Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3192

Appeal PA12-99

Toronto East General Hospital

April 25, 2013

Summary: The hospital received a request for access to vendor contracts for infant formula and any records relating to those contracts. The hospital identified an agreement between it and a third party as being responsive to the request. After being notified of the request by the hospital, the third party objected to disclosure of parts of the agreement on the basis that the mandatory exemptions at sections 17(1) (third party information) and 21(1) (personal privacy) applied. The hospital decided to grant full access to the agreement. The third party (now appellant) appealed the decision to this office. This order upholds the hospital's decision to grant full access to the agreement.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a), (b), (c) and 21

Orders and Investigation Reports Considered: PO-2435, PO-2453, PO-2863, PO-3032, MO-2611

OVERVIEW:

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

[2] The hospital identified an agreement between itself and a third party (the affected party) as being responsive to the request.

[3] Pursuant to section 28 of the *Act*, the hospital notified the affected party of the request. In its representations to the hospital, the affected party objected to the disclosure of portions of the agreement on the basis that the mandatory exemptions in sections 17(1)(a), (b) and (c) (third party information) and section 21(1) (personal privacy) of the *Act* applied. The affected party also urged the hospital to raise the exemption at section 18 (economic and other interests of Ontario) for portions of the agreement that it asked be withheld. The affected party also indicated that two additional records identified by the hospital consisting of email correspondence and a record predating the application of the *Act*,[1] were not responsive to the request.

[4] After reviewing the affected party's representations, the hospital agreed that the email correspondence and the record predating the application of the *Act* were not responsive to the request. The hospital decided to grant partial access to the agreement. The affected party (now the appellant) appealed the hospital's decision to this office.

[5] At the outset of mediation, the hospital advised that it denied access to portions of the agreement pursuant to sections 17(1), 18(1) and 21(1) of the *Act*. During the course of mediation, the requester narrowed the scope of her request by excluding certain portions of the agreement from the scope of her request.

[6] After further review and in light of the modified request, the hospital issued a revised decision to the appellant, advising that it had decided to grant the requester full access to the parts of the agreement which she was seeking.

[7] The appellant continued to object to the disclosure of portions of the agreement on the basis that section 17(1) and section 21(1) applied.[2]

[8] As mediation did not result in a resolution of the issues, the appeal 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. Only the appellant submitted representations.

---

[1] The *Act*, which applies to hospitals of January 1, 2012, provides for a right of access to a range of recorded information that came into the custody or under the control of a hospital on or after January 1, 2007.

[2] Although the appellant raised section 18 as a ground for resisting disclosure, this exemption may only be raised by the institution (see Order PO-3032). Since the hospital did not raise this exemption, I will not be considering the application of section 18 to the record.

[9] In the discussion that follows, I find that the record is not exempt from disclosure under sections 17(1) and 21(1) of the *Act* and order the hospital to disclose the record to the requester.

RECORDS:

[10] The information at issue consists of portions of an October 25, 2010 agreement between the hospital and the appellant entitled *Product Supply Agreement for Infant Formula* – specifically, the information withheld from part or all of pages 3, 13-15, 17 and 28-30 of the agreement.

ISSUES:

A. Does the mandatory exemption at section 17(1) apply to the information at issue?

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

DISCUSSION:

A. Does the mandatory exemption at section 17(1) apply to the information at issue?

[11] The appellant submits that sections 17(1)(a), (b) and (c) apply to pages 3, 13-15, 17 and 28-30 of the agreement.

Section 17(1): the exemption

[12] 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[13] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

[14] For section 17(1) to apply, the hospital and/or the appellant must satisfy each part of the following three-part test:

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

Part 1: Type of Information

[15] The appellant submits that the information at issue in this appeal relates to product pricing, proprietary technology and other matters and is thus commercial and financial information of the appellant, as these terms have been defined by this office.

[16] 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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]

---

[3] *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"*).
[4] Orders PO-1805, PO-2018, PO-2184, MO-1706.
[5] Order PO-2010.
[6] P-1621.

> *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.[7]

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

[18] The information at issue involves portions of an agreement between the hospital and the appellant for the provision of infant formula and accessories. I am satisfied that this information 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).

[19] 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

[20] 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.[8]

[21] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[9]

[22] 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.[10]

---

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

[23] 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.[11]

[24] Having reviewed the appellant's representations, I am satisfied that the information at issue was not "supplied" by the appellant to the hospital for the purposes of the section 17(1) exemption.

[25] The appellant submits that the "supplied" portion of the test is met since the disclosure of the information at issue would allow the requester to draw accurate inferences with respect to certain information provided by the appellant to the hospital "in connection with responding to the [request for proposal] that was issued, which ultimately led to the negotiation of and entry into" the agreement. This includes terms of the agreement pertaining to pricing and other financial terms. With respect, these facts, if substantiated, do not support a finding that the information was supplied as contemplated by section 17(1). Rather, it leads to the opposite conclusion. The fact that the agreement contains language indicating that terms were the subject of discussion between the parties leads to the conclusion that the agreement was in fact negotiated. The fact that pricing may have been discussed as well as other financial details is not, in my view, information "supplied" by the appellant.

