Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3473

Appeals PA08-103

Ministry of Health and Long-Term Care

March 25, 2015

Summary: The requester in this appeal seeks access to records passing between the ministry and a drug company regarding the listing of a particular product on the Ontario Drug Benefit Formulary in 2007. The third party drug company objected to the ministry's decision to disclose certain records to the requester on the basis that they were properly exempt under the mandatory third party information exemption in section 17(1). In this decision, the adjudicator upholds the ministry's decision with several exceptions, and orders the disclosure of the remaining portions of the records to the requester.

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

Cases Considered: *Minister of Health v. Merck Frosst Canada Ltd.,* 2009 FCA 166; *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

OVERVIEW:

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

> [C]opies of any and all records relating to communications and/or arrangements of a formal or informal nature between [a named company]

> or its related companies, and any individual or entity within the Ontario Ministry of Health and Long-Term Care regarding the listing of [a named drug] on the Ontario Drug Benefit Formulary.

[2] The requester clarified that this request included, but was not limited to, certain specific types of correspondence and agreements or arrangements between the named company and certain ministry officials.

[3] The ministry identified 18 responsive records and, after notifying the named company (the third party) issued decisions to the requester (with notice to the third party) in which the ministry indicated that it granted partial access to a number of records and denied access to other records or portions of records on the basis of the exemptions in sections 17(1) (third party information), 18(1)(c) and (d) (economic interests), and 19 (solicitor-client privilege) of the *Act*.

[4] The third party appealed the ministry's decision to disclose some of the records, and appeal PA08-103 was opened. In addition, the requester appealed the ministry's decision to deny access to other records or portions of records, and appeal PA08-188 was opened to address issues regarding access to those records. An order disposing of the issues in that appeal will follow shortly.

Appeal PA08-103

[5] As noted above, the ministry identified 18 records responsive to the request. It notified the third party of the request pursuant to section 28 of the *Act*, and sought the views of the third party on the disclosure of seven of the responsive records. The third party objected to the disclosure of the seven records on the grounds that the exemptions at sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act* apply. The ministry subsequently decided that sections 17(1) and 21(1) did not apply and advised that it was prepared to grant the requester full access to these seven records.

[6] The third party appealed the ministry's decision to disclose these records, and this office opened Appeal PA08-103 to deal with the matter. The records at issue in this appeal were identified as records 5, 7, 8, 10, 12, 13 and 14a.

[7] Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the appeal process. The adjudicator previously assigned to this appeal began her inquiry by sending a Notice of Inquiry, identifying the facts and issues in this appeal, to the third party. The third party provided representations in response.

[8] She then sent a copy of the Notice of Inquiry, along with a severed copy of the third party's representations, to the ministry and the requester. The requester submitted representations in which it argued that the exemptions in sections 17(1) and

21(1) did not apply. The ministry advised this office that it would not be submitting representations in response to the issues in this appeal.

[9] After reviewing the requester's representations, the previous adjudicator decided to provide the third party with the opportunity to reply, and provided it with the requester's non-confidential representations. The third party submitted representations by way of reply. In addition, representations were received from Canada's Research-Based Pharmaceutical Companies (Rx&D), a national association representing pharmaceutical companies. Rx&D indicates that it was contacted by the third party and provided representations in support of the positions taken by the third party.

[10] This file was subsequently transferred to another adjudicator and then to me to complete the inquiry process.

RECORDS:

[11] There are 7 records at issue in appeal PA08-103. The ministry has listed them in the index as follows:

Record Number	Description	No. of Pages
5	Letter from third party to OPDP dated June 13, 2007	1
7	Email chain between third party and OPDP dated June 27, 2007	1
8	Letter from third party to OPDP dated July 9, 2007	2
10	Letter from third party to OPDP dated July 27, 2007	2
12	Letter from OPDP to third party dated August 13, 2007	2
13	Email from third party to OPDP (including attachment) dated August 30, 2007	3
14a	Attachment to 14, being a letter from third party to OPDP dated September 10, 2007	3

[12] The ministry is prepared to disclose these records, but the third party appellant claims that the mandatory third party information exemption at section 17(1) applies to all of them, and that the mandatory personal privacy exemption in section 21(1) applies to portions of Records 10 and 12.

