Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3601

Appeal PA14-25

Ministry of Economic Development, Employment and Infrastructure

April 28, 2016

Summary: This appeal involves an access request for information about a pharmaceutical company's participation in Ontario's Biopharmaceutical Investment Program. The responsive records are (1) a Conditional Grant Agreement and (2) a House Note. The ministry notified the pharmaceutical company (the appellant) that it intended to disclose the Agreement, with some severances under section 17(1) (third party information). The appellant believed that more information should be severed from the Agreement under section 17(1) and filed a third party appeal of the ministry's decision to disclose. The appellant also opposes disclosure of part of the House Note. In addition, the appellant argues that it should also be entitled to rely on the discretionary exemptions found in sections 18(1)(c), (d), (e), (f) and (g) (economic and other interests) despite the fact that the ministry does not claim these exemptions.

The adjudicator finds that the information the ministry decided to disclose in both records, whose disclosure the appellant opposes, was not "supplied" to the ministry and is therefore not exempt under section 17(1). The adjudicator also finds that the appellant is not entitled to rely on sections 18(1) (c), (d), (e), (f) and (g) in the circumstances of this appeal. The adjudicator upholds the ministry's access decision and orders it to disclose the records with the severances adopted by the ministry in its original access decision.

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

Orders and Investigation Reports Considered: Ontario Orders M-430, MO-1706, PO-1791, PO-1813, PO-2435, PO-2898, PO-3157, PO-3158; Alberta Orders 2001-019, 2000-005, F2005-030, F2009-028; and BC Order 26-1994.

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *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.); *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139; *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101.

OVERVIEW:

[1] The requester, a journalist, submitted a request to the Ministry of Economic Development, Trade and Employment, now the Ministry of Economic Development, Employment and Infrastructure (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for records related to a named pharmaceutical company's involvement in the Biopharmaceutical Investment Program over a specified time period.

[2] In October 2013, the requester clarified his request, and it now reads as follows:

> Information related to the government's participation in [a specified medication] as it relates to [named pharmaceutical company] and the BIO Pharmaceutical Investment Program.
>
> The above streamlined request seeks the following records:
>
> > 1. All signed agreements between [named pharmaceutical company] and MEDT/MRI[1]
> >
> > 2. Any House Note that provides a response to the government's position on the issue of [a specified medication] and [named pharmaceutical company] as it relates to any of the grant agreements between [named pharmaceutical company] and MEDTE/MRI.
>
> For the time period of January 1, 2008 to October 1, 2013.

[3] The ministry identified a Conditional Grant Agreement (the Agreement) and a House Note as responsive records. The ministry notified the pharmaceutical company under section 28(1) of the *Act* and provided it with an opportunity to present its views regarding disclosure. The company objected to the disclosure of some information.

[4] After considering the pharmaceutical company's representations, the ministry notified the pharmaceutical company of its decision to grant partial access, while

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[1] The Ministry of Economic Development, Trade and Employment and the Ministry of Research and Innovation.

withholding some information under sections 17(1)(a) and (c) (third party information) of the *Act*. The ministry's notice of decision to the pharmaceutical company contained a detailed page-by-page description of the rationale for its decision, and included a copy of the Agreement showing its response to each of the severances proposed by the appellant.

[5] The ministry also issued a decision to the requester indicating that it would grant partial access to the Agreement and full access to the House Note.

[6] Under section 50(1) of the *Act*,[2] the pharmaceutical company filed a third party appeal of the ministry's decision to grant partial access. For the remainder of this order, I will refer to the pharmaceutical company as "the appellant."

[7] The requester filed a separate appeal of the ministry's decision to deny access to parts of the Agreement. This was addressed in Appeal PA14-100, which was resolved in mediation. The requester no longer seeks access to the information in the Agreement that is being withheld based on the ministry's access decision. For that reason, this appeal pertains only to the portions of the records that the ministry decided to disclose, and whose disclosure the appellant objects to.

[8] A mediator was appointed under section 51 of the *Act* to attempt to effect a settlement of this appeal.

[9] One of the issues raised during mediation by the appellant was the fact that the ministry had notified it with respect to the Agreement, but not the House Note. The appellant contended that disclosure of the House Note would also affect its interests. The ministry explained that it had not provided the appellant with a copy of the House Note on the basis that it may have been discussed in public and that section 17(1) of the *Act* did not apply to it. Nonetheless, based on the ministry's description of the House Note, the appellant maintained its objection to its disclosure.

[10] The appellant continues to object to disclosure of portions of the Agreement in addition to those the ministry decided to withhold, taking the position that this additional information also qualifies for exemption under section 17(1) of the *Act*.

[11] The ministry has not disclosed the portions of the Agreement that neither the ministry nor the appellant believe to be exempt because, in the ministry's view, disclosure in that form may lead to a skewed understanding of the Agreement. The ministry has also not disclosed any portion of the House Note.

