Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3174

Appeal PA10-216

Ministry of Health and Long-Term Care

February 28, 2013

Summary: The appellant is a drug manufacturer who is appealing the Ministry of Health and Long-Term Care's decision to disclose parts of two agreements between itself and the Ontario government. The appellant objects to the disclosure of only some parts of the agreements, including various dates, references to a particular pricing concept, the names, titles and signatures of the drug manufacturer representatives who signed the agreements, and the name and signature of a witness who signed one agreement. The requester did not appeal the ministry's decision to withhold other parts of the agreements. Consequently, the information in those withheld parts, which includes specific pricing information for the drug in dollar amounts and a formula for calculating a particular pricing concept, are not at issue and will not be disclosed.

In this order, the adjudicator finds that the confidentiality provisions of O. Reg. 201/96 of the *Ontario Drug Benefit Act* do not prevail over the *Freedom of Information and Protection of Privacy Act.* In addition, he dismisses the appellant's claim that the information the ministry decided to disclose qualifies for exemption under section 17(1) (third party information), section 21(1) (personal privacy) or because it is not responsive to the request. He also finds that the appellant cannot claim sections 18(1)(c) and (d) (economic and other interests) for the information at issue in the agreements, and the ministry is not required to exercise its discretion to extend these exemptions to such information. The ministry's decision to disclose other parts of the agreements to the requester is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 2(3), 10(1)(a), 17(1), 18(1)(c), 18(1)(d), 21(1), 67(1) and 67(2). O. Reg. 201/96, ss. 11(1)4, 12(7) and 12.1(1)7.

Orders and Investigation Reports Considered: Orders P-257, PO-1818, PO-3032 and MO-1194.

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3.

OVERVIEW:

[1] The appellant is a drug manufacturer who is appealing a decision of the Ministry of Health and Long-Term Care (the ministry) to disclose parts of two agreements to a requester under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*). These agreements, which are between the drug manufacturer and the Ontario government, add a drug to a provincial formulary and contain pricing information for this drug.

[2] Under the *Ontario Drug Benefit Act* (*ODBA*),[1] the Executive Officer (EO) of the Ontario Public Drug Programs is empowered to negotiate agreements with manufacturers of drug products, agree with manufacturers as to the drug benefit price of listed drug products, negotiate drug benefit prices for listed substances with suppliers, and set drug benefit prices for designated pharmaceutical products.[2] This power also includes entering into agreements with drug manufacturers that contain, among other things, provisions with respect to volume discounts and payments to the government.[3]

[3] A lawyer representing an unidentified client submitted a request to the ministry under *FIPPA* for access to the following records:

> Agreements or arrangements (formal or informal) between [a named drug company] and the [ministry] and/or the Ontario Public Drugs Program and/or the Minister, Deputy Minister, Assistant Deputy Minister and [EO] or others regarding [a named drug].

[4] The ministry located records that are responsive to the lawyer's request, which are two agreements between the Ontario government (as represented by the EO) and the drug manufacturer.

[5] The ministry then notified the drug manufacturer under section 28(1) of *FIPPA*. It enclosed a copy of the agreements and advised the drug manufacturer that it

---

[1] R.S.O. 1990, c. O.10.
[2] *Ibid.*, s. 1.1(2)(f).
[3] O. Reg. 201/96, s. 1 (1.1) (c).

proposed to withhold certain highlighted information in these records, either because it is exempt under sections 18(1)(c) and (d) (economic and other interests) of *FIPPA* or because it is not responsive to the request. It invited the drug manufacturer to provide submissions as to whether any of the other information in the agreements meets the requirements of the mandatory exemption in section 17(1) (third party information).

[6] In response, the drug manufacturer provided submissions stating that although it agreed with the ministry's severances, additional information in the agreements should be withheld under sections 17(1), 18(1) and 21(1) (personal privacy). It indicated that where the ministry had claimed section 18(1), it should also apply the exemption in section 17(1). In addition, it claimed that additional information in the agreements is not responsive to the request and should be severed.

[7] The ministry then issued separate decision letters to the drug manufacturer and the requester stating that it would be providing the requester with partial access to the agreements. It stated that some information in the agreements would be withheld under the discretionary exemptions in sections 18(1)(c) and (d) and the mandatory exemption in section 17(1). It further stated that some information would be severed because it is not responsive to the request.

