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Order F15-68

# MINISTRY OF HEALTH

Elizabeth Barker
Senior Adjudicator

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**Summary**: The applicant requested records about product listing agreements between pharmaceutical manufacturers and the Ministry. The Ministry disclosed some information but withheld other information under s. 17(1) of FIPPA (harm to the financial or economic interests of a public body or the government of British Columbia). The third party, a pharmaceutical manufacturer, submitted that the information should also be withheld under s. 21(1) (harm to third party business interests). The adjudicator found that the Ministry is authorized to withhold the information in dispute under s. 17(1), with the exception of the names and job titles of the Ministry employees and the identity of the Third Party and its employees. The adjudicator found that s. 21(1) does not apply to that information either, so it must be disclosed to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 17(1) and 21(1).

**Authorities Considered: B.C.:** Order 01-20, 2001 CanLII 21574 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F09-13, 2009 CanLII 42409 (BC IPC); Order F10-39, 2010 CanLII 77325 (BC IPC); Order F11-14, 2011 BCIPC 19 (CanLII); Order F13-01, 2013 BCIPC 1 (CanLII). **Ont.:** Order PO-2863, 2010 CanLII 2460 (ON IPC); Order PO-3032, 2012 CanLII 1320 (ON IPC).

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

## INTRODUCTION

[1] This case concerns an applicant's request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Ministry of Health ("Ministry") for records about product listing agreements ("PLAs") between pharmaceutical manufacturers and the Ministry. A PLA is a negotiated agreement setting out the terms for listing a pharmaceutical manufacturer's drug or product on the Province's PharmaCare drug and benefit formulary.

[2] The applicant made two access requests related to PLAs. In the first, she requested a list of all pharmaceutical products and their manufacturers in respect of which the Ministry has or had a PLA during the previous five years. In response, the Ministry provided the applicant with a list of 40 manufacturers. However, it refused to identify the pharmaceutical products covered by those PLAs on the basis that disclosure would harm the financial or economic interests of a public body or the government of British Columbia ("BC"), under s. 17(1) of FIPPA.

[3] The applicant's second request (made the same day as the first) was for a copy of any PLAs in effect as of the date of her request for seven specified drugs.[1] The Ministry disclosed portions of the records responsive to that request but withheld some information under s. 17(1) of FIPPA.

[4] The applicant was dissatisfied with the Ministry's decisions and requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). Mediation did not resolve the issues in dispute, and the applicant requested that they proceed to inquiry.

[5] After the inquiry commenced, the Ministry contacted a pharmaceutical manufacturer ("Third Party") asking if it wished to participate in the inquiry. Subsequently, the Third Party contacted the OIPC to request standing in the inquiry on the basis that it objected to release of the information at issue under s. 21(1) of FIPPA (harm to third party business interests). The OIPC granted the Third Party's request to have standing in the inquiry and to add s. 21(1) as an issue. The Notice of Inquiry was amended to that effect and sent to all parties.

[6] The Ministry and the Third Party each provided initial and reply submissions, and the applicant provided a response submission. The Ministry and the Third Party were given permission to submit some of their submissions and evidence *in camera*.

[1] Wellbutrin XL (generic name Bupropion HCL), Ativan (generic name Lorazepam), Nitro-Dur (generic name Nitroglycerin), Accupril (generic name Quinapril), Serquel XR (generic name Quietiapine XR), Nexium (generic name Esomeprazole Magnesium) and Reminyl ER (generic name Galantamine HBR) for any strength or dosage form.

[7] Initially, the Third Party sought to keep *in camera* its identity and the fact that the records at issue relate to it. However, it reconsidered this position, and in it is initial submission and affidavit evidence it openly discloses its identity and the fact that the records at issue are PLAs between the Third Party and the Province, amendments to the PLAs, and related "term extension notification" letters for two of the Third Party's drugs.[2]

[8] In general terms, the Ministry submits that PLAs allow the Province to get optimal value for the money PharmaCare spends on pharmaceutical products, and that its ability to successfully negotiate PLAs depends on maintaining the confidentiality of the withheld information. The Third Party echoes the Ministry's s. 17(1) submissions and also adds that disclosure will cause it undue financial loss, so s. 21(1) also applies. The applicant, on the other hand, submits that the Ministry's claim of harm is exaggerated, that disclosure will not result in pharmaceutical manufacturers being unwilling to enter into PLAs (or only on less favourable terms), and it will not reduce the Ministry's bargaining power. In fact, she submits, disclosure will increase cost savings to PharmaCare by allowing manufacturers of lower cost generic drugs to more easily compete with name-brand drug manufacturers when it comes to gaining access to PharmaCare's formulary.