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[2] Section 50(1) provides that a person who has made an access or correction request "*. . . or a person who is given notice of a request under subsection 28(1)* may appeal any decision of a head under this Act to the Commissioner." [Emphasis added.]

[12] Since it was not possible to resolve this appeal through further mediation, it was transferred to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. This office began the inquiry by sending a Notice of Inquiry to the appellant, inviting its representations on the application of section 17(1) to the records at issue.

[13] In its earlier representations to the ministry at the request stage, the appellant had argued that section 18(1) ought also to apply to the information at issue. The ministry did not claim this exemption. In view of this position, this office included an issue in the Notice of Inquiry regarding the entitlement of the appellant to raise the discretionary exemption in section 18(1).

[14] During the preparation of its representations in response to the Notice of Inquiry, the appellant expressed concern about the fact that it did not possess a copy of the House Note for the purpose of providing representations about its exemption under section 17(1). The ministry provided a copy of the House Note to the appellant, and this office subsequently received representations from the appellant, which included severed versions of both records at issue showing the portions whose disclosure the appellant objects to.

[15] This office then invited and received representations from the requester and the ministry. The requester raised the possible application of the public interest override in section 23 of the *Act*. The file was then transferred to me to complete the adjudication. I invited further representations from the appellant in reply, including on the possible application of section 23.

[16] The exchange of representations during this inquiry took place in accordance with *Practice Direction 7* issued by this office.

[17] Up to this point, neither record has been disclosed to the requester, in full or in part. This is anomalous, given that there are portions of both records that neither the ministry nor the appellant claims are exempt from disclosure. Disclosure of non-exempt information is required under section 10(2) of the *Act*, which 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 be reasonably severed without disclosing information that falls under one of the exemptions.

[18] As part of the order in this case, therefore, I will require this information to be disclosed, although I am only adjudicating the portions of the records that the ministry has decided to disclose, and whose disclosure the appellant objects to.

[19] In this order, the adjudicator upholds the ministry's original decision to disclose portions of the Agreement, and to disclose the House Note in full. Section 17(1) does not apply to the portions of the records that the ministry decided to disclose in its original access decision. The appellant is not entitled to rely on section 18(1) in the circumstances of this appeal. The ministry is ordered to disclose the information it has not exempted under section 17(1) in the Agreement, and to disclose the House Note in its entirety. Under these circumstances, it is not necessary to consider section 23.

RECORDS:

[20] The records at issue consist of the portions of the Agreement and House Note that the ministry has decided to disclose, and whose disclosure the appellant objects to.

ISSUES:

A. Does the mandatory exemption provided by sections 17(1)(a) and (c) (third party information) apply?

B. Should the appellant be permitted to claim the discretionary exemption in section 18(1) (economic and other interests)?

DISCUSSION:

Issue A. Does the mandatory exemption provided by sections 17(1)(a) and (c) (third party information) apply?

[21] The appellant claims that sections 17(1)(a) and (c) apply. These sections 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or …

[22] 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]

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

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

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

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

Part 1: Type of information

[24] The appellant claims that the records contain commercial and financial information. These types of information have been discussed in prior orders:

> *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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]
>
> *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.[7]

[25] The appellant submits that the Agreement is a contract between Ontario and itself under which Ontario has agreed to provide the appellant with a grant through the

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[3] *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.) (*Boeing Co.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[5] Order PO-2010.
[6] Order P-1621.
[7] Order PO-2010.

Next Generation of Jobs Fund Biopharmaceutical Investment Program in order to assist the appellant with the financing of its manufacturing and product development operations.

[26] In particular, the appellant submits:

> All of the information in the Agreement constitutes either commercial or financial information for the purposes of section 17(1) of the [*Act*] in that it consists of specific figures related to monetary payments, costs and expenditures, wages and number of employees, project investment, funding and financing, insurance, manufacturing operations, and R & D investment.

[27] The appellant notes that Schedule A to the Agreement contains detailed project descriptions, including milestones, deliverables and timelines, Schedule B contains an eligible costs and projects budget, Schedule C-1 contains a schedule of paid eligible costs, Schedule C-2 contains project status reports, and Schedule G contains a letter of credit form.

[28] The appellant does not make submissions relating to the House Note under part 1 of the test. As this is a mandatory exemption, I will review the House Note to make this determination.

[29] The requester acknowledges that the information in the records is commercial and/or financial.

[30] The ministry did not provide representations relating to part 1 of the test.

[31] I accept the appellant's characterization of the portions of the Agreement that are at issue as constituting financial information. They relate to money and its use or distribution and contain or refer to specific data.

