Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3209

Appeal PA12-14

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. Access was denied to portions of the records pursuant to the application of the mandatory exemption at section 17(1) (third party commercial information), and on the grounds that some of the information in the records is not responsive to the request. The requester appealed the ministry's decision. In her representations, the requester raised the possible application of the compelling public interest override at section 23. The requester also raised the issue of the reasonableness of the severances that the ministry made to the records.

In this order, the adjudicator upholds the ministry's decision that section 17(1) does not apply to portions of the records. The adjudicator upholds the ministry's decision that some of the information is not responsive to the request but finds additional information, not identified by the ministry, that is also not responsive to the request. The adjudicator finds that the compelling public interest override at section 23 does not apply. Finally, the adjudicator finds that the manner in which the ministry severed the responsive records is reasonable. Accordingly, the adjudicator partially upholds 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 10(2), 17(1)(a), (b), (c), 23, 24.

Orders Considered: Orders 24, P-345, PO-1663, PO-1938, PO-2097, PO-2142, PO-2710, and PO-2898.

Related Order: Order PO-3210.

BACKGROUND:

[1] This order addresses an appeal 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 this appeal and several related appeals by the ministry, the original 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*

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[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*.

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 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:

[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 request was submitted by a lawyer, on behalf of her client.

[8] The ministry located 27 records that it identified as responsive to the request. Records 1 to 21 are professional allowance reporting forms for the named pharmacy and a number of drug manufacturers, record 22 is a letter from the ministry, and records 23 to 27 are a letter to the ministry from the named pharmacy and four separate attachments to that letter.

[9] 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. The ministry sought their views regarding the records pertaining to them.

[10] 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 exempting 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.

[11] A number of the notified drug manufacturers responded that they objected to disclosure of the responsive information. All of them agreed that the information that the ministry had severed pursuant to section 17(1) was exempt as a result of the application of that exemption. They also took the position that all of the remaining information in the professional allowance reporting forms is 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 was exempt pursuant to the personal privacy exemption at section 21(1) of the *Act* because it is "personal information."

[12] 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 exemption at section 17(1) applied to some of the withheld portions. The ministry also withheld portions of the records on the basis that they are not responsive to the request.

[13] The ministry advised the requester of its decision, and also disclosed record 22 in its entirety, to her. It also advised that the remainder of the records would be released, in part, with an index of records, unless the affected parties filed appeals with this office.

[14] The ministry advised the drug manufacturers of its access decision. Six drug manufacturers that objected to the partial disclosure of the responsive records filed appeals of the ministry's decision with this office. As two of the six drug manufacturers had merged and now represented the same interest, five 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 to deny access to some of the records and Appeal MA12-14 was opened. The current order relates to the requester's appeal, Appeal PA12-14. The third party appeals initiated by the drug manufacturers are addressed in Order PO-3210, which is being issued concurrently.

[15] During mediation of the current appeal, the requester confirmed that she seeks to obtain access to all of the information withheld under section 17(1), as well as the information that the ministry claims is not responsive to the request.

[16] As mediation could not resolve the appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. This office provided the ministry and the affected parties (the drug manufacturers and the named pharmacy) with the opportunity to provide representations in response to a Notice of Inquiry. Representations were received from the ministry and four affected parties which were shared with the original requester pursuant to the sharing practices of this office set out in *Practice Direction 7*. Some of the affected parties who are also the third-party appellants in Appeals PA11-462, PA11-465, PA11-470, PA11-471, and PA11-472 also submitted representations on those appeals, which were also shared, in part, with the requester. The requester provided representations to which both the ministry and the affected parties were given an opportunity to reply. Reply representations were provided by some of the affected parties. Finally, the requester provided representations by way of sur-reply.

[17] In this order:

- I find that some of the information at issue in these appeals is not responsive to the request;
- I uphold the ministry's decision to apply section 17(1) to grant partial access to the responsive records;
- I find that a compelling public interest in the disclosure of the information at issue does not exist and, therefore, section 23 does not apply to override the application of the exemption at section 17(1); and
- I find that the ministry has severed the records in a reasonable manner.

RECORDS:

[18] The records at issue in this appeal are identified as records 1 to 21 and records 23 to 27.

[19] Records 1 to 21 consist of the professional allowance reporting templates submitted by the third parties to the ministry, some of which have accompanying letters. The ministry claims that section 17(1) applies to portions of these records and also claims that portions of these records are not responsive to the request. Portions of records 6, 11, 12, 15, 14 and 18 are also at issue in the five related third-party appeals that are disposed of in Order PO-3210.

[20] Record 23 is a five-page letter to the ministry and records 24 to 27 are attachments to record 23. The ministry claims that section 17(1) applies to these records in their entirety.

[21] This order addresses the appeal initiated by the requester. Therefore, it will address only the information that the ministry claims is exempt from disclosure, pursuant to section 17(1), or should not be disclosed because it is not responsive to the request. The information specifically includes the professional allowance dollar amounts, portions of two letters submitted by a drug manufacturer to the ministry, and a letter submitted to the ministry from the named pharmacy. Order PO-3210 addresses all of the remaining information in the records that the ministry was prepared to disclose to the requester that was appealed by a number of the drug manufacturers.

ISSUES:

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

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

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 exemption?

D. Has the ministry severed the records in a reasonable manner?

DISCUSSION:

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

[22] The ministry and the drug manufacturers that either responded to the Notice of Inquiry provided to them during the requester's appeal or instigated their own appeal 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.

[23] The ministry also takes the position that although records 24 to 27 are part of record 23 because they are the appendices referred to in record 23 they are not, in and of themselves, responsive to the request.

[24] Section 24 of the *Act* imposes certain obligations on requesters and institution 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.

[25] 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.[4] Additionally, to be considered responsive to the request, records must "reasonably relate" to the request.[5]

Representations

[26] The ministry has severed information related to pharmacies other than the one named in the request and it takes the position that this information is not responsive to the request.

[27] The ministry submits that the responsive records that fall within the scope of the request are: (i) the completed performance allowance reporting forms and any related covering letters that it has received from the pharmacy named in the request and (ii) the completed performance allowance reporting forms and any related covering letters that it has received from drug manufacturers regarding payments made to the pharmacy named in the request. The ministry states that the scope of the request is clear and any professional allowance reporting forms that it has received from pharmacies other than the one named in the request and the portions of the professional allowance reporting templates from drug manufacturers that relate to payments made to other pharmacies are not responsive to the request. As a result, the ministry has severed information from the performance allowance reporting forms that relates to pharmacies other than the one named in the request.

