardize its ability to secure substantial savings which flow from these pricing agreements due to the loss of what it describes as "its trusted ongoing relationship with those manufacturers."

[33] The appellant takes issue with the ministry's position that the disclosure of the aggregate payment amount could result in a determination of individual payments made to specific companies through the use of other publicly available information.

Findings

[34] In Order PO-3032, Senior Adjudicator Higgins accepted the arguments and evidence submitted by the ministry that payment summary sheets for each drug company who made payments to the ministry under the Ontario Drug Benefit Program for a specific period were exempt from disclosure under sections 18(1)(c) and (d). In making his decision, the Senior Adjudicator relied upon certain evidence submitted by the ministry that was contained in a memorandum from the Executive Officer of the Ontario Drug Benefit Program. That evidence described in detail the potential impact which the disclosure of the information at issue in that appeal might have. The memorandum of the Executive Officer set out the significant impact which the disclosure of information had following the issuance of Order PO-2865. In that decision, certain information relating to quarterly payments made by drug companies pursuant to the *Transparent Drug System for Patients Act, 2006* under the public drug plan known as Bill 102 was ordered disclosed. Specifically, the memorandum described how various drug manufacturers became "more reluctant to enter into pricing negotiations" and how the disclosure of the information ordered disclosed in Order PO-2865 "prejudiced the Ministry's ability to secure savings and ensure price stability through the negotiated agreements described above." In the current appeal, the ministry makes identical arguments in favour of a similar finding with respect to the 2009 aggregate payment amounts at issue here, but does not provide any evidence of

prejudice resulting from the disclosure of aggregate payment amounts for the years 2007 and 2008.

[35] As noted above, the appellant speculates as to the reasons why the ministry is now taking the position that the aggregate payment amounts for 2009 are subject to the section 18(1)(c) and (d) exemptions. Essentially, the appellant suggests that the system of rebating a portion of the purchase price for drugs to the ministry by the manufacturers is flawed and open to allegations of potential fraud and price manipulation.

[36] Having reviewed the evidence provided to me in this appeal, as well as that tendered by the ministry in the appeal that gave rise to Order PO-3032, I am not satisfied that the disclosure of the aggregate payment amounts for 2009 could reasonably be expected to prejudice the economic interests of the ministry or be injurious to the financial interests of the government of Ontario. I do not accept the ministry's position that the further disclosure of a single dollar amount comprising the sum total paid by drug companies under the Ontario Drug Benefits Program could reasonably be expected to result in significant harm to the relationship which exists between the ministry and the drug manufacturing industry which would then lead to a deleterious effect on the ability of the ministry to continue to negotiate the discounts which it has obtained in previous years with the drug companies. It is not a secret that drug companies pay discounts to the ministry under the Ontario Drug Benefits Program. In fact, as the appellant points out, the aggregate payment amounts for both 2007 and 2008 were published on the ministry's website. No evidence has been offered to show the harm that resulted from these disclosures.

[37] The arguments of the drug companies and the ministry with respect to section 18(1) presuppose that the disclosure of the aggregate payment amount for 2009 will enable one to determine the price paid by the Government of Ontario for a given drug. In this regard, I do not accept the evidence of the ministry in support of the position that the disclosure of the aggregate payment amount for 2009 could enable someone familiar with other publicly-available information (including that disclosed as a result of Order PO-2865) to extrapolate further and determine the amount of individual payments made by a drug manufacturer or the amount paid for any specific drug product. In my view, the evidence provided by the ministry is insufficient to establish how such a calculation is possible or how it could result from the disclosure of the aggregate payment amount.

[38] In contrast, I agree with the position taken by the appellant that the disclosure of the aggregate payment amount alone will not, when combined with already publicly available information enable someone to determine the amounts paid as volume discounts by any individual manufacturer.

