

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3286

Appeal PA12-395

The Scarborough Hospital

December 19, 2013

Summary: The Scarborough Hospital received a request under the *Freedom of Information and Protection of Privacy Act* for access to “any contract or other documentation setting out the terms on which the hospital and one or more other entities carry on a home oxygen business together.” Pursuant to section 28, the hospital notified an affected party who might have an interest in the disclosure of the responsive records and sought its position regarding disclosure. The affected party objected to the disclosure of the responsive records. The hospital then issued a decision letter denying access to the responsive records pursuant to the mandatory exemption for third party commercial information at section 17(1) of the *Act*. The requester appealed the decision. Subsequently, the hospital issued a revised decision letter advising that, on further review, it no longer took the position that section 17(1) applied to the responsive records and it was prepared to disclose them to the requester, subject to the affected party’s right to appeal its decision. The affected party (now the appellant) appealed the hospital’s decision to grant full access to the responsive records. During mediation, the appellant agreed to release portions of the responsive records to the requester, but took the position that section 17(1) applied to exempt the remainder of the information from disclosure. In this order, the adjudicator finds that section 17(1) does not apply to exempt the information at issue from disclosure and upholds the hospital’s decision to disclose the information to the requester.

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

Orders and Investigation Reports Considered: Orders MO-2164, MO-2435, PO-2226, PO-2632, PO-2384 and PO-3032.

Cases Considered: *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.); 2005 ON SCDC 24249 (CanLII), leave to appeal dismissed, Doc. M32858 (C.A.); *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475; 298 D.L.R. (4th) 134, (Div. Ct.), 2008 ON SCDC 45005 (CanLII); and, *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII).

OVERVIEW:

[1] A request was made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to The Scarborough Hospital (the hospital) for the following information:

Any contract or other documentation setting out the terms on which the hospital and one or more other entities carry on a home oxygen business together.

[2] Pursuant to section 28 of the *Act*, the hospital notified an affected party who might have an interest in the disclosure of the information. The affected party objected to its disclosure. Following consideration of the affected party's representations, the hospital issued a decision advising the requester that access to the responsive records was denied, in their entirety, pursuant to section 17(1) (third party information) of the *Act*. That decision was appealed to this office by the requester and Appeal PA12-165 was opened.

[3] During the course of Appeal PA12-165, the affected party provided the hospital with its consent to disclose additional information to the requester.

[4] Subsequently, the hospital issued a revised decision advising the parties that following further review of the information remaining at issue, it no longer claimed that section 17(1) of the *Act* applied, and it was prepared to grant the requester full access to the requested records. Appeal PA12-165 was therefore closed. However, in its decision letter, the hospital further advised that the requester's right to full access was subject to the affected party's right to appeal that decision as outlined in sections 50(1) and (2) of the *Act*.

[5] The affected party (now the appellant) appealed the hospital's revised decision to disclose the requested records and the current appeal was opened.

[6] During mediation, the appellant agreed to the release of additional information contained in the records. The appellant provided the hospital with a new, severed copy of the records identifying the portions that it agreed could be disclosed to the requester.

[7] Following his review of these records, the requester advised that he wished to pursue access to the remaining severed information.

[8] As mediation did not resolve the matter, the file was moved to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry.

[9] I began my inquiry into this appeal by sending a Notice of Inquiry to the appellant and I received representations in response. I then sent a copy of the Notice of Inquiry to the hospital and the requester, enclosing a copy of the appellant's non-confidential representations. Both the hospital and the requester provided representations in response.

[10] The hospital's representations were brief and stated simply that it "does not believe that the requested records are subject to the exemption under section 17(1) of [the *Act*]."

[11] As the requester's representations raised issues to which I believed the appellant should be given an opportunity to reply, I provided the appellant with a copy of them. The appellant provided representations in reply.

[12] The only issue to be decided in this appeal is whether the mandatory exemption for third party commercial information at section 17(1) applies to the portions of the three responsive records that remain at issue.

[13] In this order, I find that the mandatory exemption at section 17(1) of the *Act* does not apply to the information at issue and I uphold the hospital's decision to disclose this information to the requester. In this order, I make the following findings:

- The first part of the three-part test for the application of section 17(1) has been established as the information at issue qualifies as "commercial" and "financial" information;
- the second part of the three-part test for the application of section 17(1) has not been established as the information at issue does not qualify as having been "supplied"; and
- as all three parts of the section 17(1) test must be established for the exemption to apply and part two has not been established, section 17(1) does not apply.