[28] The ministry submits however, that if a given manufacturer's template included a line item indicating $0 payments to the pharmacy named in the request for a given reporting period, it would consider that to be information that is responsive to the request.

[29] The ministry also takes the position that records 24 to 27 are not responsive to the request. It submits that while record 23 is responsive to the portion of the request that reads:

- 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;

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

[30] It explains that records 24 to 27 are not responsive, because they do not relate specifically to the payment of professional allowances or rebates to the named pharmacy. The ministry submits that not only were these records prepared for the named pharmacy and not by or for the ministry, they were also not prepared in accordance with any statutory reporting obligations and the information contained within them is not responsive to the request. Specifically, the ministry submits that while record 25 contains references to rebates, the references are not about rebates "received" or "paid" and the record as a whole does not fit within the request. Records 26 and 27, the ministry submits, contain no information about the payment of professional allowances or rebates. Accordingly, it submits that based on the actual content of these records and the fact that they were created and prepared by or for the named pharmacy, they should be removed from the scope of the appeal on the basis that they are not responsive to the request.

[31] The pharmacy named in the request submits that it agrees with the ministry's position regarding the records or portions of records that are not responsive to the request. Specifically with respect to records 23 to 27, it submits:

> It is clear from the face of records 24 through 27 that they do not report professional allowances or rebates and they do not relate to professional allowances or rebates received by and/or paid to [named pharmacy]….These documents were not prepared for or by the ministry, nor were they prepared in accordance with any statutory reporting obligations. They make no mention of, and do not, in any way relate to professional allowances or rebates Although they were amended to record 23, their contents are simply not responsive to the appellant's access request.

[32] The pharmacy named in the request also submits that the majority of the information in record 23 is not responsive to the appellant's request. It submits that the notes that it provided to the ministry regarding the appendices to record 23 do not relate to professional allowances and/or rebates but, rather, to other aspects of the named pharmacy's commercial relationships.

[33] None of the drug manufacturers who responded to the Notice of Inquiry dispute the ministry's position that the portions of the professional allowance forms that have been severed are non-responsive to the request as they related to professional allowances paid or received by pharmacies other than that identified in the request.

[34] However, the drug manufacturers who responded to this appeal and who appealed the ministry's decision to disclose all of the professional allowance reporting forms other than the dollar amounts, submit that in addition to the amounts, all of the remaining information in the professional allowance reporting forms is also not responsive to the request. Some of them also submit that the information in the records

that identifies them, including the names, titles, and contact information of their officers, is not responsive because it does not reasonably relate to the quantum of professional allowance amounts received by or paid to the named pharmacy.

[35] The drug manufacturer to which records 11 and 18 relate submits that two letters among the responsive records which are letters that it sent to the ministry, are also not responsive to the request as they are "in respect of pharmacies other than [the pharmacy identified in the request]."

[36] The drug manufacturer to which record 14 relates submits that notes that it included in the reports it submitted do not reasonably relate to the professional allowance amounts received by or paid to the named pharmacy. It submits that they relate to internal organization of sales accounts, documentation relating to the payments, and comments regarding reconciliation of payments.

[37] The requester submits that all of the information on the professional allowance reporting forms and accompanying letters (records 1 to 21) and the letter and its attachments (records 23 to 27) relate directly to her 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.

[38] 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.

[39] Specifically addressing records 23 to 27, the requester submits:

> The ministry has the burden to prove that these records are not responsive, and it has not done so. … The request was not limited to documents prepared by the ministry, but specifically includes those records prepared by [named pharmacy] relating to the professional allowances and provided to the ministry. We understand that [named pharmacy] provided these records in response to a request from the ministry, in which the ministry required [the named pharmacy] to provide information under section 13.1 of the [*ODBA*].[6] Records 23 to 27 were [named pharmacy's] response to the request. "Reporting obligations" in the request are not limited to the information contained in the professional allowance templates, but also includes response to any

[6] *Supra,* note 1.

request from the ministry pursuant to section 13.1 of the *ODBA* which states:

> For the purposes of determining compliance with this Act or the regulations or with the *Drug Interchangeability and Dispensing Fee Act* and its regulations, the executive officer may require a manufacturer, wholesaler, supplier or a listed substance, operator of a pharmacy or a company that owns, operates, or franchises pharmacies to provide information other than personal information to the executive officer either in response to a specific request, or at regular intervals.

[40] The requester submits that records 23 to 27 were provided to the ministry as part of the named pharmacy's reporting obligations and are responsive to the request.

[41] In its reply representations, the named pharmacy submits that record 23 and its attachments (records 24 to 27) were submitted to the ministry in response to an industry-wide audit to assess compliance with legislative and regulatory requirements, but that the information requested by the ministry (as detailed in record 22 which has been disclosed) goes well beyond the scope of the information requested by the appellant. It submits that it is clear from their face that records 24 to 27 do not relate to professional allowances or rebates received by and/or paid to the named pharmacy and their contents are simply not responsive to the appellant's request.

[42] Specifically with respect to record 23, the named pharmacy submits that most of the letter is also not responsive with the exception of notes regarding Appendix A, Appendix A itself and its two exhibits. It submits that this information does not relate to professional allowances or rebates, but rather to other aspects of its commercial relationships.

Analysis and finding

[43] 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 she was only seeking access to the quantum of professional allowances paid.

[44] 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.

[45] With respect to the notes that the drug manufacturer to which record 14 relates 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 are not responsive to the request.

[46] 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"

[47] 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 and any notes added to the forms, 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. Additionally, I accept the ministry's position that if a given manufacturer's template included a line item indicating $0 payments to the pharmacy named in the request for a given reporting period, it would consider that to be information that is responsive to the request.

[48] With respect to the two letters submitted by one of the drug manufacturers (record 18.5, a letter dated August 31, 2009, and an un-numbered letter dated September 13, 2010 also found amongst the documents that make up record 18), I have reviewed them closely and I agree with the drug manufacturer that they are non-responsive. The requester seeks information specifically in relation to professional allowances or rebates with respect to the named pharmacy. As the information in both letters does not relate to that named pharmacy, I find that neither of them are responsive to the request and should be withheld, in their entirety.