## ISSUES

[9] The issues in this inquiry are as follows:

1. Is the Ministry authorized to refuse to disclose the information requested under s. 17(1) of FIPPA?
2. Is the Ministry required to refuse to disclose the information requested under s. 21(1) of FIPPA?

[10] Section 57(1) of FIPPA places the burden on the Ministry to prove that the applicant has no right of access to the information withheld under s. 17. The Ministry is not withholding any information under s. 21(1), therefore, the onus is on the Third Party under s. 57(3)(b) to prove that s. 21(1) applies.

## DISCUSSION

[11] **Background -** While many Canadians pay for their prescription drugs themselves, some have coverage under private benefit plans or under federal or provincial government programs. PharmaCare is a pharmaceutical insurance scheme funded by the Province of BC under the *Pharmaceutical Services Act*. It provides financial assistance to certain eligible BC residents for prescription drugs and medical supplies. PharmaCare only covers pharmaceutical products

[2] Third Party's initial submissions, para. 5 and Third Party's initial affidavit, paras. 1 and 4.

listed on PharmaCare's formulary (other than in exceptional circumstances and on a case-by-case basis).

[12] Under the PharmaCare scheme, the retail pharmacy acquires and dispenses the products listed on the PharmaCare formulary.[3] The individual PharmaCare client takes their prescription to be filled at the pharmacy and is only responsible for paying at the till any amount that may be above the formulary amount. The pharmacy is then reimbursed by PharmaCare for the amount specified in the formulary.

[13] The Ministry negotiates PLAs for pharmaceutical products that are being proposed by pharmaceutical manufacturers for listing on the PharmaCare formulary. Under a PLA, the pharmaceutical manufacturer provides the Province with some form of financial benefit in exchange for listing its product on the formulary. The financial benefit the Province receives can take different forms including direct payments from the pharmaceutical manufacture or rebates to the Province based on the volume of the manufacturer's product sold. The end result is that the pharmaceutical manufacturer compensates PharmaCare financially for a portion of the amount PharmaCare reimburses the retail pharmacy for the manufacturer's product.

[14] **Information in Dispute -** There are 38 pages of records in dispute consisting of PLAs between the Third Party and the Province, amendments to the PLAs, and related letters. The Ministry has withheld some parts of the records under s. 17(1). The Third Party submits that both ss. 17(1) and 21(1) apply to the withheld information. More specifically, the information withheld from the records is as follows:

- The Third Party's name as well as its employee's names and contact information;
- The names and job titles of Ministry employees who signed the records;
- The name of two drugs;
- Some of the terms of the PLAs; and
- All dates.

**Harm to Financial or Economic Interests - s. 17(1)**

[15] The Ministry submits that disclosure of the information at issue could reasonably be expected to harm the financial interests of the Ministry and the government of BC under s. 17(1). It further submits that ss. 17(1)(d) and (e) apply in this case. The Third Party says that s. 17(1)(f) also applies.

[3] The Province does not directly procure products from pharmaceutical manufacturers.

The applicant denies that there is any reasonable expectation of harm under s. 17(1).

[16] The parts of s. 17(1) that are relevant to this inquiry are as follows:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
> …
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[17] Previous orders have noted that ss. 17(1)(a) through (f) are examples of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1).[4]

[18] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* said the following about the standard of proof for exceptions that use the language "reasonably be expected to harm":

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground… This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the

[4] See for example, Orders F08-22, 2008 CanLII 70316 (BC IPC); F09-13, 2009 CanLII 42409 (BC IPC); F10-39, 2010 CanLII 77325 (BC IPC); F11-14, 2011 BCIPC 19 (CanLII).

> allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.[5]

[19] I adopt these principles and will apply them here.

*Ministry's submissions*

[20] The Ministry submits that PLAs provide a means for the Province to get optimal value for the money PharmaCare spends on drugs and other products, and that its ability to successfully negotiate PLAs depends on maintaining the confidentiality of the withheld information. The Ministry says that disclosure of the information in dispute would result in pharmaceutical manufacturers being unwilling to enter into PLAs in the future or only agreeing to do so on terms less advantageous to the Province. This would cause a loss of the financial benefit and savings that PLAs provide the Province. Further, the Ministry submits that disclosure of the withheld information may result in other manufacturers using the information to gain the upper hand in their own negotiations with the Province, by revealing information about the Ministry's negotiation strategies. The consequence would be increased financial costs to the Province in the form of prolonged negotiations and less favourable terms of agreement.