PRELIMINARY ISSUE

Notification issues

1) Should the ministry have notified the third party of the request for additional records?

[13] The third party takes the position that, in addition to notifying it of the request for the seven records at issue in appeal PA08-103, the ministry erred in failing to notify the third party of the request for additional responsive records, as it is required to under section 28(1) of the *Act*. Section 28(1) reads:

> Before a head grants a request for access to a record,
>
> > (a) that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the interest of a person other than the person requesting information; or
> >
> > (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21 (1) (f),
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

[14] The third party then states that, although it received notice of the request for the seven records at issue in appeal PA08-103, and was able to appeal the decision to disclose these records, it should also have received notice of all of the records at issue in PA08-188, as these records "meet the required threshold for notice to be provided." The third party argues that these records contain information that it supplied to the ministry in confidence (or would reveal such information), and that the ministry ought to have notified it of the request, and given the third party the opportunity to provide representations on the possible application of section 17(1) to them.

[15] The third party then reviews these records in some detail, and asks this office to issue a declaration that the ministry's decision to disclose certain records without providing notice was unlawful. The third party states that a declaration of this nature is necessary to ensure that, in the future third parties are not "deprived of the opportunity to make representations."

[16] The third party also refers to the decision by the Federal Court in *Merck Frosst Canada Ltd. V. The Minister of Health of Canada*[1], in which the Federal Court reviewed the issue of notice under the Federal *Access to Information Act*. At paragraphs 63 and 64 of that decision, the Federal Court reviewed the decision by the government body to disclose certain records without notice to an affected party, and found that notice ought to have been given. The third party relies on this decision in support of its position that notice ought to have been given to it.

[17] I have carefully reviewed the notification issue raised by the third party. I note that the third party was given specific notice of the ministry's decision to disclose the seven records at issue in PA08-103. I also note that the third party has had the opportunity during this inquiry to provide representations on the possible application of section 17(1) to the six records at issue in PA08-188 which have not yet been disclosed (records 1, 3, 6a, 9, 9a and 11). There are five records which are no longer at issue, as they have been disclosed to the requester, and the third party was not given the opportunity to provide representations on those records prior to their disclosure (records 2, 4, 6, 14 and 15).

[18] I also note that, since the representations were received from the third party, the Federal Court decision in *Merck Frosst* has been appealed to the Federal Court of Appeal and that court, in *Minister of Health v. Merck Frosst Canada Ltd*[2] reviewed the notification issue and determined that the trial judge erred in the reasoning contained in paragraph 64 of the decision and concluded that notification was not, in fact, necessary.

[19] Section 28(1) clearly states that an institution is obliged to notify a third party only where the head has reason to believe that the record might contain information subject to sections 17 and/or 21(1). Based on the evidence before me regarding the notification issue raised by the third party, I am satisfied that the ministry properly notified the third party of the records at issue in appeal PA08-103. In addition, on my review of the records which have been disclosed and for which no notification was given (Records 2, 4, 6, 14 and 15), I am satisfied that the ministry properly decided that these records did not require notification under section 28(1) of the *Act*. The five records that were disclosed consist of either brief cover letters or other correspondence, or an agreement which, on its face, does not meet the requirements in section 17(1).

[20] The remaining records are ones which remain at issue in appeal PA08-188. The third party has had the opportunity to provide representations on the application of section 17(1) to these records in the course of this inquiry, and the application of section 17(1) to those records is addressed in a further order. As a result, I find that it would serve no useful purpose to separately review the notification issues for those records.

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[1] 2006 FC 1201.
[2] 2009 FCA 166.

2) Identification of additional third parties

[21] I note that the third party has also taken the position that the names, positions and contact information of certain individuals who provided information to it, who are identified in portions of Records 10 and 12, qualify for exemption under section 21(1). I have found below that this information falls within the application of the mandatory third party information exemption at section 17(1). Because of this finding, it is not necessary for me to address the notification issue further with respect to these individuals; nor is it necessary for me to consider whether the information also qualifies as personal information to which section 21(1) might apply.

ISSUES:

[22] The sole issue to be determined in this appeal is whether the mandatory exemption at section 17(1) applies to the records at issue.

