Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3176

Appeals PA10-331, PA10-182, PA10-183, PA10-186, PA10-187, PA10-188, PA10-189, PA10-190, PA10-191, PA10-192, PA10-193, PA10-194, PA10-195, PA10-196, PA10-197, PA10-198, PA10-199, PA10-200, PA10-201, PA10-202, PA10-203, PA10-204, PA10-205, PA10-221 and PA11-46

Ministry of Health and Long-Term Care

March 8, 2013

Summary: An individual sought access to records relating to agreements between the Ministry of Health and Long-Term Care and drug manufacturers about the pricing and listing of drug products on Ontario's Formulary. Access was sought to the same information disclosed as a result of three prior orders: Order PO-2863, PO-2864 and PO-2865. The ministry denied access to some information and decided to disclose other information. The requester filed an appeal about the denial of access and twenty-four drug manufacturers filed appeals about the decision to disclose parts of the records. In this decision, the adjudicator upholds the decision of the ministry.

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

Orders and Investigation Reports Considered: Orders PO-2863, PO-2864, PO-2865, PO-3032, PO-1813, *British Columbia Hydro and Power Authority, Re*, 1994 CanLII 1432 (B.C.I.P.C.); *Calgary Regional Health Authority*, Order 2000-005, Review Number 1720, June 9, 2000 (Alberta: Information and Privacy Commissioner), *Attorney General Health Services Contracts, Re*, 2000 CanLII 14389 (B.C.I.P.C.).

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, *Apotex Inc. v. Ontario Public Dugs Program,* 2008 CanLII 39429 (Ont.Div.Ct).

INTRODUCTION:

[1] Through the Ontario Drug Benefit Program (ODBP), the ministry provides coverage for most of the cost of over 3,800 prescription drugs for Ontario residents who qualify for benefits under the *Ontario Drug Benefits Act* (ODBA). Eligible individuals include people over 65, residents of long-term care homes and homes for special care, people who receive professional home care services, people who qualify under the Trillium Drug Program, and individuals on social assistance. In 2010/2011, this group consisted of about 2.6 million people, and the ODBP reimbursed over 123 million claims. The allocated expenditures for the ODBP for 2011/2012 amount to about $4.4 billion.

[2] Under the *Transparent Drug System for Patients Act, 2006*, (Bill 102) which amended the ODBA, the Executive Officer (EO) of the ODBP is empowered to, among other things, keep, maintain and publish a Formulary of drug products designated as benefits under the ODBP, and to negotiate pricing agreements for drugs that are listed on the Formulary as benefits under the ODBP.

[3] Although not specifically referred to in the representations, a review of the ministry's website indicates that it maintains an electronic version of the Formulary which lists the drug products covered by the ODBP, their manufacturers, the nature of the listing (for example, general benefit or limited use), the drug benefit price and notes about therapeutic uses of the drug, amongst other things.

[4] Based on the submissions and records, it appears that there are two primary types of agreements between drug manufacturers and the ministry regarding listing of products on the Formulary. The first type applied to drugs which were listed on the Formulary at the time Bill 102 came into effect, and are referred to as pricing agreements. These agreements resulted in increases to the Formulary prices, in return for rebates from the drug manufacturers to the ministry. The second type of agreements is referred to as Product Listing Agreements (PLAs, or simply listing agreements). These agreements lead to a new listing for a drug product. Although, in its overview, the ministry refers specifically to the negotiation of "volume discounts", the particular terms of a listing and pricing agreement could include another kind of financial benefit to the ministry. As described in the non-confidential submissions of one company, in return for having a new drug product listed, a drug manufacturer could agree to a price volume discount, a drug utilization agreement, a risk sharing agreement, or several different provisions.

[5] The records at issue in these appeals relate to the pricing and listing agreements described above. Some of them deal with both types of agreements; some only with listing agreements.

[6] The purpose of these agreements is to generate government cost-savings and to obtain value for money in respect of drug products that are listed as benefits under the ODBP. Pursuant to these agreements, the effective price paid by the ministry under the ODBP program is lower than the published Formulary price (the "drug benefit price"). The Formulary price reflects what a pharmacist would pay if purchasing the listed drug from the manufacturer, and the amount that the ministry reimburses the pharmacist for the cost of the drug. But the effective price to the ministry is reduced by virtue of payments made by manufacturers to the ministry for the drug, negotiated by the EO in listing and pricing agreements.

[7] In general, only drugs that are listed on publicly funded drug plan formularies, such as the ODB Formulary, are widely prescribed to patients, and manufacturers are thus willing to negotiate and enter into listing and pricing agreements with the EO, albeit on certain conditions.

BACKGROUND OF THE APPEALS

[8] Records created in connection with the ODBP have been the subject of a number of requests under the *Act*. In January of 2010, this office issued Orders PO-2863, PO-2864 and PO-2865 in which certain records or parts of records were found to be exempt from disclosure, and other information in the records at issue was ordered disclosed. Following from the orders, the ministry disclosed the records, in some cases pursuant to additional access decisions. Generally, the information disclosed related to drug products on the Formulary, identified those which were the subject of listing or conditional listing agreements, drug manufacturers that had entered into pricing agreements, the ministry's template agreements, and payments made by the manufacturers to the ministry.

[9] By notice of application to the Divisional Court dated March 26, 2010, an industry association (Canada's Research-based Pharmaceutical Companies, or "Rx&D") and numerous drug manufacturers initiated a judicial review of those orders.

[10] The requester in the appeals before me seeks access to the same information the ministry disclosed following Orders PO-2863, PO-2864 and PO-2865.

[11] Before issuing its decision on the request, the ministry notified a number of drug manufacturers whose interests may be affected, and provided them with an opportunity to make submissions on potential disclosure of the records. The ministry's decision, dated June 14, 2010, granted access in part to the records requested. The decision letter sent to the drug manufacturers stated, among other things:

> Some information will be severed from the records under subsection 18(1)(c) and (d) (Economic and other interests of Ontario), in keeping with the Ministry's original decisions in respect of the records at issue. However, based on your representations, the Ministry will also be severing the records in part under subsection 17(1)(a) and (c) of the *Act* (Third party proprietary information).
>
> The information severed will be the same information and/or financially specific proprietary information which was severed in the access requests which led to Orders. The remaining information and records will be released.
>
> While the Ministry has given careful and thorough consideration to your representations, it is the ministry's view that the subsection 17(1) exemption, as interpreted and applied by the IPC, does not apply to the records in their entirety; not all the information contained in the records are subject to this exemption.

[12] The ministry's decision denied access to some of the information ordered disclosed in the above-noted prior orders. Essentially, the ministry re-asserted the application of the section 18(1) exemption to portions of the records, despite the decision of the adjudicator that this exemption did not apply. The ministry also rejected some of the submissions made by the drug manufacturers about the application of the section 17(1) (third party information) exemption, deciding to disclose some information to which the drug manufacturers believe this exemption applies. The ministry's decision led to two types of appeals. The requester filed an appeal regarding the decision to deny access to some of the information ordered disclosed in the prior orders. Further, twenty-four affected parties filed third-party appeals over the decision to disclose some of the information. For ease of reference, the requester will be referred to in this order as "the appellant" and the affected parties as the drug manufacturers or companies.

Processing of these Appeals

[13] During mediation, certain issues were clarified or narrowed, and the ministry also issued a supplementary decision on March 11, 2011. It is unnecessary to describe these developments in detail. The appellant confirmed that he does not seek access to information found exempt in the three prior orders, or information severed under sections 13(1) (advice and recommendations) or 21(1) (personal privacy). At the conclusion of mediation, the records remaining at issue are as described below, under "RECORDS". As mediation did not resolve all issues, these appeals were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry.

[14] During the inquiry into these appeals, this office invited representations from the ministry, the drug manufacturers who appealed and from other drug manufacturers which may have an interest in the records. Twenty-eight companies submitted representations, as well as the ministry.

[15] It should be noted that during the course of these appeals, this office issued Order PO-3032, dealing with a request for access to the same type of records at issue in Order PO-2865. Both orders related to summaries of payments made by drug manufacturers to the ministry under the ODBP, with the former covering records from April 2008 to February 2010 and the latter covering records from October 2006 to April 2008. In Order PO-2865 (issued in January 2010), the adjudicator ordered disclosure of the payment amounts. In Order PO-3032 (issued in January 2012), dealing with similar information, the adjudicator found the payment amounts exempt from disclosure under sections 18(1)(c) and (d). In these appeals, therefore, the parties were specifically referred to Order PO-3032 and asked to consider the findings in that order in making their representations.