[21] The Ministry submits that PharmaCare's total expenditures were almost $1.1 billion for the 2013-2014 fiscal year, of which $723 million was specifically for drugs and medical supplies (excluding the cost of dispensing fees). It provides an affidavit from the Ministry's Executive Director of Business Management and Supplier Relations and Systems, Medical Beneficiary and Pharmaceutical Services Division ("Executive Director") whose duties include leading and finalizing PLA negotiations. She says that PLAs represent "the most cost effective tool available to the Province to achieve financial savings"[6] for name brand or single-source drugs, and they result in significant savings by allowing the Province to effectively pay less than the market price for drugs. By way of example, she provides *in camera* evidence of the estimated savings gained by PharmaCare for several current PLAs.[7] She explains that the terms of PLAs vary substantially and are subject to negotiation on a product-by-product basis, but the majority of savings to the Province come in the form of sales or volume based rebates and payments provided by the manufacturers. She adds that the Ministry routinely negotiates PLAs for products that are proposed by the pharmaceutical manufacturers for listing on the PharmaCare formulary, and that there are many current PLAs and also many renewals and potential new PLAs under active consideration and/or negotiation.

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[5] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54.

[6] Executive Director's affidavit #1, paras. 19, 26 and 30. She provides some examples of approximate dollar savings for the 2013-14 fiscal year as well as the forecasted savings for the 2014-15 fiscal year.

[7] Executive Director's affidavit #1, para. 31.

[22] The Ministry also provides some background about the climate that led PharmaCare to begin to rely more frequently on PLAs to control costs. For instance, in a 2006 report the Auditor General for BC wrote that PharmaCare expenditures for prescription drugs had increased 92% between 1996 and 2004, and that drug cost pressures threatened the sustainability of PharmaCare.[8] He also said: "While PharmaCare has begun to negotiate with some manufacturers to reduce the cost of expensive drugs and to determine how drugs will be reimbursed, more needs to be done to manage these costs to ensure the program is sustainable."[9] In its update on progress towards the Auditor General's recommendations, the Ministry reported that it was actively pursuing PLAs to save costs, and that it projected savings flowing from PLAs to be close to $13 million in 2008/09.[10]

[23] The Executive Director says that pharmaceutical manufacturers have advised the Ministry that they consider PLA pricing information to have proprietary value, and that the confidentiality of PLA terms are an essential condition for their willingness to enter into a PLA. She says:

> The Ministry's ability to successfully negotiate rebates through PLA's is dependent on its ability to maintain the confidentiality of Pricing Information in such agreements. Without an ability to maintain the confidentiality of such information, drug manufacturers will refuse to enter into such agreements with the Province or, if they do, will not offer the Province a savings that is greater than the savings offered in other jurisdictions, for fear that the release of such terms would harm their competitive position elsewhere. Either way, the result [of] any disclosure of the Pricing Information will be financial harm to the Ministry and the Province in the future.
>
> PLA's provide significant financial compensation to the Province in return for listing the drugs in question. Drug manufacturers will not be willing to provide the Province with such compensation in the future if manufacturers are not confident that the terms of their agreements will be kept confidential.[11]

[24] The Executive Director explains that drugs are typically marketed around the world, pricing is complex and competitive, and manufacturers routinely negotiate pricing with institutional payers in more than one jurisdiction. She explains that the Ministry's negotiating leverage with global pharmaceutical manufacturers is challenged by BC's small market size, which is roughly 5-7% of the Canadian pharmaceutical market, which in turn is approximately 2% of the global pharmaceutical market. Given those market circumstances she believes

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[8] Auditor General of BC report "Managing PharmaCare: Slow Progress Toward Cost-Effective Drug Use and a Sustainable Program", March 2006, p. 15.
[9] *Ibid*, p. 29.
[10] Ministry's initial submissions, appendix A at pp.12-13.
[11] Executive Director's affidavit #1, para. 76-77.

that "the risks associated with disclosure of PLA's negotiated between pharmaceutical companies and the Province would outweigh the benefit accruing to the companies under most, if not all, such agreements."[12]

[25] Further, the Ministry submits that disclosure of the information in dispute in this case may result in other manufacturers using the information to strengthen and gain the upper hand in their own negotiations with the Province. The Executive Director says that the Ministry would be put into a defensive position at the bargaining table, and its ability to reject specific demands without concessions would be undermined. This, she says, would result in increased financial costs to the Province in the form of prolonged negotiations and potentially less favourable terms. She provides further specifics and detail *in camera*.[13]

[26] The Ministry also provided affidavit evidence from the Chief of Staff and Vice President of Legal Affairs for Canada's Research-Based Pharmaceutical Companies ("Rx&D"). He says that Rx&D is the national voice for over 50 research-based pharmaceutical companies, and it advocates for policies that enable the discovery, development and commercialization of innovative medicines and vaccines. He explains how pharmaceutical companies seek to recuperate the costs of research and development while remaining competitive globally as well as within the pricing regime specific to individual jurisdictions. Getting a product listed on a provincial formulary and gaining access to that specific part of the market, he says, is valuable to pharmaceutical manufacturers. He explains that manufacturers traditionally require that the following types of information in a PLA remain confidential: the name of the manufacturer and the product, the contractual terms and the formula for calculating the contractual payments. He describes the consequences of disclosure of such information as follows:

