Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3210

Appeals PA11-462, PA11-465, PA11-470, PA11-471, PA11-472

Ministry of Health and Long-Term Care

May 31, 2013

Summary: A request was made to the Ministry of Health and Long-Term Care for access to information relating to professional allowances and rebates received by and paid to a named pharmacy. In accordance with section 28(1) of the *Act,* the ministry notified the affected parties of the request and following receipt of their submissions, issued a decision granting partial access to the responsive records. A number of the drug manufacturers objected to the partial disclosure of the records and appealed the ministry's decision to this office. The drug manufacturers took the position that the information that the ministry was prepared to disclose was exempt under the mandatory exemption at section 17(1) (third party commercial information) of the *Act*. They also took the position that some of the information that the ministry was prepared to disclose, was not responsive to the request. Additionally, one of the drug manufacturers took the position that some of the records contained personal information that was exempt pursuant to the mandatory exemption at section 21(1) (personal privacy).

In this order, the adjudicator finds that section 17(1) does not apply to the information that the ministry is prepared to disclose but that some of it is not responsive to the request. The adjudicator also finds that the records contain no personal information and therefore, section 21(1) cannot apply. Accordingly, the adjudicator upholds, in part, the ministry's decision to grant partial access to the responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), (4), 17(1)(a), (b), (c), 21(1), and 24.

Orders Considered: Orders P-345, PO-1938, PO-2142 and PO-2632.

Related Order: Order PO-3209.

BACKGROUND:

[1] This order addresses five appeals arising from a request for information about professional allowances and rebates paid by drug manufacturers to pharmacies. The following background on professional allowances and rebates is based on the Ministry of Health and Long-Term Care's (the ministry's) website and the relevant legislation, as well as representations submitted during the course of these appeals, as well as a related appeal, by the ministry, the requester, the pharmacy named in the request, and a number of drug manufacturers.

[2] Prior to the passage of the *Transparent Drug System for Patients Act, 2006 (*the *TDSPA)*, the practice of generic drug manufacturers paying pharmacies "rebates," or discounts on generic drugs, to carry their products was widespread. The *TDSPA* prohibited pharmacies from collecting rebates but permitted them to receive defined "professional allowances." In order for a monetary payment to qualify as a professional allowance, it must be used on direct patient care services, such as flu clinics or blood pressure clinics, disease management and prevention initiatives, private patient counseling areas, or continuing education programs for pharmacists.

[3] The payment of professional allowances is governed by the *Ontario Drug Benefit Act*[1] for the Ontario Drug Benefit program (the ODBP or the "public" system) and the *Drug Interchangeability and Dispensing Fee Act*[2] for non-ODBP drug sales (the "private" system). Professional allowance payments by a drug manufacturer to pharmacies are optional. At the time of the creation of the records at issue in these appeals, the drug manufacturer had discretion with regard to the amounts of those payments made to the pharmacies up to the legislative maximum of 20% of generic sales for the ODBP. Payments made over 20% were considered "rebates" and were prohibited. There was no limit with respect to private or non-OBDP drug sales but the professional allowances were still required to be used on direct patient care services.

[4] Additionally, for payments to qualify as professional allowances, both drug manufacturers and Ontario pharmacies were required to comply with the *Code of Conduct* that is set out in the regulations to the *ODBA* and the *DIDFA*.[3] Specific reporting requirements pertaining to professional allowances were set out in the *Code of Conduct.* Between October 2006 and July 2010, drug manufacturers and pharmacies were both required to provide bi-annual reports to the ministry detailing the amounts of

[1] R.S.O. 1990, c. O-10 (*ODBA*).
[2] R.S.O. 1990, C. P.23 (*DIDFA*)
[3] *Code of Conduct*, being Schedule 1 to R.R.O 1990, Reg. 935 to the *DIDFA* and Schedule 3 to O.Reg. 201/96 of the *ODBA*.

all professional allowances paid. The drug manufacturers were required to report to the ministry the amount of professional allowance paid to each operator or company that owns a pharmacy. The ministry created templates to facilitate the reporting of professional allowances (professional allowance reporting forms). As of July 2010, pharmacies were no longer required to submit professional allowance reports unless specifically directed to do so. Drug manufacturers were required to continue to submit bi-annual reports.

[5] As of April 2013, drug manufacturers and pharmacies are no longer entitled to pay or to receive any professional allowances. However, drug manufacturers may still provide benefits to pharmacies that are in accordance with "ordinary commercial terms."

OVERVIEW OF THE APPEALS:

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

- all documents, reports or records received by the ministry from [named pharmacy] or any of its franchisees, or any company known to the ministry to be a related or affiliated corporation to any of them in accordance with statutory reporting obligations that report Professional Allowances or Rebates;

- all documents, reports or records received by the ministry from drug manufacturers, in accordance with statutory reporting obligations, which relate to Professional Allowances or Rebates received by and/or paid to the named pharmacy; and

- all documents, reports, audits or records prepared by or for the ministry relating to Professional Allowances or Rebates received by and/or paid to the named pharmacy.

[7] The ministry located 27 records, specifically professional allowance reporting forms submitted by the named pharmacy and a number of drug manufacturers, as well as correspondence that it identified as being responsive to the request.

[8] In accordance with section 28(1) of the *Act*, the ministry notified the drug manufacturers and the named pharmacy as their interests might be affected by the disclosure of the requested records. It sought their views regarding the records pertaining to them.

[9] With its notices, the ministry enclosed copies of the records relevant to the respective manufacturers and indicated that the portions that it had highlighted

represent the portions that the ministry would be withholding from disclosure on the basis of the application of the mandatory exemption at section 17(1) (third party information) of the *Act*. It also identified certain portions of the records as "non-responsive" to the request.

[10] A number of the notified drug manufacturers responded that they objected to disclosure of the responsive information. All of them took the position that all of the information contained on the professional allowance reporting forms was exempt pursuant to section 17(1) of the *Act*. Some of the drug manufacturers also claimed that some of the information related to them was not responsive to the request. One of the drug manufacturers claimed that some of the information in this record qualified as "personal information" and was exempt pursuant to the personal privacy exemption at section 21(1) of the *Act*.