[8] The requester did not appeal the ministry's decision to withhold those parts of the agreements. Consequently, the information in the withheld parts, which includes specific pricing information for the drug in dollar amounts and a formula for calculating a particular pricing concept, are not at issue in this appeal, and will not be disclosed.

[9] However, the drug manufacturer appealed the ministry's decision to provide the requester with access to other parts of the agreements. The drug manufacturer (now the appellant) objects to the disclosure of only some of those parts, including various dates set out in the agreements, references to a particular pricing concept, the names, titles and signatures of the drug manufacturer representatives who signed the agreements, and the name and signature of a witness who signed one agreement.[4]

[10] This appeal was not resolved during mediation and has been moved to adjudication for an inquiry. An adjudicator sought representations on the issues in this appeal from the ministry, the appellant and the requester. She received representations from both the ministry and the appellant, but not from the requester. This appeal was then transferred to me for a decision.

[4] The other agreement was signed by two drug manufacturer representatives, but it is not clear to me whether the second of these two individuals was acting as a witness or was binding his company to the agreement with his signature.

RECORDS:

[11] The records at issue in this appeal are two severed agreements between the Ontario government and a drug manufacturer relating to a particular drug.

[12] The ministry provided the IPC with a copy of these records and highlighted in yellow those parts that it decided to withhold from the requester. The non-highlighted parts are those that it decided to disclose to the requester. The appellant objects to the disclosure of some but not all of those parts of the records that the ministry decided to disclose.

[13] The appellant has provided me with a copy of the same records in which it has replicated the ministry's severances in yellow highlighting and has marked in green and red those parts of the records that it submits should not be disclosed to the requester because they contain information that is exempt under sections 17(1), 18(1)(c) and 18(d) or is not responsive to the request.

[14] I note that the appellant has marked all of the yellow highlighted parts of the records in green, even though this information is not at issue in this appeal. This includes specific pricing information for the drug in dollar amounts and a formula for calculating a particular pricing concept. The appellant indicates that it supports the ministry's decision that such information is exempt under sections 17(1), 18(1)(c) and 18(1)(d).

[15] As noted above, the requester did not appeal the ministry's decision to withhold those parts of the agreements and I will not be ordering them disclosed. Consequently, I will not be considering whether they qualify for exemption under those sections.

[16] The appellant objects to the disclosure of some but not all of those parts of the records that the ministry has decided to disclose. It is only those parts of the records, which the appellant has marked in green and red, that are at issue in this appeal. To provide clarity, I have summarized those parts of the records in the following two charts:

Agreement No. 1

General description of information	Page number(s)	Exemptions claimed by appellant
Effective date of agreement	1, 3	s. 17(1) ss. 18(1)(c) and (d)
References to a pricing concept	1, 3	s. 17(1) ss. 18(1)(c) and (d)

Names, titles and signatures of drug manufacturer representatives who signed agreement, including date	2	s. 17(1) (claimed for execution/signature dates s. 21(1) (claimed for names, titles and signatures)
Name and signature of individual who witnessed execution of agreement, including date	2	s. 17(1) (claimed for signature date) s. 21(1) (claimed for name)
Date of previous arrangement	3	Non-responsive s. 17(1) ss. 18(1)(c) and (d)

Agreement No. 2

General description of information	**Page number(s)**	**Exemptions claimed by appellant**
Effective date of agreement	1, 4, 5	s. 17(1) ss. 18(1)(c) and (d)
References to a pricing concept	2, 5	s. 17(1) ss. 18(1)(c) and (d)
Target date	2	s. 17(1) ss. 18(1)(c) and (d)
Deemed effective date of provisions	3	s. 17(1) ss. 18(1)(c) and (d)
Names, titles and signatures of drug manufacturer representatives who signed agreement, including dates	3	ss. 17(1) and 18(1)(c) and (d) (claimed for execution/signature dates) s. 21(1) (claimed for names, titles and signatures)
Date of previous arrangement	4, 5	Non-responsive s. 17(1) ss. 18(1)(c) and (d)

ISSUES:

A. Do the confidentiality provisions in O. Reg. 201/96 of the *ODBA* prevail over *FIPPA*?

B. Does the mandatory exemption at section 17(1) apply to information in the records?

C. Do the discretionary exemptions at sections 18(1)(c) and/or (d) apply to information in the records?

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

E. Is some information in the records not responsive to the request?

DISCUSSION:

A. Do the confidentiality provisions in O. Reg. 201/96 of the *ODBA* prevail over *FIPPA*?

[17] The appellant submits that item 4 of section 11(1) in O. Reg. 201/96 of the *ODBA* limits the ministry's authority to disclose information from agreements between drug manufacturers and the Ontario government under *FIPPA*. This provision states, in part:

> . . . if required by the executive officer, the manufacturer of the product shall enter into an agreement with the executive officer that specifies any volume discount or other amount that may be payable by the manufacturer to the Minister of Finance, and shall agree that the executive officer may make public *the following information, and that information only,* with respect to the agreement:
>
> i. The name of the manufacturer.
> ii. The subject-matter of the agreement.
> iii. The fact of entering into or terminating the agreement.
> (Emphasis added.)

[18] Similar provisions appear in section 12(7) and item 7 of section 12.1(1) of the same regulation.

[19] The appellant acknowledges that because of item 4 of section 11(1) of the regulation, there cannot be a reasonable expectation of confidentiality with respect to the name of the drug manufacturer or the fact that it has entered into or terminated an agreement with the Ontario government. However, it submits that the reference to "subject-matter of the agreement" is limited to the fact that there is a listing or pricing agreement and does not extend to specific details in the agreements, such as pricing arrangements. It further asserts that the "subject matter of the agreement" cannot reasonably be construed as extending to disclosure of the actual agreement.

[20] Section 10(1)(a) of *FIPPA* states that every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless

the record or the part of the record falls within one of the exemptions under sections 12 to 22. Consequently, a preliminary issue that must be resolved is whether item 4 of section 11(1) and similar provisions in the regulation prevail over section 10(1)(a) and other provisions of *FIPPA*.

[21] In my view, item 4 of section 11(1) in O. Reg. 201/96 and other similar clauses are confidentiality provisions, because although they require drug manufacturers to agree that the EO has the discretion to disclose specific information relating to these agreements to the public, they also make it clear that the EO "may make public the following information, and that information only." In other words, these provisions purport to limit the information from these agreements that can be publicly disclosed.

[22] In my view, these confidentiality provisions conflict with section 10(1)(a) and other provisions of *FIPPA*. Conflicts with other acts are addressed in sections 67(1) and (2) of *FIPPA*, which state:

> (1) This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.
>
> (2) The following confidentiality provisions prevail over this Act:
>
> 1. Subsection 53 (1) of the *Assessment Act*.
> 2. Subsections 45 (8), (9) and (10), 54 (4) and (5), 74 (5), 75 (6), 76 (11) and 116 (6) and section 165 of the *Child and Family Services Act*.
> 3. Section 68 of the *Colleges Collective Bargaining Act, 2008*.
> 4. Section 10 of the *Commodity Futures Act*.
> 5. Repealed: 1993, c. 38, s. 65.
> 6. Subsection 137 (2) of the *Courts of Justice Act*.
> 7. Subsection 113 (1) of the *Labour Relations Act*.
>
> 7.0.1 Sections 89, 90 and 92 of the *Legal Aid Services Act, 1998*.
>
> 7.1 Section 40.1 of the *Occupational Health and Safety Act*.
>
> 8. Subsection 32 (4) of the *Pay Equity Act*.
> 9. Sections 16 and 17 of the *Securities Act*.
> 10. Subsection 4 (2) of the *Statistics Act*.
> 11. Subsection 28 (2) of the *Vital Statistics Act*.

[23] Neither section 67(2) of *FIPPA* nor the confidentiality provisions in O. Reg. 201/96 of the *ODBA* specifically state that the latter provisions override *FIPPA*. In these circumstances, I find that these confidentiality provisions do not prevail over section 10(1)(a) and other provisions of *FIPPA*. Consequently, these confidentiality provisions do not limit the ministry from disclosing information from agreements between drug manufacturers and the Ontario government under *FIPPA*. However, I would emphasize that the disclosure of information from such agreements is still subject to the possible application of the discretionary and mandatory exemptions in *FIPPA*.

