Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3438

Appeals PA12-330, PA12-331, PA12-332, PA12-333 and PA12-334

Ministry of Health and Long-Term Care

December 18, 2014

Summary: The appellants are drug manufacturers who appealed the Ministry of Health and Long-Term Care's decision to disclose parts of records known as "Manufacturer Reports" to a requester under the *Freedom of Information and Protection of Privacy Act*. They object to the ministry's decision to disclose aggregate information relating to "professional allowances" that drug manufacturers paid to pharmacies and the standard information that appears on every Manufacturer Report. In particular, they submit that the mandatory exemption in section 17(1)(a) (third party information) of the *Act* applies to this information. In this order, the adjudicator finds that the information in the records that the ministry decided to disclose to the requester does not qualify for exemption under section 17(1)(a), and he upholds the ministry's access decision. The appeals filed by the five drug manufacturers are dismissed.

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

OVERVIEW:

[1] For a number of years, generic drug manufacturers were permitted to pay "professional allowances" to pharmacies to carry their products. The payment of professional allowances was governed by the *Ontario Drug Benefit Act* (*ODBA*)[1] for the sale of drugs under the Ontario Drug Benefit Program (ODBP) (the "public system") and

[1] R.S.O. 1990, c. O.10.

the *Drug Interchangeability and Dispensing Fee Act*[2] for non-ODBP sales (the "private system"). Drug manufacturers were required to submit bi-annual reports to the Ministry of Health and Long-Term Care (the ministry) setting out the amounts of professional allowances that they paid out.

[2] As of July 1, 2010, the Ontario government prohibited the payment of professional allowances for generic drugs in the public system (*ODBA*) and phased out the payment of such allowances in the private system (non-*ODBA*) over three years. As of April 1, 2013, drug manufacturers are not permitted to pay professional allowances of any kind to pharmacies.[3]

[3] These appeals have been brought by five drug manufacturers, who object to the ministry's decision to disclose parts of records known as "Manufacturer Reports" to a requester under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[4] The requester had submitted a seven-part access request under the *Act* to the ministry for various records relating to professional allowances or rebates paid by drug manufacturers to pharmacists in Ontario. These five appeals address information in the records located by the ministry in response to part 7, in which the requester sought the following:

> [A]ny and all information relating to the dollar volumes of generic pharmaceutical drug sales, Professional Allowances and/or Rebates in Ontario generally and with respect to SDM, in particular, for each of the calendar years from 2000 to 2011.

[5] The requester subsequently informed the ministry that with respect to this part of the request, it is "willing to accept a summary or aggregate information relating to reports of generic dollar volumes and professional allowances by year and by quarter, as available in our current reporting materials, along with other documents (briefing materials, etc.) relating to the indicated issues."

[6] The ministry located "Manufacturer Reports" that contain information responsive to the access request. These records cover the period from July, 2007 to December, 2010. In accordance with section 28(1) of the *Act*, the ministry then notified various drug manufacturers whose interests might be affected by disclosure of the requested records. The five appellants were among the drug manufacturers notified by the ministry.

[7] In these notices, the ministry sought the drug manufacturers' views regarding disclosure of the Manufacturer Reports. It enclosed a copy of these records with its

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[2] R.S.O. 1990, c. P.23.
[3] http://news.ontario.ca/mohltc/en/2010/06/improving-ontarios-drug-system.html

notice letters to them, and indicated that it intended to withhold most of the information in these records (which was highlighted in yellow), including the names of all the drug manufacturers and the specific amounts of professional allowances that each manufacturer paid for the time period of the report.

[8] However, the ministry also advised the drug manufacturers that it intended to disclose the non-highlighted information in the records, which includes the standard information that appears on every Manufacturer Report (i.e., the title and date of each report and the column headings), and the aggregate information at the bottom of the columns (i.e., the total dollar amounts of professional allowances that drug manufacturers collectively paid to pharmacies and the percentage of these total amounts paid as either *ODBA* or non-*ODBA*). In response, several drug manufacturers, including the appellants, advised the ministry that they objected to the disclosure of this information to the requester.