[16] After reviewing the material before me, I decided to seek further representations from the ministry in response to some of those from the drug manufacturers on the application of section 18(1), and the ministry provided additional representations.

[17] The non-confidential portions of the ministry's initial and additional representations were shared with the appellant, who was also provided with a summary of the drug manufacturers' representations. The appellant was invited to submit representations in response and has chosen not to.

[18] In this order I uphold the ministry's decision. In particular, I reach the following conclusions:

- The payment amounts ordered to be disclosed in Order PO-2865 are exempt under sections 18(1)(c) and (d);
- Some information ordered disclosed in Order PO-2864 is exempt under sections 18(c) and (d);
- The drug manufacturers are not entitled to raise and rely on sections 18(1)(c) and (d) with respect to information for which the ministry did not apply this exemption;
- The remaining information in the records is not exempt under sections 17(1)(a), (b) or (c); and
- The non-exempt information in the records is ordered disclosed.

[19] Additional findings on preliminary and other issues are set out in the discussion below.

RECORDS:

[20] None of the following records remaining in dispute have been disclosed to the appellant. The "Release?" column in the charts below refers to the ministry's access decision(s).

From Order PO-2863:

Description of Record	Release?	Exemptions at issue
Record 1 Template for Pricing Agreement (MOH Item #1)	In part	Sections 17(1)(a), (b) and (c).
Record 2 Template for Listing Agreement (MOH Item #2)	In part	Sections 17(1)(a), (b) and (c).
Record 4 Summary Report (MOH Item #5a)	In part	Sections 17(1)(a), (b) and (c).
Record 5 Deliverables Report (MOH Item #5b)	In part	Sections 17(1)(a), (b) and (c).
Clinical Listing Criteria (MOH Item #5c) Not addressed in Order since the MOH disclosed it in full	Yes, with late exemption claim	Sections 17(1)(a), (b) and (c) and 18(1)(c) and (d) (raised late).

From Order PO-2864:

Description of Record	Release?	Exemptions at issue
Record 1 Summary Tracking Sheet	Yes, with late exemption claim	Sections 17(1)(a), (b) and (c) and 18(1)(c) and (d) (raised late).
Record 2 Excerpt from slide presentation – Summary of Current Listing Agreements	In part	Sections 17(1)(a), (b) and (c) and 18(1)(c) and (d).

Record 3 Summary files by drug manufacturer – 49 sub-records related to 49 manufacturers	In part, with additional late exemption claim	Sections 17(1)(a), (b) and (c) and 18(1)(c) and (d) (raised late).

From Order PO-2865:

Description of Record	Release?	Exemptions at issue
Record 1 Computer generated printouts summarizing invoice dates, payment dates and payment amounts for individual drug manufacturers for the period of October 1, 2006 to April 25, 2008 (Item 1.1-1.47 from MOH Index).	In part	Sections 17(1)(a), (b) and (c) and 18(1)(c) and (d).

PRELIMINARY AND PROCEDURAL ISSUES:

Request for Stay

[21] In their representations, some of the drug manufacturers requested that these appeals be stayed or otherwise held in abeyance pending the outcome of the applications for judicial review of Orders PO-2863, PO-2864 and PO-2865. This argument was also made to the adjudicator in Order PO-3032 who denied the request based on the additional evidence that was placed before him following the disclosures made pursuant to Order PO-2865, which amounted to a change in circumstances.

[22] There is no doubt that the issues in these appeals and the issues before the adjudicator in Orders PO-2863, PO-2864, and PO-2865 overlap. As I have indicated, the appellant has based his request on the records disclosed as a result of those prior orders. The issues in the judicial review application therefore also overlap with those before me, although the extent of the overlap is not clear to me at this stage of those proceedings. The overlap does not in itself, however, lead me to conclude that I should delay my resolution of these appeals pending the court applications.

[23] In these appeals, the ministry relies to a great extent on evidence that was not before the adjudicator in Orders PO-2863, PO-2864 and PO-2865, to support its position on the section 18(1) exemption claim. In addition, this office has invited and received representations which were not before the other adjudicator.

[24] Further, although the court proceedings were commenced in the spring of 2010, they have not proceeded past an Amended Amended Notice of Application and my understanding is that the parties have, through counsel, agreed to hold them in abeyance pending these appeals.

[25] In sum, if I were convinced that the court proceedings were likely to squarely address and provide clear and timely guidance on the issues before me, I might be inclined to delay my order. However, this is not the case and I will therefore proceed with these appeals.

Late application of sections 18(1)(c) and (d) exemption

[26] In its initial representations, the ministry requests leave to raise an additional exemption that was not relied on in its June 2010 decision letter. Specifically, the ministry states that sections 18(1)(c) and (d) exempt certain information contained in Record 1 from Order PO-2864 ("Summary Tracking Sheet"). It states that the purpose of making this additional exemption claim is to ensure consistency with other exemptions claimed by the ministry as part of the present appeal(s) with regard to the other records considered in Order PO-2864 as well as with the position the ministry has taken with respect to this same record in relation to other access to information requests. The ministry made some confidential submissions in support of its position.

[27] In its second set of representations, the ministry submits that sections 18(1)(c) and (d) also apply to additional information in Record 3 from Order PO-2864 (a column heading) and information about a specific drug product in the Record "Conditional Listings – Clinical Conditions/Listing Criteria" (Listing Criteria) from Order PO-2863. It submits that its failure to raise these exemptions earlier was due to an inadvertent oversight, and that the harm to the ministry that would result from disclosure of the information outweighs any prejudice to the appellant resulting from the late raising of the section 18(1) exemptions.

[28] As indicated, the appellant provided no representations in these appeals and so has not responded to this issue.

[29] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the

> appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[30] The purpose of this rule is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. In determining whether to allow an institution to claim a new discretionary exemption claim outside the 35-day period, the adjudicator must also balance the relative prejudice to the ministry and to the appellant (Order PO-1832). The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period (Orders PO-2113 and PO-2331).

[31] In the circumstances before me, I will allow the ministry to rely on the new exemption claim. Although the claim was raised beyond the 35-day period referred to in the *Code*, the appellant has not directed me to any prejudice that would result from permitting it to be made at this stage. In reviewing the records at issue, I also note that the adjudicator in Order PO-2864 upheld the application of the section 18(1) exemption to the same or similar information and I accept that the ministry would be prejudiced by not being able to rely on the exemption with respect to the information at issue in these appeals.

Request that an additional party be notified

[32] One of the drug manufacturers requested that this office notify Rx&D, the industry association, of these appeals, and invite it to make representations on the issues. This office found it unnecessary to do so. Members of this association were directly notified as their interests are potentially affected by the issues in the appeals. Any of these members could have invited the association to intervene if they wished it to provide separate representations. The position of the drug manufacturers on the issues is fully and capably expressed through their own submissions and I see no reason to seek additional submissions from the association.

Responsiveness of a portion of a record

[33] One of the drug manufacturers submits that a portion of Record 1 from Order PO-2864, on the second page, is not responsive to the request. In Order PO-2864, the ministry took the position that the same portion of this Record was not responsive to the request, a position that the adjudicator rejected. Subsequently, the ministry issued an access decision granting access to that portion. As noted, this request seeks access to records that were disclosed as a result of the requests and determinations in Orders PO-2863, PO-2864 and PO-2865. In the circumstances, I find that this portion of Record 1 is encompassed by the request and is thus responsive.

ISSUES:

A. Do the discretionary exemptions relating to "economic and other interests" found in sections 18(1)(c) and (d) apply?

B. Should the ministry's exercise of discretion to deny access under sections 18(1)(c) and (d) be upheld?

C. Do the mandatory exemptions in sections 17(1)(a), (b) and (c) apply?

DISCUSSION:

A. Do the discretionary exemptions relating to "economic and other interests" found in sections 18(1)(c) and (d) apply?

[34] Sections 18(1)(c) and (d) 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;

[35] The purpose of section 18 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*, vol. 2[2] (the Williams Commission Report) provided the rationale for including a "valuable government information" exemption in the *Act*:

> 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 . . .

[36] 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: Orders P-1190 and MO-2233.

[37] 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.[1]

[38] For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[2]

[39] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18. Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[3]

Can the drug manufacturers rely on the section 18(1) exemption?

[40] At the outset, I will deal with the issue of whether the drug manufacturers can rely on the section 18(1) exemption with respect to information for which the ministry did not make such a claim.