[24] I will now turn to assessing whether any of these exemptions apply to the information at issue in the agreements.

B. Does the mandatory exemption at section 17(1) apply to information in the records?

[25] The appellant submits that the mandatory exemption in section 17(1) applies to the agreements and that "only a part of each record should be disclosed, if at all."

[26] Section 17(1) states:

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

[27] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[28] For section 17(1) to apply, the party resisting disclosure, which is the 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 1: type of information

[29] "Commercial information" is information that relates solely to the buying, selling or exchange of merchandise or services.[7]

[30] The appellant submits that the agreements between itself and the Ontario government relate to the buying and selling of pharmaceutical products, which constitutes commercial information. I agree and find that most of the information at issue in the agreements qualifies as commercial information because it relates to the buying and selling of drug products. Consequently, the appellant has satisfied part 1 of the section 17(1) test.

Part 2: supplied in confidence

[31] To satisfy part 2 of the section 17(1) test, the appellant must show that the information was "supplied" to the ministry in confidence, either implicitly or explicitly.

[32] I will start by examining the "supplied" element of part 2 of the test. The requirement that it be shown that the information was "supplied" to the institution

---

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

reflects the purpose in section 17(1) of protecting the informational assets of third parties.[8]

[33] The IPC has found in previous orders 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). 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)*.[9]

[34] The ministry states that it decided to disclose specific information in the agreements, such as various dates, because previous IPC orders have established that contractual terms which are mutually generated by the parties do not typically satisfy the requirement that such information is "supplied" within the meaning of section 17(1).

[35] The appellant acknowledges that previous IPC orders have found that the provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, for the purposes of section 17(1). However, it submits that in light of the Supreme Court of Canada's recent decision in *Merck Frosst Canada Ltd. v. Canada (Health)*,[10] which considered the third party information exemption in section 20(1)(b) of the federal *Access to Information Act*, these previous IPC orders are "clearly incorrect." It states, in part:

> In *Merck*, the Supreme Court of Canada noted that whether information was supplied by a third party will often be primarily a question of fact, and the mere fact that a document in issue originates from a government official, such as in an internal government e-mail, is not sufficient to bar a claim for exemption.
>
> The Supreme Court was clear that: 1) the content rather than the form, of the information must be considered, and the mere fact that information appears in a document does not resolve the issue; and the 2) the exemption must extend to information that reveals confidential information supplied by the third party as well as to that information itself.

[36] I am not persuaded by the appellant's line of argument. In the appeal before me, the records at issue are severed agreements between the Ontario government and a drug manufacturer. In *Merck*, the Supreme Court was not considering whether the

---

[8] Order MO-1706.
[9] *Supra* note 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.).
[10] 2012 SCC 3.

third party information exemption in the federal *Access to Information Act* applies to a contract or agreement between a drug manufacturer and the government. Instead, the records at issue were reviewers' notes prepared by scientists retained by Health Canada to evaluate a drug, and correspondence between Merck and Health Canada.[11]

[37] Because the records at issue in *Merck* did not include a contract, the Supreme Court's analysis and findings on the "supplied" test in section 20(1)(b) of the federal *Access to Information Act*, do not in any way address whether the provisions of a contract should generally be treated as mutually generated, rather than "supplied" by the third party. This was not an issue that was before the Supreme Court and not one that it discussed, either directly or indirectly. In my view, the appellant's suggestion that the *Merck* decision essentially overturns the IPC's jurisprudence on the meaning of "supplied" in section 17(1) of *FIPPA* is unfounded.

[38] The terms of the two severed agreements at issue in this appeal were negotiated and agreed upon between the ministry and the appellant's representatives. In other words, the information in the agreements was subject to negotiation and mutually generated, which means that it cannot be considered "supplied" by the appellant for the purposes of section 17(1) of the *Act*, unless one of two exceptions applies to this information.

[39] 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. 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.[12]

[40] The appellant suggests that the "inferred disclosure" exception applies to the information in the agreements. It states:

> Information relating to, for example, the pricing and payment arrangements agreed upon between a pharmaceutical manufacturer and the government, will enable the requester of that information to draw accurate inferences about the bargaining position of the third party. Information about a pharmaceutical manufacturer's bargaining position, including that which reveals the manufacturer's pricing and costing in a supply contract with the government, is jealously guarded by manufacturers who maintain that information in confidence. Such information, if disclosed to a pharmaceutical manufacturer's competitors,

---

[11] *Ibid.*, para 152.
[12] Orders MO-1706, PO-2384, PO-2435, PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, *supra* note 12.