> Drug manufacturers would have less incentive to negotiate, and indeed may no longer participate in such negotiations with provinces, as this would erode the product's value, not only in Canada but with regards to companies' global pricing strategy. This would also be to the detriment of British Columbia and its citizens, as they would not get access to products at as low of a price.
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> Alternatively, I believe that the disclosure of the aforementioned contractual payment and other confidential terms could reasonably be expected to result in manufacturers offering smaller contractual payments than what they would have otherwise, given that the contractual payment offered to British Columbia will be public, and therefore would have to be offered to all provinces and other Canadian payers.[14]

[12] Executive Director's affidavit #1, para. 59.
[13] Executive Director's affidavit #1, paras. 40-42.
[14] Rx&D affidavit, para. 24-25.

[27] The Ministry also provided an affidavit from the Vice President of Government Affairs and Market Access at Janssen Inc. He describes how Janssen treats PLA information as highly confidential, how Janssen's competitive position would be prejudiced if its competitors were able to use such information to shape their own pricing and contractual strategy, and how Janssen's negotiating position with regards to other buying groups or payers would be prejudiced globally, not just in Canada. He says that disclosure would have a detrimental impact on Janssen's willingness to enter into PLAs with BC because they would no longer be able to trust that information they consider to be commercially sensitive will remain confidential. The result, he says, would be that BC would no longer receive the benefits afforded by such agreements.

*Third party's submissions*

[28] The Third Party submits that the Ministry correctly withheld the information under s. 17(1), and its submissions largely echo the Ministry's concerns regarding disclosure. Specifically, the Third Party believes that disclosure of this type of information may result in pharmaceutical manufacturers in general being unwilling to provide the information that is necessary for the Ministry to enter into PLAs and/or achieve the same favourable pricing.

[29] The Third Party provides affidavits from seven pharmaceutical companies.[15] As a group, they all consider the type of information in a PLA to be highly sensitive commercial and financial information about their pricing structures or models. They say that it would be unlikely that they would continue to negotiate or enter into PLAs with the Province or offer as favourable terms if they knew such information will become available to their competitors. Alternatively, they would restrict the type and amount of information they share during negotiations. Consequently, they say, if the Ministry is not provided the type of information it needs to make its listing decisions, it might have to spend time and resources investigating matters related to a PLA to a degree not currently necessary. Several also say that, in terms of the negative impact on their company's global market, the risk of disclosure to its competitors simply outweighs the value of any one agreement with the Province.

[30] Regarding its own situation, the Third Party submits that disclosure of the type of information at issue would cause it undue financial loss. It says that it operates in a highly competitive environment, and its competitors would be able to use the information to draw accurate inferences about its products, business

[15] Vice President, Government Affairs and Market Access at Janssen Inc., the Senior Manager of Market Access at Gilead Sciences Canada Inc., the Vice President, Corporate Affairs at Eli Lilly Canada Inc., the Senior Director, Market Access at Purdue Pharma Canada, the President at Novo Nordisk Canada Inc., the Vice President External Affairs at Takeda Canada, and the Director of Reimbursement and Health Economics at Hoffmann-La Roche Limited.

and marketing strategies. This, in turn, would allow its competitors to undercut its future negotiating position.

[31] It also submits that disclosure would prejudice it in negotiations with drug plan providers in other jurisdictions and could result in lower prices and profit for its products in many markets worldwide. It provides affidavit evidence, a World Health Organization report and several other reference articles[16] describing how governments use global price referencing to determine drug prices in their own countries.[17] It adds that disclosure of PLA prices may result in Canada being viewed globally as a lower priced market, which will impact the prices in countries that look to Canada as a price reference. For that reason, the Third Party explains, pharmaceutical manufacturers might delay product launches in Canada (or not launch at all) until their product has first been approved for use in higher-price countries.[18] The Third Party says:

> …the decision as to whether or not to provide information to the Ministry or to enter into a PLA is not solely the decision of the Third Party which operates in Canada but is also influenced by the Third Party's international parent and affiliate companies. Global business strategies and policies constrain the kind and extent of information that an international pharmaceutical company can disclose and the terms under which they may enter into agreements.
>
> In particular, in the pharmaceutical industry, the reality of international price referencing means that multi-national companies must act with the coordinated global strategy with respect to the commercial and financial terms they agree to when bringing a product to market. If a company within a particular jurisdiction cannot achieve agreements with terms that fit the requirements of the global strategy then it is entirely possible that the company would not be permitted to enter into such agreements.[19]