[49] Finally, with respect to records 23 to 27, I find that only portions of record 23 are responsive to the request and that records 24 to 27 are not responsive, in their entirety. I agree with the requester that the request is not limited to records prepared by the ministry. I also agree with the requester that the scope of the request includes any records received by the ministry in accordance with statutory reporting obligations which is not limited to the information contained in professional allowance reporting forms. However, based on the wording of the request I find that any responsive information must relate to professional allowances or rebates received by and/or paid to the named pharmacy.

[50] Regarding record 23, in my view, only the note relating to Appendix A on page 3 and Appendix A-2 together with its two exhibits are responsive to the request. None of the other information relates to professional allowances or rebates received by and/or paid to the named pharmacy.

[51] Regarding records 24 to 27, from my review of their contents, the information contained therein does not relate specifically to professional allowances or rebates received by or paid to the named pharmacy. Therefore, I find that records 24 to 27 are not responsive to the request.

[52] Accordingly, I uphold the ministry's decision with respect to the information that it has withheld as not responsive, the portions of professional allowances reports relating to other pharmacies and records 24 to 27, as I find that this information does not relate specifically to the payment of professional allowances or rebates to the named pharmacy. However, I also find that the following additional information that the ministry has not identified as not responsive to the request is also not responsive and should be removed from the scope of the appeal:

- Notes 1 through 5 in records 14.1, 14.2, 14.3, 14.4, 14.5, 14.6 and 14.7;
- Note (v) in records 11.4 and 11.5 as identified above;
- Record 18.5 (letter dated August 31, 2009) and un-numbered record amongst the documents that make up record 18 (letter dated September 13, 2010); and
- All portions of record 23 with the exception of the notes under Appendix A on page 3, Appendix A-2, and exhibits 1 and 2 to Appendix A-2.

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

[53] The ministry claims that the dollar amounts of the performance allowances paid to the named pharmacy are subject to exemption pursuant to the mandatory exemption at section 17(1). It also submits that section 17(1) applies to the portions of record 23, a letter provided to the ministry from the named pharmacy, that remain at issue. The ministry has indicated that it is prepared to disclose all of the remaining information (with the exception of that which is not responsive to the request).

[54] All of the drug manufacturers and the named pharmacy take the position that the mandatory exemption at section 17(1) applies to the performance allowance reporting forms and that the specific amount of performance allowances paid to the pharmacy named in the request are also exempt under section 17(1). The named

pharmacy also agrees with the ministry that the remaining portions of record 23 are exempt pursuant to section 17(1).

[55] 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

[56] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[7] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[8]

[57] 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

[7] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[8] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

[58] The ministry submits that all of the records that have been severed on the basis of section 17(1) contain commercial and/or financial information because they reflect or refer to the payment of professional allowances by drug manufacturers to the named pharmacy. The ministry submits that professional allowance amounts paid or received constitute commercial and financial information as those terms have been defined by this office.

[59] The ministry submits that records 1 to 21 reveal the professional allowance amounts paid by particular drug manufacturers received by the named pharmacy. The ministry also submits that record 23 contains information about the professional allowance amounts that the named pharmacy has received from identified drug manufacturers, as well as the named pharmacy's business information. The ministry submits that this constitutes commercial and financial information.

[60] The named pharmacy submits that the information severed from the records by the ministry amounts to its financial and commercial information, thereby meeting the first part of the test. It states that the information severed from the records clearly falls within the definition of financial information as it pertains to specific data detailing the total amount of professional allowances received by drug manufacturers, the total amount of professional allowance monies expended and the use, allocation and distribution of those monies to specific categories identified in the records. It also submits that the information severed from the records falls within the definition of commercial information at it reveals the monies received from drug manufacturers and earned and expended by the named pharmacy.

[61] All of the drug manufacturers submit that the records at issue contain both commercial and financial information within the meaning of section 17(1). They submit that the reports reveal information about the commercial relationship between the drug manufacturers and the named pharmacy 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 the named pharmacy 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.

[62] The requester acknowledges that the responsive records will contain some information that is commercial or financial in nature, however, she submits that the information which identifies the drug manufacturers 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). She submits that it is only the disclosure of both the identifying information and the payment amounts together which constitutes commercial and financial information under the first part of the section 17(1) test.

[63] I have reviewed the records at issue in this appeal and conclude that they contain information about professional allowance amounts that satisfies the definition of commercial information, as it relates to the buying and selling of pharmaceuticals in the context of a commercial relationship between the drug manufacturers and the named pharmacy. I also find that the responsive records contain information that qualifies as financial information as the professional allowance amounts are specific amounts relating to money and its use or distribution as contemplated by the definition of that term.

[64] Therefore, I find that the information at issue meets the first part of the test under section 17(1).

Part 2: supplied in confidence

Supplied

[65] 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.[9] 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.[10]

[66] The ministry submits that the named pharmacy and the drug manufacturers had a statutory obligation to provide completed professional allowance templates to the ministry. It further submits that given that the information in the templates reflects payments made or received by these parties, it is based on information that is internal to and generated by them, and was provided to the ministry without ministry involvement. Therefore, the ministry takes the position that the information at issue was "supplied" to it.

[67] The ministry relies upon Order PO-1983, which found that documents supplied to a ministry in compliance with statutory reporting requirements are still considered to be

[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.

"supplied" under section 17(1) and are distinguishable from information which is collected or obtained by an institution, rather than the third party providing it.

[68] The ministry submits that this same reasoning applies to record 23 as it amounts to correspondence that was prepared and supplied by the named pharmacy to the ministry.

[69] The named pharmacy submits that it directly supplied the information relating to it to the ministry. This includes the professional allowance reporting forms and record 23.

[70] All of the drug manufacturers submit that the information in the professional allowance reporting forms and any covering letters was "supplied" to the ministry pursuant to the requirements of the *ODBA* and the *DIDFA*. 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 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.

[71] The requester submits:

> The information in the responsive records was supplied pursuant to the requirements of the *Code of Conduct*[11]... 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.

[72] 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 and letters at issue being provided by the drug manufacturers or the named pharmacy, 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 statutory reporting requirements of the Ontario Drug Benefit Program governed by the *OBDA* and the *DIDFA.* Previous orders have established that information provided to an institution under a mandatory reporting requirement in legislation or regulations is "supplied" for the purposes of section

[11] *Code of Conduct*, supra note 3.

17(1).[12] Accordingly, I find that the information at issue in this appeal was "supplied" by the drug manufacturers and the named pharmacy to the ministry.