[41] Although they do not take a consistent position, some of the drug manufacturers submit that I should apply the section 18(1) exemption more broadly than it has been applied by the ministry, in order to achieve a "rational and coherent result." They submit, among other things, that this office has accepted in prior appeals that disclosure of information that would reveal the volume discount for a particular drug, as well as the other financial and value for money conditions a manufacturer has agreed to give to the ministry, could reasonably be expected to lead to the harms contemplated in sections 18(1)(c) and (d). Therefore, it is submitted, if some of the information in these appeals will disclose the volume discount and other terms and conditions offered to the ministry for a specific drug product, that information should be exempt under section 18(1)(c) and (d) even if the ministry has not claimed the application of the exemption to that information.

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[1] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 1104 (ON CA), [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.).
[2] Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.).
[3] Orders MO-1947 and MO-2363.

[42] Order PO-3032 also dealt with similar submissions by drug manufacturers about the application of the section 18(1) exemption beyond the position taken by the ministry. In paragraphs 29 to 32 of that order, the adjudicator stated:

> As explained above, the 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 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.

[43] I also find that the present circumstances are not a rare exception that would justify the application of the sections 18(1)(c) and (d) exemptions in the manner suggested by the drug manufacturers. The ministry has had the opportunity to consider the views of the drug manufacturers on disclosure of the information, and has apparently concluded that not all of the potential disclosures would result in harm to Ontario's economic or financial interests.

[44] These exemptions are harm-based, and the ministry is in the best position to judge whether the harms described in those provisions could reasonably result from disclosure of the disputed information. It has the discretion to decide that the risk of harm to the province's interests is insufficient to justify applying the exemptions. Indeed, as the exemption is discretionary, the ministry may also choose not to rely on the exemption even in the face of harm.

[45] In this appeal, because of the factual assertions being made by some manufacturers about the degree to which the information in dispute could reveal other information to which the ministry decided to apply section 18(1), I decided to provide the ministry with an additional opportunity to consider the drug manufacturers' views on the application of section 18(1), and provided it with the submissions of several of these companies. For most of this information[4], the ministry confirmed its position not to apply the section 18(1) exemption. From this I infer that it does not agree with the assertions made by these companies about the degree to which the information at issue reveals other information protected by section 18(1).

[46] In the circumstances, as I have indicated, the ministry is entitled to make the decision not to apply the section 18(1) to some information, and I will not consider this exemption in relation to this additional information.

[47] The following discussion relates to information in the records to which the appellant seeks access, and to which the ministry has applied the section 18(1)(c) and (d) exemptions.

Do sections 18(1)(c) and (d) apply to exempt the information withheld by the ministry?

[48] The appellant is not pursuing access to any portions of the records that were found exempt from disclosure in Orders PO-2863, PO-2864 and PO-2865.

[49] In response to the current request, the ministry has decided to withhold some information that had been previously ordered disclosed through those orders. The information to which the ministry has applied sections 18(1)(c) and (d) and which the appellant seeks in these appeals, is:

- Portions of Record 1 from Order PO-2864 (Summary Tracking Sheet), for which I have permitted the ministry to make a late exemption claim;
- Portions of Record 2 from Order PO-2864 (Summary of Current Listing Agreements);
- Portions of Record 1 from PO-2865 (payment information).

[4] See discussion of its additional representations above at para. 27.

[50] As indicated above, in its additional set of submissions, the ministry also seeks to apply section 18(1)(c) and (d) to an additional portion of Record 3 from Order PO-2864 and a portion of the Listing Criteria Record.

[51] With respect to Records 1 and 2 from Order PO-2864, the ministry submits that the severed information reveals the type of agreements negotiated for each of the drug manufacturers listed. Although all of the entries in Record 2 are known to be listing or pricing agreements with particular manufacturers, the severed descriptor in the third column would reveal the particular type of cost benefit arrangement the ministry was able to negotiate for the named drug with the specified manufacturer, thereby disclosing key components of the relevant agreements. This would amount to disclosure of the nature of important negotiated contractual terms, which both parties to the agreements regard as sensitive and highly confidential.

[52] The ministry submits that to the extent that the prior orders dealt with the information at issue, the

> ...findings and factual conclusions...are no longer sustainable and should be reexamined in light of the drug industry's uniform and severe reaction to, as well as the media's analysis of, the impact of the Ministry's disclosure of quarterly volume discount payment information pursuant to Order PO-2865, as well as to the reasoning adopted subsequently by Senior Adjudicator Higgins in the more recent Order PO-3032.

[53] More generally, the ministry submits that the conclusions in PO-2864 should be reevaluated in light of the evidence put forward by the ministry and the drug manufacturers regarding the importance of safeguarding confidential negotiated information in relation to their agreements.

[54] With its representations, the ministry submitted a memo from the EO describing the background context of these appeals, the negotiations between the ministry and the drug manufacturers and the impact of disclosure of the records at issue on the economic interests of the ministry and Ontario.

[55] The EO states that she negotiates a unique pricing agreement with each manufacturer. The discount provided to the ministry by a given manufacturer under the terms of its pricing agreement is strictly confidential, even amongst manufacturers; each manufacturer knows only the terms of its own volume discount pricing arrangement. The EO states that the volume discount and pricing information contained in these agreements is considered by manufacturers to be confidential and proprietary commercial information, and that they have been consistently unwilling to enter into such agreements in the absence of an express assurance of strict confidentiality. Accordingly, each agreement contains a reciprocal contractual requirement to hold the details of each agreement in confidence, as well as a provision

under which the ministry acknowledges and agrees that the manufacturer's pricing information was supplied in confidence, and that its disclosure would reasonably be expected to result in competitive or commercial harm to the manufacturer.

[56] The ministry's intention to treat this information as confidential is reflected in O. Reg. 201/96 (the Regulation) which prescribes the limited information about pricing agreements that may be considered "public", specifically, (1) information about the name of the manufacturer, (2) the subject matter of the agreement, and (3) the fact of entering into the agreement. The EO refers to the Ontario Divisional Court decision in *Apotex Inc. v. Ontario Public Dugs Program*[5] which interprets "subject matter" as used in this Regulation.

[57] With respect to the impact of disclosure on economic and other provincial interests, the EO states that a significant percentage of Ontario's provincial health care costs are spent on drugs, making drug spending the ministry's highest health care cost after hospital services. She states that the reform of the public drug system has led to over $1.5 billion in cost-savings to the province since 2006. Negotiated pricing agreements contributed significantly to these savings. Further, she states, pricing agreements also provide the government with budgetary certainty. Obtaining volume discounts through enforceable and stable pricing agreements is a measure that has helped the ministry and the province achieve certainty with respect to significant budget expenditures.

[58] The EO states that the negotiations and agreements with drug manufacturers would not be possible if they were not given a promise of strict confidentiality in respect of the terms of the agreements and particular the pricing provisions that reflect or reveal volume discount information.

[59] The EO states that the disclosures as a result of Orders PO-2863, PO-2864 and PO-2865 have resulted in manufacturers becoming more reluctant to enter into pricing negotiations. She states that disclosure has prejudiced the ministry's ability to secure savings and ensure price stability through the negotiated agreements and that, in her view, the ministry will not be able to obtain the lowest possible prices for drugs because manufacturers may either refuse to enter into negotiations altogether, or be less willing to offer significant volume discounts.

[60] The EO states that following the disclosures, drug manufacturers have stated in their negotiations that, due to their concerns about the potential disclosure of volume discount information, they are no longer able to provide Ontario with the same price reduction level they had agreed to in previous agreements. Further, she states that since early 2010, drug manufacturers have been submitting product listing proposals that are not directly related to price in an effort to try and bypass having any sensitive

[5] 2008 CanLII 39429.

financial information disclosed through an access request. When this has occurred, it has resulted in product listing agreements becoming more difficult to manage. A price may be proposed with changes to the price in the future, putting more risk on the ministry in making funding decisions.

[61] The EO states that if Ontario is required to disclose confidential information regarding volume discount payment amounts that are derived from pricing agreements, as well as the nature of benefits and specific contractual terms agreed to, this province would be the only jurisdiction in Canada required to do so. The rise in ODBP costs that would inevitably result from a decision ordering the disclosure of sensitive pricing information will have a prejudicial impact on the cost of health care in Ontario and the provincial economy at large. Further it will delay and may, in some cases, even prevent access to funding drug therapies under the ODBP, thereby prejudicing patients.

[62] With respect to the information severed from Record 1 of Order PO-2864 (the subject of a late exemption claim), the ministry provided confidential representations. Although I am unable to describe those representations in detail, the ministry's position is that disclosure of this information would reveal to a knowledgeable individual that an agreement conferred a particular type of benefit on the ministry. The ministry states that disclosure of this information would allow knowledgeable individuals to estimate actual price rebates on a per product basis when coupled with other publicly available sources of information.