[11] Following its receipt of the drug manufacturers' positions, the ministry issued an access decision to the original requester. Access was granted in part to the responsive records. The ministry claimed that the mandatory exemption at section 17(1) applied to portions that had been withheld. The ministry also advised that some of the information had been severed as it was not responsive to the request.

[12] The ministry advised the drug manufacturers of its access decision. Six of the drug manufacturers that objected to the partial disclosure of the responsive records filed appeals of the ministry's decision with this office. Subsequently, two of those six drug manufacturers merged and are now collectively one manufacturer. Accordingly, five third-party appeals were opened by this office and designated as Appeals PA11-462, PA11-465, PA11-470, PA11-471 and PA11-472. The requester also filed an appeal of the ministry's decision and Appeal PA12-14 was opened. Order PO-3209, which is being issued concurrently, will address the original requester's appeal.

[13] This order relates to the five third party appeals. The specific records at issue in this appeal consists primarily of the professional allowance reporting forms submitted to the ministry, as well as two letters at issue in Appeal PA11-462, dated August 31, 2009 and September 13, 2010 between the ministry and one of the manufacturers. The information that is at issue in this appeal is the information that has *not* been severed by the ministry, specifically a portion of one of the two letters identified above and all of the information on the professional allowances reporting forms with the exception of the quantum of professional allowances.

[14] During mediation, all of the drug manufacturers advised that they object to the disclosure of the professional allowance reporting forms that they provided to the ministry, and took the position that they should be withheld in their entirety pursuant to section 17(1) of the *Act*. In addition to objecting to the disclosure of the payment amounts on the professional allowance reporting forms which the ministry is prepared to sever, all of the manufacturers advised that they also object to the disclosure of any

remaining information, including information that might identify them, such as the names, titles, and contact information of their officers and employees. Some of the manufacturers took the position that this information is not responsive to the request while others take the position that the disclosure of their identity would reveal the fact that they made professional allowance payments to the pharmacy named in the request which is, in and of itself, subject to the mandatory exemption at section 17(1) of the *Act*. Some of them also took the position that this information was not responsive to the request.

[15] In addition, the drug manufacturer in Appeal PA11-472 specifically objected to the disclosure of its notes, which appear in the "notes" field of the reporting forms, as it submits that this information is not responsive to the request.

[16] In Appeal PA11-462, the drug manufacturer also objected to the disclosure of the portions of one of the letters that the ministry was prepared to disclose, relying on the exemption at section 17(1) of the *Act* and also on the position that the letter is not responsive to the request.

[17] In Appeal PA11-465, the drug manufacturer indicated that the names, signatures, telephone numbers and email addresses of its officers and employees should be withheld, citing the application of the mandatory exemption at section 21(1) of the *Act*.

[18] Also during mediation, the drug manufacturer in Appeal PA11-465 noted that some of the information in one of the records was not responsive to the request as it did not pertain to the pharmacy identified in the request. In response, the ministry advised the mediator that it concurred with the drug manufacturer's position regarding this information. The ministry stated that it was an oversight that it had not been severed and agreed to do so.

[19] As mediation could not resolve these appeals, they were transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. This office provided the drug manufacturers, initially, with the opportunity to provide representations in response to a notice of inquiry. Those representations were shared, in part, pursuant to the sharing practices of this office set out in *Practice Direction 7*, with the ministry and the requester. Both the ministry and the requester provided representations in response which raised issues to which the drug manufacturers were given the opportunity to reply. They provided reply representations.

[20] In this order:

- I find that the records do not contain personal information;

- I find that some of the information at issue in these appeals is not responsive to the request; and

- I uphold the ministry's decision to apply section 17(1) to grant partial access to the responsive records.

RECORDS:

[21] Although the ministry's decision granted partial access to information contained in the records at issue, as a result of the appeals filed by the drug manufacturers objecting to the disclosure of the information that the ministry was prepared to disclose, all of the records outlined below were withheld in their entirety. Order PO-3209 will address the information that the ministry claims is exempt. This order addresses all the information that the ministry was prepared to disclose to the appellant in the following records.

Appeal PA11-462 – Records 11 and 18:

- Record 11.1 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2007 to September 30, 2007 (2 pages).

- Record 11.2 – Professional Allowances Reporting Template – Drug Manufacturers October 1, 2007 to December 31, 2007 (3 pages).

- Record 11.3 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2008 to June 30, 2008 (4 pages).

- Record 11.4 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2008 to December 31, 2008 (3 pages).

- Record 11.5 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2009 to June 30, 2009 (3 pages).

- Record 11.6 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2010 to June 30, 2010 (34 pages).

- Record 18.1 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2007 to September 30, 2007 (4 pages).

- Record 18.2 – Professional Allowances Reporting Template – Drug Manufacturers October 1, 2007 to December 31, 2007 (4 pages).

- Record 18.4 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2008 to December 31, 2008 (1 page).

- Record 18.5 – letter dated August 31, 2009 (1 page).

- Record 18.6 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2009 to December 31, 2009 (2 pages).

- Record 18.7 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2010 to June 30, 2010 (3 pages).

- No record number – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2009 to June 30, 2009 (1 page).

Appeal PA11-465 – Record 6:

- Record 6.1 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2007 to September 30, 2007 (4 pages).

- Record 6.2 – Professional Allowances Reporting Template – Drug Manufacturers October 1, 2007 to December 31, 2007 (3 pages).

- Record 6.3 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2008 to June 30, 2008 (2 pages).

- Record 6.4 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2008 to December 31, 2008 (5 pages).

- Record 6.5 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2009 to June 30, 2009 (4 pages).

- Record 6.6 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2009 to December 31, 2009 (6 pages).

- Record 6.7 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2010 to June 30, 2010 (4 pages).