[32] In the absence of representations from the appellant about the contents of the House Note under part 1 of test, I have independently reviewed the portions of this record that the appellant seeks to withhold. Although they contain information that relates to the appellant's business, I find that they do not "relate solely to the buying, selling or exchange of merchandise or services," as required to qualify as commercial information, nor do they "relate to money and its use or distribution *and* contain or refer to specific data" as required to be financial information.

[33] As all three parts of the test must be met, and the House Note has not met part 1, it is not exempt under section 17(1)(a) or (c). However, for the sake of completeness, I will consider this record under part 2 of the test as well, below.

Part 2: Supplied in confidence

Supplied

[34] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[8]

[35] 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.[9]

[36] 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.[10]

[37] 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 third party to the institution.[11] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[12]

Appellant's representations

[38] In its initial representations, the appellant refers to *Merck Frosst Canada Ltd. v. Canada (Health)*[13] (*Merck Frosst*), a decision of the Supreme Court of Canada that deals with the third party information exemption found in section 20(1) of the federal *Access to Information Act*.[14] Section 20(1) is somewhat similar, but not identical, to section

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[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] This approach was approved by the Divisional Court in *Boeing Co.,* cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (*Miller Transit*).
[11] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[12] *Miller Transit*, above at para. 34.
[13] 2012 SCC 3.
[14] Section 20(1) states, in part: Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains (a) trade secrets of a third party; (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third

17(1) of the *Act*.

[39] In particular, the appellant relies on the following passage from the decision:[15]

> A third principle is that whether or not information was supplied by a third party will often be primarily a question of fact. For example, if government officials correspond with a third party regarding certain information, it is possible that the officials have prior knowledge of the information gained by their own observation or other sources. But it is also possible that they are aware of this information because it was communicated to them beforehand by the third party. The mere fact that the document in issue originates from a government official is not sufficient to bar the claim for exemption. But, in each case, the third party objecting to disclosure on judicial review will have to prove that the information originated with it and that it is confidential.
>
> To summarize, whether confidential information has been "supplied to a government institution by a third party" is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. Judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.

[40] It is important to note that in *Merck Frosst*, the information at issue was not contained in a contract, and the decision therefore contains no discussion of the jurisprudence cited above, to the effect that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" within the meaning section 17(1) of the *Act* or similar provisions in other statutes. That jurisprudence therefore remains relevant in assessing the merits of the appellant's arguments with respect to the Agreement. As succinctly stated by Ontario's Divisional Court in *Miller Transit* (cited above), commenting on the Supreme Court's decision in *Merck Frosst:*[16]

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party; . . . (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

[15] found at paras. 157 and 158.

[16] at paras. 30-31.

> The specific information said to have been "supplied" consisted of reviewers' notes prepared by scientists retained by Health Canada to evaluate the drug and correspondence between Merck and Health Canada. The information was not contained within a contract. In *Boeing*, as well as the IPC decisions cited by the adjudicator, the information purportedly covered by the exemption consisted of information in a contract entered into by a government institution and a third party. The interpretive principle employed by the IPC adjudicator in this case and many past IPC decisions – that contractual information is presumed to have been negotiated, not supplied – flows from this key factual distinction.
>
> *Merck* does not alter the law on this point. Rather, the presumption that contractual information was negotiated and therefore not supplied is consistent with *Merck*. A party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the "inferred disclosure" or "immutability" exception applies.

[41] After discussing *Merck Frosst,* the appellant refers to the "inferred disclosure" and "immutability" exceptions to the principle that 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). In that regard, the appellant cites a number of decisions, which I will now review.

[42] Under the "inferred disclosure" exception, the appellant refers to Order 2001-019 of the Alberta Information and Privacy Commissioner (Alberta IPC), which held that a Memorandum of Understanding (MOU) developed and provided by Telus to the City of Edmonton had been "supplied in confidence." I note that, although Order 2001-019 bases its finding of "supplied" on the fact that Telus "developed" the MOU, it also refers to the contents of the MOU having been "negotiated."

[43] It is significant, therefore, that this decision does not refer to the principle that negotiated agreements will not normally qualify as having been "supplied" to an institution. That approach had been adopted by the Alberta IPC in Order 2000-005, and has been followed by that office in many later orders including F-2009-028, where the Alberta IPC applied the principle and found that none of the information in agreements between Alberta Health Services and a private company had been "supplied" to Alberta Health Services.

[44] Not surprisingly, given that Order 2001-019 does not refer to the principle that negotiated contracts will not normally qualify as having been "supplied," it also does not mention the "inferred disclosure" exception to it, although this is the basis upon which the relevance of Order 2001-019 is urged by the appellant. Given that it does not

address the principle that information in negotiated contracts will not normally meet the "supplied" requirement, I conclude that Order 2001-019 should not be seen as determinative.