> may be used to gain a competitive advantage over the manufacturer in future negotiations for competing supply contracts.

[41] I do not find the appellant's submission persuasive. The "pricing and payment arrangements" in the agreements cited by the appellant are not at issue in this appeal. The ministry severed both the specific pricing information for the drug in dollar amounts and a formula for calculating a particular pricing concept under sections 17(1) and sections 18(1)(c) and (d) of *FIPPA*. The requester did not appeal the ministry's decision to withhold this information, which means that it is not at issue and will not be ordered disclosed.

[42] The information that the ministry has decided to disclose and which is at issue includes various dates, references to a particular pricing concept, the names, titles and signatures of the drug manufacturer representatives who signed the agreements, and the name and signature of a witness who signed one agreement. In my view, disclosure of this information would not permit a competitor, for example, to draw accurate inferences about any underlying non-negotiated confidential information, such as the appellant's bargaining position or other proprietary business information.

[43] The appellant does not address whether the "immutability" exception applies to the information at issue in this appeal. However, the contractual terms between the appellant and the Ontario government were negotiated and therefore clearly susceptible of change. None of the information appears to be immutable in the sense contemplated by this exception. I find, therefore, that the "immutability" exception does not apply to the information at issue in the agreements.

[44] In short, I find that the information at issue in the severed agreements was the product of a mutual negotiation process between the appellant and the Ontario government. It cannot, therefore, be said that the appellant "supplied" the information in these agreements to the government. Although the appellant submits that it supplied the information "in confidence," it is not necessary to consider that element of part 2 of the three-part test, because I have already found that the appellant has failed to satisfy the preliminary requirement that it "supplied" the information in the agreements to the government.

[45] Consequently, I find that the appellant has failed to satisfy part 2 of the section 17(1) test. The appellant submits that the harms contemplated in part 3 of the test could reasonably be expected to occur if the information at issue in the agreements is disclosed. However, the appellant must satisfy all three parts of the test to establish that the information at issue is exempt from disclosure. If the appellant fails to meet any part of this test, the section 17(1) exemption does not apply.

[46] Given that I have found that the appellant has failed to satisfy part 2 of the test, the information at issue in the severed agreements does not qualify for exemption under section 17(1). It is, therefore, not necessary to consider whether the appellant has satisfied part 3 of the test.

C. Do the discretionary exemptions at sections 18(1)(c) and/or (d) apply to information in the records?

[47] As noted above, the ministry decided to withhold information in the agreements, including specific pricing information for the drug in dollar amounts and a formula for calculating a particular pricing concept under the exemptions in sections 17(1) and 18(1)(c) and (d). That information is not at issue in this appeal because the requester did not appeal the ministry's decision with respect to that information.

[48] However, the ministry did not claim the discretionary exemptions in sections 18(1)(c) and (d) for other information in the agreements that the appellant submits should be withheld, including various dates and references to a particular pricing concept. The ministry decided to disclose this (and other information) to the requester, and I have already found that it does not qualify for exemption under section 17(1).

[49] The appellant submits that it should be able to claim sections 18(1)(c) and (d) for such information and that the ministry should exercise its discretion and extend these exemptions to this information.

[50] The purpose of section 18 of *FIPPA* is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*,[13] explains the rationale for including a "valuable government information" exemption in *FIPPA*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[51] Sections 18(1)(c) and (d) state:

> A head may refuse to disclose a record that contains,

[13] Vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).

> (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;

[52] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[14]

[53] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[15]

[54] Although the broad purpose of the section 18 exemptions is to protect the economic interests of government institutions, not private-sector companies, the appellant submits that it should be able to claim sections 18(1)(c) and (d) for such information and that the ministry should exercise its discretion and extend sections 18(1)(c) and (d) to exempt additional portions of the records. Consequently, it must be determined whether the appellant can raise sections 18(1)(c) and (d) for information for which the ministry did not claim these exemptions.