In confidence

[73] 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.[13]

[74] 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; and
- prepared for a purpose that would not entail disclosure.[14]

[75] The ministry submits that the drug manufacturers and the named pharmacy supplied the information at issue to it with an expectation of confidentiality. It submits that record 23 and all of the covering letters accompanying the professional allowance reporting forms clearly state "strictly private and confidential" in the header. It also submits that record 23 contains "a very strong statement, on page 5, about the confidentiality of these records." Its position is that the affected parties that supplied this information expected the ministry to treat the sensitive financial contents of these documents as such and submits that it is its practice to do so.

[76] The named pharmacy also submits that the cover letters that accompanied the professional allowance reporting forms as well as record 23 itself, "are marked in bold and capital letters with the words 'STRICTLY PRIVATE & CONFIDENTIAL'" and contain a paragraph stating the following:

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[12] Orders P-345, PO-1938 and PO-2142.
[13] Order PO-2020.
[14] Orders PO-2043, PO-2371 and PO-2497.

- the information contained in the report consists of highly confidential sensitive financial and business information;

- is of considerable strategic importance;

- is consistently treated as confidential by [named pharmacy]; and

- disclosure of this information or any part of it to anyone other than staff of the Ontario Public Drug Programs would cause significant commercial harm to [named pharmacy].

[77] The named pharmacy submits that in these records it also states that it "trusts that the ministry will resist any attempt by any third party to gain access to this information through Freedom of Information legislation or otherwise."

[78] The named pharmacy also submits that a further indicator that the records contain information that it supplied explicitly in confidence is the words at the top of the reports stating "Note: This report is strictly private and confidential."

[79] Finally, the named pharmacy submits that because the ministry has also treated these reports as confidential and considers them to be so, as indicated by their actions in severing portions of the reports responsive to the request for information. It submits that the information that has been severed is information that both the ministry and the named pharmacy have treated as confidential, is not publicly available, and was prepared to meet the statutory requirements set out by the ministry and not for any purpose that would entail disclosure.

[80] 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." They submit that professional allowance rates are highly sensitive commercial information that is kept confidential between a manufacturer and their client.

[81] 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

> 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.

[82] 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.

[83] 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 that "[t]he amounts paid as professional allowances are pursuant to commercial agreements between two private entities both of whom has contracted to maintain confidentiality."

[84] 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 been otherwise publicly available.

[85] 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 precautions 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.

[86] Most of the drug manufacturers also submit that the ministry has acknowledged that the information relating to professional allowances is confidential proprietary commercial information.

[87] 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, she submits that the information was supplied to the ministry pursuant to a statutory requirement. She 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, it has provided no evidence to support its assertion. She 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.

[88] Based on my review of the information contained in the professional allowance reporting forms and record 23, and having considered the submissions of the parties, I am satisfied that the information contained in them was supplied by the drug manufacturers and the named pharmacy 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 the ministry and the drug manufacturers and the named pharmacy given the nature and type of information that is at issue. As a result, I find that the parties have satisfied me that the professional allowance amounts and the other information that remains at issue was 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

[89] To meet this part of the 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.[15]

[90] 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).[16]

[91] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[17]

[92] 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*.[18]

Representations of the parties on harms

[93] The ministry submits that the disclosure of the records at issue in this appeal could reasonably be expected to prejudice the competitive position of identified drug manufacturers that pay professional allowances to the named pharmacy, and interfere significantly with their contractual negotiations with other clients as contemplated by section 17(1)(a). It also submits that it would result in undue loss to those manufacturers, and an undue gain to their competitors as contemplated by section 17(1)(c).

[94] The ministry submits that the drug manufacturing industry is extremely competitive, and any commercial information about the business decisions of a particular manufacturer could be of value to their competitors or their clients who would seek to use the information to gain a competitive advantage to the detriment of that manufacturer. It submits:

> A manufacturer's decision to provide professional allowances to [the named pharmacy], and the particular form of professional allowances provided, is an internal commercial decision. That decision is based on a

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

> number of business and commercial considerations. If competitors had access to this information, they could use it to copy a given manufacturer's strategies, without having to engage in the research and analysis required to develop the strategies. This would amount to an undue gain for the manufacturer's competitors.

[95] The ministry states that the representations that it received in response to the notice given pursuant to section 28 of the *Act* prior to the issuance of the decision were "consistent in describing the nature of the economic harm that would result to them from the disclosure of the information at issue." The ministry submits that "to a layman, the information in the records may seem mundane or basic business information, but to the affected parties, it is extremely sensitive and highly confidential because it is so valuable to their competitors."

[96] The ministry cites the following information taken from representations it received from one of the affected drug manufacturers upon receiving its section 28 notification:

> While each customer would have access to its own individual information they would not have information as to the business relationship between [the manufacturer] and other customers. With the disclosure of the information requester, [the manufacturer's] competitors could analyze the [manufacturer-named pharmacy] relationship and use it to the [manufacturer's] disadvantage by disclosing sensitive commercial information to other [manufacturer's] customers which is not otherwise available to them, with a view to convincing them to switch loyalties to the competitor's product.

[97] The ministry submits that it agrees with this analysis and states that if a competitor knew the rate or amount of professional allowances provided to the named pharmacy over a period of time, it could use this information to its advantage in its future contractual or other negotiations with the named pharmacy. The ministry submits that this would result in an economic loss to the manufacturer and an undue gain to its competitors.

[98] Specifically with respect to record 23, the ministry submits that it contains highly sensitive, internal business information that, if disclosed, would essentially reveal how the named pharmacy conducts its business. The ministry submits that the disclosure of this record would have a direct and significant prejudicial effect on the named pharmacy's contractual negotiations with other parties and the loss of confidentiality with respect to the information in these records would result in a significant undue loss to the named pharmacy and an undue gain to its competitors.