DISCUSSION:

Does the mandatory exemption at section 17(1) apply to the records at issue in Appeal PA08-103?

[23] The third party takes the position that section 17(1) applies to the seven records at issue in this appeal (Records 5, 7, 8, 10, 12, 13 and 14a).

[24] Section 17(1) reads, in part:

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

[25] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions[3]. 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[4].

[26] The purpose of section 17(1) is set out in the legislative history of the *Act* found in the *Williams Commission Report*. That Report discusses at length the sound policy objectives for imposing a three-part test for this exemption, including a harms test: Commercial and business information should be made available to the public in order to ensure that government is effective, even-handed and accountable in its treatment of similarly situated businesses, except to the extent that overriding concerns can be demonstrated for keeping the information confidential:

> It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequences to the firms. Exemption of all business related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory regimes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.... The ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity....
>
> Two further propositions are broadly accepted as imposing limits on the general presumption in favour of public access. The first is that disclosure should not extend to what might be referred to as the informational assets of a business... The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.

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[3] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).
[4] Orders PO-1805, PO-2018, PO-2184, MO-1706.

> ... [T]he difficulty is one of identifying the kind of information that constitute a firm's informational assets... Accordingly, we believe that the exemption should refer broadly to commercial information submitted by a business to the government, but should limit the exemption to information which could, if disclosed, reasonably be expected to significantly prejudice the competitive position of the firm in question....
>
> If ... an exemption were to be drafted so as to protect "any information supplied on a confidential basis", existing patterns of secrecy might be preserved on the basis of tacit or express understanding that the government would treat the information as confidential...

[27] Under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. In cases where section 17(1) has been claimed, the third party shares the onus in establishing the application of this exemption to the records to which it has been applied. Additionally, under section 28(1) of the *Act*, where an institution seeks to disclose a record or part of a record where section 17(1) may apply, the burden of proof that the record or part of the record falls within that mandatory exemption lies upon the individual or entity resisting that disclosure, in this case, the third party appellant.

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

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

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

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

Part One: Type of Information

[29] The third party appellant submits that the records at issue contain commercial and/or financial information. These terms have been defined in previous orders of this office as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to

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

[30] Having reviewed the records at issue, along with the other records that were identified as being responsive to this request, and considering the representations made by the parties, I am satisfied that they fall within the overall rubric of "commercial" information as that term is defined above. I find that Records 5, 7, 8, 10, 12, 13 and 14a were created within the context of the commercial relationship between the third party and the ministry, in furtherance of that relationship.

Part Two: Supplied in Confidence

[31] In order to satisfy part 2 of the test, the third party must establish that the information was "supplied" to the ministry by the third party "in confidence", either implicitly or explicitly.

Supplied

[32] The requirement that information be "supplied" to an institution reflects the purpose in section 17(1) of protecting the informational assets of third parties (Order MO-1706).

[33] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).

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

single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.[5]

[35] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products[6].

In Confidence

[36] In regards to whether the information was supplied in confidence, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must be reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly. [Order M-169]

[37] 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:

> (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
>
> (2) 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.
>
> (3) Not otherwise disclosed or available from sources to which the public has access.
>
> (4) Prepared for a purpose which would not entail disclosure.
>
> [Order P-561]

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[5] See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[6] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above).

Records 5, 7, 8, 10, 12, 13 and 14a

Supplied

[38] The third party takes the position that all of the records at issue in this appeal were supplied by it to the ministry, or would reveal such information. It states:

> Information is considered to be "supplied" by an affected third party if it is 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 the affected third party. …

[39] It then states that records 5, 8, 10, 13 and 14a and a portion of record 7 were directly supplied by it to the ministry. With respect to record 12 and the remaining portion of record 7, the third party states:

> Record 7 [Email chain between the third party and the Ministry] contains information that, if disclosed, would permit the drawing of accurate inferences with respect to information supplied by [the third party]. …
>
> Record 12 [Letter from the Ministry] likewise contains information that, if disclosed, would permit the drawing of accurate inferences with respect to information supplied by [the third party].