Appeal PA11-470 – Record 12:

- Record 12.1 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2009 to August 31, 2009 (2 pages).

- Record 12.2 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2009 to December 31, 2009 (2 pages).

Appeal PA11-471 – Record 15:

- Record 15.1 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2007 to September 30, 2007 (2 pages).

Appeal PA11-472 – Record 14:

- Record 14.1 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2007 to September 30, 2007 (3 pages).
- Record 14.2 – Professional Allowances Reporting Template – Drug Manufacturers October 1, 2007 to December 31, 2007 (4 pages).
- Record 14.3 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2008 to June 30, 2008 (2 pages). Check years.
- Record 14.4 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2008 to December 31, 2008 (3 pages).
- Record 14.5 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2009 to June 30, 2009 (2 pages).
- Record 14.6 – Professional Allowances Reporting Template – Drug Manufacturers July 1, 2009 to December 31, 2009 (2 pages).
- Record 14.7 – Professional Allowances Reporting Template – Drug Manufacturers January 1, 2010 to June 30, 2010 (2 pages).

ISSUES:

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

B. Are portions of the records exempt from disclosure pursuant to the mandatory exemption at section 21(1) of the *Act*?

C. Are some of the records or portions of the records not responsive to the request?

D. Are the records or portions of the records exempt from disclosure pursuant to the mandatory exemption at section 17(1) of the *Act*?

DISCUSSION:

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

[22] The drug manufacturer in Appeal PA11-465 submits that the performance allowance reporting forms at issue in its appeal contain "personal information" and that its disclosure amounts to an unjustified invasion of personal privacy pursuant to the mandatory exemption at section 21(1) of the *Act*.

[23] In order to determine whether section 21(1) of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[24] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[4]

[25] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[26] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[5]

[27] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[6]

[28] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[7]

Representations

[29] The drug manufacturer in Appeal PA11-465 submits that the signatures of employees on the professional allowance reporting forms "constitute personal information since it reveals information about the individual in his or her personal rather than their professional capacity." It submits: "While the fact that the individual signed a

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[4] Order 11.
[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.
[7] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

document in his or her professional capacity may not be personal information, the signature itself is." The drug manufacturer also submits that a telephone number that appears in the records as the contact information for one of the individuals who prepared some of the reports on behalf of the drug manufacturer is a personal number that qualifies as personal information.

[30] In its representations, the drug manufacturer concedes that generally the names, titles, email addresses, and the telephone numbers and extensions of the employees who are responsible for submitting the reports to the ministry are not personal information. However, it submits that the one particular telephone number is the home telephone number of the employee that submitted some of the reports and, as such, amounts to their personal information.

[31] The ministry does not claim that the mandatory exemption at 21(1) relating to personal privacy applies and does not make submissions on whether the records contain any information that qualifies as personal information in accordance with the definition at section 2(1) of the *Act*.

[32] The requester submits that the records at issue do not contain personal information and notes that the ministry did not claim that the mandatory exemption at section 21(1) applies.

Analysis and findings

[33] As noted above, pursuant to section 2(3) of the *Act,* personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[34] The drug manufacturer submits that the signatures of its employees who prepared the reports constitute their personal information. Previous orders of this office have examined whether a signature amounts to the personal information of an identifiable individual in a variety of different circumstances. Generally, in cases where the signature appears in records created in a professional or business context it is not considered to be "about the individual" in a personal sense and, therefore, does not fall within the scope of the definition.[8] However, in situations where identity is an issue and the signature could identify the individual in a personal capacity, it is brought into the scope of the definition of personal information.[9]

[35] In the circumstances of this appeal, I find that the signatures at issue clearly appear in records created in a business context. They are the signatures of employees of the drug manufacturer as they appear on professional allowance reporting forms, prepared by those employees during the course of their professional duties, to be

[8] Orders P-773, PO-2632 and MO-2611.
[9] Orders P-940, MO-1194 and PO-1699.

submitted to the ministry on behalf of their employer. In my view, there is nothing in the records that brings the signatures into the personal realm. Accordingly, I find that the signatures on the professional allowance reporting forms do not qualify as personal information within the meaning of the definition in section 2(1) of the *Act*.

[36] The drug manufacturer also argues that the telephone number connected to one of the employees who prepared some of the reports, is a home telephone number and, therefore, qualifies as the personal information of the individual connected to that number, within the meaning of the definition of that term at section 2(1) of the *Act.* However, section 2(4) states that the name, title, contact information or designation of an individual that identifies them in a professional capacity applies even if that individual carries out business, professional, or official responsibilities from their dwelling and that contact information for the individual relates to that dwelling.

[37] In my view, the employee provided their home telephone number in the context of fulfilling their professional responsibilities as an employee of the drug manufacturer including the responsibility of preparing and submitting the professional allowance reports to the ministry. As a result of the application of section 2(4) of the *Act*, I find that even though the telephone number is the employee's home telephone number, it has been employed in a professional capacity and does not qualify as that employee's personal information within the meaning of that term.

B. Are portions of the records exempt from disclosure pursuant to the mandatory exemption at section 21(1) of the *Act*?

[38] As I have found that the records at issue do not contain any "personal information" as that term is defined in section 2(1) of the *Act,* the mandatory exemption at section 21(1) cannot apply.

C. Are some of the records or portions of the records not responsive to the request?

[39] Both the ministry and all of the drug manufacturers take the position that portions of the professional allowance reporting forms are not responsive to the request. To determine whether or not this information is responsive, the scope of the request should be clarified first.

[40] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to request for access to records. Section 24(1)(b) requires a requester to "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." Section 24(2) requires the institution to assist the requester in "reformulating" the request if it does not adequately describe the records sought.

[41] It is a well-established principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[10] Additionally, to be considered responsive to the request, records must "reasonably relate" to the request.[11]

Representations

[42] Most of the drug manufacturers submit that other than the professional allowance amounts, all of the remaining information in the professional allowance reporting forms is not responsive to the request. Some of the drug manufacturers also submit that the information in the records that identifies them, including the names, titles and contact information of their officers does not reasonably relate to the appellant's request for the quantum of professional allowance amounts received by or paid to the named pharmacy. They submit that, as a result, that information is not responsive to the request.

