Order F19-50

MINISTRY OF HEALTH
Celia Francis
Adjudicator

December 23, 2019

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Summary: An applicant requested access to records related to meetings between the Ministry of Health and representatives of pharmaceutical companies. The adjudicator found that s. 13(1) (advice or recommendations) and s. 17(1) (harm to financial interests of public body or government) applied to some of the information. The adjudicator found that s. 17(1) and s. 21(1) (harm to third-party business interests) did not apply to other information and ordered the Ministry to disclose it to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(a), 13(3), 17(1), 21(1)(a)(ii), 21(1)(b), 21(1)(c)(I), 21(1)(c)(iii).

INTRODUCTION

[1] This case concerns a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records related to meetings between the Ministry of Health (Ministry) and representatives of pharmaceutical companies. After receiving the applicant's request, the Ministry gave four pharmaceutical companies notice of the request under s. 23 of FIPPA and sought their representations. The pharmaceutical companies responded by asking that the Ministry withhold some of the information under s. 21(1) of FIPPA (harm to third-party business interests) and s. 22(1) (harm to third-party personal privacy).

[2] The Ministry told the pharmaceutical companies that it had decided to withhold some information under ss. 17(1) (harm to public body's financial or economic interest) and 21(1) but would disclose other information. One pharmaceutical company requested a review by the Office of the Information and Privacy Commissioner (OIPC) of the Ministry's decision not to withhold some of the information under s. 21(1). During the OIPC's mediation of the review, the Ministry disclosed some information to the applicant but continued to withhold information under ss. 13(1) (advice or recommendations), 16(1) (harm to

intergovernmental relations), 17(1) and 21(1). Mediation was not otherwise successful and the matter proceeded to inquiry.

[3] After the OIPC issued the notice of inquiry, the Ministry disclosed more information and abandoned its reliance on ss. 16 and 22. In its initial submission, the Ministry maintained that ss. 13(1) and 17(1) still apply to some of the information but said it was not taking a position on s. 21(1).[1]

[4] Three of the four pharmaceutical companies, including the company that requested the review of the Ministry's decision, decided not to participate in this inquiry because they no longer wished to pursue their objections to the Ministry's decision.[2] However, Pfizer Canada ULC (Pfizer) provided a submission to this inquiry, arguing that s. 21(1) applies to some of the information. I have considered that submission. The applicant did not make a submission about any of the issues in the inquiry.

ISSUES

[5] The issues before me are these:

1. Is the Ministry authorized by ss. 13(1) and 17(1) to withhold information?
2. Is the Ministry required by s. 21(1) to withhold information?

[6] Under s. 57(1) of FIPPA, the Ministry has the burden of proof regarding ss. 13(1) and 17(1). The Ministry said that, under s. 57(3)(b), Pfizer has the burden of proving that the applicant has no right of access to some of the information by virtue of s. 21(1) of FIPPA.[3] As the Ministry has abandoned its earlier decision to rely on s. 21(1), I agree that, under s. 57(3)(b), Pfizer has the burden of proof regarding this exception.

DISCUSSION

Information in dispute

[7] The information in dispute in the 541 pages of responsive records is the following:

- the information that the Ministry withheld under ss. 13(1) and 17(1) in information briefing notes and other background information prepared for Ministry officials in advance of meetings with various pharmaceutical companies; and

[1] Ministry's initial submission, para. 99. It is not clear if the Ministry told the applicant and Pfizer before this that it had decided not to apply s. 21(1) to the records.
[2] Pfizer's initial submission, para. 4. Email of November 18, 2019 to OIPC registrar.
[3] Ministry's initial submission, para. 8.

- the information that Pfizer said should be withheld under s. 21(1) in a Pfizer business review presentation (presentation) that Pfizer gave to the Ministry in 2010.

Section 13(1) – Advice or recommendations

[8] The process for determining whether s. 13(1) applies to information involves a number of steps. First, the public body determines whether disclosure of the information would reveal advice or recommendations developed by or for the public body or a minister. If it would, the public body must then consider whether the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).[4] If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories or by s. 13(3), the public body must then decide whether to exercise its discretion to refuse disclosure.[5]

Principles for applying s. 13(1)

[9] The courts have said that the purpose of exempting advice or recommendations is "to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice,"[6] recognizing that some degree of deliberative secrecy fosters the decision-making process.[7] They have interpreted the term "advice" to include an expression of opinion on policy-related matters[8] and expert opinion on matters of fact on which a public body must make a decision for future action.[9] They have also found that advice includes policy options prepared in the course of the decision-making process.[10] Previous orders have found that a public body is authorized to refuse access to information, not only when it directly reveals advice or recommendations, but also when it would enable an individual to draw accurate inferences about advice or recommendations.[11]

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[4] Order F16-30, 2016 BCICP 33, para. 18.
[5] Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.
[6] *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*], at paras. 34, 43, 46, 47.
[7] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*], para. 105.
[8] *John Doe*, para. 46.
[9] *College of Physicians*, para. 113.
[10] *John Doe*, para. 35.
[11] See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).