[40] It then describes this specific information in greater detail in its confidential representations, and identifies how the disclosure of records 7 and 12 would allow others to infer the information supplied by the third party to the ministry.

[41] The requester asks that I carefully review these records to ensure that they were "supplied," or that disclosure would reveal information "supplied" by the third party, taking into account the section 17(1) tests.

[42] Having reviewed records 5, 7, 8, 10, 12, 13 and 14a, I am satisfied that they were either directly supplied to the ministry by the third party or, in the case of record 12 and a portion of record 7, disclosure would reveal information directly supplied by the third party to the ministry.

In confidence

[43] The third party takes the position that the information in records 5, 7, 8, 10, 12, 13 and 14a was prepared for a purpose which would not entail disclosure. It states:

> All of the information was provided to the Ministry as part of confidential negotiations to reach an agreement.… [The third party] treats its

> negotiations with public and private payors with the utmost confidentiality and would reasonably expect that this sensitive commercial and marketing information would be treated confidentially during the course of negotiations.

[44] The requester argues that the third party's assertions of a reasonable expectation of confidentiality are not adequately supported, and asks that I review the specific evidence to determine this issue.

[45] On my review of records 5, 7, 8, 10, 12, 13 and 14a, which relate to matters involving the third party and others, I am satisfied that they were supplied or would reveal information supplied by the third party to the ministry with a reasonably-held expectation of confidentiality. Accordingly, I find that the second part of the three-part test is met for these records.

Part Three: Harms

[46] To meet this part of the test, the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient[7].

[47] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus. [Order PO-2020]

Records 5, 7, 8, 10, 12, 13 and 14a

[48] The third party takes the position that disclosure of records 5, 7, 8, 10, 12, 13 and 14a would result in the harms identified in sections 17(1)(a), (b) and (c) of the *Act*. It states:

> The seven records at issue in this appeal all pertain to the strategies and techniques used by [the third party] to reach an agreement with OPDP regarding … listing of [the named drug] in the Ontario Formulary …. Some of the records reveal the specific terms of the offer made by [the third party] to the OPDP. Previous orders of [the IPC] have acknowledged the inherent confidentiality and the harm from disclosure associated with records containing information of this nature.

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

[49] The third party refers to Orders PO-2097, PO-2273 and PO-2528 in support of the position that disclosure of the correspondence between the third party and the Drug Quality and Therapeutics Committee (DQTC) contains information relating to:

- its marketing strategies and techniques;
- the timing of its submissions;
- pricing strategies about the application and its position relating to the product;
- details about the drug's history, development and chemical make-up; and
- application and pricing details employed by a third party in successfully having its products listed in the Formulary.

[50] It argues that the disclosure of this type of information meets the requirements of part three of the test set out in section 17(1)(a), (b) and/or (c).

[51] The third party then reviews each of the seven records at issue in some detail and states:

> Details of the competitive harm and harm to [the third party's] contractual and other negotiations that can reasonably be expected to result from disclosure of each specific record are as follows:

[52] With respect to records 5 and 14, the third party states that record 5 advises the ministry of the third party's position on an identified matter, and that record 14a is a follow-up letter on that issue. The third party states disclosure of these records could reasonably be expected to result in competitive harm, and refers to certain legal actions which have arisen in another jurisdiction in support of its position that its concern is not speculative. The third party also states:

> Disclosure of Records 5 and 14(a) also could reasonably be expected to cause competitive harm to [the third party] because the information provided therein discloses the timing and approach used by [the third party] to reach an agreement with the OPDP regarding the listing of [the named drug]. Knowledge of [the third party's] approach to formulary listing would provide its competitors with valuable information to use in, their own negotiations with the OPDP, without having to expend the time and resources expended by [the third party] to develop this approach.

[53] With regard to the email chain that is record 7, the third party states:

> Record 7 discloses that [the third party] made a confidential proposal to the OPDP for listing of [the named drug] in the Ontario Formulary. Disclosure of such information can reasonably be expected to cause competitive harm to [the third party's] contractual and other negotiations

> with other public and private payors in Ontario, and other jurisdictions in Canada and internationally….
>
> Record 7 furthermore discloses a term of the confidential proposal submitted by [the third party] …. Disclosure of the terms of an agreement (or contemplated agreement) between [the third party] and a particular public payor can reasonably be expected to cause competitive harm to [the third party] and interfere with [the third party's] contractual negotiations with other public and private payors ….