*Applicant's submissions*

[32] The Applicant submits that the evidence does not establish that disclosure would result in a reasonable expectation of harm under s. 17. In particular, she argues that the Ministry's submissions and evidence fail to address how disclosure of the information at issue would result in savings to PharmaCare. There would be savings, she submits, because it would be easier for

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[16] *WHO/HAI Project on Medicine Prices and Availability Review Series on Pharmaceutical Pricing Policies and Interventions, Working Paper 1: External Reference Pricing*, May 2011; *Pharmaceutical pricing, The use of external reference pricing*, Rand Europe, 2013; *Market Segmentation and International Price Referencing*, Cambridge Pharma Consultancy; *International reference pricing: Connecting the dots*, Gustavo Ando blog; An international strategy for pricing and profit, by Dr. Eckhard Kucher in Scrip Magazine, 1997.

[17] Third Party's initial affidavit, para. 16.

[18] Third Party's initial submissions, para. 59.

[19] Third Party's initial submissions, paras. 46-47 and Third Party initial affidavit, paras. 21-22.

manufacturers of lower cost generic drugs to compete with brand-name manufacturers for listing on the formulary. She says:

> The fact that the net price is secret means that generic companies considering whether to incur the significant time and costs involved in bringing a generic version of the drug to market do not know the price they have to beat to be listed on the PharmaCare formulary (as well as the public formularies of other Canadian jurisdictions that have PLAs). This is a significant disincentive for generic manufacturers. While generic companies can and will offer PharmaCare a price that is lower than that of the brand-name product where they know what the Province actually pays for that product, they will not negotiate by guessing at the secret net price. Moreover, the uncertainty over whether their product will be listed and at what price may cause them not to enter the market at all. The result will be that the brand-name drug's monopoly price will prevail for a longer period of time. Millions of dollars of savings will not be realized.[20]

[33] The applicant provides affidavit evidence from the President of the Canadian Generic Pharmaceutical Association and from the Vice President of Marketing for Apotex Inc. They both speak about the savings that can be realized by PharmaCare if it includes generic drugs in its formulary. The President of the Canadian Generic Pharmaceutical Association says that its research shows that 73.7% of the prescriptions covered by PharmaCare were for generic products in BC in 2014, yet they accounted for only 28.2% of the total amount PharmaCare spent on prescription drugs. He also says that it is not cost effective for a manufacturer to bring either a brand name or a generic drug to market in Canada unless it will be listed on provincial formularies. He provides details about the process and how it can take anywhere from three to six years and $4 million to bring a generic drug to market, and it might also involve challenging the brand-name patent. They also both say that companies who are considering doing so would benefit from knowing "the price they have to beat"[21] to be listed on the PharmaCare formulary.

[34] The applicant disputes that disclosure of the name of the manufacturer and its products that are subject to a PLA could cause harm. She says that the Ministry has already disclosed to her the names of 40 manufacturers with whom the Ministry has or had a PLA in the past five years, and she is not aware of any evidence that this disclosure resulted in any harm. Further, she says that the pan-Canadian Pharmaceutical Alliance ("pCPA")[22] website lists the new brand-

[20] Applicant's submission, para. 22.
[21] President of the Canadian Generic Pharmaceutical Association, para. 29 and Vice President, Marketing for Apotex Inc., para. 10.
[22] According to its website (http://www.canadaspremiers.ca/en/initiatives/128-health-care-innovation-working-group), the pCPA is a health care innovation working group comprised of the 13 provinces and territories. The pCPA conducts joint provincial/territorial negotiations for new brand name drugs in Canada with the goal of achieving greater value for publicly funded drug programs. However, it is still up to each participating jurisdiction to make its own decisions on

name drugs for which there have been pan-Canadian negotiations. From this, one can accurately infer which pharmaceutical manufacturers have engaged in pCPA negotiations because who holds the patent for a new brand-name drug is commonly known. She says:

> The Applicant has seen no evidence in this Inquiry demonstrating that the disclosure of information on the pCPA website about brand-products and negotiations has reduced brand manufacturer's willingness to negotiate with the pCPA or to enter into PLAs with member jurisdictions. Nor has the Applicant seen any evidence demonstrating that this disclosure has increased brand-name drug costs to pCPA member jurisdictions.[23]

[35] Regarding disclosure of other information that might reveal financial aspects of the PLAs, the applicant submits that the Ministry's claims of harm are exaggerated. In particular, she disputes that disclosure of PLA information will reduce the Ministry's bargaining power in the way it says. She submits that BC has adequate bargaining power within the relevant market, which is Canada and that it benefits from the combined bargaining power of the pCPA.