[39] It is also important to bear in mind that the aggregate totals for 2007 and 2008 were made available by the ministry on its website. The ministry has not demonstrated whether or how the disclosure of the aggregate payment amounts for those years had any negative impact on its ability to negotiate volume discounts in the following years or any other deleterious impact on its bargaining position with the drug manufacturers. Similarly, the drug manufacturers do not indicate in the evidence presented to me that they changed their bargaining strategies or took a more "hard line" with the ministry as a result of the disclosure of the aggregate payment amounts in 2007 and 2008. In my view, this reinforces the conclusion that the disclosure of the aggregate payment amount will not result in the types of harm contemplated by sections 18(1)(c) and (d).

[40] As a result, I conclude that the drug companies will continue to negotiate with the Government of Ontario for the sale and purchase of drug products at a discounted rate, where there is no demonstrable risk that the price paid by Ontario for a given drug product could be calculated based on publicly available information. Therefore, I cannot accept the position of the ministry that there is a reasonable expectation of prejudice and harm to the relationship between the parties to the Ontario Drug Benefit Program which will have a significant negative impact on the economic interests of the ministry and the Government of Ontario. Accordingly, based on the evidence provided to me, I am not satisfied that the disclosure of this information could reasonably result in the harms contemplated by sections 18(1)(c) and (d). Accordingly, the information contained in the records at issue does not qualify for exemption under those sections. It is not necessary for me to consider whether the ministry properly exercised its discretion to deny access to the record as I have not upheld the application of the discretionary exemption in sections 18(1)(c) and (d).

[41] I will now consider whether the information falls within the ambit of the section 17(1) exemption.

Issue B: Do the mandatory exemptions at sections 17(1)(a), (b) and/or (c) apply to the information at issue?

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

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

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

[43] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*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.)]. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

[44] 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.

[45] In this appeal, the ministry indicates that it relies on the representations of the drug companies with respect to the application of section 17(1) to the record.

Part 1: type of information

[46] The affected parties take the position that the information at issue constitutes commercial or financial information within the meaning of those terms in section 17(1). The types of information listed in section 17(1) have been discussed in prior orders as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact

> that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[47] In my view, the aggregate total of rebate payments made by drug companies to the Government of Ontario qualifies as both commercial and financial information for the purposes of part one of the test under section 17(1) as this amount relates to the buying and selling of prescription drugs and the use or distribution of money.

Part 2: supplied in confidence

Supplied

[48] 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 [Order MO-1706].

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

[50] The drug companies argue that they directly supplied the total aggregate figure to the ministry as a result of making the payments which comprise and were used to calculate the aggregate payment amount which is at issue. The drug companies who provided submissions consistently made similar arguments about this aspect of the test under section 17(1). In a submission echoed by many others on this point, one of them argues that:

> . . . the disclosure of the aggregate payment amount would permit a requester to draw accurate inferences with respect to the baseline pricing information actually supplied [by each manufacturer] to the ministry in connection with the negotiation of and entry into the PLA (product listing agreement) and the listing of [each manufacturer's] products on the Formulary. This is because the information already produced by the Ministry permits the requester to calculate the portion of the aggregate discount paid by a manufacturer in prior years. The requester can infer that the manufacturer has provided the same portion 2009 as in prior years. Knowing the PLAs entered into by the Ministry and various

> manufacturers (this information is posted by the Ministry), the requester can relate the portion of the aggregate amount paid by a manufacturer to specific drugs. The requester could then combine this information with drug utilization information and formulary pricing that is publicly available to draw conclusions about confidential baseline pricing of specific products.

[51] In another submission from one of the drug companies, the following argument relating to the "supplied" aspect of section 17(1) is posited:

> . . . if the Information were to be disclosed, a reasonably informed observer would be able to draw an accurate inference from the Information concerning the percentage and dollar amounts of discounts for each of our client's specific drug products. It does this by providing a trend to the 'steady state' of discount when a new product(s) achieves listing. The observer would be able to make this determination by identifying the difference after the listing date between the trend and the actual discount, which would be a reasonable estimate of the individual discount for the new product(s) for that time period.
>
> The observer would also be able to make this determination by combining the Information with the list price of the drug on the Ontario Formulary and information about drug utilization in Ontario (which is readily available from various sources) to determine the formula by which the discount is calculated. This, in turn, would permit the requester/appellant to derive the baseline pricing information of specific drug products. Thus, *even though the Information itself is not referable to a single manufacturer or a single drug sold by a manufacturer*, it can be manipulated, together with readily available sources of information on Ontario drug utilization, which could permit the calculation of specific volume discounts offered on various drugs. [my emphasis]