[26] The appellant also argues that disclosure of the disputed information would permit the requester to draw accurate inferences with respect to other contractual terms which were initially put forward by the appellant to the hospital that found their way into the agreement itself. The agreement does contain a "*Products and Prices Schedule"* which sets out the price to be charged for products and accessories. It provides that if a certain contingency occurs, a particular pricing schedule will be applied. It is simply a necessary part of the formula for determining the price to be charged to the hospital should the contingency event occur. This is a matter of negotiation between the parties, similar to other contractual elements.

[27] The representations submitted by the appellant infer that the information in this schedule was not subject to negotiation with the hospital since it was provided to the hospital prior to an agreement being completed. As indicated above, this office has stated:

---

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

> … 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" 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).[12]

[28] Therefore, agreed-upon essential terms of a contract or agreement are generally considered to be the product of a negotiation process and not "supplied," even if the "negotiation" amounts to acceptance of the terms proposed by the third party.[13]

[29] 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 a form of negotiation.

[30] Similarly, in Order PO-2453 I found that the terms outlined by the successful bidder in a request for quotation process formed the basis of a contract between it and the institution, and were not "supplied" within the meaning of the second part of the test under section 17(1). By choosing to accept the affected party's bid, I determined that the information contained in that bid became "negotiated" information to which the ministry agreed. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract for services.

[31] Consistent with the above, I find that the information provided by the appellant to the hospital during the request for proposal process, which ultimately led the parties to enter into an agreement for the provision of goods, was not "supplied" by the appellant to the hospital within the meaning of section 17(1). Instead, the information at issue reflects the negotiated agreement between the appellant and the hospital.

[32] In its representations, the appellant cites two orders of this office in support of its claim that the "inferred disclosure" exception applies to the present appeal. The appellant describes Order PO-2863 as having arisen in an "analogous context" involving requests for the financial terms of product listing agreements between the Ministry of Health and Long-Term Care and drug manufacturers for the supply of drugs. The appellant submits that, in that order, "the Ministry of Health acknowledged that the release of this type of information could lead to an inference of the baseline pricing of a

---

[12] MO-1706. This approach was approved in *Boeing,* above at note 3.
[13] Orders PO-2384 and PO-2497.

manufacturer's products." The appellant also cites Order PO-3032 as an instance where "the Adjudicator was prepared to accept that payment amounts under a product listing agreement may be considered to be information that was "supplied" to the Ministry of Health."

[33] Orders PO-2863 and PO-3032 involved requests to the Ministry of Health and Long-Term Care (the Ministry) for information including the amounts of discount payments made by individual drug manufacturers to the ministry pursuant to agreements made between them.

[34] Order PO-2863 considered whether volume discount information was exempt under the section 18(1) discretionary exemptions claimed by the ministry. In its representations on the applicability of these exemptions, the ministry maintained that disclosure of the information at issue would reveal the confidential volume discount amounts and other information relating to the calculation of the volume discount amounts paid by drug manufacturers to the ministry pursuant to listing or pricing agreements. In the result, the order upheld the ministry's decision that disclosure of the information at issue could reasonably be expected to attract the harms contemplated in sections 18(1)(c) and (d).

[35] Although the appellant describes Order PO-2863 as having arisen in an "analogous context" to the circumstances in this appeal, I do not agree. In that order, the adjudicator found that the ministry provided detailed representations as to how the information at issue could be used to calculate the volume discount and other monetary conditions negotiated by the Executive Officer of the Ontario Public Drug Programs in the listing and pricing agreements with individual drug manufacturers. The ministry's 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. The ministry did more than merely allege that disclosure of the information at issue could lead to an inference with respect to underlying confidential information. Furthermore, the analysis was conducted under sections 18(1)(c) and (d) of the *Act*, not section 17(1) which is the exemption at issue in the present appeal.

[36] Similarly, Order PO-3032 upheld the ministry's decision to deny access, under sections 18(1)(c) and (d), to payment amounts of a similar nature to those considered in Order PO-2863. While the appellant states that this office "was prepared to accept that payment amounts under a product listing agreement may be considered to be information that was 'supplied' to the Ministry of Health" in Order PO-3032, the extract cited in support of this assertion does not support this claim.[14]

[14] The cited extract (paragraphs 64 to 65 of Order PO-3032) considers whether certain information (the company name, invoice and payment dates) qualifies as one of the types of information listed in section 17(1). Order PO-3032 found that the information does qualify as commercial information and therefore meets part 1 of the test.