[10] The Supreme Court of Canada has noted that there is a distinction between advice and factual "objective information."[12] In addition, the BC Supreme Court said this about the type of factual information to which s. 13(1) applies:

> ... if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body or if the expert's advice can be inferred from the work product it falls under s.13(1) ... the compilation of factual information and weighing the significance of matters of fact is an integral component of the expert's advice and informs the decision-making process. Based on the principles articulated in *Physicians*, the documents created as part of a public body's deliberative process are subject to protection.[13]

[11] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above.

Does s. 13(1) apply?

[12] The Ministry said that disclosure of the information at issue would:

- reveal "advice or recommendations, including implications, to allow Ministry executive to prepare for upcoming meetings and on various other issues;" or

- allow the drawing of accurate inferences about such information.[14]

[13] The Ministry said that its Pharmaceutical Services Division (PSD) is responsible for publicly funded drug programs in BC and has a mandate to "lead, innovate and manage" BC's drug programs. It said PSD staff gathered and analyzed information in order to prepare the records in question to brief Ministry officials on upcoming meetings and issues.[15] I am satisfied from the Ministry's evidence that the PSD staff who prepared the records were "experts".

[14] I find that the information to which the Ministry applied s. 13(1) comprises the following:

- PSD staff's advice and expert opinions on the state of competition among pharmaceutical companies, on positions or approaches the

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[12] *John Doe,* at paras. 50-52, commenting with approval on findings in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC).
[13] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)* [*PHSA*], 2013 BCSC 2322, at para. 94.
[14] Ministry's initial submission, paras. 86-87.
[15] Affidavit of Executive Director, Business Management, Supplier Relations and Systems, Pharmaceutical Services Division, paras. 6-9.

companies have taken or are likely to take and on strategies they are likely to adopt or arguments they are likely to make, together with implications for those strategies, positions, approaches or arguments;

- PSD staff's analyses of financial and other implications of certain actions the Ministry was contemplating, together with considerations for those actions;

- PSD staff's advice and expert opinion on the merits of a report, including on how to view the position the report was taking;

- PSD staff's advice on methods of achieving competitive pricing; and

- PSD staff's advice on the merits and implications of proposals by pharmaceutical companies, including options and advice on how to respond to those proposals and positions the Ministry should take.

[15] In my view, this information is "expert opinion on matters of fact on which a public body must make a decision for future action" and its disclosure would reveal advice or recommendations prepared by or for the Ministry or allow the drawing of accurate inferences of such advice or recommendations. I find that s. 13(1) applies to it.

Does s. 13(2) apply?

[16] Section 13(2) states that a public body must not refuse, under s. 13(1), to disclose certain types of information, including "any factual material" (s. 13(2)(a)). The Ministry argued that s. 13(2) does not apply here.[16]

[17] Past orders have discussed the difference between "factual material" to which s. 13(2)(a) applies (and which may not be withheld under s. 13(1)) and factual information which may be captured by s. 13(1):

> It is important to recognize that source materials accessed by the experts or background facts not necessary to the expert's advice or the deliberative process at hand would constitute "factual material" under s. 13(2)(a) and accordingly would not be protected from disclosure. However, if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or if the expert's advice can be inferred from the work product, it falls under s. 13(1) and not under s. 13(2)(a).[17]

[16] Ministry's initial submission, paras. 88-91.
[17] Order F16-43, 2016 BCIPC 47 (CanLII), at para. 25, with reference to *PHSA*.

[18] While the information in dispute contains some "factual material," it is intertwined with and integral to the information which I find is advice, such that severing would not be reasonable. Its disclosure would reveal advice or recommendations, either directly or by inference. As such, I find that s. 13(2)(a) does not apply to the withheld information in the records. I have also considered the categories of information in ss. 13(2)(b)-(m) and find that none of them applies to the withheld information.

