Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3185

Appeal PA12-98

The Hospital for Sick Children

April 5, 2013

Summary: The hospital received a request for access to vendor contracts for infant formula and infant formula products, including records describing any form of non-monetary compensation and/or gifts. The hospital identified an agreement and email correspondence between the hospital and a third party as being responsive to the request. After being notified of the request by the hospital, the third party claimed that the mandatory exemptions at section 17(1) (third party information) applied to the agreement. The third party also claimed that the email correspondence was not responsive to the request. The hospital decided to grant full access to the records. The third party (now appellant) appealed the hospital's decision to this office. This order upholds the hospital's decision to grant full access to the agreement, but concludes that the email correspondence is not responsive to the request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 24

Orders and Investigation Reports Considered: MO-1706, PO-2435, PO-2453, PO-2863, PO-3032

OVERVIEW:

[1] The Hospital for Sick Children (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to vendor contracts for infant formula and any records relating to those contracts, dating back to January 2010.

[2] Following discussions with the hospital, the requester clarified her request as follows:

- Vendor contracts for infant formula and infant formula products, including records detailing any form of non-monetary compensation and/or gifts.

[3] Pursuant to section 28 of the *Act*, the hospital notified a third party whose interests may be affected by the disclosure of the requested information. In its representations to the hospital, the third party objected to the disclosure of the records pursuant to sections 17(1)(a), (b) and (c) of the *Act*.

[4] The third party also indicated that the email correspondence included with the records at issue is not responsive to the request.

[5] After receiving the third party's representations, the hospital advised the requester and the third party that it decided to grant the requester full access to the requested records. The third party (now the appellant) appealed the hospital's decision to this office.

[6] The parties were unable to resolve the appeal through mediation and the appeal was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During my inquiry, I invited the hospital, the appellant and the original requester to make submissions on the issues in this appeal. The hospital and the appellant submitted representations.

[7] I note that the appellant raised the application of section 18(1) of the *Act* to the records at issue. This office has determined that the exemption in section 18(1) may only be raised by an institution.[1] Since the hospital did not raise this exemption, I will not consider its application to the records.

[8] In the discussion that follows, I find that the agreement is not exempt from disclosure under the *Act* and I order the hospital to disclose it to the requester. I also find that the email correspondence is not responsive to the request.

RECORDS:

[9] The records at issue in this appeal are an agreement between the hospital and the appellant and email correspondence.

[1] See Order PO-3032.

ISSUES:

A. What is the scope of the request? Is the email correspondence responsive to the request?

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

DISCUSSION:

A. What is the scope of the request? Is the email correspondence responsive to the request?

[10] The appellant claims that the email correspondence identified by the hospital as part of the records at issue is not responsive to the request.

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2]

[13] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

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[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.

[14] The request, as clarified by the requester, asked for access to:

> - Vendor contracts for infant formula and infant formula products, including records detailing any form of non-monetary compensation and/or gifts.

[15] The hospital located an agreement between itself and the appellant as well as email correspondence.

[16] The appellant takes the position that the email correspondence is not responsive to the request. The appellant submits that the email does not constitute a contract, nor does it detail any form of non-monetary compensation or gift. As such, the appellant submits that it is irrelevant to the request and the hospital has no authority to disclose it.

[17] Neither the requester nor the hospital made submissions on the responsiveness of the record.

[18] I have carefully reviewed the email correspondence at issue and find that it is not responsive to the request. As the appellant submits, the email correspondence does not constitute a contract, nor does it describe any other information requested. Further, the correspondence does not relate to the contract at issue. Rather, it concerns a contract that was agreed to prior to the drafting of the contract at issue. As such, I find that the email correspondence at issue is outside the scope of the request.

[19] Therefore, I will only consider whether section 17(1) applies to the agreement between the hospital and the appellant.

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

[20] The appellant submits that the entire agreement is exempt from disclosure under section 17(1) of the *Act*.

Section 17(1): the exemption

[21] Section 17(1) states, in part:

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

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

[22] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[5]

[23] For section 17(1) to apply, the appellant must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial financial or labour relations information; and
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: Type of Information

[24] The appellant submits that the record relates to product pricing and proprietary technology. As such, it contains the commercial and financial information of the appellant, as these terms have been defined by this office.