RECORDS:

[14] Portions of the following three records remain at issue in this appeal:

- Record 1: Joint Venture Agreement dated June 1, 2010 – withheld in part;

- Record 2: Management Services Agreement dated June 1, 2010 – withheld in its entirety; and,
- Record 3: Director’s Resolution dated June 1 2010 – withheld in part.

DISCUSSION:

Does the mandatory exemption at section 17(1) of the *Act* apply to the information that remains at issue?

[15] The appellant submits that the exemptions at sections 17(1)(a) and/or (c) apply in the circumstances of this appeal. Those sections read:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[16] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ 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.²

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

¹ *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.); 2005 ON SCDC 24249 (CanLII).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[18] The types of information listed in section 17(1) have been discussed in prior orders. Those that may be relevant in the current appeal are the following:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.³

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.⁴

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.⁵

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

³ Order PO-2010.

⁴ *ibid.*

⁵ *ibid.*

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

[19] The appellant submits that the information at issue falls into three categories of information. It states:

- *Category 1 – Creation and Corporate Information.* These severances detail information related to the Joint Venture's creation and corporate information, including...share structure, dissolution provisions, along with [the appellant's] and [the hospital's] transfer of assets...
- *Category 2 – Operations.* These severances detail information related to the Joint Venture's operations...
- *Category 3 – Tax Strategy.* These severances detail the Joint Venture's tax strategy...[T]he Joint Venture structure is a unique corporate structure that is crafted to minimize risk and maximize profitability. Technical taxation advice was sought and paid for by [the appellant] to structure the Joint Venture in the most tax efficient manner. This tax structure is not known in the industry, or amount those whom with [the appellant] competes...

[20] The appellant submits that the records at issue contain trade secrets, commercial and financial information. The appellant submits:

Commercial Information

All three of [the categories of information identified above] represent [the appellant's] commercial information.

The requested records in their entirety describe the buying, selling, and exchange of services between [the hospital] and [the appellant] in creation and in execution of their joint venture. The requested records form the basis of a commercial arrangement between [the hospital] and [the appellant] for the buying and selling of services contemplated by

⁶ Order PO-2010.

⁷ Order P-1621.

⁸ Order PO-2010.

their joint venture, which the IPC has held satisfies part one of the test.⁹ The requested records also describe the business activities of [the appellant's] business model, the same model at the centre of its joint ventures with other hospitals. Moreover, the requested records detail how [the appellant] will deliver home respiratory care services to patients, how services are provided to the parties' joint venture, the roles and responsibilities of each of the parties and the distribution and exchange of profits. This type of agreement is quintessentially the commercial information of [the appellant] and has held to be so by the IPC.¹⁰

Financial Information

Portions of the requested records also contain financial information:

- (a) Category 1 includes the financial structure or "money matters" of the parties' joint venture. This category of information explains the transfer of assets, purchasing and structure of shares, and the joint venture's dissolution provisions. This information explains how money, assets, and shares are distributed between the parties.
- (b) Category 2 includes the parties' remuneration and distribution of profits, which obviously relate precisely to how money is distributed between [the hospital] and [the appellant]. This is exactly the type of information that the IPC has held constitutes financial information.¹¹
- (c) Category 3 captures the technical taxation advice that [the appellant] sought and obtained in order to develop its business model as outlined in the requested records. This advice is captured in the provisions which describe the equal ownership of the parties, distribution of remuneration between the parties, divestiture of shares and dissolution provisions. This profit maximizing structure is akin to an accounting method used to maximize profits. Accordingly, this is also the financial information of [the appellant].¹²

Trade Secrets

Each of [the three categories identified above] also contains the trade secrets of [the appellant].

⁹ Orders PO-2435 and PO-2384.

¹⁰ Order PO-3116.

¹¹ Order PO-2010.

¹² Orders PO-2010 and PO-3116.