Effect of s. 13(3)

[19] Section 13(3) states that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. The Ministry argued that this provision does not apply here.[18]

[20] Of the records to which the Ministry applied s. 13(1), three have been in existence for 10 or more years.[19] Section 13(1) does not, therefore, apply to the information in dispute in these records.

Conclusion on s. 13(1)

[21] In conclusion, I find that s. 13(1) applies to the information in dispute,[20] with the exception of the information in the three records that have been in existence for more than 10 years.[21]

Exercise of discretion

[22] Section 13 is discretionary. This means that the head of a public body must properly exercise its "discretion in deciding whether to refuse access to information, and upon proper considerations."[22] If the head of the public body has failed to exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where "the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations."[23]

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[18] Ministry's initial submission, paras. 92-93. The Ministry's submission is dated May 2019.
[19] Information briefing notes of August 25, 2009 (pages 7-8), September 8, 2009 (pages 13-14; almost the same as the August note) and November 19, 2009 (pages 38-39).
[20] That is, the information the Ministry withheld under s. 13(1) on pages 51-52, 61-62, 67, 68, 70-71, 73, 77, 79, 82, 83-84, 86, 87-88, 93, 106, 118, 126-127, 129-131, 132-133, 148, 149, 151, 152, 170, 187, 192, 197, 204, 206.
[21] That is, the information the Ministry withheld under s. 13(1) on pages 7-8, 13-14 and 38-39.
[22] Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144.
[23] *John Doe*, at para. 52; see also Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.

[23] The Ministry said it reconsidered its position on severing the records in May 2019 and released more information. It said it exercised its discretion to withhold the remaining information under s. 13(1).[24]

[24] The Ministry did not identify any information to which it had originally applied s. 13(1) and which it later disclosed. The Ministry also did not explain what factors it considered in disclosing the information, for example, the age of the records. However, I can see that the Ministry conducted a line by line review of the records and that it disclosed some information that it could technically have withheld under s. 13(1). There is no evidence that it considered improper or irrelevant factors or that it acted in bad faith in deciding to withhold some information. I am satisfied that the Ministry exercised its discretion properly in this case.

Standard of proof for harms-based exceptions – ss. 17(1) and 21(1)(c)

[25] The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> 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 consequences" ... [25]

[26] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[26] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

[27] I have applied these principles in considering the arguments on harm under s. 17(1) and s. 21(1)(c).

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[24] Ministry's initial submission, paras. 94-95.
[25] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94.
[26] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

Section 17(1) – harm to economic or financial interests of public body

[28] The Ministry said that disclosure of the information at issue would harm the financial interests of the Ministry and the Province under ss. 17(1). I have already found that s. 13(1) applies to much of that information. I need not, therefore, consider whether s. 17(1) applies to the same information. I consider s. 17(1) below where it is the only exception. I include here the three records to which I found that s. 13(1) does not apply, by virtue of s. 13(3).

[29] The Ministry says that ss. 17(1)(d) to (f) apply in this case. The relevant provisions read 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:
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> ...
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> (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;
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> (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.

[30] Past orders have held that, even if information fits within subsections (a) to (f), a public body must also prove the harm described in the opening words of s. 17(1), i.e., harm to the financial or economic interests of the public body or the ability of the government to manage the economy.[27] Therefore, the overriding question is whether disclosure of the information could reasonably be expected to harm the financial or economic interests of the Ministry or the Province.

PharmaCare

[31] The Ministry explained that, 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 that the Province of BC funds under the *Pharmaceutical Services Act*. It provides financial assistance to certain eligible BC residents for prescription drugs and medical supplies. PharmaCare only

[27] See, for example, Order F18-51, 2018 BCIPC 55 (CanLII) and Order F18-49, 2018 BCIPC 53 (CanLII).

covers pharmaceutical products listed on PharmaCare's formulary (other than in exceptional circumstances and on a case-by-case basis).[28]

[32] The Ministry said that it does not purchase drugs directly from drug manufacturers. Rather, under the PharmaCare scheme, a retail pharmacy acquires and dispenses the products listed on the PharmaCare formulary. The individual eligible PharmaCare client takes his or her prescription to be filled at the pharmacy and is only responsible for paying any amount that may be above the formulary amount. PharmaCare then reimburses the pharmacy for the amount specified in the formulary.[29]

Product Listing Agreements (PLAs)