[43] The drug manufacturer in Appeal PA11-462 submits that the portion of the letter dated August 31, 2009 that the ministry is prepared to disclose is also not responsive to the request as it is "in respect of pharmacies other that [the named pharmacy]."

[44] The drug manufacturer in Appeal PA11-472 takes the position that notes that it included at the very end of the reports that it submitted do not reasonably relate to the professional allowance amounts received by or paid to the named pharmacy and are, therefore, not responsive to the request. It submits that they relate to internal organization of sales accounts, documentation relating to the payments, and comments regarding reconciliation of payments.

[45] The requester submits that the responsive records which drug manufacturers filed with the ministry in accordance with the statutory reporting obligations relate directly to the request for "all documents, records or reports filed in accordance with professional allowance or rebate reporting obligations." She further submits that information which identifies the drug manufacturer or its officers or, the commercial relationship between the drug manufacturer and the named pharmacy, is responsive to the request which, she submits, is not limited to simply the quantum of professional allowances.

[46] The requester agrees, however, that information in respect of pharmacies other than that identified in the request is not responsive to the request and may be severed from the record as such.

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[10] Orders P-134 and P-880.
[11] Orders P-880 and PO-2661.

Analysis and finding

[47] In the circumstances of this appeal, I find that the scope of the request is clear. The requester sought access to records relating to professional allowances or rebates received by and/or paid to a named pharmacy. From my review of the wording of the request, the requester did not specify that they were only seeking access to the quantum of professional allowances paid.

[48] Having reviewed the professional allowance reporting forms, I am satisfied that all of the information in them which was identified by the ministry as non-responsive is indeed not responsive to the request as it relates to information with respect to pharmacies other than the one specifically identified in the request.

[49] With respect to the notes that the drug manufacturer in Appeal PA11-472 has added to the professional allowance reports that it submitted to the ministry, I have considered the substance of the notes and agree that they do not specifically relate to professional allowances or rebates received by or paid to the specific pharmacy named in the request. Accordingly, I accept that Notes 1 and 2, found in records 14.1, 14.2, 14.3 and 14.4, Notes 1 to 3 in records 14.5, Notes 1 to 5 in record 14.6, and Notes 1 to 4 in record 14.7 that the drug manufacturer added to the professional allowance reporting forms submitted to the ministry are not responsive to the request.

[50] All parties have agreed that information relating to pharmacies other than the one named in the request is not responsive. On my review of the records, I have identified some additional information that relates to other pharmacies that should also be deemed to be not responsive. Specifically, I find that the following information should be severed from the records as non-responsive:

- Record 11.4 – note (v) under the heading "Representations"
- Record 11.5 – note (v) under the heading "Representations"

[51] However, I find that all of the remaining information that is at issue on the professional allowance reporting forms, including the identity of the drug manufacturers, is responsive. In my view, the scope of the request, which was not specifically for only the quantum of professional allowances, was broad enough to encompass this type of information.

[52] Having reviewed the portion of the letter dated August 31, 2009 at issue in Appeal PA11-462 that the ministry was prepared to disclose I agree with the drug manufacturer that it is non-responsive. The request seeks information specifically in relation to professional allowances or rebates with respect to the named pharmacy. As the information that remains at issue on the letter dated August 31, 2009 does not relate to that named pharmacy, I find that it is not responsive to the request.

[53] Accordingly, I find that the portions of the professional allowance reports relating to other pharmacies that the ministry has severed as non-responsive, the notes in records 14.1, 14.2, 14.3, 14.4, 14.5, 14.6 and 14.7 at issue in appeal PA11-472, the additional information in records 11.4 and 11.5 that I have identified above, and the portion of the letter dated August 31, 2009 at issue in appeal PA11-462 is not responsive to the request and should be removed from the scope of the appeal. However, I find that all of the remaining information on the professional allowance reporting forms is responsive to the request and therefore at issue in these appeals.

D. Are portions of the records exempt from disclosure under the mandatory exemption in section 17(1) of the *Act*?

[54] All of the drug manufacturers take the position that the mandatory exemption at section 17(1) applies to all of the information that has not been severed from the performance allowance reporting forms, specifically, any information that identifies the drug manufacturer who is providing the performance allowances disclosed in the reports. Generally, they take the position that all information on the performance allowance reports is exempt pursuant to section 17(1), save and except for the template of the form itself.

[55] The ministry has identified the dollar amounts of the performance allowances paid to the named pharmacy as subject to exemption pursuant to the mandatory exemption at section 17(1). It has indicated that it is prepared to disclose all of the other information that appears on the professional allowance reporting forms (with the exception of that which is not responsive to the request).

[56] The relevant portions of section 17(1) 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

[57] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[12] 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.[13]

[58] For section 17(1) to apply, the party resisting disclosure 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.

Part 1: type of information

[59] All of the drug manufacturers submit that the portions of the records that are at issue in these appeals contain commercial information within the meaning of section 17(1). They submit that the reports reveal information about the commercial relationship between the drug manufacturers and those pharmacies related to the sale of merchandise, namely the buying and selling of pharmaceuticals, which constitutes "commercial" information as that term has been interpreted by this office. They submit that the specific dollar amounts of professional allowances that were paid to individual pharmacies pursuant to commercial contracts that appear in the reports also qualify as "financial" information within this office's definition of that term. Generally, the drug manufacturers take the position that the information in the reports provides a detailed accounting (the amount and timing) of the professional allowances paid to the pharmacy identified in the request, for given reporting periods.

[60] The requester acknowledges that the responsive records will contain some information that is commercial or financial in nature, however, it submits that the information which identifies the drug manufacturer and the existence of a commercial relationship between the appellant and the named pharmacy is not information that is exempt pursuant to section 17(1). It submits that it is only the identifying information

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[12] *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.).
[13] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

and the payment amounts together which constitutes commercial and financial information under the first part of the section 17(1) test.