[45] Under the "immutability" exception, the appellant cites Orders PO-1813 and PO-1791 of this office, both of which deal with pricing initially proposed by third parties that was incorporated, unchanged, into a contract. I note, however, that neither of these orders actually refers to the "immutability" exception.

[46] Nor does Order PO-1813 mention the principle that information in negotiated contracts will not normally meet the "supplied" requirement in section 17(1). It simply finds that proposed costs accepted by the institution were "supplied."

[47] In Order PO-1791, this office explained its conclusion that the pricing information had been "supplied" as follows:

> In this case, MBS [Management Board Secretariat] has submitted that the Appendices to the contract were drafted by the affected party and submitted to MBS in response to its Request for Prices. More particularly, the unit price information contained in those Appendices were provided as a price quote.
>
> On the basis of this information, I am satisfied that the prices severed from the Appendices were not the product of negotiation between MBS and the affected party, are the same as that originally provided by the affected party in response to the Request for Prices, and were therefore "supplied" by the affected party within the meaning of section 17(1).

[48] However, in subsequent Order PO-2435, this office expressly addressed the issue of unchanged pricing in an agreement and took a different approach than the one followed in Orders PO-1791 and PO-1813:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. *The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation*. . . . [Emphasis added.]

[49] Subject to the "inferred disclosure" and "immutability" exceptions, the approach that this office now takes to whether information in a contract was "supplied" is aptly stated in Order MO-1706:

> In addition, the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1).[17] The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion. [Emphasis added.]

[50] This approach has been upheld in a number of judicial review decisions.[18]

[51] Under the heading "Information is 'supplied' where disclosure would reveal sensitive third party information," the appellant appears to suggest that the "supplied" requirement will not be strictly applied if "disclosure of the seemingly innocuous information would allow an industry player to see into the financial and commercial affairs of the third party. . . ." In support of this submission, the appellant cites three further cases, which I will now review.

[52] The appellant mentions Order 26-1994[19] of the Information and Privacy Commissioner of British Columbia (BC IPC), which dealt with a contract between B.C. Hydro and a third party for the supply of computer-related services. This order contains critical commentary on the Ontario approach to whether information in a contract has been "supplied":

> In general, I find the Ontario interpretation of "supplied in confidence" provides a reasonable basis for application in British Columbia. However, I also agree with B.C. Hydro and Westech that a strict application of this interpretation could produce results that were not intended by the legislators.

[53] Order 26-1994 goes on to cite two exceptions to the principle that, generally speaking, information in contracts is not "supplied": (1) where the information in the contract has been supplied and remains "relatively unchanged" and (2) where disclosure would permit the recipient of the information to draw "accurate inferences" about sensitive third party business information. These categories roughly correspond to the exceptions recognized in Ontario, as referenced above, which are commonly

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[17] Section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* is the equivalent of section 17(1) of the *Act*.
[18] See, for example, *Boeing Co.* and *Miller Transit*, both cited above.
[19] also cited as *British Columbia Hydro and Power Authority*, 1994 CanLII 1432 (BC IPC).

referred to as the "immutability" and "inferred disclosure" exceptions.

[54] The description of the "inferred disclosure" exception in B.C. Order 26-1994 comports reasonably well with Ontario jurisprudence, except that the information discoverable by inference is described in Ontario as "underlying non-negotiated confidential information."[20]

[55] However, the assertion that information in a contract that is "relatively unchanged" falls under the "immutability" exception, and therefore qualifies on that basis as having been "supplied," must be challenged.

[56] As noted in Order MO-1706, (quoted above), "the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of this exemption. Rather, as stated in *Miller Transit* (cited above) and other authorities:

> The immutability exception arises in relation to information actually supplied by the third party which appears in a contract but which is not susceptible to change in the give and take of the negotiation process such as financial statements, underlying fixed costs and product samples or designs. . . .[21] [Emphasis added.]

[57] In other words, it is not sufficient that information in a contract is "relatively unchanged" from what the third party provided to the institution; rather, the important point is that the information is *not susceptible to change*.

[58] The appellant also cites *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*,[22] which appears to be the basis for the appellant's argument that the "supplied" rule will not always be strictly applied to information in contracts. *Jill Schmidt* deals with information that had been incorporated unchanged into a contract. The Court agreed with the B.C. IPC that this information had not been "supplied." Referring to the "inferred disclosure" exception to the general rule about information in contracts not being "supplied," the Supreme Court of British Columbia stated:[23]

> This exception applies to information *which by itself may not meet the test for exemption*, but because of its close connection to information

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[20] See Order MO-1706.
[21] at para. 34 of *Miller Transit*. The Divisional Court cites *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 at paras. 73-75, 77.
[22] 2001 BCSC 101.
[23] at para. 34

> which has been exempted, it should also be exempted. This exception has no application to the Disputed Information in this case. [Emphasis added.]