[25] In its representations, the hospital agrees with the appellant that the agreement contains commercial and financial information, satisfying the first part of the section 17(1) exemption.

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[4] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct). leave to appeal dismissed, Doc. M32858 (C.A.) (*"Boeing"*).
[5] Orders PO-1805, PO-2018, PO-2184, MO-1706.

[26] Past orders of this office have defined commercial and financial information as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

[27] I adopt these definitions for the purposes of this appeal.

[28] The record at issue is an agreement between the hospital and the appellant for the provision of infant formula. Upon review of the record, I am satisfied that the information at issue in the agreement relates to the buying, selling or exchange of merchandise or services, and to the use or distribution of money for the provision of these goods. Accordingly, I find that it qualifies as commercial and financial information for the purposes of section 17(1).

[29] As a result, the first part of the test for the application of section 17(1) has been met.

Part 2: Supplied in Confidence

Supplied

[30] The requirement that it be shown that information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[9]

[31] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[10]

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[6] Order PO-2010.
[7] P-1621.
[8] Order PO-2010.
[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.

[32] The contents of a contract involving an institution will not normally qualify as having been supplied for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[11]

[33] There are two exceptions to this general rule which are described as the "inferred disclosure" and immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[12]

[34] The appellant submits that it "supplied" the agreement to the hospital within the meaning of section 17(1) of the *Act*. The appellant states that the agreement is a standard form agreement that it has developed for use with its customers (such as the hospital) and was, therefore, supplied to the hospital. However, beyond this general assertion, the appellant has provided no other evidence to support its position that the record was supplied to the hospital.

[35] In its representations, the hospital submits that the agreement was created as a result of a negotiation process between itself and the appellant, and therefore, the agreement cannot be considered to have been "supplied" to the hospital. The hospital refers to previous decisions of this office, including PO-2435, MO-2330, MO-2179, PO-2438 and MO-2627, where a record that was negotiated between a third party and an institution was found to not meet the "supplied" test of part two. The hospital specifically states that "the contract was reached through negotiation by both parties, and thus we disagree with the appellant's view that it was supplied in confidence."

[36] Having reviewed the agreement and considered the representations of the parties, I am satisfied that the agreement was not "supplied" by the appellant to the hospital, but rather, was the product of negotiation between them. As indicated above, this office has stated in an analogous situation:

> … the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied"

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[11] This approach was approved by the Divisional Court in *Boeing*, cited above at note 3. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[12] Orders MO-1706, PO-2384, PO-2435 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, cited above at note 10.

> within the meaning of section 10(1) [the municipal equivalent to section 17(1)]. The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545).[13]

[37] In Order PO-2435, I considered the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to government requests for proposals, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. After carefully reviewing the records and representations, I rejected that argument and concluded that the government's option of accepting or rejecting a consultant's bid is in itself a form of negotiation.

[38] I find that agreed-upon essential terms of a contract or agreement are generally considered to be the product of a negotiation process and are not "supplied," even if the "negotiation" amounts to acceptance of the terms proposed by the third party.[14] Assuming that the current agreement is based on a standard form developed by the appellant for use with its customers, the acceptance of the terms of the agreement by the hospital, particularly Schedule "A" which sets out products and prices, amounts to negotiation of the agreement. On this point, I accept the position of the hospital that the contract was reached "*through negotiation by both parties*."

[39] As the appellant has failed to show that the information at issue was "supplied in confidence," it has not met part two of the test for the application of section 17(1). This is sufficient to conclude that the information at issue is not exempt under sections 17(1)(a), (b) or (c). However, for the sake of completeness, I will also address the arguments put forward by the appellant with respect to the "harms" that could reasonably be expected to arise as a result of disclosure of the information at issue.