[54] Insofar as record 8 is concerned, the third party states that disclosure of the record would reveal the rationale for [the third party's] decision to approach the ministry regarding listing of [the named drug] in the Ontario Formulary. The third party identifies how this would result in the identified harms. The third party also states that disclosure of record 8 would disclose the specific terms of the confidential proposal contained in record 6a. The third party states:

> The third and fourth paragraphs of Record 8 disclose the specific terms of the confidential proposal [which is Record 6a] ….
>
> Disclosure of the specific terms of the confidential proposal furthermore would provide [the third party's] competitors with valuable base-line information to use in structuring proposals to compete against [the third party], both with respect to [the named drug] and with respect to other drug products. This will provide a competitive advantage to [the third party's] competitors in future negotiations, and will prejudice [the third party's] competitive position by placing [the third party] in an inferior position to its competitors, who will now have a benchmark for the terms included in [the third party's] proposals.
>
> Record 8 in its entirety discloses the arguments advanced by [the third party] in support of its confidential proposal. This information reveals the strategies and techniques employed by [the third party] for use in … listing of [the named drug] in the Ontario Formulary.… As recognized by [the IPC] in previous cases, the approach used by a company to obtain formulary listing is considered to be highly confidential and proprietary in the pharmaceutical industry, and if disclosed, could reasonably be expected to cause prejudice to competitive position and financial harm.

[55] With respect to records 10, 12 and 13, the third party refers to the expectation it had that this information would not be disclosed. It states that public disclosure of this information will cause irreparable harm to the relationship of mutual trust between it and certain identified parties, and that these parties would be "unwilling, or at least extremely hesitant," to provide such information to the third party in the future. It

states this will have negative implications for its competitiveness, both with respect to sales of the named drug, and with respect to sales of other drug products.

[56] The third party also argues that disclosure of records 10 and 13 would reveal the "approach and strategy" used by the third party to reach an agreement with the ministry, and would result in a loss to the third party of "the investment and resources expended in developing and pursuing this strategy," and a corresponding gain to the third party's competitors.

Section 17(1)(b)

[57] The third party's representations in support of its position that the harms in section 17(1)(b) will result from disclosure state:

> It is of obvious benefit to the OPDP and to Ontario patients that drug manufacturers and the Executive Officer can negotiate in confidence in an effort to reach agreements regarding formulary listings. This fact is implicitly acknowledged by O.Reg 201196, which prohibits the release of information regarding agreements, with the exception of the name of the manufacturer, the subject matter of the agreement, and the fact of entering into or terminating the agreement.
>
> Notwithstanding that the information supplied by [the third party] was required by the Ministry to make an informed decision regarding the costs and benefits of entering an agreement, [the third party] would not have supplied the information had it known that such information would be publicly disclosed. …

[58] The third party then reviews the information it provided to the ministry, and identifies the information that it would not have supplied to the ministry if disclosure was a possibility. It refers to confidential affidavit material in support of its position.

Section 17(1)(c)

[59] The third party also provides representations in support of its position that the harms in section 17(1)(c) will result from disclosure. The undue loss the third party and the undue gain to its competitors, which the third party believes would result from the disclosure can be summarized as follows:

- financial losses of the third party's resource expenditures associated with the development of the confidential and proprietary business strategies and business plans reflected in the records, and a corresponding gain to the third party's competitors, who would benefit from this knowledge without having made this investment;

- financial losses to the third party resulting from competitors' knowledge of the approach used by the third party to listing in the Ontario Formulary, and a corresponding gain to the third party's competitors who will be able to structure future proposals to meet or better those offers;
- financial losses to the third party associated with disclosure of information that the third party was prepared to enter an identified agreement;
- financial losses to the third party associated with disclosure of the specific terms of the third party's confidential proposal; and
- additional financial losses to the third party associated with the need to direct certain resources in a particular way, and the losses as a result of the disruption of certain future communications.