[59] This is not the approach that has been taken by this office or the Ontario courts which, as stated above, is that the "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be drawn with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[24] By contrast, this extract from *Jill Schmidt* suggests that information that does not meet the test for exemption is nevertheless exempt from disclosure. This bizarre proposition files in the face of the principle stated in section 1(a)(ii) of the *Act* that "necessary exemptions from the right of access should be limited and specific." [Emphasis added.] It is also inconsistent with the overall scheme of the *Act*, which is, essentially, that responsive records which are not subject to an exemption[25] must be disclosed.[26]

[60] As *Jill Schmidt* is a precedent from another province, it is not binding on me. Moreover, with respect, because of its inconsistency with the basic structure and scheme of the *Act*, I do not find this aspect of the Court's reasons to be persuasive. I also note that, as is made clear in the final sentence of the paragraph I have just quoted from the decision, the Court did not apply the exception and these comments are therefore *obiter*. In any event, to the extent that *Jill Schmidt* suggests that non-exempt information should be exempted from disclosure, I decline to follow it.

[61] With respect to evidence to support its assertion that the information in the Agreement whose disclosure is opposed by the appellant meets the "supplied" test, the appellant simply states as follows:

> The commercial and financial information that [the appellant] has redacted from the agreement was "supplied" by [the appellant] within the meaning of FIPPA, in that it was directly supplied (i.e., remains relatively unchanged in the contract), or in the sense that disclosure of the information would allow [the appellant]'s competitors to draw accurate inferences about information supplied by [the appellant] to the Ministry, as well as [the appellant]'s sensitive third party business information that properly falls within the protection of section 17(1).

[62] In addition, the introduction to the appellant's representations states that the information "was supplied by [the appellant] to the Ministry in confidence for the purposes of participating in Ontario's Next Generation of Jobs Fund Biopharmaceutical Investment Program. . . ."

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[24] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[25] (and where the request is not frivolous or vexatious).
[26] See sections 1(a), 10(1) and 29(1).

[63] The appellant's initial representations also contain the following arguments about "inferred disclosure":

- references to the appellant's annual baseline R & D investment in Ontario (both the reference that it is taken from and the specific amount) in the Agreement permit the drawing of an accurate inference regarding the appellant's underlying confidential business strategy relating to investments in specific jurisdictions; and

- the component of the "eligible costs" definition that defines the threshold amount in respect to which the recipient may source specialized equipment demonstrably not available in Ontario would allow third parties to access specific information regarding the appellant's sourcing of equipment for the project.

[64] Notably, these representations do not explain what specific information could be inferred or how such an inference might arise from these categories of information if they are disclosed.

[65] The appellant's reply representations state that the information ". . . was provided to the Ministry solely for the purpose of applying for a grant to assist [the appellant] with the financing of its manufacturing and product development operations. . . ."

[66] The appellant's reply representations also reiterate its argument based on *Merck Frosst*, already outlined above.

[67] I have also reviewed the appellant's representations to the ministry at the request stage, which were provided as part of the section 28 notification process. These representations, and the representations it provided during this inquiry, identify broad categories of information within the contract whose disclosure the appellant objects to. In these parts of its representations, the appellant expressly refers to some of these categories being "supplied," but not others. I will refer to these categories in more detail in my review of the ministry's representations, below.

Ministry's representations

[68] In the "Background" portion of its representations, the ministry explains how information was provided to it with respect to the Next Generation of Jobs Fund ("NGOJF") Biopharmaceutical Investment Program:

> A business interested in a NGOJF grant was required to supply a project proposal to the Ministry that included a detailed project description, detailed information about the financial investment in Ontario the business would make and the number of jobs the project would create. . . .

[69] In deciding to release the information it has not exempted, whose disclosure is

opposed by the appellant, the ministry explains that its actions were guided by Orders PO-3157 and PO-3158. The ministry states:

> These two orders related to grant agreements entered into under a program called the Strategic Jobs and Investment Fund ("SJIF"). Although the kinds of projects funded under SJIF are different than those funded under NGOJF, the program structure of both NGOJF and SJIF are fundamentally similar: an applicant proposes a project to the Ministry and, if the Ministry decides to support the project, it incorporates details of the project into a funding agreement. Like NGOJF grant agreements, SJIF grant agreements contain job and investment commitments.
>
> In these two appeals, the IPC disallowed section 17 severances relating to information on: the cumulative job targets, the project investment commitment, the project costs, and terms relating to the disbursement of the grant and enforcement. In Order PO-3158, the Adjudicator wrote:
>
> > I accept the ministry's submission that most of the information at issue is taken directly from or derived from the affected party's business plan submission. That, however, is not determinative of whether the information was "supplied" within the meaning of section 17(1). As indicated above, this office has stated,
> >
> > > … the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1) [the municipal equivalent to section 17(1)]. The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545).[27]
> >
> > Thus, in the usual course, agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied", even if the "negotiation" amounts to acceptance of the terms proposed by the third party: see Orders PO-2384 and PO-2497.
> >
> > In this case, I find that the essential bargain between the ministry and the affected party is the ministry's commitment to provide a

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[27] Order MO-1706. This approach was approved in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, above at note 2.