[63] In its additional set of representations, the ministry addresses the application of sections 18(1)(c) and (d) to portions of Record 3 from Order PO-2864 and the Listing Criteria Record. It submits that the information in Record 3 would allow for the calculation of volume discounts/rebates and relies on its previous submissions about the effect of disclosure of such information on the economic/financial interests and competitive position of the province. With respect to the Listing Criteria Record, the ministry submits that although the information at issue is not volume discount/rebate information, it does describe a "value for money" consideration, disclosure of which would be tantamount to disclosure of volume discount/rebate information and as such, inconsistent with previous decisions. The ministry relies on the same arguments made above, about the impact of disclosure of this information on the economic and competitive interests of the province.

[64] The appellant provided no submissions in response to the above.

[65] As indicated above, a number of the drug manufacturers provided submissions on the application of sections 18(1)(c) and (d), both to information the ministry decided to exempt under these sections, and to additional information. They also provided extensive submissions on the application of section 17(1). I have found that these companies cannot raise the s. 18(1) exemption independently of the ministry. However, to the extent that their submissions on all issues support the ministry's

assertions as to the impact of disclosure on the negotiations between these parties, those submissions are relevant and helpful to my assessment of this claim.

[66] As a group, the drug manufacturers reiterate the expectations of confidentiality surrounding their negotiations. They refer to the express confidentiality clauses in the agreements, as well as to the Regulation. Their submissions support those of the ministry on the manner in which negotiations are carried out, and the expectations of confidence each party holds.

[67] Several companies submit that Ontario represents only one market of many in which they sell their products, and one payer amongst many. Price referencing by other countries, it is submitted, means that pricing in any jurisdiction is a global issue. If the company's international interests are prejudiced by disclosure of pricing information in Ontario, it may no longer be able to enter into agreements with Ontario, either at all or for the same magnitude of discounts that it has thus far agreed to.

[68] They submitted that it is not a matter only of whether or not manufacturers will be willing to enter into agreements with Ontario, but also whether they will be willing to negotiate the same significant discounts they have thus far been willing to provide. Knowing that competitors and other private and public payers would use the information disclosed as a "baseline" from which to undercut the company or from which to negotiate greater discounts, the company will not be able to supply the information necessary to negotiate such a low baseline. One company refers to evidence that the existence of these agreements pursuant to Bill 102 have in fact reduced Ontario's overall expenditure on drugs.

Decision

Record 1 from Order PO-2864

[69] As noted above, in response to this request, the ministry initially decided to disclose Record 1 from Order PO-2864 in its entirety. In its representations, however, it takes the position that certain specific information in this record is exempt under section 18(1), and I have permitted it to raise this claim.

[70] On my review of the material and submissions before me, I find that this information is covered by the section 18(1) exemption. The information reveals a specific financial term of the agreements between the ministry and drug manufacturers. The same information is also found in Record 3 from Order PO-2864, and in that order, it was found exempt from disclosure. In arriving at this finding the adjudicator stated, with respect to this and other information from the record:

> Based upon my review of the information at issue in Record 3, I find that the disclosure of the information at issue in this record would reveal or

> could result in the revelation of the volume discount amounts paid by drug manufacturers to the Ministry, the method for calculating these payments and the specific details of the financial and value for money conditions negotiated as consideration for the Ministry entering into pricing and listing agreements with drug manufacturers.
>
> Based on my review of the records, I agree with the Ministry that disclosure of the information at issue in this record could reasonably be expected to attract the harms contemplated in sections 18(1)(c) and (d). ...
>
> I find 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, for fear of this information being used by their other public and private sector customers seeking to negotiate similar discounts with the drug manufacturers [Order PO-2786].

[71] Likewise, in these appeals, I am satisfied that disclosure of the information at issue in Record 1 from Order PO-2864 could reasonably be expected to lead to the harms described in sections 18(1)(c) and (d). I accept the submissions of the EO that, following disclosure of this and other financial information through the prior orders, the ministry's ability to secure savings and ensure price stability through the negotiated agreements has been prejudiced, to the detriment of the province's economic and financial interests.

[72] This information is therefore exempt under section 18(1). In the discussion below, I also uphold the ministry's exercise of discretion in deciding to apply this exemption.

Record 2 from Order PO-2864

[73] With respect to Record 2 from Order PO-2864, the information at issue reveals the nature of the financial terms of a pricing or listing agreement between the ministry and a drug manufacturer, in relation to a named drug product. In Order PO-2864, this information was not found exempt. The adjudicator concluded that

> disclosure of the information at issue in Record 2 could not reasonably be expected to seriously prejudice the Ministry's ability to secure savings on prescription drugs by weakening its bargaining position in negotiations with drug manufacturers. The information at issue does not disclose "confidential pricing information" for drug products, which is a concern of the individual drug manufacturers. The information at issue does not disclose either the volume discount amount or the method for calculating

> this amount for specific drug products nor the actual specific details of the financial or "value for money" conditions.

[74] I agree that the information at issue in Record 2 does not disclose "confidential pricing information", volume discount amounts, or the method for calculating this amount for specific drug products. However, it does disclose the particular nature of the financial benefit the ministry obtained with respect to each particular drug product. Further, it is clear that the parties to the agreements view information about the nature of the particular benefit associated with a particular drug to be covered by the confidentiality provisions of their agreements as well as the terms of the Regulation. In the ministry's submission, this information reveals the "nature of benefits and specific contractual terms" that no other jurisdiction in Canada is required to disclose.

[75] As indicated above, the ministry referred me to the decision in *Apotex*, in which the Divisional Court interpreted the confidentiality provisions of the Regulation. In that court proceeding, Apotex Inc. sought judicial review of the EO's decision to refuse production of an agreement with another drug manufacturer. In upholding the decision of the EO, the court stated

> Further, there was no breach by the EO in refusing to provide Apotex with a copy of the agreement with Servier. The agreement contains a confidentiality clause and it is contemplated by the regulation that this would be the case.
>
> The EO's position is that "subject matter" [as set out in the Regulation] refers to general topics such as "Conditional Listing Agreement for product 'x'" and does not extend to "confidential pricing information or confidential information relating to the terms and conditions of [the] agreement". In my view, that interpretation is consistent with the legislative scheme. [para.18]

[76] The court's decision appears to limit "subject matter", as used in the Regulation, to information that a drug is covered by a listing (or conditional listing) or pricing agreement. The information in Record 2 goes beyond that, and identifies whether the listing or pricing agreement was based on a volume discount, or another type of cost benefit to the ministry. The non-confidential representations of some of the parties describe how the benefits obtained by the ministry could include volume discounts, rebates, lump sum payments, or other. The representations establish that each of these benefits is negotiated separately and confidentially between the ministry and a manufacturer.

[77] Although the fact that the ministry negotiates volume discounts and other conditions with drug manufacturers is public information, I have no evidence that the particular type of financial condition attached to the listing of a particular drug is public.

I accept the submissions that the parties believe this information to be covered by the confidentiality provisions of their agreements, based on their understanding of the provisions of the Regulation.

[78] Most significantly, and in contrast to the situation before the adjudicator in Order PO-2864, I also accept the evidence submitted by the ministry that disclosure of this information has, in combination with the other information disclosed, prejudiced its ability to negotiate agreements to secure savings and ensure price stability, to the detriment of the province's economic and financial interests.

[79] I note that in Order PO-3032, this office rejected the argument that information revealing the "type of agreement" is confidential, as the EO has the authority under the Regulation to disclose the "subject-matter" of agreements. However, that finding was made in the context of considering the application of section 17(1) to another type of record, and the adjudicator found in any event that the information did not meet the test for exemption on other grounds.

[80] On my review of the representations and material before me, I therefore conclude the information in Record 2 from Order PO-2864 identifying the type of agreement pertaining to the listed drugs and, specifically, the type of financial or other benefit obtained by the ministry through the agreement, is exempt under sections 18(c) and (d).

[81] Below, I also uphold the ministry's exercise of discretion in deciding to apply this exemption.

Record 3 from Order PO-2864

[82] I accept that the ministry's failure to redact a column heading from this Record was inadvertent, as this information had been redacted from the same Record in Order PO-2864, and the adjudicator upheld the application of the section 18(1) exemption to it. This information contains a formula which would allow for the calculation of volume discounts/rebates.

[83] For the same reasons as above, as well as those given in Order PO-2864, I find this information to be exempt under sections 18(c) and (d). In the discussion below, I also uphold the ministry's exercise of discretion in deciding to apply this exemption.