[37] The only portion of Order PO-3032 that addresses the question of whether payment amounts meet part two of the test under section 17(1) is a statement that reads: "While I might be prepared to accept these arguments with respect to the payment amounts, I am not satisfied that they should be upheld with respect to the dates."[15]

[38] This statement arises in the course of an analysis of whether other information at issue – namely, the dates when payments were received by the ministry – satisfied the "supplied" part of the test under section 17(1). In rejecting the drug manufacturers' argument that disclosing the dates would permit the drawing of accurate inferences about their business activities, practices and strategies, this office indicated that an "inferred disclosure" argument might be more plausibly made for payment amounts than for the date information at issue. I do not find that this comment amounts to a finding by the adjudicator (or an indication that the adjudicator "was prepared to accept") that payment amounts "may be considered to be information that was 'supplied' to the ministry". The adjudicator did not proceed with an analysis of whether the payment amounts did in fact meet the "supplied" part of the test in the circumstances.[16] Finally, this comment was made in light of the particular facts of that case, including the specific representations made by the parties regarding the payment amounts at issue. Given all the above, I do not find the treatment of payment amounts in Order PO-3032 to be relevant in the present appeal.

[39] As the appellant has failed to establish 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 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.[17]

[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

---

[15] Order PO-3032, at para. 79.

[16] This analysis was unnecessary, since these amounts had already been found to be exempt under sections 18(1)(c) and (d) of the *Act*.

[17] *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.[18]

[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).[19]

[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*.[20]

[44] The appellant submits that disclosure of the information at issue could cause harms, including interference with its ability to negotiate with other parties and enabling competitors to develop similar technologies. The appellant again cites the "analogous context" of Order PO-2863 as a case where the IPC "appears to have accepted" the Ministry'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."

[45] I again 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. I note that 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 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.

[46] Unlike Order PO-2863, I do not find that the appellant has provided sufficiently "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 technologies, "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, cited by the appellant on other grounds, above, 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 a reasonable expectation of harm.

---

[18] Order PO-2020.
[19] Order PO-2435.
[20] Order PO-2435.

[47] There are other deficiencies in the appellant's position. It is the appellant's position that disclosure of the unsevered agreement could interfere with its negotiations with other parties. As I noted in Order PO-3185, where the appellant in that appeal made a similar claim:

> …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.
>
> 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.

[48] I am, therefore, not satisfied that part three of the test for the application of section 17(1) has been met. As a result, I find that the information at issue is not exempt under section 17(1).

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

[49] The appellant claims that section 21(1) applies to the redacted portion of page 28 of the agreement, consisting of the name, signature and date of signature of an individual whom the appellant refers to as its representative. The appellant submits that the name of the representative who executed the agreement constitutes personal information about this individual and it is, therefore, exempt from disclosure under section 21(1).

[50] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[51] In order to determine if section 21(1) of the *Act* applies, it is first necessary to decide whether the record contains "personal information," and if so, to whom it relates.

[52] The term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[53] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[21]

[54] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[55] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[22]

[56] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[23]

[57] In Order MO-2611, this office considered whether the signature portion of an indemnity agreement between a municipality and a third party, consisting of the actual signature, along with the name and title of a signing authority, was exempt under the municipal equivalent to section 21(1). In that order, this office adopted the context-driven approach endorsed in previous orders[24] in considering the question of whether signature information falls within the definition of "personal information" and whether it is exempt under the municipal equivalent of section 21(1).

[58] The context in which the signature information appeared in Order MO-2611 was found to be a business and professional context, rather than a personal one. This office also found that, in the context of the indemnity agreement made between the corporate third party and the municipality, the individual who had signed the agreement on behalf of the third party had not done so in his or her personal capacity (such that he or she was personally liable under the agreement), but rather only in his or her professional capacity, in order to bind the third party. Accordingly, the signature

---

[21] Order 11.
[22] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[23] Orders P-1409, R-980015, PO-2225 and MO-2344.
[24] Orders PO-2632, M-1194.

information was not personal information as contemplated by section 2(1) of the *Act* and was not exempt under the municipal equivalent to section 21(1).

[59] Similarly, the information at issue in this appeal consists of the name, signature and date of signing of the agreement by a representative of the corporate appellant. The representative's signature information in the context of the agreement binds the appellant, and not the representative personally, in an agreement with the hospital. As a result, I find that the signature information at issue appears in a business or professional context rather than a personal one. In addition, I do not find that disclosure of the signature information would reveal something of a personal nature about the representative. It would merely reveal that he or she has signing authority for the appellant. As this information does not qualify as personal information of the representative, the mandatory exemption at section 21(1) does not apply and the information should be disclosed.

ORDER:

1. I uphold the hospital's decision to disclose the remaining information at issue and order it to do so by **May 31, 2013** but not before **May 27, 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.

Original Signed by: April 25, 2013
Brian Beamish
Assistant Commissioner