> grant under the SJIF, conditional on the affected party's commitment to invest in the project described in its business plan, and create jobs as a result. Once the government accepted the affected party's business plan submission, with its investment and job creation targets, those elements became part of the bargain agreed to between them. As incorporated into the funding agreement, these investment and job creation targets are not the "informational assets" of the affected party, but agreed-upon essential terms of the agreement.
>
> The ministry has submitted that in its review of the business plan, it does not seek to alter the business fundamentals. I accept that the ministry's role as funder does not encompass the type of input that, for example, a potential business partner may have. But it is indisputable that the ministry's funding was subject to the affected party's commitment to meet the key elements of its business plan. Once these elements became incorporated into the conditional grant agreement, it would be incorrect to characterize those terms as "belonging" to the affected party in the sense protected by section 17(1). This information "belongs" as much to the ministry as to the affected party.

[70] The ministry also notes that its ". . . principal reason for not applying severances is that [the ministry] believes the information was not 'supplied' within the meaning of section 17."

[71] The ministry goes on to discuss the categories of information that the appellant believes should have been severed, according to its representations on "harms" (part 3 of the test). These submissions contain detailed references to the contents of the records and I will not quote them at length for that reason. However, the ministry makes the following points concerning these categories of information:

- the information the ministry proposes to disclose about "Baseline R & D Development" consists of negotiated terms whose disclosure would not permit accurate inferences to be drawn about the appellant's underlying business strategy relating to investments in specific jurisdictions;

- terms described as "product portfolio information" were negotiated, not "supplied";

- consistent with Orders PO-3157 and PO-3158, information about job targets is negotiated, not supplied;

- in its effort to apply Orders PO-3157 and PO-3158, the ministry sought to sever year over year project details but disclose "the essential bargain" between it and the appellant;
- eligible costs schedules are negotiated, not supplied;
- the project completion date is standard and forms part of the negotiated terms;
- consistent with Orders PO-3157 and PO-3158, the overall project cost and the terms of grant disbursement were not severed;
- information about insurance requirements was negotiated, not supplied; and
- the House Note was not severed for the same reason as the product portfolio information.

Requester's representations

[72] The requester submits that the information at issue in this appeal does not meet the "supplied" requirement under section 17(1).

[73] Like the ministry, he relies on Order PO-3158 (quoted above), a case involving a similar agreement to the one at issue here, in support of his arguments in favour of disclosure.

[74] Echoing the conclusions reached in Order MO-3158, the requester submits that "[o]nce the proposals and commitments made by [the appellant] were incorporated in the Conditional Grant Agreement, that information no longer "belonged" to [the appellant]."

[75] He also argues that "the cases cited by [the appellant] in its submissions are distinguishable from the facts of this situation." I have already discussed this in my review of these authorities, above. The appellant goes on to state:

> Despite citing cases that found information was supplied based on the above grounds, [the appellant] did not provide any evidence to suggest that information it provided to the Ministry was "supplied" on similar grounds. [The appellant]'s claims . . . that confidential and financial information was "supplied" by [the appellant] are nothing more than unsupported assertions and sweeping generalizations. [The appellant] claims that information it supplied was included in the Conditional Grant Agreement was "relatively unchanged." The intention of section 17(1) is to protect information of the third party that is not susceptible of change

> in the negotiation process, not information that was susceptible to change but was not, in fact, changed.[28]
>
> [The appellant] has failed to explain how the information required to be disclosed would permit inferences to be drawn regarding "information supplied by [the appellant] to the Ministry" or "[the appellant]'s sensitive third-party business information.[29] It has failed to provide any examples or evidence of the non-negotiated commercial or business information that may be revealed if the information at issue is disclosed. [The appellant] has also not identified any specific information in the Conditional Grant Agreement that was actually supplied in confidence by [the appellant].

Analysis

[76] Regardless of the legal arguments advanced by the appellant, which I have addressed in detail above, I conclude that the appellant has simply not demonstrated, on an evidentiary basis, that the information it seeks to withhold in either the Agreement or the House Note was "supplied" to the ministry. My reasons for this conclusion follow.

[77] *Miller Transit* (cited above) describes the way the "supplied" element of the test is applied to contractual information as an "interpretive principle," and summarizes this principle as follows: "that contractual information is presumed to have been negotiated, not supplied."[30] [Emphasis added.]