Record 1 from Order PO-2865

[84] This record consists of one page summaries for each of 47 different drug manufacturers showing payments invoiced by the ministry and made by the manufacturers between October 1, 2006 and April 25, 2008. The names of the manufacturers are shown along with columns showing invoice dates, amounts paid and

payment dates. The information about amounts paid will be referred to here as the "quarterly payment information".

[85] In the access decision giving rise to Order PO-2865, the ministry disclosed all of the information in the record, except for the quarterly payment information. The adjudicator did not accept the ministry's position that sections 18(1)(c) and (d) applied to this information, and directed disclosure of the quarterly payment information. The ministry subsequently disclosed this information. In Order PO-3032, the Senior Adjudicator reviewed evidence provided by the ministry about the effect of this disclosure on the subsequent negotiation of agreements under the ODBP, and found that sections 18(c) and (d) exempted similar quarterly payment information from disclosure, for a different time period.

[86] In the appeals before me the ministry claims, as it did in Order PO-2865, that sections 18(1)(c) and (d) apply to the quarterly payment information. As indicated above, the ministry submits that the conclusions in PO-2865 are no longer sustainable in light of the demonstrated effects of disclosure, as well as the findings in Order PO-3032. As in Order PO-3032, the ministry submitted a memo from the EO documenting the events following disclosure of this information.

[87] On my review of that memo and the submissions before me, I am satisfied that disclosure of the quarterly payment information in Record 1 from PO-2865 could reasonably be expected to prejudice the economic interests of the ministry and be injurious to the financial interests of the government of Ontario. In arriving at this conclusion, I agree with the findings in Order PO-3032, considering similar evidence, that

> ... the disclosure pursuant to Order PO-2865 "has in fact resulted in manufacturers becoming more reluctant to enter into pricing negotiations to achieve the kind of savings described above."
>
> I am satisfied that the ministry has provided credible, detailed and convincing evidence that the disclosure of this same type of information pursuant to Order PO-2865 has had a negative impact on the Executive Officer's efforts to negotiate discounts with drug manufacturers, and I am also satisfied that, given the costs involved, further disclosures of this type of information could reasonably be expected to cause not just harm, but significant harm, to the economic interests of the ministry and the financial interests of the government of Ontario.
>
> With respect to the appellant's arguments that the drug manufacturers would still do business with Ontario even if the information is disclosed, that may be true but it is hardly the point. The issue here is not a continuing business relationship, but the ability to continue to effectively

> negotiate discount pricing. I am satisfied that disclosure could reasonably be expected to interfere with that process, and as a consequence, there is a reasonable expectation of prejudice to the economic interests of the ministry and injury to the financial interests of the government of Ontario. [paras.51-53]

[88] I therefore find the quarterly payment amounts in Record 1 from PO-2865 exempt under sections 18(1)(c) and (d). Below, I uphold the ministry's exercise of discretion in deciding to apply this exemption.

Listing Criteria Record

[89] I agree with the ministry that the information it proposes to sever from this Record (on page 3 of 6) contains information about a particular drug which reveals a "value for money" consideration provided by a drug manufacturer to the ministry. Disclosure of this information could, similar to disclosure of volume discount information, reasonably be expected to lead to the harms described in sections 18(1)(c) and (d). I find this information exempt from disclosure and, for the reasons given below, I uphold the ministry's exercise of discretion in deciding to apply the exemption.

B. Should the ministry's exercise of discretion be upheld?

[90] In conclusion, I find the information the ministry severed from Records 1, 2 and 3 from Order PO-2864, Record 1 from Order PO-2865 and the Listing Conditions Record to be exempt from disclosure under sections 18(1)(c) and (d).

[91] The section 18(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[92] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[93] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[94] The ministry submits that in exercising discretion under section 18(1), the EO took into account the uniformly negative response of the affected third parties and the reasons articulated for their concern in relation to the original disclosure of this information pursuant to Orders PO-2864 and PO-2865, as well as more recent responses. It also submits that the EO considered the fact that it is primarily private financial interests, namely the affected manufacturers' competitors and potential customers, who would be most directly served by disclosure. On the other hand, it submits, the public's interests in receiving the lowest possible drug costs is protected by the non-disclosure of this kind of confidential information regarding pricing and listing agreements and associated volume discounts, to the extent that such confidentiality will encourage manufacturers to continue to enter into similar agreements that benefit the public in the future.

[95] Based on the submissions, I find no error in the ministry's exercise of discretion and I uphold its decision to apply section 18(1) to the information at issue.

[96] It remains for me to consider the application of the section 17(1) exemption.

C. Do sections 17(1)(a), (b) or (c) apply to the information in the records?

Background to section 17(1) analysis

[97] The ministry applied section 18(1) to withhold some information in the records. For other information, it applied both sections 17(1) and 18(1). For one portion, on page 9 of 13 in Record 4 from PO-2863, it applied only the section 17(1) exemption.

[98] The drug manufacturers agree with the ministry's decision to apply section 17(1) where it has, but some submit that it should also apply to additional information in the records.

[99] It is unnecessary for me to come to a decision about whether section 17(1) would apply to information I have found exempt under section 18(1). It is also unnecessary to consider this exemption in relation to information the appellant does not seek (ie. information found exempt in Orders PO-2863, PO-2864 and PO-2865). The following discussion therefore relates only to information that the appellant seeks, the ministry decided to disclose, and to which the companies (and in the case of the portion in Record 4 from Order PO-2863, the ministry) assert section 17(1) applies.

[100] Sections 17(1)(a), (b) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[101] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[6] 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.[7]

[102] 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.

[103] Different manufacturers take different positions on the application of the section 17(1) exemption. Some submit that section 17(1) applies to all of the information in all of the records at issue. Others object to disclosure of specific information in the records. I will deal with the records in turn as necessary.

[104] The ministry does not make submissions on the application of the section 17(1) exemption.

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

Part 1: type of information

[105] "Commercial information" has been defined as information that relates solely to the buying, selling or exchange of merchandise or services. [Order P-493] The drug manufacturers submit, and I accept, that most of the information at issue qualifies as commercial information in that it relates to the buying and selling of drug products. Some of the information in the record "Clinical Listing Criteria" is not clearly commercial information, in that it is about the clinical use of certain drug products, but I will assume without deciding that it also meets this part of the test for exemption under section 17(1).

Part 2: supplied in confidence

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

[107] 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 has been explained as having its basis in the purpose of section 17(1), which is to protect the "informational assets" of third parties. In this context and having regard to the plain meaning of the words used in section 17(1), this office has not generally accepted that the terms of a contract constitute information "supplied" by a third party to an institution.

[108] Exceptions to this general rule have been described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[10]

[109] Several of the drug manufacturers refer to decisions of the British Columbia and Alberta Information and Privacy Commissioners that consider similar legislation in those

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[8] Order MO-1706.
[9] Orders PO-2020, PO-2043.
[10] Orders MO-1706, PO-2384, PO-2435; and Order PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, 2008 CanLii 45005 (Div. Ct.).

jurisdictions, and their application to negotiated agreements[11]. It is not clear to me whether it is being suggested that the approach in those provinces differs significantly from the principles I have described above; all jurisdictions recognize that even terms of a contract may be exempt where they reveal or could be used to infer proprietary information.

[110] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[12]

[111] It should be noted that no party has argued that the provisions of the Regulation, or of the contract, override the rights to access under the *Act*. There is no suggestion that those confidentiality provisions amount to the type of legislated confidentiality provision to which section 67 of the *Act* gives precedence.[13] I do not suggest that the parties entered into their arrangements with an unreasonable expectation of confidentiality, but simply indicate that the rights under the *Act* apply to the information at issue despite those contractual and regulatory provisions. Whatever the parties may have agreed to between themselves, and despite the provisions of the Regulation, I must give effect to the rights to access under the *Act*. Those rights are, of course, subject to the exemptions under the *Act*, applied on a case by case basis and in accordance with the requirements of a particular exemption. Among other things, the exemption in section 17(1) is, unlike the confidentiality provisions in the parties' contracts, harm-based.

[112] In any event, as described above, the confidentiality provisions of the contracts and Regulation do not prevent the EO from making public information about the fact that she has entered into a listing agreement with a named manufacturer, for a named drug.[14]

[113] With the above context and principles in mind, I will consider whether the information at issue was "supplied in confidence" within the meaning of the section 17(1) exemption.

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[11] *British Columbia Hydro and Power Authority, Re*, 1994 CanLII 1432 (B.C.I.P.C.); *Calgary Regional Health Authority*, Order 2000-005, Review Number 1720, June 9, 2000 (Alberta: Information and Privacy Commissioner).

[12] Order PO-2020.

[13] This office recently found that the confidentiality provision found in the Regulation does not prevail over the *Act*: Order PO-3174.