[52] After considering the arguments raised by this issue, I find that the aggregate payment amount does not reveal any information supplied by the drug companies to the ministry. In my analysis of this issue, I am mindful of the nature of the actual information at issue in this appeal, the aggregate payment amount representing a composite total of payments received from a large number of sources. Even if each of the component parts which make up the aggregate amount could be said to have been "supplied" to the ministry within the meaning of section 17(1), the same cannot be said for the aggregate amount. This dollar figure was arrived at as a result of the ministry compiling a total figure from the many amounts paid by the drug manufacturers as part of their participation in the volume discount scheme. This amount represents the sum total of the amounts received by the ministry as part of this program, and not the actual individual payments made by each manufacturer participating in it.

[53] Further, I do not accept the arguments put forward by the drug companies that in conjunction with other publicly available sources, a knowledgeable individual could work backward from the aggregate payment amount and determine the amounts paid by each manufacturer for each of its products. This seemingly simple calculation was not made for me in any of the representations which I received from the drug manufacturers to demonstrate how it might be possible to do so. While an individual with access to the information at issue in this appeal, along with the information disclosed as a result of Order PO-2865, might be able to surmise very roughly what amounts may have been paid by any given manufacturer, such a calculation is premised on consistent year to year participation by each drug manufacturer and identical product listings being carried forward. In my view, the disclosure of the aggregate payment amount could not be used to arrive at a dollar figure which would reveal the amounts actually paid to the ministry.

[54] As a result, I find that the parties resisting disclosure of the aggregate payment amount, in this case the drug companies, have failed to demonstrate that the information was "supplied" to the ministry within the meaning of part two of the test under section 17(1). As all three parts of the test must be satisfied under this exemption, I find that it has no application to the aggregate total that comprises the sole information at issue.

[55] For the sake of completeness, however, I will also consider whether the drug companies and the ministry have demonstrated that the third part of the test under section 17(1), relating to harms, has been made out by the evidence. I note that in some of the submissions received from the drug companies, the nature of the information in the record at issue is not clearly understood to be only the aggregate payment amount. Instead, some of the parties express concerns about the disclosure of "quarterly payment records" or "Payment Summary records", which are not, in fact, the information at issue in this appeal.

Part 3: Harms

General principles

[56] To meet this part of the test, the institution and/or the drug companies who are resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[57] 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 [Order PO-2020].

[58] 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* [Order PO-2435].

Section 17(1)(a): prejudice to competitive position

[59] The drug companies who responded to the Notice provided similar submissions on the application of section 17(1) to the aggregate payment amount. They consistently describe how the pharmaceutical industry is highly competitive amongst patented drug manufacturers and between them and the manufacturers of generic drug products. They also submit that participation in this industry involves the expenditure of "many millions of dollars in research, development and formulary listings for new drugs." One of the drug companies argues that the disclosure of the aggregate payment amount would "teach competitors about bargaining outcomes satisfactory to the Ministry and about [the companies'] bargaining strategy, both of which can only assist a competitor in its own negotiations with the Ministry to the clear competitive detriment to [it]."

[60] The drug companies also submit that harm to their commercial relationship with their customers would ensue from the disclosure of the aggregate payment amount. They submit that other provincial governments across Canada, as well as governments beyond Canada's borders and private sector drug plans would insist on obtaining the same treatment afforded Ontario if the aggregate payment amount were to be disclosed. They take the position that their negotiating position with other governments and private sector drug plans would be adversely affected by the disclosure of this sum as they would demand similar price concessions.