[61] In its reply representations, one of the drug manufacturers states that the requester's position that only the disclosure of both the identifying information and the payment amounts constitutes commercial or financial information is incorrect. It submits:

> Whether or not the payment amounts are 'divorced' from the information about the manufacturers making the payments…the information itself remains commercial and financial information as it reveals the existence and nature of a commercial arrangement as well as financial information expressed as dollar amounts.

[62] The terms "commercial" and "financial" information have been defined in previous 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.[14] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[15]
>
> *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 cost.[16]

[63] I have reviewed the professional allowance reporting forms and conclude that the information that is at issue in these appeals amounts to information that satisfies the definition of commercial information. The professional allowance reports relate to the buying and selling of pharmaceuticals in the context of a commercial relationship between the drug manufacturers and the named pharmacy. As the ministry has severed the quantum of professional allowances from the record and that information is not at issue in these appeals, I do not accept that the portions of the reports that are before me contain information that qualifies as financial information. Nevertheless, as I find that the information qualifies as commercial information, the first part of the test under section 17(1) has been met.

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[14] Order PO-2010.
[15] Order P-1621.
[16] Order PO-2010.

Part 2: supplied in confidence

Supplied

[64] 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.[17] 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.[18]

[65] All of the drug manufacturers submit that the information at issue in the professional allowance reporting forms was "supplied" to the ministry. One of them submits that it generated the information in exactly the form in which it appears in the record and supplied it, in this form directly to the ministry. Another drug manufacturer states that its payment of professional allowances to pharmacies is an element of the commercial arrangement between itself and those individual pharmacies to which the ministry is not privy. It further submits that if it did not supply the information contained in the performance allowance reporting forms, the ministry would not have access to it. All of the other drug manufacturers submit generally that they "supplied" all of the information in the professional allowance reporting forms to the ministry pursuant to the requirements of the relevant legislation.

[66] The requester submits:

> The information in the responsive records was supplied pursuant to the requirements of the Code of Conduct[19]… This information was not provided to the ministry on a voluntary basis or to further a benefit or interest of the generic drug manufacturers or pharmacies. It was a statutory requirement for the parties involved in provision of professional allowances. The information was provided to the government as part of a regulatory scheme intended to provide accountability and transparency respecting the sale of generic drugs in Ontario

[67] Based on the parties' submissions and given the nature of the information at issue, I accept that in the absence of this information contained in the performance allowance reporting forms being provided by the drug manufacturers, the ministry would not have access to this information. Moreover, it is not in dispute that the information was provided to the ministry pursuant to the established requirements of the Ontario Drug Benefit Program governed by the *OBDA* and the *DIDFA.* Previous orders have established that information that is provided to an institution under a mandatory reporting requirement in legislation or regulations is "supplied" for the

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[17] Order MO-1706.
[18] Orders PO-2020 and PO-2043.
[19] *Code of Conduct*, supra, note 3.

purposes of section 17(1).[20] Accordingly, I find that the information contained in the records at issue was "supplied" by the drug manufacturers to the ministry.

In confidence

[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.[21]

[69] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure.[22]

[70] The drug manufacturers take the position that the information contained in the professional allowance reports constitutes "confidential information that is not publicly disclosed by manufacturers."

[71] One of the drug manufacturers argues that the information is confidential in nature because it forms part of a private commercial agreement between the drug manufacturer and the pharmacy. It submits:

> [T]he payment of [professional allowances] to pharmacies is discretionary. A drug manufacturer is not required to provide any [professional allowances] to a pharmacy. Instead, [professional allowances] are a benefit that drug manufacturers may provide to a pharmacy to encourage the pharmacy to purchase drug products from that drug manufacturer instead of a competing drug manufacturer. Both the decision to provide to [professional allowance] to a particular pharmacy, and the amount of

[20] Orders P-345, PO-1938 and PO-2142.
[21] Order PO-2020.
[22] Orders PO-2043, PO-2371 and PO-2497.

> that [professional allowance] is entirely discretionary on the part of the manufacturer. In short, the mere existence of these discretionary payments … is strictly confidential and commercially sensitive information that is not publicly available.
>
> Such payments are completely voluntary and information about such payments is highly confidential commercial and financial information belonging to [the drug manufacturer]. The records constitute reports that are mandated under the legislation governing [professional allowances] in Ontario, and were provided to the [ministry] on a strictly confidential basis. When [the drug manufacturer] submits [professional allowance] reports to the [ministry] it does so with the expectation that the confidentiality of those documents will be maintained by the [ministry] and that it will refrain from disclosing that information to third parties.

[72] Another drug manufacturer argues that although the information contained in the professional allowance reports was supplied to the ministry as a statutory requirement, "the agreements between [the drug manufacturer and the named pharmacy] are like any other commercial agreement for the provision of goods and services" and that it has always treated information regarding its agreements with pharmacies, including the existence of the agreement itself that would reveal its decision to provide a professional allowance to one pharmacy over another, as highly confidential commercial information.

[73] The drug manufacturer submits that it has, "at all times, maintained the expectation that information that it submitted to the ministry would be kept confidential." Further it submits:

> While government monitoring of amounts paid as professional allowances may be reasonable as a regulatory activity, disclosure of this information would not further the express and accepted purposes of the *Act*, that is, to ensure transparency and accountability of government actions and use of resources. The amounts paid as professional allowances are pursuant to commercial agreements between two private entities both of whom have contracted to maintain confidentiality. The reporting templates do not reveal information about government actions, decisions, or use of resources. For these reasons, [the drug manufacturer] has always relied upon the fact that section 17(1) of the *Act* required the head of the institution to refuse to disclose the information in the records.

[74] It also submits that it has in place "physical, technological and organizational safeguards to ensure the confidentiality of information such as it contained in the records" and also, that it has neither disclosed this information to other parties nor has it been otherwise publicly available.