[33] The Ministry and an individual drug manufacturer negotiate a PLA for a specific product, under which the Ministry agrees to add the product to the PharmaCare formulary, in return for a financial benefit (usually a rebate) to the Ministry. The Ministry said that in "recent years, many of the new drugs listed on PharmaCare's drug formulary have been the subject of PLAs." (I take from this that not all drugs on the PharmaCare formulary are subject to PLAs.) The Ministry said that the terms of the PLA for each drug differ but the net result is that the price the Province pays for a drug is lower than the price the drug manufacturer would charge in the open market. The Ministry said that savings from PLAs in 2017/18 were more than $2 million or 17.3% of total PharmaCare expenditures of over $1.2 billion. It expects savings to increase in the coming years, as it concludes more PLAs.[30]

Ministry's submission regarding harm

[34] The Ministry said that:

- the environment in which pharmaceutical companies establish prices is complex and competitive;
- drugs are typically marketed around the world, across national boundaries;
- pharmaceutical companies are subject to global pricing pressures and varying regulatory pricing regimes, as well as demands for additional value from institutional payers; and
- since 2010, BC has been combining its purchasing power with that of other provinces and territories in the pan-Canadian Pricing Alliance

[28] Ministry's initial submission, paras. 20-22; Affidavit of Executive Director, Business Management, Supplier Relations and Systems, Pharmaceutical Services Division, paras. 13-18.
[29] Ministry's initial submission, para. 23; Affidavit of Executive Director, Business Management, Supplier Relations and Systems, Pharmaceutical Services Division, para. 33.
[30] Ministry's initial submission, paras. 39-53; Affidavit of Executive Director, Business Management, Supplier Relations and Systems, Pharmaceutical Services Division, paras. 23-38.

(pCPA) to negotiate greater value for publicly funded drug programs and patients and, as a result, is entering into more agreements with pharmaceutical manufacturers.[31]

[35] The Ministry said that PLAs are "the most effective tool available to the Province to achieve financial savings" for single source (mostly brand) drugs. The Ministry admitted that it is publicly known that some pharmaceutical companies negotiate rebates and other financial concessions with the Province and public drug plans in other jurisdictions. The Ministry said, however, that even the fact that a company has entered into a PLA respecting a given drug remains "completely unknown, as does any concession through rebates or other financial compensation." The Ministry said that, due to its market size (about 2% of the global manufacturing market), the Province is "challenged in leveraging its position and does not have the luxury of dictating its own terms in relation to PLAs." The Ministry added that pharmaceutical companies have made it clear, and the Ministry has agreed, that the details of PLAs must be kept confidential.[32]

[36] The Ministry argued that, if PLAs were disclosed, the pharmaceutical companies might choose not to do business in BC, as the risk of negative impacts on their global business would outweigh the benefits. In addition, the Ministry argued, other pharmaceutical companies would use the information in PLAs to improve their bargaining position in future negotiations. The Ministry said that disclosure of the information in dispute would put it in a defensive position during negotiations of future agreements and undermine its ability to reject demands for similar provisions. This would, the Ministry argued, result in financial harm to the Province, either by prolonging negotiations and increasing the cost of those negotiations or by increasing the financial cost to the Province on a resulting agreement.[33]

Discussion and analysis

[37] I accept the Ministry's evidence that drug pricing is complex and competitive, that the Ministry and the Province benefit financially from PLAs and that PLAs play an important role in the Ministry's ability to manage drug costs under the PharmaCare program. I also accept that pharmaceutical companies wish to keep PLAs and their drug pricing confidential and that the Ministry has agreed to this condition.

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[31] Ministry's initial submission, paras. 35-38; Affidavit of Executive Director, Business Management, Supplier Relations and Systems, Pharmaceutical Services Division, paras. 19-22, 63-72.
[32] Ministry's initial submission, paras. 54-56, 61-69; Affidavit of Executive Director, Business Management, Supplier Relations and Systems, Pharmaceutical Services Division, paras. 41-62.
[33] Ministry's initial submission, paras. 54-56, 61-69; Affidavit of Executive Director, Business Management, Supplier Relations and Systems, Pharmaceutical Services Division, paras. 41-62.

[38] I am satisfied from the Ministry's submission and evidence that disclosure of the information in dispute, as it relates to the existence of actual PLAs and their terms, could reasonably be expected to result in financial harm to the Ministry and the Province, for reasons the Ministry argued. This finding is consistent with Order F15-68,[34] in which the adjudicator found that s. 17(1) applied to the terms of PLAs.[35]

[39] However, most of the information in dispute does not explicitly concern or refer to individual PLAs or their terms. The Ministry did not address any of this other information in its submission but rather concentrated on the harm from disclosure of PLAs.