[36] She also disputes that disclosure of PLA information will result in pharmaceutical manufacturers being unwilling to enter into PLAs in the future (or only on less favourable terms), or that they may decide not to launch a drug in BC (or delay launching it in BC). She suggests that this would be an abuse of patent rights and could result in negative consequences under the federal *Patent Act*.[24] She also submits that delays in launching a drug are not necessarily a bad thing because there are only a relatively small number of new medicines that actually make any substantial therapeutic contribution, according to her understanding of the World Health Organization study that the Third Party submitted.[25]

*Ministry's and Third Party's replies*

[37] In its reply, the Ministry acknowledges the value generic drugs can provide. However, it submits that PLAs are another means by which the Province is able to achieve financial savings in relation to prescription drugs. It disagrees with the applicant's submission that PLAs must be disclosed in order to allow generic drugs to compete for a spot on the formulary or that PLAs are a barrier to generics entering the BC market. For instance, the Ministry Executive Director explains how generic companies can, and do, apply for and obtain listing on the formulary without knowing the details of existing PLAs, and she explains

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whether to fund any drug through its public drug plan and enter into a jurisdiction-specific PLA with the manufacturer.

[23] Applicant's submissions, para. 26.

[24] Applicant's submission, para. 61.

[25] Applicant's submissions, paras. 62-63.

that approximately 63% of the 5000 drugs on the PharmaCare formulary are generics. The Ministry says:

> The listing of a brand drug, when a generic drug is available, is the exception, not the rule, in relation to the Provincial Formulary. The Province pursues cost savings where it can to protect tax payers. In some cases, the Province has refused to list a generic drug on the basis that another drug offered a better value. In some recent cases, generic manufacturers have responded by lowering their prices and the Province has terminated a PLA with the brand manufacturer and thereby financially benefitted by the willingness of the generic company to reduce the price for the drug. Those cases undermine the position of the Applicant that generic manufacturers are somehow unable to successfully negotiate with the Province for the purpose of competing with brand companies.[26]

[38] The Ministry also responds to the applicant by providing *in camera* the actual number of listing applications for generics that were rejected for inclusion in the formulary because there was already a PLA in place at prices lower than the generic.[27] The Executive Director says that the generic manufacturer in those circumstances could have continued to negotiate in an effort to find a mutually agreeable price. She adds that those generics were still sold in BC even though they were not covered by the PharmaCare formulary.[28]

[39] For its part, the Third Party disputes the applicant's submission regarding the *Patent Act*, and says that the fact that a drug manufacturer may not be prepared to enter into a PLA and offer a price discount to a provincial formulary is not an abuse of patent rights. It also points out how it believes the applicant has misstated the findings of the WHO report. Ultimately, it says, the point of the WHO report is that external reference pricing has an impact on global market launch decisions.

**Analysis – s. 17**

[40] All three parties provided extensive submissions and supporting evidence about the pricing and marketing of pharmaceutical products and how that impacts PharmaCare. Based on that information, I accept that pricing in the pharmaceutical industry is complex and highly competitive, and it reflects not just the competitive environment in BC but also global market considerations.

[41] The evidence demonstrates that PharmaCare costs are a significant pressure for the Province, and managing the cost of pharmaceutical products is an ongoing challenge. The Ministry provided detailed and persuasive evidence about how the PLAs can provide savings when it comes to brand-name

[26] Ministry reply, para. 48.
[27] Executive Director affidavit #2, para. 7.
[28] Executive Director reply affidavit, para. 8.

pharmaceutical products, and that PLAs are an important method by which the Ministry manages the public funds expended under the PharmaCare program.

[42] The Ministry's submissions and evidence persuade me that disclosure of the terms of the PLAs could reveal the Ministry's negotiation strategies and the prices and other terms that it finds acceptable. In my view, if this information were available to industry players, it would weaken the Ministry's bargaining position in negotiations for future PLAs. This could reasonably be expected to result in increased financial costs in the form of prolonged negotiations and less favourable terms of agreement. In turn, this would be injurious to the financial interests of the Province, which relies on PLAs to help manage the costs associated with PharmaCare.

[43] In addition, I am satisfied that disclosure of the terms of the PLAs could reasonably be expected to result in at least some pharmaceutical manufacturers being unwilling to enter into future PLAs or only doing so on terms that provide fewer financial benefits to the Province. The evidence establishes that most pharmaceutical manufacturers operate in a global marketplace, of which BC is only one small part, and disclosure of PLA information could have an impact on pricing, marketing and competitive position beyond BC's borders. The terms of a PLA would enable a competitor or a buyer to glean competitively useful details about a manufacturer's pricing and negotiating strategies. In my view, it is reasonable to expect that the risk of disclosure of PLA terms will in some circumstances and for some manufacturers be too damaging to their competitive position to warrant entering into a PLA with BC. I am also persuaded that if manufacturers are still willing to enter into a PLA, they will only agree to terms that they are content to let their competitors and other buyer groups know. The incentive to offer the Province the same level of financial benefit in order to reach a deal will be reduced. Simply put, disclosure of PLA terms would significantly detract from their usefulness as a tool for negotiating cost savings, which would be a loss to the Province in terms of the financial benefit and savings that PLAs provide.