Part 3: Harms

[40] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[15]

[41] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a

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[13] MO-1706. This approach was approved in *Boeing,* above at note 3.
[14] Orders PO-2384 and PO-2497.
[15] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[16]

[42] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[17]

[43] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[18]

[44] The appellant submits that the disclosure of the information at issue could allow competitors to understand its standard contractual terms and either match those terms or offer its customers preferable terms. In addition, the appellant submits that disclosure of the agreement would interfere with its negotiations with other organizations which could demand similar terms in other agreements.

[45] The appellant cites the "analogous context" of Order PO-2863 as a case where the IPC "appears to have accepted" the institution's arguments concerning the harms that could result from disclosing the information at issue in that case. In light of this, the appellant states that "[t]he necessary corollary to the competitive damage referred to above" is that the appellant would "suffer undue loss, in terms of lost profits, while public, private and other purchasers would enjoy undue gain."

[46] The hospital states that it does not agree that the disclosure of this record could reasonably be expected to result in the harms to the appellant. The hospital submits that the contract itself was created using a standard contract template, and notes that this office previously decided that the disclosure of the form and structure of a bid or proposal or general layout or format does not prejudice competitive position, even where it can be used as a template in future bids[19]. Likewise, the hospital submits that this office has found that disclosures of the pricing terms in the final contract will not prejudice the competitive position of the affected party[20].

[47] I agree with the hospital's position.

[48] With regard to the appellant's arguments, I note that the findings concerning harm in Order PO-2863 arose in the context of an analysis under sections 18(1)(c) and (d), different sections of the *Act* than those at issue in the present appeal. In addition, the finding in Order PO-2863 was based on the adjudicator's review of *detailed representations* made by the ministry concerning specified harms that could reasonably

[16] Order PO-2020.
[17] Order PO-2435.
[18] Order PO-2435.
[19] The hospital refers to Orders MO-2176, PO-2478, MO-2627 and PO-2435.
[20] The hospital refers to Orders PO-2435 and PO-2172.

be expected to result *to the ministry* from disclosure of the information at issue. These representations were further supported by letters from the drug manufacturers referred to in the records and from the Executive Officer, affirming the Ministry's position.

[49] I do not find that the appellant in the present appeal has provided similarly "detailed and convincing" evidence that disclosure of the information at issue could reasonably be expected to give rise to the harms outlined in sections 17(1)(a), (b) or (c) of the *Act*. The appellant provides no support for its assertions that disclosure "could allow" competitors to develop similar template agreements, "could interfere" with its negotiations with other parties through the possibility that those parties "could demand" favourable terms in future negotiations, or that competitive disadvantage "could arise" since competitors "could prepare proposals" adopting the appellant's terms. In Order PO-3032, this office rejected similar "bald assertions" of harm without specific explanation or evidence as being insufficient to meet part three of the section 17(1) test. I agree that these speculative statements, without more, do not support a finding of reasonable expectation of harm.

[50] There are other significant deficiencies in the appellant's position in addition to its failure to provide detailed and convincing evidence of harm. It is the appellant's position that disclosure of the agreement could interfere with its negotiations with other parties. In this regard, I note that the appellant is a sophisticated company with ample resources at its disposal. I am not convinced that disclosure of an agreement entered into with this particular hospital would place it in a position of weakness in future discussions with other organizations.

[51] Most importantly, previous orders of this office have rejected the argument that the ability of competitors to prepare more competitive proposals constitutes "harm" as contemplated by section 17(1). For example, in Order PO-2435, I stated:

> I also accept that the disclosure of this information could provide the competitors of the contractors with details of the contractor's financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs…. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[52] I am therefore not satisfied that part three of the test for the application of section 17(1) has been met.

[53] Having found that parts two and three of the test have not been met, I find that the information at issue is not exempt under section 17(1) and will order that it be disclosed to the requester.

ORDER:

1. I uphold the hospital's decision to disclose the entire agreement to the requester and order it to do so by **May 10, 2013** but not before **May 6, 2013**.

2. In order to verify compliance with Order Provision 1, I reserve the right to request the hospital to provide me with a copy of the record provided to the original requester.

3. The email correspondence identified by the hospital is not a responsive record and need not be disclosed to the requester.

Original signed by: April 5, 2013
Brian Beamish
Assistant Commissioner