[40] The information that is not about the terms or existence of individual PLAs is dated and I do not see how its disclosure could reasonably be expected to harm the financial interests of the Ministry and the Province for the purposes of s. 17(1). The Ministry did not explain. I discuss the individual records below:

- **Information briefing notes (IBNs) of August and September 2009**[36] provide background on an upcoming meeting with the Canadian Generic Pharmaceutical Association (CGPA). The withheld information describes the CGPA's interests and concerns of its members in their future dealings with the Ministry. This 10-year-old information concerns past events and arrangements no longer in effect. Moreover, the Ministry severed the information in these two notes inconsistently, disclosing information in some places while withholding it in others. The Ministry did not explain these severing inconsistencies.

- **An IBN of November 19, 2009**[37] discusses a report of November 2, 2009 called *Rx&D International Report on Access to Medicines 2008-09* which compared pharmaceutical reimbursements in Canada to those in 25 other countries. The withheld information, which is 10 years old, sets out Ministry staff's comments on the report and provides advice on how to interpret the report's findings.

- **An IBN of May 5, 2010**[38] provides background information on an upcoming meeting with Hoffmann-LaRoche Limited (LaRoche), a pharmaceutical company. The withheld information concerns individual LaRoche products.[39]

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[34] Order F15-68, 2015 BCIPC 74 (CanLII).
[35] My finding that s. 17(1) applies concerns the information the Ministry withheld under s. 17(1) on pages 15, 20, 25, 31-32, 136-137 and 204.
[36] Pages 7-8, Phase 2, and almost identical note at pages 13-14, Phase 2.
[37] Pages 38-39, Phase 2.
[38] Pages 51-53, Phase 2.
[39] One sentence on page 51, Phase 2, and a two-page appendix at pages 53-54, Phase 2, which lists individual products.

- **An IBN of November 17, 2011**[40] discusses interjurisdictional purchasing and procurement of pharmaceutical products in anticipation of an upcoming meeting. The withheld information forms part of the discussion of the benefits of joint purchasing of individual named products and refers to past events.

- **An IBN of March 16, 2012**[41] discusses upcoming reforms in Ontario's pricing of generic products. The withheld, seven-year-old, information concerns the financial benefits of BC's pricing options for a named product.

- **Appendices to an IBN of June 12, 2012** discuss several pharmaceutical companies.[42] The Ministry withheld similar information in each of the appendices regarding the companies' pharmaceutical products.

- **An IBN of November 11, 2012**[43] provides information on the pCPA and its success in negotiating lower prices for drugs for the pCPA partners. The Ministry withheld information in one column of the appendix to this note. The withheld information is, in my view, innocuous and is, moreover, similar in character to information the Ministry released elsewhere.

- **An IBN of November 15, 2012**[44] summarizes pricing initiatives for generic drugs. The Ministry withheld one sentence. This sentence is innocuous, in my view, and appears to have no connection to financial matters.

- **An IBN of June 10, 2013** provides an overview of Johnson & Johnson pharmaceutical products that PharmaCare covers and "their associated cost to PharmaCare."[45] The Ministry disclosed the overview, including the pharmaceutical company's name, but withheld information on its products.

- **Bullets for an upcoming Rx&D Bilateral Session** discuss a number of Ministry policies and upcoming regulations.[46] This record is undated but, from its context, I gather it was prepared for a May 2013 meeting. The Ministry applied s. 17(1) to comments and certain concerns with the policies, as well as to the benefits of one proposed regulation. Internal evidence suggests that the Ministry planned to address those concerns in the near future and that the regulation was to come into effect soon after.

[40] Pages 74-75, Phase 2.
[41] Pages 80-81, Phase 2.
[42] Pages 93, 95, 97, 99-101, 104, Phase 2.
[43] Pages 123-125, Phase 2.
[44] Page 134, Phase 2.
[45] Pages 138-139, Phase 2.
[46] Pages 142-144.

- **Bullets for a meeting of September 7, 2012** discuss various general matters respecting PLAs.[47] The Ministry withheld approximately four lines of information under s. 17(1). This seven-year old information does not refer to the existence of specific PLAs or their terms. It is, moreover, similar in character to (disclosed) information in the Ministry's submission to this inquiry.

- **A briefing note of November 20, 2009** on a meeting that the CGPA requested provides background on the CGPA and issues it was likely to raise.[48] The Ministry disclosed the background but withheld about eight lines of what I find to be innocuous information.