[44] The applicant argues that the type of information that is in dispute here is already publicly available on the pCPA website and that there is no evidence that this has increased drug costs or reduced brand-name manufacturer's willingness to negotiate with the pCPA or enter into PLAs with member jurisdictions. However, while one can easily infer from the pCPA website which manufacturer was engaged in negotiations with the pCPA, the website reveals nothing about the terms reached, if any. It also does not reveal whether the manufacturer subsequently entered into a PLA, and if so, with whom and under what terms.

[45] As I understand the applicant's submissions, she also believes that disclosure of the information in dispute will not result in harm to the public purse but rather a benefit from lower costs associated with more generic drugs

becoming available. She says that her evidence demonstrates that the "risk picture created by the Ministry and the Third Party is neither complete nor accurate."[29] She argues that if manufacturers of generics can determine the price their brand-name competitors are willing to accept in order to be listed on the formulary, the generic manufacturers will know what price they have to beat. Assuming the generic manufacturer decides that this makes it worth the risk and cost of developing and marketing its product, PharmaCare will benefit from the savings associated with having a lower cost generic drug to list on the formulary.

[46] I accept the applicant's submission that generic drugs are in general priced lower than brand-name drugs, and that the Province can realize cost savings by including generic drugs on the formulary. The Ministry does not dispute this, although it also provided convincing examples and detail (*in camera*) of how, sometimes, even the prices offered by generic drug manufacturers do not beat the price savings offered in a PLA. However, it is evident that listing generics in the formulary is another method currently used by the Province to manage PharmaCare costs. The evidence provided by the Ministry demonstrates that it is interested in, and takes advantage of, the financial savings offered by generic drugs, and that a substantial portion of the drugs listed on the formulary are generics. The applicant's own evidence was that 73.7% of the prescriptions covered by PharmaCare in 2014 were for generic products, and they accounted for 28.2% of the total amount PharmaCare spent on prescription drugs.

[47] Based on the evidence provided in this case it is not possible to determine whether there would be a net gain to PharmaCare's bottom dollar from disclosure of the information in dispute in the way the applicant suggests. In particular because the evidence demonstrates that - even without knowing their brand-name competitor's PLA information - many generics develop and market their drugs and PharmaCare lists them on the formulary (and realizes any associated costs savings).

[48] In support of their arguments the parties refer to multiple orders of the Information and Privacy Commissioner of Ontario, which dealt with PLAs and related information. The applicant comments on two of those cases, in particular, Orders PO-2863 and PO-3032,[30] where information about discounts paid by drug manufacturers to the Ontario Ministry of Health and Long-Term Care was found to be properly withheld under s. 18(1) of Ontario's *Freedom of Information and Protection of Privacy Act* (the equivalent to BC's s. 17(1) of FIPPA). The applicant submits that I am not bound by those orders, and unlike the applicants in those cases she has done a better job in providing evidence to rebut the Ministry's claims of harm. However, I find the facts in those cases to be substantially similar to the present case and their ultimate conclusions are persuasive.

[29] Applicant's submissions, para. 52.
[30] Order PO-2863, 2010 CanLII 2460 (ON IPC); Order PO-3032, 2012 CanLII 1320 (On IPC).

[49] In Order PO-2863, the adjudicator determined that disclosure of the information 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 that their other customers would seek similar negotiated discounts. She also found that disclosure could 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. In Order PO-3032, the adjudicator found that disclosure of the amount of discount payments made by individual drug manufacturers could reasonably be expected to prejudice the Ministry's economic interests and be injurious to the financial interests of the government of Ontario. In particular, he had evidence that the disclosure of the same type of information pursuant to an earlier Order subsequently had a negative impact on the Ministry's efforts to negotiate discounts with drug manufacturers.

[50] The applicant also cites Orders F08-22 and 01-20[31] in support of her submissions. In Order F08-22 the Fraser Health Authority relied, in part, on s. 17(1) to withhold the pricing terms in an addendum and change order to a multi-year contract for hospital housekeeping services. In Order 01-20, the University of British Columbia's refusal to disclose portions of a sponsorship agreement between the university, its student society and Coca-Cola Bottling Ltd. was also based, in part, on s. 17(1). In both cases, former Commissioner Loukidelis found that s. 17(1) did not apply as the evidence was not persuasive and did not demonstrate that disclosure of the information in dispute could reasonably be expected to compromise the willingness of contractors to compete for contracts in the future or result in less favourable terms for the public body. In my view, the facts and context of those cases differ significantly from the present case. In particular, the evidence clearly establishes in this case that the competition, marketing and sale of pharmaceutical products are global, and broader considerations than what takes place in BC alone are at play when it comes to negotiating PLAs.