[99] The named pharmacy submits that that the disclosure of the information that was severed by the ministry would place it at a competitive disadvantage in what is "a very competitive industry." It submits that disclosure would cause it significant commercial harm, as well as prejudice to its competitive position. It states:

> This is because the information redacted by the ministry contained in the records is highly confidential and sensitive financial and commercial information detailing the amounts provided by drug manufacturer to [named pharmacy] and its licensees and franchisees in connection with prescription drug sales, the total amounts expended and how and in what amounts those monies have been expended. This information provide substantial insight into [named pharmacy's] business operation and confidential commercial arrangements with drug manufacturers that, if publicly known would impair our competitive position and interfere with ongoing contractual negotiations with drug manufacturers. This, in turn, would result in significant financial harm to the [named pharmacy]…. It is submitted that disclosure of the information relating to professional allowance funds could reasonably be expected to result in undue financial loss to [named pharmacy], a competitive gain to other pharmacy operators as a result of their use of this information to their commercial benefit, prejudice [named pharmacy's] competitive position and interfere with contractual relationships with drug manufacturers. We respectfully submit, therefore, that the information redacted by the ministry must therefore not be disclosed due to the significant potential for harm to our competitive position within our industry and our business relationship with drug manufacturers in connection with its negotiated contractual arrangements and pharmacy sales and how we conduct our affairs with respect to these amounts. This information would be extremely useful in the hands of a competitor in order to benefit their own competitive position and contractual negotiations with pharmaceutical manufacturers, while prejudicing the position of [named pharmacy]. Moreover, it is submitted that disclosure of the information in question can reasonably be expected to impair [named pharmacy's] contractual relationships and future abilities to negotiate with suppliers of pharmaceutical products.

[100] All of the drug manufacturers agree that the disclosure of the monetary amounts of the professional allowances that they made to the named pharmacy would result in the harms contemplated by section 17(1)(a) and/or (c). One of them also submits that disclosure would result in similar information no longer being supplied in the future as contemplated by section 17(1)(b).

[101] They submit that decisions to make discretionary professional allowance payments are important components of confidential commercial arrangements with pharmacies and are the subject of "hard-fought negotiations" between them. They also

submit that decisions as to the timing of the payments are made "very strategically and with a great deal of market research, competitive insight and strategic consideration." They submit that, as a result, the amount of the payments is commercially sensitive information that would be "extremely useful" to their competitors as it would provide them with a competitive advantage arising from insight into its business operations, allow them to determine sales and calculate the allowance they would have to offer pharmacies to entice them away from the drug manufacturer, and give them insight with respect to penetrating the Ontario market.

[102] One drug manufacturer specifically submits that disclosure of professional allowance amounts would permit a competitor to compare amounts given to that pharmacy with its sale of drugs to that pharmacy over the same period and obtain the resulting overall rate given to the named pharmacy as a percentage of sales. It submits that professional allowance rates that they offer a given pharmacy for given drugs is an important tool allowing drug manufacturers to compete with each other for clients and, for this reason, professional allowance rates are highly sensitive commercial information that is confidential between manufacturers and pharmacies. It submits that it may suffer important monetary damages and sustain irreparable harm through loss of clientele if its professional allowance rates given to the named pharmacy were to become public as a competitor may offer competing products at better rates that it would be forced to match or other pharmacy clients may switch to other suppliers.

[103] Several other drug manufacturers submit that professional allowances arise out of commercial agreements with pharmacies and are directly analogous to pricing information. They submit that professional allowances are as sensitive, and in some cases more sensitive, than pricing information. They submit that the particulars of these allowances are a critical part of its business model that bear directly on its competitive position as it gives competitors the ability to understand pricing levels and strategies with respect to its pharmacy clients and that disclosure of these amounts would prejudice their competitive position vis-à-vis other drug manufacturers, interfere with its negotiations with pharmacies and result in losses.

[104] One drug manufacturer submits that the disclosure of the specific professional allowances paid to the named pharmacy in the applicable reporting periods could be used in combination with other information to estimate the amount of listed drug products and the effective cost of such drug products that were sold to the named pharmacy. It also submits:

> If the fact that [drug manufacturer] provided professional allowances to [named pharmacy] were revealed, this would significantly prejudice the competitive position of [drug manufacturer] and interfere significantly with [drug manufacturer's] negotiations with other [pharmacies]. Such [pharmacies] could expect and demand similar benefits in respect of the sale of its drug products. Even with the gradual elimination of

> professional allowances in Ontario, customers could still use [drug manufacturer's] past payment of professional allowances as leverage when negotiating compliant pricing arrangements – for example, demanding lower prices for unlisted drug products on the basis that [drug manufacturer] has been willing to effectively provide benefits for unlisted drug products in relation to its products historically. Business dealings with other pharmacies may be difficult on the basis that [drug manufacturer] provided professional allowances to [named pharmacy] but did not previously provide the same, or any, allowances to such pharmacies.

[105] The drug manufacturer also submits that in Order PO-2863, this office found that disclosure of information contained in a product listing agreement between the ministry and a drug manufacturer "can negatively affect the manufacturer's competitive position because the information could be used by other provinces and private sector companies negotiating with the manufacturer as a low benchmark price for the manufacturer's given drug products. The drug manufacturer in this appeal submits that "[i]n the same vein, information regarding professional allowances paid by a manufacturer will negatively affect [its] negotiating position with its customers [pharmacies] as it reveals financial and strategic information relating to the sale of its products." In sum, the drug manufacturer submits that the necessary corollary to this competitive damage is that it would suffer undue loss, in terms of lost profits, while other manufacturers and pharmacies would enjoy undue gain.

[106] The requester submits that any alleged prejudice or harm to the drug manufacturers' competitive position can be addressed by severing the record to remove the identity of the drug manufacturers. The requester submits that without the drug manufacturer's identity, the records contain no information which would give an advantage to their competitors or provide any insight whatsoever into their commercial practices or business operations. The requester states, that, in particular, "competitors will not be able to use any disclosed information to the detriment of any particular drug manufacturer because the only information disclosed is the quantum of the professional allowance paid by an unnamed generic drug manufacturer to [named pharmacy]." She submits that this information will not be useful or valuable to the drug manufacturer's competitors. The requester also submits:

> Moreover, the disclosure of the amounts of professional allowances paid to [named pharmacy], when divorced from the payors, will have no effected on the ability of the [drug manufacturers] to negotiate contractual relationships with its clients, including [named pharmacy] in respect of professional allowances … before they are eliminated entirely in April 2013. Such disclosure will not jeopardize the generic drug manufacturers' relationships with other clients if they became aware that quantum of professional allowances may be disclosed. Pharmacies (i.e.

> their clients) are well aware that generic drug manufacturers have statutory reporting obligations in respect of professional allowances.