- **An IBN for a meeting of June 5, 2012** discusses LaRoche products.[49] The Ministry disclosed the pharmaceutical company's name and some information about individual LaRoche products but withheld other product information.

- **An IBN of November 12, 2012** provides background on LaRoche products.[50] The Ministry disclosed the background, including the pharmaceutical company's name, but withheld a two-page appendix listing LaRoche products.

- **Bullets for a meeting of September 7, 2012** with LaRoche provide background on La Roche and its products.[51] The Ministry disclosed the background, including the pharmaceutical company's name, but withheld information related to LaRoche products.

- **Bullets for a meeting of May 1, 2013** with Sanofi, a pharmaceutical company, provide background on Sanofi.[52] The Ministry disclosed the background, including the pharmaceutical company's name, but withheld information on Sanofi products.

Conclusion on s. 17(1)

[41] Aside from the information on specific PLAs, the Ministry's submission and evidence have not persuaded me that disclosure of the withheld information, now several years old, could reasonably be expected to result in harm under s. 17(1). The Ministry has not shown a clear connection between disclosure of the withheld information and a reasonable expectation of the alleged harms contemplated by s. 17(1). It has not, in my opinion, provided "evidence 'well

[47] Pages 167-169, Phase 2.
[48] Pages 177-178, Phase 2.
[49] Page 195 and its duplicate, page 196, Phase 2.
[50] Pages 197-200, Phase 2.
[51] Pages 218-219, Phase 2.
[52] Pages 220-221, Phase 2.

beyond' or 'considerably above' a mere possibility of harm." It has not met its burden of proof in this case. I find, therefore, that s. 17(1) does not apply to the information the Ministry withheld under that exception in the records I discussed above in paragraph 40.

Section 21

[42] The Ministry's table of records indicates that it withheld a Pfizer meeting form[53] and a Pfizer business review presentation[54] (presentation) under s. 21(1). However, Pfizer stated in its initial submission that it does not object to the disclosure of its meeting form and portions of its presentation.[55] Under s. 21(3)(a) of FIPPA, s. 21(1) does not apply to the information that Pfizer agreed may be disclosed and the Ministry must therefore disclose it.[56] I consider below Pfizer's objections to disclosure of the remaining portions of its presentation.[57]

[43] The relevant parts of s. 21(1) of FIPPA in this case read as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> …
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,[58]
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> …
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> (iii) result in undue financial loss or gain to any person or organization, …

[53] Pages 165-166, Phase 1 records.
[54] Pages 167-196, Phase 1 records.
[55] Pfizer's initial submission, paras. 3, 10. Pfizer's initial submission, para. 10.
[56] Section 21(3) states that s. 21(1) does not apply if the third party consents to disclosure.
[57] Pages 171, 172, 177, 188, 193-195.
[58] Pfizer's opening remarks on s. 21(1)(c) said one of the harms would be that similar information would no longer be supplied to the public body when it is in the public interest that similar information continue to be supplied, a reference to s. 21(1)(c)(ii). However, its arguments actually dealt with harm to its competitive position (s. 21(1)(c)(i)), so this is what I consider here.

[44] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[59] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, Pfizer must demonstrate that disclosing the information in issue would reveal: trade secrets of a third party; or commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, it must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

Section 21(1)(a) – type of information

[45] FIPPA does not define the terms listed in s. 21(1)(a)(ii). However, previous orders have said the following:

- "Commercial information" relates to commerce, or the buying, selling, exchanging or providing of goods and services. The information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[60]

- "Commercial" and "financial" information of or about third parties includes hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.[61]

[46] Pfizer said that the information in dispute is its commercial, financial or scientific information.[62]

[47] **Pages 171-172** – This information concerns the products that were in what Pfizer called its "pipeline" in 2010, which I understand to be drugs that Pfizer was developing that year. Pfizer said that it may or may not sell products in its pipeline.[63] These pages list several drugs, together with information on what they are used for and how they work. I am satisfied that this information relates to goods or products that Pfizer did, or might, provide at the time. I find that it is "commercial information" of or about Pfizer.

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[59] See, for example, Order 03-02, 2003 CanLII 49166 (BCIPC), Order 03-15, 2003 CanLII 49185 (BCIPC), and Order 01-39, 2001 CanLII 21593 (BCIPC).
[60] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[61] For example, Order F19-11, 2019 BCIPC 13 (CanLII) at para. 14, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16, Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24.
[62] Pfizer's initial submission, para. 17.
[63] Pfizer's initial submission, para. 17.