[14] See discussion of *Apotex*, above.

Records 1 and 2 from Order PO-2863

[114] Records 1 and 2 from Order PO-2863 consist of a template pricing and listing agreement. As they are templates, they do not contain the names of any third parties, their drug products or specifically negotiated terms. The appellant is not seeking disclosure of the portion in Schedule "B" to each agreement that sets out the formula for calculation of a volume discount, and which was found exempt under section 18(1) in Order PO-2863.

[115] Although these records were identified as being in issue, most of the drug manufacturers participating in these appeals did not make submissions on the application of section 17(1) to the remainder of the information in these records.

[116] While I accept, based on my review of the records, that they contain commercial information, I have no evidence that they reveal information supplied in confidence by a third party, disclosure of which could reasonably be expected to result in the specified harms. As template agreements, they are the ministry's product. The section 17(1) exemption therefore does not apply and I uphold the ministry's decision to disclose these records in part.

[117] I should note that one drug manufacturer has expressed a concern that if these template documents are disclosed electronically, they should be carefully reviewed to ensure that no manufacturer-specific information is inadvertently included. It suggests, to this end, that written copies, and not electronic copies, be used for the purpose of disclosure. I point this out for the ministry's consideration.

Record 4 from Order PO-2863

[118] Record 4 from Order PO-2863 is a chart listing drug products and their manufacturers, and providing certain information about conditions associated with the listing of a drug on the Formulary.

[119] The ministry has applied the exemptions in sections 13(1), 17(1), 18(1) and 21(1) to portions of this record. The appellant is not seeking disclosure of the portions severed under sections 13, 18 or 21, but does seek access to the portion the ministry withheld under section 17(1) (on p.9 of 13).

[120] In addition, some of the affected parties submitted that the section 17(1) exemption applies to information about their products in this record.

[121] The drug manufacturer [Company A] whose drug product is the subject of the entry on page 9 of 13 made submissions on the application of section 17(1) to the information in this record. It submits, in particular, that volume discount formulas and discount information are very sensitive commercial information. I note that this

information was found in Order PO-2863 to be exempt under section 18(1), and the appellant does not seek access to it in his appeal. It is therefore not at issue here.

[122] This drug manufacturer does not specifically address the other information about its drug products found in this record that is unrelated to volume discount information.

[123] I note that in this manufacturer's third party appeal, it raises concerns over pricing information and aggregate payment information, both of which are not at issue here.

[124] I find that there is no basis to conclude that the portion of page 9 of 13, for which the ministry has claimed the section 17(1) exemption only, meets the elements of the three-part test for exemption. While I accept that the information is commercial information, I have no basis to conclude that it was supplied in confidence or that its disclosure would result in the harms described in that section.

[125] This information therefore does not meet the test for exemption under section 17(1), and I will order it to be disclosed.

[126] Another drug manufacturer [Company B] making representations about the application of section 17(1) to this record submitted that information about the listing of a particular product under a particular program reveals information that could be used by other third-party reimbursers to seek similar terms for Formulary access, and asserts that the entire document must be withheld from release. I am unable to provide more detail about its submission without revealing the nature of the information at issue. It is not apparent whether these submissions relate to this record specifically, or to Record 5 from Order PO-2863. In either event, I do not accept the submission that section 17(1) applies to exempt this information from disclosure.

[127] There is nothing in the information the ministry has decided to disclose in Record 4 that reveals anything specific about the terms a particular manufacturer has agreed to in order to secure a listing, much less the kind of proprietary third party information protected by the "inferred disclosure" and "immutability" concepts. Manufacturers understand that the EO may disclose the fact that she has entered into conditional listing agreement with them in relation to a particular drug. It is well-known that the purpose of listing and pricing agreements is to generate government cost-savings through the negotiation of volume discounts and other financial benefits. The fact alone that a particular manufacturer has entered into a conditional listing agreement for the purpose of having a drug product listed does not reveal information "supplied in confidence" for the purposes of section 17(1).

[128] Finally, one particular manufacturer [Company C] objects to the disclosure of any information in this record that identifies drug products covered by an agreement with the ministry. It submits that the prior disclosure of quarterly payment information

under Order PO-2865 would, when combined with the information in this record, allow for the calculation of the volume discount applicable to a particular drug product. This manufacturer submits that such disclosure will therefore jeopardize its bargaining position vis-à-vis other payers, including the ministry, other provinces and other purchasers of product.

[129] On my review of the records, the previous disclosures and the representations, I do not find that disclosure of the information in Record 4 that this affected party seeks to withhold could reasonably lead to that result. From my review, information that has been disclosed through previous requests did not identify specific drug products for which quarterly payments were being made, and did not distinguish between the products on the Conditional Listings chart and other products. Even assuming that the information about volume discounts would be in itself exempt under section 17(1), I have not been provided with sufficient evidence establishing a link between disclosure of the information in Record 4, and revelation of that other information.

[130] In conclusion, I uphold the decision of the ministry to disclose this record in part, but do not uphold the decision to exempt information severed from page 9 of 13 under section 17(1).

Record 5 from Order PO-2863

[131] This record is a chart listing drug products, their manufacturers, the dates of conditional listing agreements and listing dates and providing information about fiscal and other deliverables. In its decision, the ministry claims the application of the section 18(1) exemption to portions of the record, specifically, information under the column "deliverables" as well as other specific entries. In Order PO-2863, the adjudicator upheld the ministry's application of the section 18(1) exemption to those portions, and the appellant does not seek disclosure of that information.

[132] Although this record was generally identified by the parties as raising an issue under section 17(1), most of the drug manufacturers have provided no representations on the application of that exemption to this record. Some companies explicitly state their agreement with the position taken by the ministry and do not seek further severances.

[133] As indicated above in my discussion of Record 4, one company [Company B] objects to the release of information about the listing of a particular product under a particular program. For the same reasons given above, I find that section 17(1) does not exempt this information from disclosure.

[134] ne company [Company D] submits that, in addition to the information the ministry withheld, information under the heading "timeframe" is covered by the s. 17(1) exemption. In its submission, disclosure would increase the information available to the

requester to infer the unit prices of individual products. No specific detail was provided about how this information can be used in this manner although I can surmise that, as with other submissions made on other records, the concern is about how such information could be used in conjunction with the payment information disclosed in Record 1 from Order PO-2865. On my review of the information in the records, I am not satisfied that any accurate inferences could be made about unit pricing for individual drug products, based on the information in this column. The information at issue here is similar to certain information in Record 1 from Order PO-2865 (payment dates, invoice dates) (discussed below) and I make the same finding in both cases.

[135] The information about time frames was not in itself "supplied" by any third party, as from the context it is apparent that it represents negotiated terms. Nor can this information be used to reasonably infer proprietary business information. It therefore does not meet the second part of the test for exemption under section 17(1).

[136] I accordingly uphold the decision of the ministry to disclose this record, in part.

Listing Criteria Record

[137] This is a chart that was disclosed in full as a result of the request described in Order PO-2863. It is therefore not addressed in that order. The chart lists a number of drug products and their manufacturer and contains a column headed "Therapeutic Notes". The information in this column is primarily about the clinical use of the drug, although in a few instances there is additional information about the terms of the listing. Above, I have found one portion, relating to a specific drug, exempt under section 18(1) and it is unnecessary to consider whether it is also exempt under section 17(1).

[138] Several of the manufacturers object to release of the information in this column, submitting that "[i]f a manufacturer agrees to clinical listing criteria as a condition to entering a PLA [Product Listing Agreement], those listing criteria in that context represent a specific term and condition of the PLA."

[139] Some manufacturers submit that the names of their drug products in this chart should be withheld, as they identify products subject to listing agreements. Consistent with its position on other records, Company C submits that this information can be used, in conjunction with information already disclosed through past requests, to calculate the volume discount applicable to its products.

[140] Some companies do not object to disclosure of their information in this record.

[141] I am not convinced that the information in this chart was "supplied in confidence" within the meaning of section 17(1). If the clinical uses of a drug product were part of the terms of its conditional listing, then this information was "negotiated"

rather than "supplied". Further, it is apparent that information about the therapeutic uses of a drug product will be known to others, such as the doctors and patients using these drug products and so it is difficult to conclude that the information is inherently confidential. Information about therapeutic uses of drug products is also available on the Formulary itself.

[142] The names of products that are subject to conditional listings do not meet the criteria of having been "supplied in confidence". Again, these represent negotiated terms of an agreement and in any event, as indicated above[15], is information to which no reasonable expectation of confidentiality can attach.