[61] In my view, the drug companies have not provided me with sufficiently detailed evidence to substantiate a finding that the disclosure of the aggregate payment information could reasonably be expect to give rise to the type of harm contemplated by section 17(1)(a). As noted above, the fact that such payments are made by drug companies to Ontario is well known. I also note that the harms described in their representations did not occur when the identical information was disclosed for the years 2007 and 2008. As described in my analysis above, the drug companies have not provided me with any explanation as to how the disclosure of the aggregate payment amount could be extrapolated to calculate the amount paid by any individual manufacturer or to determine the amounts paid for any specific drug products. As a result, I find that section 17(1)(a) has no application to the aggregate payment amount at issue in this appeal.

Section 17(1)(b): similar information no longer supplied

[62] Several of the drug companies have also indicated their reliance on the application of section 17(1)(b) to the information at issue in this appeal. The parties relying on this exemption take the position that the disclosure of the aggregate payment amount "could lead our client to stop negotiating with the Ministry." One of the parties suggests that "[I]f all provincial and private sector drug plans were to demand the same price concessions, our client would be forced to abandon proposed deals with the Ministry, or with any other provincial drug plan, involving large discounts and other favourable financial terms for fear this information will be used by provincial governments seeking to negotiate similar discounts."

[63] I note that the exemption in section 17(1)(b) addresses the situation where the disclosure of the record could reasonably be expected to "result in similar information no longer being supplied to the institution." In my view, the kind of harm being suggested by the affected parties raising this exemption is more appropriately addressed in the discussion above under sections 18(1)(c) and (d) as it posits that disclosure would result in a negative impact upon the ministry's economic interests. The section 17(1)(b) exemption speaks to economic harm to the institution that arises as a result of the cessation of the supply of information by an affected party, rather than harm that may flow from a disinclination to negotiate with the Government of Ontario that stems from a disclosure of a record. As a result, I conclude that section 17(1)(b) has no application to the aggregate payment amount.

Section 17(1)(c): undue loss or gain

[64] Several of the drug companies also submit that, the disclosure of the aggregate payment amount, will result in an undue loss and their competitors were receive an equivalent benefit, as contemplated by section 17(1)(c). These arguments focus on the contention that a competitor could reasonably be expected to deduce the amount of the volume discounts negotiated by each of the drug manufacturers as a result of the disclosure of the amount at issue in the record. Again, this pre-supposes that such a calculation is possible and that this information could then be used to the commercial advantage of one of the companies' competitors.

[65] In response to these arguments, I note that the aggregate payment amount was calculated using the discount payments made by some 47 drug companies covering a large number of their drug products. One can also assume that some of these companies produce competing products, putting each on an equal footing insofar as possible harm to their competitive position is concerned. Reiterating my findings above with respect to the application of section 18(1)(c) and (d), I have not been provided with evidence to enable me to make a finding that the disclosure of the aggregate payment amount could give rise to undue loss or gain by any party. The evidentiary

link between the disclosure of this information and the harm alleged in section 17(1)(c) has not been established in this case by the parties claiming the exemption.

[66] To conclude, I find that section 17(1)(a), (b) and (c) have no application to the information at issue in this appeal. I have found above that section 18(1)(c) and (d) also do not apply to exempt the information at issue from disclosure. Accordingly, I find that neither of the exemptions claimed apply and information ought to be disclosed.

[67] Several of the drug companies have urged me not to order the release of the record at issue in this appeal because there is a judicial review application of Order PO-2865 presently before the Divisional Court in which the application of sections 18(1)(c) and (d) and 17(1) to similar information is the subject matter. In Order PO-3032, Senior Adjudicator John Higgins responded to similar arguments and determined to proceed with his order. In deciding to do so, he noted that in the case before him, the parties to the appeal had submitted additional evidence beyond that which was available to the adjudicator in Order PO-2865 "which amount to a change in circumstance." In the present appeal, I find that because the information at issue in this appeal is different from that which was under consideration in Orders PO-2865 and PO-3032, it is not necessary for me to postpone a determination of the issues pending the outcome of that judicial review application.

ORDER:

1. I do not uphold the ministry's decision to deny access to the 2009 aggregate payment amount in the record.

2. I order the ministry to disclose the aggregate payment amount contained in the record to the appellant by providing him with a copy by **November 23, 2012,** but not before **November 16, 2012.**

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

Original Signed by: October 18, 2012
Donald Hale
Adjudicator