[9] The ministry then issued a decision letter to the requester and the drug manufacturers. This letter stated that most of the information in the records would be severed under the mandatory exemption in section 17(1) (third party information) and the discretionary exemptions in sections 18(1)(c) and (d) (economic and other interests of Ontario) of the *Act*. In addition, some information would be severed because it is not responsive to the access request. However, the ministry decided to maintain its original decision to disclose the standard information that appears on every Manufacturer Report and the aggregate information at the bottom of the columns in each report.

[10] The requester did not appeal the ministry's decision to withhold information in the Manufacturer Reports under sections 17(1) and 18(1)(c) and (d) of the *Act*, and the information that is not responsive to the access request. However, five drug manufacturers (the appellants) appealed the ministry's decision to disclose some of the information in the Manufacturer Reports to the requester. During the mediation stage of the appeal process, they asserted that this information should be withheld from disclosure, pursuant to section 17(1)(a) of the *Act.*

[11] These appeals were not resolved during mediation and were moved to adjudication for an inquiry. I sent Notices of Inquiry, setting out the facts and issues in these appeals, to the appellants and the ministry. In response, I received a letter from the ministry which simply stated that it believes that the specific information at issue in the five appeals is not exempt under section 17(1) of the *Act*. The appellants submitted a letter stating that "we are relying on the representations which we have submitted in the file so far . . ." I notified the appellants that I would be treating their five letters to the ministry of May 29, 2012, which they attached to their appeals to the Information and Privacy Commissioner of Ontario (IPC), as the representations that they were asking me to rely upon in reaching my decision.

[12] I then sent a Notice of Inquiry to the requester, along with a complete copy of the ministry's letter and a severed copy of the appellants' representations. In response, I received representations from the requester. I shared the requester's representations with both the ministry and the appellants and invited them to respond. Both parties submitted brief responses to me.

RECORDS:

[13] The records at issue in these appeals are Manufacturer Reports from July, 2007 to December, 2010. As noted above, the appellants are appealing the ministry's decision to disclose some information in these records, including the standard information that appears on every Manufacturer Report (i.e., the title and date of each report and the column headings), and the aggregate information at the bottom of the columns (i.e., the total dollar amounts of professional allowances that drug manufacturers collectively paid to pharmacies and the percentage of these total amounts paid as either *ODBA* or non-*ODBA*).

DISCUSSION:

THIRD PARTY INFORMATION

Does the mandatory exemption at section 17(1)(a) apply to the records?

General principles

[14] The appellants submit that the mandatory exemption in section 17(1)(a) applies to the information at issue in the Manufacturer Reports.

[15] Section 17(1)(a) states:

> 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,
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> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[16] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

[17] For section 17(1)(a) to apply, the parties the appellants must satisfy each part of the following three-part test:

1. the records 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 ministry in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the records must give rise to a reasonable expectation that one of the harms specified in paragraph (a) of section 17(1) will occur.

Part 1: type of information

[18] To satisfy part 1 of the section 17(1)(a) test, the appellants must prove that the Manufacturer Reports reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

[19] The appellants submit that the Manufacturer Reports contain specific information relating to the sale of their merchandise to pharmacies and the amount and timing of professional allowance payments made on such merchandise. They submit that such information is "the type of proprietary commercial and financial information that comprises the informational assets of private business that the [section 17(1) exemption] was designed to protect."

[20] The requester acknowledges that the records likely contain commercial or financial information, specifically the amounts of professional allowances paid in a reporting period by the generic drug manufacturers to pharmacies.

[21] "Commercial information" is information that relates solely to the buying, selling or exchange of merchandise or services.[6] In my view, the Manufacturer Reports reveal

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[4] *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.).
[5] Orders PO-1805, PO-2018, PO-2184, MO-1706.
[6] Order P-493.

information that is "commercial information," because they relate to the buying and selling of pharmaceutical products between various drug manufacturers and pharmacies.

[22] "Financial information" refers to information relating to money and its use or distribution and must contain or refer to specific data.[7] I find that the dollar amounts of professional allowances that drug manufacturers paid to pharmacies for a specific time period in each Manufacturer Report qualifies as "financial information." However, the ministry decided to withhold this financial information from the Manufacturer Reports, and it is, therefore, not at issue in these appeals.