[75] This drug manufacturer also makes the submission that although in the current appeal the request was for professional allowances made to a single named pharmacy, subsequent requests could be made for the professional allowances paid to other pharmacies which could reveal a list of all pharmacies with which each drug manufacturer has entered into confidential commercial arrangements. It submits that this demonstrates how highly sensitive and confidential this commercial information is.

[76] The three other drug manufacturers submit that their expectation of confidentiality is based on reasonable and objective grounds for the following reasons:

- It was provided to the ministry with the expectation that it would be kept confidential because it is confidential highly sensitive commercial and financial information.

- It takes careful precaution and measures to protect the information from disclosure and does not disclose it to anyone outside of the company in the absence of a confidentiality agreement which restricts disclosure and preserves the confidential nature of the information. It identified a number of special procedures and measures in place to protect the information.

- It is not otherwise disclosed or made available to the public and is not available from sources to which the public has access.

- The information was prepared to be disclosed in confidence only to the ministry and was provided with the expectation that it would be used by the ministry only during the course of carrying out its mandate and responsibilities under the Ontario Drug Benefit Program.

[77] These three drug manufacturers also submit that the ministry has acknowledged that the information relating to professional allowances is confidential proprietary commercial information.

[78] The requester submits that there was no reasonable expectation of confidentiality, either implicitly or explicitly, with respect to the information contained in the responsive records. As noted above, it submits that the information was supplied to the ministry pursuant to a statutory requirement. It submits that there is nothing in the *Code of Conduct* or applicable legislation that suggests that the information would be kept confidential by the ministry. The requester submits that although the drug manufacturer has submitted that it expected that it would be kept confidential, the appellant has provided no evidence to support its assertion. It submits that the drug manufacturer has not provided evidence to suggest that it sought or received assurance

from the ministry that the information would be kept confidential or that it had any expectation that it would remain confidential in the hands of the ministry.

[79] Based on my review of the information contained in the professional allowance reporting forms and having considered the submissions of the parties, I am satisfied that the information contained in them was supplied by the drug manufacturer to the ministry with a reasonably-held expectation that it would be treated in a confidential fashion by the ministry. In my view, this expectation was implicitly understood by both the ministry and drug manufacturer given the nature and type of information that is at issue, as well as the way in which it was safeguarded by the parties. As a result, I find that the drug manufacturers have satisfied me that the professional allowance amounts were supplied in confidence to the ministry, in accordance with the requirements of the second part of the test under section 17(1).

Part 3: harms

[80] To meet the third part of the section 17(1) test, the institution and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[23]

[81] 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).[24]

Representations of the parties on harms

[82] All of the drug manufacturers submit that were the information regarding the professional allowance payments made to the named pharmacy disclosed, it is reasonably expected to significantly prejudice their competitive position and interfere with negotiations between them and other parties, especially pharmacies [section 17(1)(a)], and significantly result in undue loss to the themselves, and result in undue gain to their competitors [section 17(1)(c)]. One of them also submits that disclosure would result in similar information no longer being supplied in the future [section 17(1)(b)].

[83] Several of the drug manufacturers explain:

> The pharmaceutical industry is highly competitive with a relatively small number of drug manufacturers trying to secure a greater market share for their products over their competitors in the pharmaceutical market. The

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

> information included in the records is not shared among drug manufacturers.

[84] The drug manufacturers submit that decisions to make discretionary professional allowance payments are important components of their confidential commercial arrangements with pharmacies and are the subject of "hard-fought negotiations" between them. They also submit that decisions as to which pharmacies it provides professional allowances to, the timing of those payments, and the kinds of programs and services it provides are "[made] very strategically and with a great deal of market research, competitive insight and strategic consideration." They submit that this information forms part of the marketing and relationship building between drug manufacturers and the pharmacies.

[85] The drug manufacturers explain that professional allowances are paid by drug manufacturers to pharmacies to encourage the pharmacy to purchase drug products from that manufacturer. A pharmacy is more likely to purchase drug products from the manufacturer that pays the highest amount of professional allowances. Therefore, they submit that disclosing whether or not they make payments to a particular pharmacy and if so, the amount of those payments is commercial sensitive information that would be "extremely useful to a manufacturer's competitors" and seriously harm their ability to compete in the pharmaceutical market because it would:

- provide its competitors with a competitive advantage and insight into its business operations which would otherwise be unavailable thereby affecting its ability to compete in the pharmaceutical market;

- allow competitors to determine sales and to calculate the allowances they would have to offer to clients to be competitive and entice or convert clients to their competing products; and,

- give competitors insight into their penetration into the Ontario market.

[86] One of the drug manufacturers submits that the decision as to which pharmacies will receive professional allowances is a strategic commercial decision and if competitors gain access to the information in the records they could either copy commercial strategies without having to invest the same time or resources as the manufacturer did or undermine it in the execution of its commercial strategies. It submits that this would ultimately cause prejudice to its competitive position, undue financial loss and undue financial gain to its competitors.

[87] The drug manufacturers also submit that the relationship between drug manufacturers and pharmacies is crucial and the disclosure of information from private commercial arrangements between them would foster a negative environment which would prejudice their "future bargaining position," and interfere with future negotiations

with other pharmacies as not all pharmacies are offered the same terms and each agreement is confidential.

[88] One drug manufacturer explains:

> Disclosure of this information would significantly prejudice [named drug manufacturer] both with respect to its commercial relationship with pharmacies and with respect to its position in relation to its competitors. For example, if it were to be made public that [named drug manufacturer] paid a professional allowance to one pharmacy, other pharmacies would seek to received professional allowances from [named drug manufacturer] too. Similarly, if one pharmacy were to discover that the commercial terms of an agreement between [named drug manufacturer] and another pharmacy were more favourable or provided more desirable benefits than did its own agreement with [named drug manufacturer] it would seek additional benefits. The demands of such pharmacies could challenge or exceed [named drug manufacturers] resources and therefore result in prejudice to [named drug manufacturer's] competitive position and result in undue loss to [named drug manufacturer].