Analysis and findings

[60] Having reviewed records 5, 7, 8, 10, 12, 13 and 14a, I find that, with a few exceptions, these records do not qualify for exemption under section 17(1), as they do not meet the harms in sections 17(1)(a), (b) or (c).

[61] On my review of the records, I find that most of them contain information that can be characterized as general background or historic information about various actions and legal proceedings relating to the third party and others.

[62] Records 5 and 14a are correspondence from the third party to the ministry which generally describes a particular situation regarding the sale of a generic drug. I am not satisfied that these records qualify for exemption under section 17(1), as the information they contain simply summarizes certain circumstances existing at the time of the letters, June and September of 2007. I find that the requisite harms required to meet part 3 of the test under section 17(1) have not been established, and that these records do not qualify for exemption under section 17(1).

[63] Record 7 consists of an email chain which took place in June of 2007. The third party takes the position that disclosure could reasonably be expected to cause competitive harm to the third party's contractual and other negotiations, as it discloses that the third party made a confidential proposal to the ministry, and that this record also discloses a term of the confidential proposal. On my review of this record, I am not satisfied that the harms in sections 17(1) have been established. The information referred to is, in my view, innocuous and describes a particular public disclosure that the third party has consented to. As a result, I cannot agree that disclosure could reasonably be expected to give rise in the identified harms in sections 17(1).

[64] With respect to records 10, 12 and 13, which date back to July and August of 2007, I have reviewed the third party's representations and the records themselves. The third party has claimed that disclosure of this information will cause irreparable harm to the relationship of mutual trust between it and certain entities which are

identified in the records. It also argues that these entities would be "unwilling, or at least extremely hesitant," to provide certain information to the third party in the future, and that this will have negative implications for the third party's competitiveness.

[65] With the exception of the identities of the entities that are referred to in the records, I find that I have not been provided with sufficient evidence to satisfy me that the disclosure of the remaining information in records 10, 12 and 13 would result in the harms described in section 17(1) of the *Act*. Although the third party explains its concerns about disclosure, I find that these concerns would not result in *significant* prejudice or interference; nor would it result in *undue* loss or gain to any person, group, committee or financial institution or agency. This is particularly so given the age of the records and the fact that any commercial information they may contain is now obsolete.

[66] Although not explicitly expressed by the third party, when its representations on this issue are considered as a whole, I am satisfied that the identification of the parties referred to in records 10 and 13 could reasonably be expected to result in undue loss to these parties for their part in providing information to the third party, which was then communicated to the ministry. I find that these parties sit in a vulnerable position vis-à-vis the third party and other similar organizations, such as the requester, and their commercial interests could reasonably be unduly impacted by revealing their identities in this context. Accordingly, I find that, with the exception of the identifying information of other parties in records 10 and 13, records 10, 12 and 13 do not qualify for exemption under section 17(1).

[67] Record 8 consists of correspondence from the third party to the ministry. On my review of this record, I note that portions of record 8 contain information which refers to certain information contained in a record that is also at issue in Appeal PA08-188 (record 6a). I have considered the third party's arguments regarding this record and am satisfied that paragraphs 3, 4 and 5 of record 8 reveal information whose disclosure would result in the harms identified in section 17(1)(a). However, on my review of the remaining portions of record 8, I am not satisfied that these portions qualify for exemption under section 17(1). The remainder of record 8 contains only information that is more general or simply summarizes existing circumstances, and I am not satisfied that its disclosure would result in any of the harms in section 17(1).

[68] In summary, I find that section 17(1)(a) and/or (c) applies to parts of records 8, 10 and 12. For greater certainty, I have highlighted in yellow the portions of records 10 and 13 to which section 17(1) applies.

ORDER:

1. I uphold the ministry's decision to deny access to those portions of records 8, 10 and 13 which I have highlighted on the copies of these records provided to the ministry with this order.

2. I order the ministry to provide the requester with copies of the remaining parts of records 8, 10 and 13, as well as records 5, 7, 12 and 14a in their entirety, by **May 1, 2015,** but not before **April 27, 2015.**

3. In order to verify compliance with order provision 2, I reserve the right to require the ministry to provide me with copies of the records which are disclosed to the requester.

Original Signed By: March 25, 2015
Donald Hale
Adjudicator