[55] In Order PO-3032, former Senior Adjudicator John Higgins considered a similar argument made by drug manufacturers who were appealing the ministry's decision to disclose specific information in payment summary sheets, including the names of the drug manufacturers, the dates on which the ministry issued invoices to them, and the dates on which the ministry received payment. He cited Order P-257 and stated:

> . . . [T]he purpose of the section 18 exemptions, broadly stated, is to protect the economic interests of institutions. In this case, it is evident that the ministry took a different view than the drug manufacturers who provided representations on this issue, of the extent to which disclosure of

---

[14] Orders P-1190 and MO-2233.

[15] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

> information in the records could reasonably be expected to damage its economic interests.
>
> In my view, this is a decision the ministry is entitled to make. As outlined below, the ministry clearly took the views of drug manufacturers into account in its decision to claim sections 18(1)(c) and (d) for the payment amounts.
>
> Given the purposes of these exemptions, to protect the government's ability to compete in the marketplace and to protect the broader economic interests of Ontarians, it would only very rarely be appropriate to support a claim for these exemptions by a private party, whose arguments are directed at protecting their own interests, and not those of the government or the public.
>
> In my view, the circumstances of this appeal do not constitute one of these rare exceptions. The position taken by the drug manufacturers in these appeals is fundamentally concerned with protecting their own interests. Any perceived overlap with the interests of the government or the public arises from arguments that the drug manufacturers' interests would be damaged by disclosure, and that this would have a spill-over effect that could reasonably be expected to be prejudicial to the interests of the government or the public.

[56] I agree with Senior Adjudicator Higgins' reasoning and find that it applies to the facts and circumstances present in this appeal. The appellant states that although the IPC has generally held that the section 18 exemption may only be relied upon by the government, it may be appropriate, in rare circumstances, for a third party to rely on this exemption. It suggests that such circumstances exist in this appeal and it should therefore be able to claim sections 18(1)(c) and (d) for specific information, and the ministry should exercise its discretion and extend these exemptions to such information.

[57] I am not persuaded by the appellant's argument. The ministry, not the appellant, is in the best position to assess whether its own economic and financial interests require protection by applying the exemptions in sections 18(1) to specific information in the agreements. Moreover, it is evident from the appellant's submissions that its decision to appeal the ministry's decision to disclose some parts of the agreements is fundamentally about protecting its own interests, not the economic and financial interests of government. In my view, the circumstances in this appeal do not constitute one of the rare instances in which it would be appropriate to allow a third party to raise an exemption that is designed to protect the government's own interests.

[58] In short, I find that the appellant cannot claim sections 18(1)(c) and (d) for the information at issue in the agreements, and the ministry is not required to exercise its discretion to extend these exemptions to such information.

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

[59] The appellant objects to the ministry's decision to disclose the names, titles and signatures of the drug manufacturer representatives who signed the agreements with the Ontario government, and the name and signature of a witness who signed one agreement. It submits that such information constitutes the personal information of these individuals and should therefore be found exempt under the mandatory personal privacy exemption in section 21(1) of *FIPPA*.

[60] However, section 21(1) only applies to personal information, not to information that identifies an individual in a business, professional or official capacity. Consequently, it must be determined whether the names, titles and signatures of the drug manufacturer representatives and the name and signature of a witness qualify as the personal information of these individuals. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,

> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[61] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[16]

[62] However, section 2(3) of *FIPPA* excludes specific information from the definition of personal information. It states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[63] In my view, the names and titles of the drug manufacturer's representatives clearly fit within section 2(3), because this information identifies these individuals only in a business or professional capacity. Consequently, I find that this information is business or professional information relating to these individuals, not personal information, and it cannot, therefore, qualify for exemption under the personal privacy exemption in section 21(1).

[64] The name of a witness who signed one agreement does not appear with an accompanying job title or position. In addition, neither the ministry nor the appellant provided any additional information about this individual in their representations. However, given the confidentiality that the appellant ascribes to the agreements, particularly with respect to the pricing information, it is highly unlikely that it would consent to any random individual witnessing the execution of the agreements in his or her personal capacity.

[65] In my view, this witness was acting in a business or professional capacity, not a personal capacity. I find that the witness's name fits within section 2(3) and is business

---

[16] Order 11.

or professional information relating to this individual, not personal information. This individual's name cannot, therefore, qualify for exemption under the personal privacy exemption in section 21(1).