[143] I do not accept the submission by Company C that disclosure of even the names of its drug products on this list can, in conjunction with other previously disclosed information, lead to inferences about volume discounts. As I stated above, information that has been disclosed through previous requests is aggregated and did not identify specific drug products for which quarterly payments were being made. It also did not distinguish between the products on the Conditional Listings chart and other products.

[144] I also take into account that the ministry decided not to apply section 18(1) to this information, although it applied that exemption to other information that in its view revealed volume discount information, and maintained this position after being given an opportunity to consider this company's submissions.

[145] I conclude, in sum, that none of the information at issue in this record meets the requirement of having been "supplied in confidence". Nor does it fall within either the "inferred disclosure" or "immutability" principles. I uphold the decision of the ministry to disclose it in full, subject to the late exemption claim under section 18(1).

Record 1 from Order PO-2864

[146] This record, titled "Signed Agreements Tracking Sheet", lists pricing and listing agreements by manufacturer. It contains columns indicating the contract number, effective date of the agreement, the date the agreement was signed by the EO, and whether it is a listing, pricing, or amending agreement. The final column shows the date of the Formulary Update relevant to the agreement.

[147] Some of the information does not pertain to pricing and listing agreements, but to other types of agreements.

[148] The ministry decided to grant full access to this record although, as indicated above, it made a late exemption claim under section 18(1) exemption for specific information in one column, and I have upheld this claim.

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[15] See discussion of *Apotex*, above at paras. 75-76.

[149] A number of the drug manufacturers declined to make submissions on the application of section 17(1) to this record. Two companies submitted only that section 17(1) applied to the same information I have found exempt under section 18(1) (and which is unnecessary for me to deal with here). Other drug manufacturers submitted that information about the effective date of the agreement, the date it was signed by the EO and the type of agreement (ie. listing, pricing or amending) is exempt under section 17(1). Some companies submit that any information about them, including the names of their drug products, is exempt under section 17(1).

[150] Some of the drug manufacturers submit that information about the type of agreements and the dates on which they were signed could lead to inferences about the financial terms of the agreements. Company D, for example, submits that the description of an agreement under the column "Type of Agreement" will reveal the discount/rebate formula associated with that type of agreement. It further submits that Formulary listing agreements are typically negotiated for a period of three years and information about the dates agreements were entered into will reveal when a manufacturer's Formulary listing agreement comes to an end, giving competitors who provide drug products in similar therapeutic categories an unfair advantage.

[151] On my review, I do not accept that information about the dates or types of agreements could reveal details of volume discounts or rebate arrangements. The submissions do not provide me with detailed guidance on how such inferences could be made. There are only several "types" of agreements referred to. The ministry's representations, as well as those of some companies, state that the EO negotiates a unique pricing agreement with each manufacturer. Disclosure of the type of agreement falls far short therefore of revealing the specific financial terms of the agreement. The ministry was asked to consider, in its Reply representations, whether such inferences could be made and did not agree that this information could be combined with other publicly available data to reveal the actual payment terms of the agreements.

[152] I also have regard to the submissions of one company that a listing agreement could encompass more than one kind of financial benefit to the ministry.

[153] In any event, I am not satisfied that any of the information at issue was "supplied in confidence" within the meaning of section 17(1). The provisions of the Regulation, as clarified by the court in *Apotex*, do not remove the authority of the EO to disclose the fact that an agreement was entered into or terminated (which presumably would include dates), the type of agreement (e.g., conditional listing agreement), and the drug product covered by the agreement.

[154] I conclude that none of this information can be considered the confidential proprietary "informational assets" of a drug manufacturer. Further, none of this information could be used to infer confidential proprietary business information or

immutable information about the companies. I uphold the ministry's decision to disclose this record in full, subject to the information withheld under section 18(1).

Record 2 from Order PO-2864

[155] This record is titled "Summary of Current Listing Agreements" and appears to cover a subset of the agreements listed in Record 1 from Order PO-2864. The document names the drug product covered by a listing agreement, describes its listing status on the Formulary (e.g., general benefit) and under a column "Summary of Agreements", contains information about the key conditions of the listing agreement.

[156] The ministry claimed the section 18(1) exemption for information that it severed from the column "Summary of Agreements", and I have upheld its position above. It is unnecessary to consider whether it is also exempt under section 17(1).

[157] Many of the drug manufacturers did not make submissions on the application of section 17(1) to this record. Some submissions addressed section 17(1) only in relation to the information I have already found exempt under section 18(1). Several drug manufacturers submitted that information under both the columns "Listing Status" and "Summary of Agreements" is exempt under section 17(1). Two manufacturers submit that, in addition to or instead of other severances, the names of their drug products should be withheld.

[158] For the same reasons given above in relation to Record 1 from Order PO-2864, I find that section 17(1) does not apply to the names of drug products in this record, in that it does not amount to and does not reveal information "supplied in confidence" by third parties.

[159] I arrive at the same conclusion with respect to the information in the column "Listing Status". Information identifying the nature of the listing of a drug product on the Formulary, such as whether it is a general benefit, or is a benefit to which certain criteria apply, was neither supplied nor confidential. It represents the kind of listing to which the parties agreed, and which is correspondingly noted on the Formulary.

[160] As this information does not meet the requirement of having been supplied in confidence, it does not qualify for exemption under section 17(1).

[161] I uphold the ministry's decision to disclose this record in part.

Record 3 from Order PO-2864

[162] This record consists of 49 tables, relating to 49 drug manufacturers. For each manufacturer there is a list of drug products listed on the Formulary, the effective date of agreements with the ministry, the date of the corresponding Formulary update, and

columns with prices. Some of the tables contain brief notes referring to, for instance, a change to a listing.

[163] The requester does not seek access to information found exempt in Order PO-2864. Above, I allowed the ministry to make a late exemption claim under section 18(1) for an additional portion, and upheld that claim.

[164] Remaining at issue is the contention by a number of drug manufacturers that additional information in the record is exempt under section 17(1).

[165] The drug manufacturers do not share a common position. Some are content with disclosure of the record in accordance with the rulings in Order PO-2864. At the other end of the spectrum, some manufacturers submit that the record is exempt in its entirety.

[166] Others identify portions of the record to which they believe section 17(1) applies, beyond those previously redacted. Generally, this group takes the position that these portions of the record could be used by sophisticated users (such as their competitors), and in conjunction with other available information, to derive the volume discounts paid for specific drug products.

[167] Several of these companies submit that disclosure of the dollar amounts and the column headings that describe these amounts would allow for calculation of the precise volume discount/rebate given to the ministry for each specific product. They submit that the previous redactions are insufficient to prevent disclosure of this pricing information. In their confidential representations, they provide more detail of their positions.

[168] Some companies submit that the entire record is exempt. They explain how, in their view, the very presentation of the information would allow a competitor who is familiar with the presentation to make inferences about volume discounts and unit pricing. In their submission, information revealing even that there are agreements in place for specific drug products would allow for these inferences to be made. These submissions focus on how the information in this record could be combined with other publicly available information as well as information in other records at issue, to derive volume discount details.

[169] The ministry clearly does not agree with the assertions made about the information it proposes to disclose in this record. It applied the section 18(1) exemption to some information, on the basis that it reveals volume discount information or other financial terms, and that disclosure of this information would lead to the harms described in that section. By not extending the application of section 18(1) to other information in this record, it has apparently concluded that this other information would not give rise to the same concerns.

[170] This is confirmed in its additional representations, in which the ministry stated it carefully reviewed those submissions and considered whether the additional information will in fact disclose the volume discount or other value for money conditions for specific drug products, and therefore whether disclosure would cause harm to the economic/financial interests, and future negotiating position of the ministry. It submitted only that certain information, and not the information at issue here, would allow for the calculation of volume discounts/rebates or would describe a "value for money" consideration provided by a third party to the ministry.

Analysis

[171] I begin by noting that even if I accept the position of some drug manufacturers that information in this record, beyond the redactions, could lead to inferences about volume discounts or other financial terms, none of that information would meet the requirement of having been "supplied" to the ministry. As described above, negotiated terms of contracts generally do not (subject to certain exceptions) qualify as "supplied" information. None of the parties disagree that the financial terms of their agreements was negotiated.

[172] It may be that the ministry and the drug manufacturers treat the financial terms of their agreements as the proprietary information of these companies, but their understanding is subject to the provisions of the *Act*, as they have been applied by this office (and upheld by the courts), and the specific manner in which the Legislature has chosen to protect third party information.

[173] Several of the companies take the position that the financial terms of their agreements have been "supplied in confidence" because disclosure of this information would give insight into their commercial affairs. They submit that, in revealing the *quid pro quo* of their agreements, disclosure of these terms reveals confidential business strategies in negotiating with the OPDB, or their willingness to provide payments or grant concessions.