[89] The drug manufacturer further submits that were this information disclosed, a future request could be made for the list of the pharmacies that receive professional allowances from it. It submits that if pharmacies were privy to the fact that certain pharmacies were receiving professional allowances, and information about the kinds and value of professional allowance benefits other pharmacies were receiving, it could significantly prejudice future or continuing business dealings with pharmacies that were not being provided with professional allowances or lesser or different types of benefits. It further submits that the loss of such future or continuing opportunities with that pharmacy could reasonably and foreseeably result in financial loss to the drug manufacturer.

[90] The same drug manufacturer also submits that the information contained in the records could be misrepresented by its competitors because the value of benefits are not bare cash payments, but are tied to specific programs that benefit patients and is administered or overseen by the manufacturer. It submits that because reporting templates show only a dollar value amount "it is reasonably foreseeable that the information in the records would be misconstrued by media or competitors to suggest that the amounts reflect rebates or bare cash payments not tied to a specific patient program when in fact this is not the case."

[91] Another manufacturer submits that disclosure of the information at issue could result in similar information no longer being supplied to the ministry, the harm contemplated in section 17(1)(b). It submits that although the reports that make up the majority of the responsive records were submitted to the ministry pursuant to a

statutory requirement the governing legislation has been amended to eliminate the payment of all professional allowances by April 2013 and the reporting of this information is no longer required. Nevertheless, the drug manufacturer submits, post April 2013, manufacturers may still provide benefits to pharmacies that are in accordance with "ordinary commercial terms" and the government has made it clear that partnerships between pharmacies and drug manufacturers should be encouraged to continue as they are to the benefit of Ontarians helping pharmacies to provide "necessary and enhanced services and patient care." The drug manufacturer concludes:

> [I]f information about professional allowances is disclosed to third parties, the commercial advantage to manufacturers providing those benefits will be defeated and manufacturers will be less likely to provide such benefits in the future.

[92] The requester submits that the drug manufacturers have not provided any evidence of the harms that it will face. They submit that any alleged prejudice or harm to the drug manufacturer's position can be addressed through severances made to the records.

[93] The requester submits that the responsive records should be disclosed with severances that "are more consistent with the spirit and purpose of the *Act.*" Specifically, the requester submits that the records should be severed to remove the identity of the drug manufacturer, but the quantum of professional allowance paid or received by the named pharmacy should be disclosed.

[94] The requester takes the position that none of the alleged harms can occur if the identity of the drug manufacturers are divorced from the payment amount and submits that the ministry should have assessed whether the records could have been severed to provide the professional allowance amounts, because this would promote the purpose of the *Act* by providing as much disclosure as possible while protecting third parties from potential harm.

[95] The requester submits:

> Without the identity of the drug manufacturers, the responsive records contain no information which would give advantage to the appellant's competitors or provide any insight whatsoever into the appellant's commercial practices or business operations.
>
> The disclosure of the amounts of professional allowances paid to [named pharmacy], when divorced from the payors, will have no effect on the ability of the [drug manufacturers] to negotiate contractual relationships with its clients in respect of professional allowances, over the remaining eight months before they are eliminated entirely in April 2013. Such

> disclosure will not jeopardize the [drug manufacturers'] relationships with other clients if they became aware that quantum of professional allowances may be disclosed. Pharmacies are well aware that generic drug manufacturers have statutory reporting obligations in respect of professional allowances.

[96] In its reply representations, one of the drug manufacturers responds to the requester's position that because professional allowance payments will be eliminated entirely in April 2013, the current commercial relationships between pharmaceutical manufacturers and the named pharmacy will "cease completely" and the information in the records "will have no significance to the ongoing competitive interests of the [drug manufacturer]." This manufacturer submits that while professional allowances will be discontinued the commercial relationships between manufacturers and pharmacies will not cease as the legislation provides that manufacturers may still provide benefits to pharmacies in accordance with "ordinary commercial terms."

[97] The drug manufacturer further submits that professional allowances and rebates are permitted in other provinces and the commercial relationship between manufacturers and pharmacies is often national in scope which means that disclosure of the information relating to the current commercial agreements will cause significant prejudice to its ongoing commercial relationships with the pharmacies.

[98] Finally, the drug manufacturer submits that even if a particular commercial agreement between two parties terminates, this does not mean the existence, nature and terms of the agreement do not remain confidential information. The drug manufacturer submits that there is an expectation that the nature and existence of its agreement with the named pharmacy should remain confidential, even after the agreement itself has terminated.

Analysis and findings

[99] As noted above, the ministry's decision grants the appellant partial access to the professional allowance reporting forms at issue in these appeals, severing the information that relates to pharmacies other than the one named in the request as non-responsive (which I have upheld earlier in this order) and the quantum of professional allowances paid by the drug manufacturers pursuant to the exemption at section 17(1). The only information before me in these appeals is the remaining information contained in the professional allowance reporting forms, including the identity of the drug manufacturers. The drug manufacturers suggest that disclosure of this information would give rise to the harms contemplated by section 17(1).

[100] Having carefully reviewed the representations of the parties and the information that remains at issue in these appeals, I find its disclosure could not reasonably be

expected to give rise to any of the harms contemplated in sections 17(1)(a), (b) and (c).

[101] I accept the drug manufacturers' position that their decisions as to the specific professional allowance amounts given to specific pharmacies, including the pharmacy named in the request, are strategic decisions that are made following a significant degree of market research and evaluation. I accept that this type of information is confidential, commercial information of considerable value that could reasonably be expected to provide a competing drug manufacturer with a significant advantage, facilitating its ability to compete within the pharmaceutical market and attempt to solicit existing clients away from the manufacturers whose information is disclosed. However, the quantum of the professional allowances is not at issue in these appeals. It is only the information that the ministry is prepared to disclose that is at issue. I find that the drug manufacturers have failed to establish that the disclosure of the information that remains at issue on the professional allowance reporting forms, including their identity, could reasonably be expected to prejudice significantly their competitive position, interfere significantly with their negotiations, or result in an undue loss to them or correlative undue gain to another.