[78] Significantly, *Miller Transit* also states that "[a] party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the 'inferred disclosure' or 'immutability' exception applies."[31] Accordingly, information in the Agreement will not be found to be exempt unless one of these exceptions applies.

[79] Overall, the appellant's evidence and argument on the "supplied" issue are, at best, very general. They do not rise beyond general statements about the "inferred disclosure" exception. They put forth a flawed interpretation of the "immutability" exception, for which it is not sufficient that information in the contract be "relatively unchanged," as the appellant asserts; rather, it must be demonstrated that this information is "not susceptible to change."[32]

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[28] [Citation omitted.]
[29] [Citation omitted.]
[30] at para. 30.
[31] at para. 31.
[32] *Miller Transit*, cited above, at para. 34.

[80] The inferred disclosure exception ". . . arises where information actually supplied does not appear on the face of a contract but may be inferred from its disclosure."[33] Even where the appellant refers to particular categories of information, it does not explain what information could be inferred or how such an inference might arise from these categories of information if they are disclosed. I have reviewed the appellant's representations in detail, above, and I conclude that the appellant has not provided sufficient evidence and argument to demonstrate, on a balance of probabilities, that this exception applies.

[81] The "immutability" exception arises ". . . in relation to information actually supplied by a third party which appears in a contract but which is not susceptible to change in the give and take of the negotiation process such as financial statements, underlying fixed costs and product samples and designs. . . ."[34] As noted above, the appellant has mischaracterized the threshold for this exception as information that is "relatively unchanged." The appellant gives no examples of information at issue in the Agreement, provided by it, that is not susceptible to change during negotiations. I conclude that the appellant has not provided sufficient evidence and argument to demonstrate, on a balance of probabilities, that this exception applies.

[82] For its part, the ministry goes into significant detail about its reasoning process, not all of which could be included in this order because of its detailed discussion of the contents of the records.

[83] Moreover, as noted by the requester, the comments made by Assistant Commissioner Sherry Liang in Order PO-3158 could also be applied to the Agreement. As already quoted above, the Assistant Commissioner found that it would be incorrect to characterize elements that had been incorporated in a conditional grant agreement as "belonging" to the affected party in the sense protected by section 17(1). In this case, therefore, I agree with the requester that "[o]nce the proposals and commitments made by [the appellant] were incorporated in the Conditional Grant Agreement, that information no longer "belonged" to [the appellant]." In other words, these elements cannot be considered as "informational assets" of the appellant that are subject to protection under section 17(1).

[84] Accordingly, I have concluded that the ministry's decision under section 17(1) should be upheld with respect to the Agreement. The information to be disclosed is contained in a negotiated contract, and I have not been provided with a convincing basis for applying either the "immutability" or "inferred disclosure" exception to the general principle that such information was not "supplied." I find that the information in the Agreement that the ministry proposes to disclose, and to whose disclosure the

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[33] *Miller Transit*, cited above, at para. 33.
[34] *Ibid.*, at para. 34.

appellant objects, was not "supplied" within the meaning of section 17(1).

[85] The House Note provides a suggested response to a question concerning the decision to enter into a Conditional Funding Agreement with the appellant. The appellant seeks to withhold the question itself, despite the fact that it refers to matters that are common knowledge, as demonstrated by newspaper clippings provided by the requester with his representations. Other portions of the House Note the appellant seeks to withhold are also common knowledge. It is clear that this information was not "supplied" to the ministry by the appellant. Rather, the question and most of the other information in the note that the appellant seeks to withhold are based on publicly available information that is widely known.

[86] The only exceptions to this are two references in the House Note to specific terms of the agreement, but significantly, the way the House Note describes these terms of the agreement makes it clear that this information was also not "supplied" by the appellant to the ministry. This information was part of essential bargain between the appellant and the ministry, not a supplied informational asset of the appellant.

[87] The House Note was drafted by staff at the ministry. It refers to matters of common knowledge and, additionally, reveals one aspect of the agreement in a way that, as I have just stated, demonstrates that it was not "supplied" by the appellant. I find that the information at issue in the House Note was not "supplied" to the ministry within the meaning of section 17(1).

[88] On this basis, none of the information the appellant seeks to withhold in either of the records at issue was "supplied." As such, these records do not meet part 2 of the test. There is no need to address the "in confidence" aspect of part 2, as the information was not "supplied." All three parts of the section 17(1) test must be met in order for the exemption to apply. Accordingly, I find that section 17(1) does not apply to the information at issue. Under the circumstances, it is not necessary to address part 3 of the test.

Issue B. Should the appellant be permitted to claim the discretionary exemption in section 18(1) (economic and other interests)?