[23] The information in the severed records that the ministry decided to disclose is the total dollar amounts of professional allowances that drug manufacturers collectively paid to pharmacies and the percentage of these total amounts paid as either *ODBA* or non-*ODBA*. This aggregate data, which is not linked to any identifiable drug manufacturer, is the information that is at issue in these appeals. In my view, this aggregate information also qualifies as commercial and/or financial information, and I find, therefore, that the appellants have satisfied part 1 of the section 17(1)(a) test.

[24] However, the appellants' representations do not address whether the standard information that appears on every Manufacturer Report (i.e., the title and date of each report and the column headings) falls within the types of information listed in section 17(1). In my view, this information does not qualify as commercial or financial information or any of the other types of information listed in section 17(1). Consequently, the appellants have failed to satisfy part 1 of the section 17(1) test with respect to this information.

[25] Given that the appellants must satisfy each part of the section 17(1) test but have failed to meet part 1 with respect to the standard information that appears on every Manufacturer Report, I find that this information cannot qualify for exemption under section 17(1)(a) of the *Act* and must be disclosed to the requester.

Part 2: supplied in confidence

[26] To satisfy part 2 of the section 17(1) test, the appellants must show that they "supplied" the commercial/financial information in the Manufacturer Reports to the ministry in confidence, either implicitly or explicitly.

[27] 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.[8] In order to show that

[7] Order PO-2010.
[8] Orders PO-2020 and PO-2043.

this information was supplied "in confidence," the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[9]

[28] The appellants submit that they supplied the information contained in the Manufacturer Reports to the ministry with a reasonable expectation that it would be kept confidential and not disclosed because of the "highly sensitive commercial and financial nature of the information," and that the ministry would only use the information in the course of carrying out its mandate and responsibilities under the ODBP.

[29] The requester disagrees and states that although the appellants submit that they supplied the information contained in the Manufacturer Reports to the ministry in confidence, the issue in these appeals is whether the appellants have a reasonable expectation that the ministry would keep the total aggregate professional allowances paid by generic drug manufacturers confidential. It states:

> . . . [T]here is nothing in the applicable legislation which suggests that the information in respect of total aggregate professional allowances paid by generic drug manufacturers, without any information to identify individual generic drug manufacturers, would be kept confidential by the ministry. The generic drug manufacturers had no reasonable expectation that this summary information would be kept confidential. In fact, the ministry itself has disclosed in publically available reports that generic drug manufacturers made total payments of $750 million in professional allowances to Ontario pharmacies.

[30] The information in the Manufacturer Reports that the ministry decided to disclose and remains at issue in these appeals is the total dollar amounts of professional allowances that drug manufacturers collectively paid to pharmacies and the percentage of these total amounts paid as either *ODBA* or non-*ODBA*. This aggregate information was compiled from the specific amounts of professional allowances that the appellants and other drug manufacturers directly supplied to the ministry for inclusion in the records. Consequently, I find that this aggregate information is made up of information that was directly "supplied" to the ministry by the appellants and other drug manufacturers.

[31] In my view, however, it cannot be said that the appellants had a reasonable expectation of confidentiality with respect to this aggregate data. Even if I were to accept that the appellants had a reasonable expectation that they supplied the specific amounts of professional allowances paid to pharmacies "in confidence," they have

[9] Order PO-2020.

provided me with insufficient evidence to support a finding that they had a similar expectation of confidentiality with respect to the aggregate information that the ministry compiled, which is not linked to any single identifiable drug manufacturer. Consequently, the appellants have failed to satisfy part 2 of the section 17(1) test with respect to this information.

[32] In the circumstances, I find that the aggregate information in the Manufacturer Reports was not supplied "in confidence," either explicitly or implicitly. Given that the appellants must satisfy each part of the section 17(1) test but have failed to satisfy part 2, I find that this aggregate information cannot qualify for exemption under section 17(1)(a) of the *Act* and must be disclosed to the requester.