[107] With respect to the harms that the named pharmacy alleges it would suffer were the information disclosed, the requester submits:

> The ministry has severed the global quantum of professional allowances reported as received by [the named pharmacy], and the allocation of the professional allowances in the reporting categories, for the period from July 2007 to 2010. This information does not provide valuable information into the business operations of [the named pharmacy] for three reasons. First, the information is dated and does not provide information [the named pharmacy's] current practices. Second, the information about the receipt and use of professional allowances has little value, as professional allowances will be completely eliminated by April 2013. Third, this information will not impair future contractual negotiations with drug manufacturers as such agreements will not be lawful by April 2013. The severed information does not appear to contain information that is specific to individual generic drug manufacturers, and will not reveal any information about the business relationship with specific drug manufacturers.

[108] In its reply representations, the named pharmacy takes the position that contrary to the requester's position that the information is "dated" and of "little value" because professional allowances are no longer permissible as of April 2013, it is precisely *because* professional allowances have been eliminated that disclosure of the quantum of past professional allowances would impair future contractual negotiations it has with drug manufacturers. It submits that the commercial relationships will not cease as suggested by the appellant, but continue on "ordinary commercial terms." The named pharmacy submits that disclosure of the quantum of professional allowance paid will allow suppliers to draw reasonable inferences of amounts paid by to it by other suppliers and will provide its competitors with commercially valuable confidential information about the quantum of professional allowances that the named pharmacy receives. The named pharmacy points to Order PO-2898 to support its position:

> The IPC previously upheld a decision by the ministry to withhold analogous information that would reveal specific details of how much a named manufacturer has agreed to pay by way of volume discounts. Further to the points made above, the IPC concluded that this type of information could be used by other potential purchasers as a discount standard or price goal to be obtained from other drug manufacturers. The IPC held that the information could reasonably be expected to discourage drug manufacturers in the future from negotiating discounts and other favourable financial terms out of concern that the information could be

> used by other customers seeking to negotiate similar discounts. Even in the context of an agreement with the government (which would militate in favour of disclosure), the IPC concluded that disclosure would prejudice the ministry's economic interests and competitive position….These principles have even greater weight and application in the present situation where the agreements in issue are private commercial agreements to which the government is not even a party, and competitive harm is evident.

[109] In response to the requester's argument that the information at issue will have no significance to the ongoing competitive interests of the drug manufacturers or the named pharmacy given that professional allowances were eliminated as of April 2013, the drug manufacturers submit that this ignores the fact that access to Ontario professional allowance amounts may be leveraged in other provinces where professional allowances are still permitted. Some of the manufacturers also submit that despite the elimination of professional allowances, commercial relationships between the named pharmacy and drug manufacturers will continue to exist and the fact that a manufacturer was willing to pay a professional allowance to the named pharmacy, and the amount of that allowance, would reveal confidential business information relating to past practices which can be used, to their detriment, in future business negotiations.

Analysis and findings

[110] The information that remains at issue in this appeal is the quantum of professional allowances paid by the drug manufacturers and portions of record 23, a letter submitted to the ministry in response to a ministry request for information pursuant to section 13.1 of the *OBDA*. The ministry, the pharmacy named in the request, and the drug manufacturers allege that disclosure of this information would give rise to the harms contemplated by section 17(1).

[111] Having carefully reviewed the representations of the parties and information that remains at issue in these appeals, I find that the disclosure of the quantum of professional allowances, as well as the information remaining at issue in record 23, could reasonably be expected to give rise to the harms contemplated in sections 17(1)(a) and (c).

[112] 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. As a

result, I find that the disclosure of the quantum of professional allowances supplied by drug manufacturers could reasonably be expected to result in prejudice to those manufacturers' competitive positions and/or result in an undue loss to them and an undue gain to their competitors.

[113] Although this information is dated and although drug manufacturers are no longer required to supply this type of information to the ministry as professional allowances have been eliminated as of April 2013, I accept that the relationships between the various drug manufacturers and the named pharmacy are ongoing. Pursuant to the amendments to the relevant legislation, drug manufacturers continue to be permitted to provide benefits to pharmacies in accordance with "ordinary commercial terms" and I accept that they will continue to do so. In my view, I have been provided with sufficient evidence to conclude that in the highly competitive pharmaceutical market, the disclosure of the quantum of professional allowances that certain drug manufacturers have traditionally provided to pharmacies continues to be valuable information for their competitors and could reasonably be expected to have a negative effect on their continuing competitive interests and cause them undue loss with a correlative undue gain to their competitors**.**

[114] I also accept that the information at issue in record 23 is highly sensitive internal business information belonging to the named pharmacy that, if disclosed, would reveal how it conducts its business and information regarding its agreements with drug manufacturers. Accordingly, I find that the disclosure of this information could reasonably be expected to interfere with its contractual negotiations with other parties and result in an undue loss to it with a correlative gain to its competitors.

[115] Previous orders have found that records that constitute or contain the terms and conditions of private agreements between two third parties that are supplied to government pursuant to regulations should not be disclosed.[19] Specifically, in Order PO-2710, Adjudicator Frank DeVries withheld access to agreements and portions of agreements entered into by two third parties stating:

> It is clear from the records and the representations that these agreements are confidential, commercial agreements entered into between commercial entities, and that disclosure of the terms and contents of these agreements could reasonably be expected to prejudice the interests of those commercial entities. Accordingly, I am satisfied that these record qualify for exemption under section 17(1)(a).

[116] Furthermore, as noted above, although one of the central purposes of the *Act* is to shed light on the operations of government, the purpose of section 17(1) serves to

[19] Orders PO-2710 and PO-2965.

limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[20] This purpose was discussed in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*[21] which provided the foundation of the *Act*:

> [T]he exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself.

[117] In the current appeals, the quantum of professional allowances reported on the forms and the information that is at issue in Record 23, is information that arises in the context of private commercial arrangements that were negotiated between drug manufacturers and pharmacies, both private entities. Based on the representations that I have received, I accept that this information forms part of the terms of the agreements between the drug manufacturers and the pharmacies that would not otherwise be revealed and appears to be guarded closely within the pharmaceutical industry. In my view, this is not information that relates to commercial matters generated by government itself but rather to commercial matters generated by two non-governmental entities.

[118] Although the ministry has been supplied this information in accordance with statutory requirements, the amounts do not reflect monies paid or received by any government entity. I have not been provided with evidence to conclude that the disclosure of these amounts would shed light on the operations of government institutions or promote transparency and accountability with respect to government expenditures. In my view, as confidential information arising from two third parties that could be exploited by a competitor in the marketplace, the quantum of professional allowances is the very type of information that, pursuant to the Williams Commission Report, section 17(1) was designed to protect.