[102] Some of the drug manufacturers submit that the disclosure of their very identity would significantly interfere with negotiations with other pharmacies and result in an undue loss to them. They submit that were it disclosed that they entered into an agreement to provide professional allowances to the named pharmacy, those pharmacies to which they do not provide professional allowances would seek to receive benefits from them as well. While I accept that this may very well be the case, pharmacies are well aware that drug manufacturers provide benefits to some of them, but not to others. If they do not have an agreement with a particular drug manufacturer, this is information that is already known to them and it is within their ability to approach them and initiate negotiations for benefits. Conversely, drug manufacturers are free to choose with which pharmacies they negotiate, whether or not the existence of agreements with other pharmacies is known or not.

[103] From the representations that have been submitted by the drug manufacturers, I have not been provided with sufficient evidence to conclude that the disclosure of the very existence of an agreement with the named pharmacy alters their competitive position or interferes with negotiations with other pharmacies in a significant way. In my view, knowledge of the existence of such an agreement alone, without additional information about the terms and conditions of that agreement, does not provide a pharmacy seeking to negotiate for benefits from a drug manufacturer with sufficient information to either *significantly* prejudice their competitive position or *significantly* interfere with their contractual or other negotiations. I find that the drug manufacturers have not established that, without the terms of the agreements with other pharmacies, including the quantum of professional allowances provided, disclosure of the

information that remains on the professional allowance reporting forms could reasonably be expected to give rise to the harms contemplated by section 17(1)(a).

[104] Similarly, the disclosure of the fact of an agreement between a drug manufacturer and pharmacy alone, without any information about the quantum of the benefit, is not, in my view, sufficient to give rise to an undue loss to the drug manufacturer. Drug manufacturers had the discretion to provide professional allowances to pharmacies and now have the discretion to provide benefits in accordance with "ordinary commercial terms" to entice them to stock their products. While I accept that if a pharmacy is aware that a drug manufacturer has previously provided professional allowances to another it may seek to negotiate benefits from that drug manufacturer, without further information about the terms of the agreement with the other pharmacy, in my view, it does not have sufficient information to put the drug manufacturer into a position where that manufacturer will necessarily suffer an undue loss. I find that the drug manufacturers have not provided sufficient evidence to prove that, without the terms of the agreements with other pharmacies, including the quantum of professional allowances, disclosure of the information that remains on the professional allowance reporting forms could reasonably be expected to give rise to the harms contemplated by section 17(1)(c).

[105] One of the drug manufacturers also suggests that disclosure of its identity and the very fact that it entered into an agreement to provide professional allowances to the named pharmacy would prejudice significantly its competitive interests vis-à-vis other drug manufacturers. Previously under the *ODBA* and the *DIDIFA*, all drug manufacturers, generic or not, had the discretion to provide professional allowances to pharmacies. Currently, all drug manufacturers have the ability to provide benefits to pharmacies in accordance with "ordinary commercial terms." Thus, the fact that a particular manufacturer chose to enter into such an agreement with a pharmacy is not in and of itself information that, in my view, could reasonably be expected to *significantly* prejudice their competitive position or result in an undue loss or gain as contemplated by sections 17(1)(a) and (c). I note that all drug manufacturers are aware that, if they determine it is in their competitive interest to do so, they are also permitted to enter into similar agreements.

[106] One of the drug manufacturers submits that disclosure could also give rise to the harm contemplated in section 17(1)(b) which is, were the information at issue disclosed it could reasonably be expected that disclosure of the information at issue would result in similar information no longer be supplied to the government institution. I find that this harm has not been established in the circumstances of these appeals for three reasons.

[107] First, the completed reporting forms were supplied to the ministry pursuant to a statutory requirement. Accordingly, at the time, if professional allowances were paid it was not optional to report them, it was required. Previous orders have established that

section 17(1)(b) was not intended to protect information that is provided pursuant to a statutory obligation.[25] Second, as of April 2013, professional allowances have been eliminated and there is no requirement to supply this specific information to the ministry anymore. Third, although the drug manufacturers are still permitted to provide benefits to pharmacies that are in accordance with "ordinary commercial terms" which may be considered to be "similar information," I have not been provided with any substantive evidence to suggest that the disclosure of the information that remains at issue in the current appeals (namely all information on the professional allowances reporting forms *other* than the quantum of professional allowances), would prevent drug manufacturers from supplying similar information to the ministry even if they are required or encouraged to do so. Accordingly, I find that the harm contemplated by section 17(1)(b) has not been established.

[108] As I have found that none of the harms in sections 17(1)(a), (b) or (c) have been established with respect to the disclosure to the information that remains at issue in the professional allowance reporting forms, part three of the section 17(1) test has not been met. As all three parts of the test must be met for the exemption to apply, I find that the exemption at section 17(1) cannot apply to the information that remains at issue in this appeal, namely, information other than the quantum of professional allowances that appear on the professional allowance reporting forms. Accordingly, I will uphold the ministry's decision to disclose this information contained in the professional allowance reporting forms.

ORDER:

1. I order the ministry to withhold the following information that is not responsive to the request:

    - the notes in records 14.1, 14.2, 14.3, 14.4, 14.5, 14.6 and 14.7 at issue in Appeal PA11-472;
    - note (v) in records 11.4 and 11.5 at issue in Appeal PA11-462; and,
    - the portion of the letter dated August 31, 2009 at issue in Appeal PA11-462.

2. I uphold the ministry's decision to grant partial access to the balance of the information at issue in this appeal and order it to disclose the records to the requester by **July 8, 2013**, but not before **July 2, 2013**.

[25] Order P-323.

3. In order to verify compliance with provisions 1 and 2 of this order, I reserve the right to require the ministry to provide me with a copy of the records as disclosed to the requester.

May 31, 2013

Catherine Corban
Adjudicator