Part 3: harms

[33] It is not necessary for me to consider part 3 of the section 17(1)(a) test because I have found that the appellants have not satisfied part 2 with respect to the aggregate information in the Manufacturer Reports. However, in the interests of addressing the section 17(1)(a) exemption fully, I will consider part 3 with respect to this information. To satisfy part 3, the appellants must show that disclosing this information could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

[34] The appellants must provide detailed and convincing evidence about the potential for harm. They must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[10]

[35] The appellants state that the generic pharmaceutical industry is "highly competitive," with a relatively small number of generic drug manufacturers attempting to secure a greater market share for their products over their competitors in the market. They submit that disclosing the information in the Manufacturer Reports would give the requester a "competitive advantage" and insight into the appellants' business operations, including their sales and professional allowances paid.

[36] They further submit that if the requester is one of their competitors, disclosing the information in the Manufacturer Reports would seriously harm their commercial and competitive interests. In particular, it would provide the appellants' competitors with a competitive advantage that is unavailable to the appellants, which would have an adverse effect on their ability to compete in the generic pharmaceutical market.

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[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[37] The requester submits that the appellants have not provided the detailed and convincing evidence required to show that the harms contemplated by section 17(1)(a) could reasonably be expected to occur. It submits:

> The appellants assert that the severed records will give insight into their business operation and harm their competitive advantage and interests. However, they have provided no evidence or submissions as to how the disclosure of only the total quantum of professional allowances, without identifying the manufacturers or pharmacies, would provide insight into a particular manufacturer's business operations or prejudice competitive advantage.
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> Nothing in the severed records identifies or could identify the generic drug manufacturer or the pharmacies to whom professional allowances [were] paid. Without this identification, the records contain no information which would give an advantage to the appellants' competitors or provide any insight whatsoever into the appellants' commercial practices or business operations. The requester submits that the appellants have not established a reasonable expectation of harm.

[38] In my view, the appellants have not provided the type of detailed and convincing evidence required to show that disclosing this aggregate information could reasonably be expected to lead to the harms contemplated in section 17(1)(a) of the *Act*.

[39] As noted above, the appellants submit that disclosing the information in the Manufacturer Reports would give other drug manufacturers a "competitive advantage" and insight into the appellants' business operations, including their sales and professional allowances paid. Although this argument might have validity with respect to the specific amounts of professional allowances that each named drug manufacturer paid for the time period of each Manufacturer Report,[11] none of that information is at issue in these appeals, and it will not be ordered disclosed to the requester.

[40] The information at issue in these appeals is the total dollar amounts of professional allowances that drug manufacturers collectively paid to pharmacies and the percentage of these total amounts paid as either *ODBA* or non-*ODBA*. None of this aggregate information is linked to any named drug manufacturer, including the five appellants, and it is simply not credible, in my view, that disclosing this particular information could reasonably be expected to significantly prejudice the appellants' competitive position in the marketplace or lead to the other harms contemplated in section 17(1)(a).

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[11] See Order PO-3209.

[41] In short, I find that the appellants have failed to satisfy part 3 of the section 17(1)(a) test. Consequently, the aggregate information in the Manufacturer Reports does not qualify for exemption under section 17(1)(a), and it must be disclosed to the requester.

ORDER:

1. I uphold the ministry's decision to disclose parts of the Manufacturer Reports to the requester, including:

   > (a) the standard information that appears on every Manufacturer Report (i.e., the title and date of each report and the column headings); and
   >
   > (b) the aggregate information at the bottom of the columns (i.e., total dollar amounts of professional allowances that drug manufacturers collectively paid to pharmacies and the percentage of these total amounts paid as either *ODBA* or non-*ODBA*).

2. I order the ministry to disclose a severed copy of these records to the requester no later than **January 28, 2015**, but not earlier than **January 23, 2015**.

3. The ministry's decision to withhold parts of the Manufacturer Reports, including the names of the drug manufacturers and the specific amounts of professional allowances that each named drug manufacturer paid for a particular time period, was not appealed by the requester. Consequently, I reiterate that the ministry must not disclose this information to the requester. To be clear, all of the yellow highlighted information in the copy of the records that the ministry sent to the IPC must be severed out and withheld from disclosure.

4. The appeals filed by the five drug manufacturers are dismissed.

Original Signed by: December 18, 2014
Colin Bhattacharjee
Adjudicator