[89] This office has previously taken the following approach to the issue of whether an affected party is entitled to rely on a discretionary exemption not raised by the institution:

> As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the

> Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. This result would occur, for example, where release of a record would seriously jeopardize the rights of a third party.[35]

[90] In particular, the appellant raises sections 18(1)(c), (d), (e), (f) and (g). These sections state:

> A head may refuse to disclose a record that contains,
>
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
> >
> > (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
> >
> > (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
> >
> > (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Representations

[91] In its initial representations, the appellant submits as follows on this issue:

> This appeal constitutes the "most unusual of circumstances" in that by not applying the section 18(1) exemption to the records, the Ministry puts in jeopardy the very goals that the Province of Ontario seeks to achieve through the Biopharmaceutical Investment Program. This initiative was specifically designed to stimulate economic growth and prosperity in

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[35] Order M-430. See also Orders P-257, M-10 and P-1137.

> Ontario while helping create the next generation of jobs, and increase the level of biopharmaceutical research and development and advanced manufacturing in Ontario. If its sensitive proprietary information contained in the Agreement is made public, *[the appellant] stands to suffer serious financial losses* which will set back its progress aided by the Program. [Emphasis added.]

[92] The appellant makes the following further submissions:

- the Agreement has a unique customized structure and content whose disclosure will harm the financial interests of both the appellant and the ministry;
- the appellant has competitive business interests in the information to be redacted;
- disclosure of the specific terms and conditions could cause direct financial and/or competitive harm to the ministry – for example, disclosure could negatively affect current or future relations because other companies will assert an entitlement to similar terms and conditions – Order PO-2898;
- it is illogical to foster scientific progress and economic growth by providing innovative companies grant assistance, and at the same time reversing those benefits to Ontario by exposing grant recipients to financial harm in a highly competitive market;
- section 18 exists to protect institutions and third party businesses from such consequences, and this appeal is "one of those unusual cases where a third party should be allowed to raise the section 18 exemption which has not been claimed by the institution."

[93] The ministry did not provide representations on this issue, and the appellant did not refer to it in its reply representations. The requester addresses the issue, mostly from the perspective that the appellant has not established that section 18(1) actually applies.

Analysis

[94] Several of the appellant's arguments on this issue make it clear that the appellant seeks to invoke section 18 in order to protect what it considers to be its own interests. It also asserts that the government's interests could be damaged.

[95] In one of its arguments, the appellant relies on Order PO-2898. In that order, the information exempted under section 18(1)(c) and (d) related to the amount of volume discount paid by a drug company to Ontario under the Ontario Drug Benefit Plan. Order PO-2898 does not support the appellant's argument that it should be able

to claim a discretionary exemption not relied on by the ministry because that issue did not arise there. In Order PO-2898, the institution had claimed section 18(1)(c) and (d), and had provided representations on those sections.

[96] In addition, the adjudicator in Order PO-2898 applied the exemption on the basis that "disclosure of the information at issue could reasonably be expected to discourage drug manufacturers in the future from negotiating large volume discounts and other favourable financial terms with Ontario." Unlike the situation in Order PO-2898, where Ontario had negotiated to *receive* discounts on the purchase of goods, the present appeal relates to a grant program where funds are *paid out* by the government. Hindering the receipt of discounts that would benefit the government is very different than paying out government funds under a grant system. These schemes are not analogous and I conclude, for that reason as well, that Order PO-2898 does not support the appellant's claim.

[97] The appellant's argument on this point refers several times to alleged damage to its own position, with several very general allegations that Ontario's financial interests could be harmed by disclosure. A cursory review of sections 17 and 18 makes it clear that section 17(1) is the exemption intended to protect the appellant's interests, while section 18 is intended to protect Ontario's interests.

[98] It is apparent that the appellant's desire to rely on section 18 is, essentially, an attempt to protect its own interests, not those of Ontario. Moreover, particularly in view of the analysis and conclusions reached under section 17(1), above, the evidence provided to me falls far short of demonstrating that disclosure of the records "would seriously jeopardize the rights of a third party" as contemplated in Order M-430. It is also significant that the ministry, which surely exists, in part at least, to protect the interests of Ontario, has not argued that sections 18(1)(c), (d), (e), (f) and (g) apply.

[99] Under the circumstances, I find that the appellant is not entitled to rely on section 18(1)(c), (d), (e), (f) or (g).

ORDER:

1. I uphold the ministry's decision to disclose parts of the Agreement, and the House Note in its entirety.

2. For greater certainty, I am enclosing, with the copy of this order that is being sent to the ministry, a copy of the Agreement provided by the ministry to reflect its decision letter to the appellant, showing the portions the ministry exempted under section 17(1) of the *Act*.

3. I order the ministry to disclose the information it has not exempted under section 17(1) as shown on the enclosed copy of the Agreement, and the House Note in its entirety, to the appellant on or before **June 2, 2016** but not earlier than **May 27, 2016**.

Original Signed by: April 28, 2016

John Higgins
Adjudicator