[48] **Page 177** – This information concerns Pfizer's business methods and its financial projections and commitments. I find that it is both commercial and financial information of or about Pfizer.

[49] **Page 188** – This information concerns Pfizer's methods and strategy for determining its pricing. I find that that it is financial information of or about Pfizer.

[50] **Pages 193-195** – This information concerns what Pfizer described as "case studies that are proprietary to Pfizer." It is about Pfizer's methods for doing business and I find that it is commercial and financial information of or about Pfizer.

[51] I have found that the information dispute in the presentation is commercial and financial information of or about Pfizer. I find, therefore, that s. 21(1)(a)(ii) applies to this information. As a result, I do not need to consider if it is also scientific information of or about Pfizer.

Section 21(1)(b) – supply in confidence

[52] The next step is to determine whether the information in issue was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[64]

[53] **Supplied:** Pfizer said that the records themselves show that it supplied the presentation to the Ministry.[65]

[54] A letter from Pfizer to the Ministry, which the Ministry disclosed,[66] shows that Pfizer attached a copy of the presentation and requested comments on its content. I find that the information in dispute in the presentation was "supplied" for purposes of s. 21(1)(b).

[55] **In confidence:** A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly or implicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[67]

> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business

[64] See, for example, Order F17-14, 2017 BCIPC 15 (CanLII), at paras. 13-21, Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, and Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[65] Pfizer's initial submission, para. 20; Affidavit of Pfizer's Director, Access and Government Relations, para. 13.
[66] Page 163, Phase 1 records.
[67] Order 01-36, 2001 CanLII 21590 (BC IPC).

> cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.
> …
>
> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
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> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

[56] Pfizer said that the records show it supplied the information with the expectation of confidence. It added that the information is "not otherwise widely circulated."[68]

[57] The presentation is marked "Confidential Information for BC Pharmaceutical Services use only." I accept from this and Pfizer's affidavit evidence that the information in dispute was supplied explicitly "in confidence" for the purposes of s. 21(1)(b).

Conclusion on s. 21(1)(b)

[58] I found above that the information in dispute in the presentation was both "supplied" and supplied explicitly "in confidence" for the purposes of s. 21(1)(b). I find, therefore, that s. 21(1)(b) applies to it.

Harm under s. 21(1)(c)

[59] I will now consider whether Pfizer has demonstrated a reasonable expectation of harm under s. 21(1)(c) respecting the information in dispute (pages 171-172, 177, 188 and 193-195).

[60] **Harm to competitive interests** – Pfizer said that the proprietary financial information on pages 177, 188 and 193-195 is not publicly known and could provide insight into its methods of doing business, to the benefit of competitors

[68] Pfizer's initial submission, paras. 20-21; Affidavit of Pfizer's Director, Access and Government Relations, paras. 13-15.

who could use it to "undercut or compete more effectively with Pfizer."[69] It added that a competitor could use the information on pages 171-172 to gain insight into Pfizer's business planning, in turn allowing the competitor to adjust its marketing plans and take other actions to compete better with Pfizer.[70]

[61] Pfizer did not explain how disclosure of the information on pages 171-172, 177, 188 and 193-195 could provide insight into its methods of doing business or business planning. Nor did Pfizer explain who its competitors are nor how they could use the information to harm its competitive interests in the way it suggested.

[62] Moreover, the information in question is almost ten years old. Pfizer did not explain why competitors would be interested in this dated information, still less how or why they would or could use the information to undercut Pfizer or compete "more effectively" with Pfizer. Pfizer also did not explain how this could in turn reasonably be expected to lead to "significant harm" to its competitive interests under s. 21(1)(c)(i).

[63] **Undue loss or gain** – Pfizer said that the "pipeline information" on pages 171-172 gives a "snapshot" into its development plans in 2010. It said that some of these products have been "successfully brought to market" but others have not. Moreover, it said, some approved products were not approved for all the uses listed. Pfizer argued that this could give the impression that there were safety or other negative concerns with products that were not brought to market, even though, it admitted, there are many reasons why Pfizer might not market certain products. Nevertheless, in Pfizer's view, disclosure of the information "could be used to create an unfairly negative impression of Pfizer, affecting stock prices and customer confidence."[71]

[64] I accept that some of the products Pfizer was developing in 2010 did not come to market or were not approved for all uses shown on these pages. However, I am not persuaded that disclosure of the information in dispute would give a negative impression of Pfizer or result in the other negative affects Pfizer suggested. It is also not clear to me why customers would even be interested in the products Pfizer was developing 10 years ago, still less why, on learning that certain drugs were not marketed, these customers would lose confidence in Pfizer or drive its stock price down. Pfizer could, in any case, explain what happened with the drugs listed on these pages, if it considered this helpful.