[119] I have found that the disclosure of the quantum of professional allowances listed on the reporting forms and the remaining information in record 23 could reasonably be expected to give rise to the harms in section 17(1)(a) and (c). Therefore, I find that they are exempt under the mandatory exemption at section 17(1) and should not be disclosed.

[120] Additionally, 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

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[20] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[21] 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report)

appeals for three reasons. 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. Second, as of April 2013, professional allowances have been eliminated and there is no longer a mandatory requirement to supply this specific information to the ministry. 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 been provided with no 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.

[121] To summarize, I am satisfied that all three parts of the test for exemption under section 17(1) have been met for the quantum of professional allowances listed on the reporting forms and the information remaining at issue on record 23.

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 exemption?

[122] In her representations, the requester takes the position that there is a compelling public interest in the disclosure of the information that has been withheld by the ministry. I have upheld the ministry's decision not to disclose that information pursuant to the application of section 17(1). As a result, I will consider the possible application of section 23 of the *Act* to that information.

[123] Section 23 reads:

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

[124] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.[22]

[125] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of

[22] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.).

reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, this office will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[23]

[126] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[24] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[25]

[127] Any public interest in *non*-disclosure that may exist also must be considered.[26] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[27]

[128] A public interest does not exist where the interests being advanced are essentially private in nature.[28] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[29]

[129] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[30]

Representations

[130] In her representations, the requester submits that there is a compelling public interest in the disclosure of the information at issue in this appeal. The requester states:

> Professional allowances cost Ontarians over $750 million a year. There is a public interest in the disclosure of information relating to professional allowances. The legislative changes referred to above were specifically meant to increase transparency in the generic drug sales system. The

[23] Order P-244.
[24] Orders P-984 and PO-2607.
[25] Orders P-984 and PO-2556.
[26] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[27] Orders PO-2072-F and PO-2098-R.
[28] Orders P-12, P-347 and P-1439.
[29] Order MO-1564.
[30] Order P-984.

> public interest in understanding the payment and use of professional allowances is compelling.
>
> As the professional allowance regime will cease in April 2013, the public interest in disclosing the responsive records, with the severances proposed above, outweighs the alleged harms to the third parties, and should be balanced against the public interest in the disclosure of this information.

[131] In their reply representations, both the ministry and the named pharmacy take the position that the requester did not provide sufficient evidence to support her assertion that there is either a general or compelling public interest in the disclosure of the particular payment information at issue as opposed to the public's general interest in lowering the cost of generic drugs. Both the ministry and the named pharmacy state that the requester has not referred to any media, business or public advocacy sources to support her "very general" or "vague" submission.

[132] The ministry and the named pharmacy both take issue with the fact that the requester's main argument, that professional allowances cost Ontarians over $750 million a year, is inaccurate. The ministry submits that "professional allowances do not directly 'cost Ontarians over $750 million a year' as the appellant indicates in its submissions." The ministry points to the news release relied upon by the requester which states:

> In 2009, generic drug manufacturers reported paying pharmacy owners more that $750 million in professional allowances, with pharmacy owners themselves revealing that 70% were used for rebates instead of patient care.

[133] Both the ministry and the named pharmacy submit that this news release satisfies the public interest in "understanding the payment and use of professional allowances," and serves the purpose of informing the citizenry about the activities of their government." They submit that the news release specifically addresses the public interest in reducing and controlling drug costs by explaining the various measures the ministry is undertaking to achieve this goal, including the elimination of "rebates."

[134] The ministry further submits that "disclosing the *actual amounts* paid by manufacturers to a single pharmacy does not further 'inform' the public; nor does it add 'in some way to the information the public has to make effective use of the means of expressing public opinion to make political choices.'" It submits that the disclosure of the actual amounts paid by particular drug manufacturers to the named pharmacy serves a private rather than a public interest:

> In Order PO-2097, the IPC acknowledged the highly competitive nature of the pharmaceutical industry. The ministry submits that because it is such a competitive business, any financial information that can be gleaned from the records at issue could potentially be used by [named pharmacy's] competitors, or drug manufacturers, for their private commercial advantage. The [requester] nowhere suggests that the information would or could be used to promote lower drug prices. As such the ministry submits it is reasonable to conclude that it is not in the public interest to disclose this information, and that only private commercial business interests would be served by its disclosure.

[135] The ministry argues that there is no evidence of a general public interest in the disclosure of the information at issue and states that the requester has not pointed to any media, medical or other type of public coverage or debate about the information at issue in these records, and has not raised any health or safety concerns in relation to the drug products for which the professional allowances are paid.

[136] Finally, the ministry submits that even if an interest in the disclosure of the information at issue were to exist, it would not be "compelling" as it is not related to an issue that has attracted "rousing strong interest or attention" from the public. The named pharmacy submits that the information does not even relate to the operations or activities of government it submits that "it relates to private commercial interests of [named pharmacy] and its business partners" rather than issues such as "public health, public safety or protection of the environment (issues which tend to engage the public interest)."

[137] The named pharmacy submits that the law firm that represents the requester is the same firm that represents plaintiffs in a proposed class action suit against it where damages are claimed in respect of professional allowances. It submits that it is "highly relevant" that the information sought through the access to information request at issue in this appeal is also evidence sought in the class action. It submits:

> The information sought is not intended to (and would not) shed light on the operations of government, but rather the operations of private commercial entities, in the context of private commercial relationships, in the context of a private dispute. Section 23 of the *Act* cannot be used for this purpose.

Analysis and finding

[138] As noted above, two requirements must be met to establish that the public interest override in section 23 of the *Act* applies to the portions of the records to which section 17(1) has been found to apply:

- There must be a compelling public interest in disclosure of the information; and

- this interest must clearly outweigh the purpose of the exemption.

[139] While I acknowledge that there is a general public interest in ensuring that there is a degree of transparency with respect to many elements of the drug sales system, the information in the records that I have found to be exempt pursuant to the mandatory exemption at section 17(1) of the *Act* amounts primarily to the quantum of professional allowances provided by drug manufacturers to a named pharmacy pursuant to commercial agreements between these private, non-governmental, entities. Based on my careful consideration of the specific information that I have found to qualify for exemption and the representations received from the parties, I am not satisfied that any public interest in the disclosure of this specific information reaches the threshold of "compelling." In my view, I have not been provided with sufficiently cogent evidence to conclude that the lack of the disclosure of this information rouses strong interest or concern that has not been addressed by various initiatives by the ministry, including amendments to the legislation governing drug sales in Ontario. Also, in my view, I have not been provided with any evidence that disclosure of the specific information that has been withheld would serve to enlighten the citizenry about activities of their government or its agencies nor am I satisfied that it would respond to the public interest considerations that the requester alludes to in her representations.