[174] I recognize that the parties to these agreements regard as highly sensitive the details of the volume discount or other financial terms, and in that regard, the ministry has argued, and this office has accepted, the application of the section 18(1) exemption to that information. But the purposes of the section 17(1) and 18(1) exemptions are not the same and may lead to different results with respect to the same or similar information. Where the ministry decides, in its discretion, not to withhold information under section 18(1), and the issue is only whether section 17(1) applies, then the information must be considered through the lens of that particular exemption and how it has been interpreted and applied.

[175] In this regard, consistent with the principles I describe above, the fact that a third party was willing to enter into an agreement with an institution for specified financial terms is not in itself information "supplied" by the third party. It may reveal something about that party's commercial affairs but it reveals as much about the government's willingness to accept the agreed on terms and so it would be difficult to characterize those terms as proprietary to the company. The information "belongs" as much to the government as to the third party.

[176] One manufacturer submitted that the meaning given by this office to the term "supplied" in section 17(1) is incorrect in light of the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) (*Merck*). It submits that it is wrong to treat confidential information originating from a third party as not having been "supplied" when it appears in a contract between that third party and the government. This company states that if revealing information contained in a contract enables a requester to accurately infer information about a third party's bargaining position, it is subject to the section 17(1) exemption. Such information, it is said, is part of a third party's "informational assets" that section 17(1) seeks to protect.

[177] I do not read anything in the *Merck* decision to conflict with the principles developed by this office in considering the "supplied" requirement of section 17(1). On this point, the Court was not dealing with a contract, but with evaluations of drug products prepared by government scientists, and correspondence between the government and third parties. In this context, the Court emphasizes that the mere fact that the information appears in a government document does not, on its own, resolve the issue of whether it is covered by the exemption. The Court affirms that the exemption must be applied "to information that reveals the confidential information supplied by the third party, as well as to that information itself." This is entirely consistent with the "inferred disclosure" principle I described above.

[178] Several of the manufacturers relied on Order PO-1813 of this office, as well as the decision of the B.C. Information and Privacy Commissioner (B.C.I.P.C.) in *Attorney General Health Services Contracts*[16] in support of their position that information in this and other records at issue is exempt under section 17(1). I do not find these cases to support this position. Order PO-1813 involved pricing information contained in proposals, and not in a contract. The decision of the B.C.I.P.C. found that contract pricing was not "supplied" within the meaning of the equivalent provision in that province and therefore not exempt from disclosure.

[179] I therefore conclude that none of the information at issue, and whether or not it may reveal the financial terms of the agreements, was "supplied" by the drug manufacturers.

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[16] 2000 CanLII 14389 (Order 00-22).

[180] In any event, based on the submissions and evidence before me, I am not convinced that the information the drug manufacturers seek to withhold under section 17(1) would reveal the same information about volume discounts or other financial terms as that redacted under section 18(1).

[181] In assessing the submissions on this point, I have regard to the different views of the different drug manufacturers on the extent to which the information at issue would reveal details of volume discounts and other financial terms. As I have indicated, some companies do not claim that section 17(1) applies to information beyond that found exempt under section 18(1). Company E, for instance, made submissions about how information in Record 1 from Order PO-2864 could be combined with publicly available data or previously disclosed data to "reverse engineer" information about actual payments terms in the agreements. But it did not make the same submissions with respect to the information at issue here.

[182] As I have indicated, the ministry put its mind to what information should be exempt under section 18(1) based on concerns that it reveals volume discount details, and has decided that only certain portions of this record raises these concerns.

[183] In reviewing the submissions of some of the drug manufacturers, the manner in which it is suggested the information at issue could be used to calculate volume discounts depends on a level of consistency in the financial terms reached between the ministry and the drug companies. The ministry, however, submitted that the EO negotiates a *unique* pricing agreement with each manufacturer. The representations of one company also refer to "unique" volume discounts and price arrangements which are privately negotiated between the EO and a manufacturer individually. The representations of another company indicate that one listing agreement could encompass several different kinds of financial terms.

[184] I therefore have, on the one hand, submissions suggesting that each agreement contains unique financial terms specifically negotiated between the ministry and a drug manufacturer. On the other hand, the submissions of some manufacturers suggest the application of a standard formula which is so well known and based on values that are so easily available, that it is difficult to imagine how this information could be considered confidential and proprietary.

[185] Finally, some of the concerns expressed by some drug companies are based on assumptions about the availability of other information, which they fear could be combined with the information in this record to reveal volume discount details. For instance, one company pointed to the potential use of information about payments made over subsequent time periods. However, given the ruling in Order PO-3032, and my application of those principles to payment information here, it is unlikely that this sort of comparative information will be available.

[186] Related to the above, submissions were made to me about the applicability of the "mosaic" concept, in which seemingly innocuous information is linked with other available information, resulting in the disclosure of otherwise exempt information.[17] I acknowledge the reality of this concern, but the applicability of this concept must be demonstrated in the context of the facts of any particular appeal.

[187] Many of the submissions by the drug manufacturers before me seek to demonstrate the manner in which the information in this and other records at issue can be combined with other available information to reveal sensitive proprietary data. Ultimately, after reflecting on the submissions and material before me, I conclude that, even if details of volume discounts and other financial terms could be considered proprietary informational assets of the affected parties of the sort that section 17(1) serves to protect, the information at issue could not reasonably reveal those details.

[188] I therefore find that section 17(1) does not apply to exempt the information at issue in this record, as it does not meet the "supplied in confidence" component of that exemption.

[189] I uphold the ministry's decision to disclose this record in part.

Record 1 from Order PO-2865

[190] Above, I have found the payment amounts in this record exempt under section 18(1). It is unnecessary to consider whether this information would also be exempt under section 17(1) and the following discussion relates to the other information in the record. This record includes, in addition to payment information, payment and invoice dates and the names of the drug manufacturers. A few of the drug manufacturers submit that section 17(1) applies to exempt all the information in this record, but have not specifically addressed the application of the three-part test for exemption under section 17(1), other than to the payment information.

[191] In Order PO-3032 the same type of information, but for a different time frame, was at issue. It is unnecessary to review the findings in that order in detail but, in brief, the adjudicator held that the information was neither "supplied" nor subject to a reasonable expectation of confidentiality. He also found, on review of the evidence before him, that disclosure of the names of drug manufacturers, payment dates and invoice dates could not reasonably be expected to produce the harms enumerated in section 17(1).

[192] I agree with and apply those reasons here. I also refer to my findings on similar information in other records, above. The submissions before me do not establish that this information was supplied in confidence, or that it could reasonably be expected to

[17] See *Children's And Women's Health Centre of British Columbia, Re*, 2001 CanLII 21555; Order PO-3032

lead to the harms described in section 17(1). I find that section 17(1) does not apply to the information remaining at issue in this record and I uphold the ministry's decision to disclose it in part.

CONCLUSION

[193] I uphold the ministry's decision to apply sections 18(1)(c) and (d) to the information severed in Record 1 from Order PO-2864, Record 2 from Order PO-2864, and Record 1 from Order PO-2865. I also uphold the decision to apply those sections to additional information in Record 3 from Order PO-2864 and the Listing Conditions Record.

[194] I do not uphold the ministry's decision to apply section 17(1) to information severed from page 9 of 13 of Record 4 from Order PO-2864.

[195] I uphold the ministry's decision to disclose the remaining information in the records.

ORDER:

1. I uphold the decision of the ministry to disclose the records in part and order it to disclose the following information by sending it to the appellant by **April 12, 2013** but not before **April 8, 2013**:

    - The unsevered portions of Records 1, 2, 4 and 5 from Order PO-2863.
    - The unsevered portions of the Listing Criteria Record. The ministry's severances include the portion for which I have allowed a late exemption claim, on p. 3 of 6.
    - The unsevered portions of Records 1, 2 and 3 from Order PO-2864. The ministry's severances include the portions of Records 1 and 3 for which I have allowed a late exemption claim.
    - The unsevered portions of Record 1 from Order PO-2865.

2. With respect to Record 4, I do not uphold the ministry's decision to apply section 17(1) to the severed portion on page 9 of 13 and I order that portion disclosed.

3. I uphold the decision of the ministry to deny access to the balance of the information at issue in this appeal.

4. In order to verify compliance with provisions 1 and 2 of this order, I reserve the right to require the ministry to provide me with a copy of the records as disclosed to the appellant.

Original Signed By: March 8, 2013
Sherry Liang
Senior Adjudicator