[65] Pfizer also said that information on "mechanisms of action and indications" of the drugs listed on pages 171-172 provides insight into Pfizer's "research

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[69] Pfizer's initial submission, paras. 29-30; Affidavit of Pfizer's Director, Access and Government Relations, paras. 21-23.
[70] Affidavit of Pfizer's Director, Access and Government Relations, para. 18.
[71] Pfizer's initial submission, paras. 25, 27; Affidavit of Pfizer's Director, Access and Government Relations, paras. 17-20.

direction and findings," some of which, it said, may not have been made public. Pfizer said a competitor could use the information to guide its own research activities, for example, by "researching the efficacy of drugs with similar mechanisms of action in the listed indication."[72]

[66] In Pfizer's view, its competitors could also use the information in dispute to "gain insight" into its future business plans, as the competitors could "adjust marketing strategies or take other measures to create an advantage." This could, Pfizer argued, cause undue financial gain to the competitors and undue loss to Pfizer. Pfizer also said that the information could give competitors insight into its "significant research activities." This would, it said, give the competitors an undue gain, as they would not have to spend money on their own research. Pfizer added that information on its pricing strategies and financial forecasts pages 177 and 188 includes the name of a product listing agreement that, Pfizer said, is not public and cannot be disclosed. Disclosure of this information could, Pfizer argued, give competitors insight into its market and pricing strategies which they could use to undercut or compete more effectively with Pfizer, resulting in loss of business to Pfizer and corresponding gains to its competitors.[73]

[67] Previous orders have said that the ordinary meaning of "undue" financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be "undue."[74]

[68] Pfizer did not explain how the information in dispute would give "insight" into its pricing and marketing strategies, research activities, business plans or financial forecasts. It also did not say why its competitors might be interested in this type of 10-year old information. Pfizer also did not explain how its competitors could use this dated information to give themselves an unfair advantage or how this would lead to an undue gain by the competitors and an undue loss by Pfizer. Pfizer also did not say if the PLA on page 188 is still in effect nor why it "cannot be disclosed." I note that the Ministry does not share Pfizer's concern about disclosure of this PLA information.

Conclusion on s. 21(1)(c)

[69] Pfizer has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish

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[72] Pfizer's initial submission, paras. 28, 30; Affidavit of Pfizer's Director, Access and Government Relations, para. 19.
[73] Pfizer's initial submission, para. 29; Affidavit of Pfizer's Director, Access and Government Relations, paras. 21-22.
[74] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.

a reasonable expectation of harm under s. 21(1)(c).[75] Pfizer's arguments on harm amount to little more than assertions and do not persuade me that any of the harms under s. 21(1)(c) could reasonably be expected to result from disclosure. It has not demonstrated a clear and direct connection between disclosing the information in dispute and a reasonable expectation of the alleged harms. Therefore, I find that Pfizer has not met its burden of proof and that s. 21(1)(c) does not apply to the information in dispute. I find that the Ministry is not required to refuse the applicant access to this information under s. 21(1).

CONCLUSION

[70] For reasons given above, I make the following orders under s. 58 of FIPPA:

1. Under s. 58(2)(b), I confirm that the Ministry is authorized to refuse access to the information to which I found s. 13(1)[76] and s. 17(1)[77] apply.

2. Under s. 58(2)(a), I require the Ministry to give the applicant access to the information to which I found that s. 17(1)[78] and s. 21(1)[79] do not apply.

[71] As a term under s. 59, I require the Ministry to give the applicant access to the information specified in item 2 in the preceding paragraph by February 6, 2020. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

December 23, 2019

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F15-62416

[75] *Community Safety*, at para. 54.
[76] That is, the information the Ministry withheld under s. 13(1) on pages 51-52, 61-62, 67, 68, 70-71, 73, 77, 79, 82, 83-84, 86, 87-88, 93, 106, 118, 126-127, 129-131, 132-133, 148, 149, 151, 152, 170, 187, 192, 197, 204, 206.
[77] That is, the information the Ministry withheld under s. 17(1), on pages 15, 20, 25, 31-32, 136-137 and 204.
[78] That is, the information the Ministry withheld under s. 17(1) in records I discussed in para. 40 above.
[79] That is, the information Pfizer wanted withheld on pages 171-172, 177, 188 and 193-195.