[140] Moreover, even if I were to find that a public interest does exist in this information, I have not been provided with sufficient evidence to demonstrate that such a public interest in the disclosure of this information clearly outweighs the purpose of the section 17 exemption in this case, which, as stated above, is designed to protect the confidential informational assets of non-governmental parties that could be exploited by a competitor in the marketplace.

[141] Accordingly, I conclude that the public interest override at section 23 does not apply in the circumstances of this appeal.

D. Has the ministry severed the records in a reasonable manner?

[142] Section 10(2) of the *Act* states:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[143] The records responsive to the request in this appeal include two types of professional allowance reporting forms. Those submitted to the ministry by drug manufacturers and those submitted to the ministry by the pharmacy named in the request. For the forms prepared by drug manufacturers, the ministry has severed the records to remove the quantum of professional allowances paid to the named pharmacy, but has indicated that it is prepared to disclose all of the other information on the forms, including the identity of the manufacturer that submitted the report.

[144] As briefly mentioned above, the requester submits that the ministry did not provide any rationale for the manner in which it severed the reporting forms submitted by the drug manufacturers and that it should have severed them in a different manner. She submits that it should have assessed whether they could be severed to provide the payment amounts without reference to the drug manufacturers instead of the other way around. She proposes that the records prepared by the drug manufacturers be severed to remove the following information:

(a) the name and contact information of the drug manufacturers;

(b) the name and contact information of the author and signatories of the report; and

(c) the information in respect of pharmacies other than that named in the request (as non-responsive).

[145] The requester submits that to disclose the quantum of professional allowances paid by the drug manufacturers while removing their identity provides as much disclosure as possible while protecting the drug manufacturers from potential prejudice or harm. She submits that this approach is more consistent with the spirit and purpose of the *Act* and is the one that should have been taken by the ministry.

[146] The requester acknowledges that she has already been provided with records containing identifying information of some of the drug manufacturers. However, she submits that she is prepared to return this information with an affirmation that they have not been copied or retained and the ministry could create a new numbering system for the records to avoid any possibility that the requester could cross-reference the documents.

[147] In response to the requester's submissions with respect to the alternative severance of the records at issue, the drug manufacturers submit that her suggested manner of severance poses, at best, significant challenges that are not easy to overcome and are, at worst, unworkable. They all express concern that the appellant will inadvertently end up with the complete information and the harms contemplated in section 17(1) could reasonably be expected to occur.

[148] One drug manufacturer submits that disclosure of the professional allowances payment amounts would still enable a competitor to obtain an advantage, as they would still be able use the payment information to inform their pricing decisions even though the competitor would not know which of several suppliers to the named pharmacy it was impacting. It submits that the harms that could be expected to occur would be the same. It further submits:

> In short, it is publicly known that [named drug manufacturer] supplied drugs to [named pharmacy] – the products are visible from the pharmacy counter. As such, if the professional allowance payment data for five manufacturers were disclosed, a reasonable person would conclude that one of those manufacturers was [named drug manufacturer]. As such, the professional allowance payment date would still be used by competitors to undercut [named drug manufacturer] in Ontario, in supplying hospitals, or in supplying drug products in other provinces. Moreover, the professional allowance payment data would still be used by other provincial governments to negotiate lower prices from [named drug manufacturer] or generic manufacturers generally…

[149] Another drug manufacturer submits that two separate requests could be made, one for the identifying information and not the professional allowance amounts, and one of the amounts and not the identifying information, the results could be linked to identify both the pharmacies that paid professional allowances to the named pharmacy as well as the amounts that they paid. The drug manufacturer also points out that although withholding the manufacturers' identities while releasing the professional allowances would maintain the individual manufacturer's confidentiality and mitigate the resultant harms, it does not take into account the harms caused to the named pharmacy as the full amounts of professional allowances paid to it would be revealed.

[150] Still another drug manufacturer submits that given that the requester already has information identifying some of the drug manufacturers, despite her assertions to the contrary, it is information that is not easily taken away. The manufacturer expresses concern that by providing the appellant with the professional allowance amounts, the appellant may have knowledge of the entire records, or may be able to re-constitute such knowledge from its parts.

Analysis and finding

[151] Under section 10(2), the head is obliged to disclose as much information as can reasonably be severed from the responsive record without disclosing information that is protected by the exemption.

[152] The key question raised by section 10(2) is one of reasonableness. It is not reasonable to request a head to sever information from a record if the end is simply a

series of disconnected words or phrases with no coherent meaning or value. A valid section 10(2) severance must provide the requester with information that is, in some way, responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.[31]

[153] Additionally, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[32]

[154] Having reviewed the professional allowance reporting forms submitted to the ministry by the drug manufacturers, I do not agree with the requester that the records should be severed in a manner that would permit the disclosure of the quantum of professional allowances paid by the manufacturers to the named pharmacy. In my view, the ministry's severances are reasonable. It has disclosed to the requester as much of the information in the records as can reasonably severed without disclosing the information that I have found to be exempt pursuant to section 17(1) of the *Act*. As discussed above, I have found that it is the amounts of professional allowances themselves that are the "information assets" of the drug manufacturers which is the very type of information that, pursuant to the William Commission Report, section 17(1) was designed to protect.

[155] Moreover I accept that, future access requests by an assiduous requester could be worded in a fashion that would ultimately result in the entire content of the record being disclosed.

[156] Accordingly, I find that the ministry has appropriately severed the professional allowance reporting forms submitted by drug manufacturers to remove the quantum of professional allowances.

ORDER:

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

    - Notes 1 through 5 in records 14.1, 14.2, 14.3, 14.4, 14.5, 14.6 and 14.7;

    - Note (v) in records 11.4 and 11.5 as identified above;

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[31] Order 24.
[32] Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.).

- Record 18.5 (letter dated August 31, 2009) and un-numbered record amongst the documents that make up record 18 (letter dated September 13, 2010); and

- All portions of record 23 with the exception of the notes under Appendix A on page 3, Appendix A-2, and exhibits 1 and 2 to Appendix A-2.

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**.

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 disclosed to the requester.

Original signed by: May 31, 2013
Catherine Corban
Adjudicator