[51] Further, I note that in Order F13-01,[32] the adjudicator found that s. 17(1) applied to information provided by a pharmaceutical manufacturer to the Ministry of Health. His reasons were brief, given the *in camera* nature of much of what he considered. However, he concluded that it was in the financial interest of the Ministry of Health to promote commercial interactions with pharmaceutical manufacturers and to maintain the types of communication with them that were the subject of the disputed information. The evidence he heard included that the pharmaceutical manufacture would not share sensitive commercial information as part of its communications with the Ministry if it believed the Ministry would

[31] Order F08-22, 2008 CanLII 70316 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC).
[32] Order F13-01, 2013 BCIPC 1 (CanLII).

disclose that information. That case, and its outcome, is persuasive given the similarities to the present case.

[52] I am persuaded that disclosure of the information in dispute in this case – with two exceptions, which I will discuss immediately below - would reveal the specifics of the terms contained in the PLAs. Even considering the evidence that the applicant provides in her efforts to rebut the Ministry's position, I find that disclosure of PLA terms could reasonably be expected to significantly undermine the effectiveness of PLAs as a cost-savings tool and harm the Ministry's position in future PLA negotiations it conducts on behalf of the Province. Given the magnitude of PharmaCare's costs, this outcome would harm the financial and economic interests of the Ministry and the government of BC and its ability to manage the economy. Therefore, the Ministry has satisfied me that s. 17(1) applies to the information that reveals the terms contained in the PLAs.

[53] As mentioned above, there are two exceptions to my finding that s. 17(1) applies to the information in dispute: the identity of the Third Party (and its employees) and the identity (and job titles) of the Ministry employees. In my view, disclosure of the identity of the Third Party and its employees could not reasonably be expected to result in harms under s. 17(1). The applicant already knows that the records pertain to the Third Party because the Third Party divulges this in its submissions and affidavit evidence.[33] Also, the name of the Third Party is included in the already-disclosed list of the 40 pharmaceutical manufacturers with whom the Ministry has or had a PLA during the time period in question. The Third Party did not explain how disclosure to the applicant of information that has already been disclosed to him could reasonably be expected to result in harm under s. 17(1). Finally, it is not evident how disclosure of the names and job titles of the Ministry staff who signed the records could reasonably be expected to result in harm under s. 17(1), and the Ministry does not explain.

[54] In conclusion, I find that the Ministry is authorized to refuse to disclose the information in dispute under s. 17(1), with the exception of information that discloses the identity of the Third Party and its employees and the identity of the Ministry's employees.

**Harm to Third-Party Business Interests - s. 21(1)**

[55] The Third Party submits that s. 21(1) applies to all of the information in dispute. However, given my findings above regarding s. 17(1), the only information left to consider under s. 21(1) is that which reveals the identity of the Third Party and its employees and the identity and of the Ministry's employees.

[33] Third Party's initial submissions, para. 5 and Third Party's initial affidavit, paras. 1, 4.

[56] The relevant portions of s. 21(1) are as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, ...

[57] The principles to be considered in applying s. 21(1) are well established.[34] All three elements - 21(1)(a),(b) and (c) - must be met in order to properly withhold information under s. 21(1). The Ministry says that it did not withhold any information under s. 21(1) because it did not believe the information met the criteria in s. 21(1)(b) for having been "supplied".

[58] In my view, the identity of the Third Party and its employees and the names and job titles of the Ministry employees are clearly not the trade secrets of a third party, nor are they commercial, financial, or technical information of or about a third party, so s. 21(1)(a) does not apply. Therefore, it is not necessary to consider s. 21(1) any further. I find that the Ministry is not required to refuse to disclose this information under s. 21(1).

## CONCLUSION

[59] For the reasons above, I make the following order under s. 58 of FIPPA:

1. Subject to paragraph 2 below, the Ministry is authorized under s. 17(1) of FIPPA to refuse to disclose the information in dispute.

2. The Ministry must disclose to the applicant the information highlighted in a copy of the records which is being sent to the Ministry along with this order.

[34] See for example, Order 03-15, 2003 CanLII 49185 (BC IPC).

3. The Ministry is not required to refuse disclose any of the information in dispute under s. 21(1) of FIPPA.

4. I require the Ministry to give the applicant the highlighted information by February 5, 2016. The Ministry must concurrently copy the Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

December 22, 2015

**ORIGINAL SIGNED BY**

Elizabeth Barker, Senior Adjudicator

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