[66] The IPC has found that whether a signature is personal information depends on the context in which it appears. In cases where the signature is contained on records created in a business, professional or official context, it is generally not "about the individual" in a personal sense, and would not normally fall within the scope of the definition.[17]

[67] The drug manufacturer's representatives and the witness signed the agreements in a business or professional capacity, not a personal capacity. In such circumstances, I find that these signatures are their business or professional information, not personal information, and it cannot, therefore, qualify for exemption under the personal privacy exemption in section 21(1).

[68] The appellant further submits that the names, titles and signatures of the drug manufacturer's representatives and the name and signature of a witness should not disclosed until the ministry has notified these individuals under section 28(1)(b) of *FIPPA*. This provision states:

> Before a head grants a request for access to a record,
>
> > 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.

[69] Under section 50(3), the IPC also has the discretion to notify a person with an interest in the appeal.

[70] I am not persuaded that the notification requested by the appellant is required for two reasons. First, an institution is only required to notify an individual under section 28(1)(b) if the information in a record is "personal information," as that term is defined in section 2(1). Consequently, section 28(1)(b) does not require an institution to notify an individual if the information relating to an individual in a record does not fall within the definition of "personal information."

[71] As noted above, the names and titles of the drug manufacturer representatives and the name of the witness fall squarely within section 2(3), which excludes such

[17] Order MO-1194.

information from the definition of "personal information" in section 2(1). Moreover, these individuals wrote their signatures in the agreements in a business or professional capacity, not a personal capacity. In such circumstances, the information relating to these individuals is clearly business or professional information, not personal information, and hence notification under section 28(1)(b) is not required.

[72] Second, the adjudicator previously assigned to this appeal issued a notice of inquiry to the appellant's external legal counsel and invited him to submit representations on various issues, including whether the records contain "personal information" as defined in section 2(1) and whether section 2(3) applies to specific information in the agreements. The appellant's legal counsel submitted representations, including on whether the names, titles and signatures of the appellant's representatives constitute their personal information. In my view, given that these individuals are executives or employees of the appellant, the notification to the appellant's legal counsel, which took place during the inquiry process, was sufficient to meet fair procedure requirements.

E. Is some information in the records not responsive to the request?

[73] The appellant objects to the ministry's decision to disclose some information in the agreements because it submits that this information is not responsive to the request. This information includes the date of a previous arrangement, which appears more than once in the agreements.

[74] The IPC has found in previous orders that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[18] To be considered responsive to the request, records must "reasonably relate" to the request.[19]

[75] The appellant submits that any references to the date of a previous arrangement constitute information that is not responsive to the request and it should be severed.

[76] In determining whether this information is responsive to the request, it is worthwhile examining the wording of the request. The requester asked for access to the following records:

> Agreements or arrangements (formal or informal) between [a named drug company] and the [ministry] and/or the Ontario Public Drugs Program and/or the Minister, Deputy Minister, Assistant Deputy Minister and [EO] or others regarding [a named drug].

[18] Orders P-134 and P-880.
[19] Orders P-880 and PO-2661.

[77] I note that the request is clearly for the "agreements or arrangements" regarding a particular drug. There is no suggestion in this wording that the requester is not seeking specific information that may appear in the agreements, such as the date of a previous arrangement. In such circumstances, I find that this information reasonably relates to the request and is responsive. As a result, it cannot be severed from the agreements.

ORDER:

1. I uphold the ministry's decision to disclose parts of the agreements to the requester.

2. I order the ministry to disclose a severed copy of the agreements to the requester no later than **April 9, 2013**, but not earlier than **April 4, 2013**.

3. The ministry's decision to withhold parts of the agreements, including specific pricing information for the drug in dollar amounts and a formula for calculating a particular pricing concept, was not appealed by the requester. Consequently, I reiterate that the ministry must not disclose this information to the requester. To be clear, all of the yellow highlighted information in the copy of the agreements that the ministry sent to the IPC must be severed out and withheld from disclosure.

4. To verify compliance with the terms of this order, I reserve the right to require the ministry to send me a copy of the severed agreements that it discloses to the requester under order provision 2.

Original signed by: February 28, 2013
Colin Bhattacharjee
Adjudicator