The severed portions of the requested records describe the detailed formula comprising [the appellant's] unique joint venture corporate structure, the same structure now being used by [the appellant] and [the hospital]. Specifically, Category 1 and Category 2 of the requested records describe the corporate and financial structure, as well as the management, of the parties' joint venture.

Category 3 of the requested record captures the technical taxation advice that was sought to implement the parties' joint venture. [The appellant's] joint venture formula is [the appellant's] trade secret. The joint venture formula which includes significant legal, ethical and financial advice sought and paid for by [the appellant], advice used to formulate and create [the appellant's] joint ventures with Ontario hospitals. Although the concept of a joint venture with hospitals is known in the home respiratory care industry, the details of [the appellant's] joint venture formula are not known. It is the secrecy of this formula that has enabled [the appellant] to be so successful. Disclosure of this formula would allow for increased and more efficient competition of [the appellant], harming its competitive advantage in the industry.... As evidenced by [the appellant's] success, this formula as illustrated by the significant underlying professional advice which is the foundation of the parties' joint venture.

The joint venture as outlined in the requested records is subject to confidentiality as between [the appellant] and [the hospital]. [The appellant] does not disclose this formula to the public, and ensures that such information does not inadvertently get disclosed to others by locking the requested records in secure offices. Accordingly, [the appellant] submits that the requirements of the IPC to establish that the requested records constitute a trade secret have been satisfied.

[21] The requester acknowledges that "the contractual and other terms governing a business arrangement *can* constitute commercial and/or financial information." However, the appellant submits that as he does not know the exact nature of the information at issue, he defers to my determination as to whether it constitutes such information.

[22] However, the requester submits that despite not knowing the exact nature of the severed information, he "take[s] issue with its characterization as a 'trade secret'" as it "seems manifestly unlikely that any of [the information at issue] constitutes a trade secret."

[23] The requester submits:

Like most multi-party business arrangements, a joint venture is “housed” in (a) a contractual relationship (e.g. a services agreement or a partnership agreement), (b) a corporation (in which the joint venturers are shareholders), or (c) both a contractual relationship and a corporation. This particular joint venture (unsurprisingly) appears to involve both: a corporation (in which the hospital is the shareholder) has entered into a contract with the hospital to provide certain goods and services, with [the appellant] providing management services to that corporation, and both parties profiting from the arrangement.

Structuring a joint venture (whether contract, corporation or both) is not akin to developing a software code or concocting a special formula. Rather, the joint venture is merely a business arrangement in which one party agrees to undertake certain obligations, another party agrees to undertake other obligations, and the parties agree on how their activities are funded and how profits are allocated. This is no different from a services agreement or a purchase agreement.

[The appellant] has also asserted that because it sought external legal and other advice, this imports the qualities of a trade secret to the requested records. While a party to a joint venture may seek external advice, the same is true of any contractual relationship: parties routinely seek legal, business and tax advice regarding their contractual negotiations and relationships – this does not make a negotiated contract that is influenced by that advice a trade secret. An affected party could not claim that merely because it sought legal advice (i.e. hired a lawyer to negotiate and advise on a contract) that the work product of the lawyer when embedded into a contract is somehow that party’s trade secret.

The fact that [the appellant] happens to use the same structure in its joint venture with other hospitals does not itself make this a trade secret. It merely evidences that the structure has been used elsewhere.

A trade secret must have inherent value. I contend that even if the requested records had some inherent value as a trade secret at the time the requested records were created, that value has now materially diminished, such that the requested records cannot be considered to be or contain a trade secret.

[24] The requester points to a notice issued by the Ontario Hospital Association on behalf of the Ministry of Health and Long-Term Care.¹³ He submits that it relates to Ontario hospitals that are considering an expanded role in providing home oxygen therapy and/or respiratory devices and that it references new policies that need to be considered. The requester submits that, as described in this notice, Ontario hospitals will no longer be able to enter into joint ventures with oxygen therapy services providers and receive funding from the ministry. He submits that as a result, there is no longer a market for the appellant to enter into new joint ventures with hospitals and their argument that the records constitute trade secrets fails because the records lack value.

[25] The requester submits:

Characterizing this joint venture as a trade secret would be a dangerous expansion of the well-define concept of a "trade secret," and would significantly frustrate the application of [the *Act*] if adopted.

[26] In reply, the appellant responded to the requester's argument that as a result of the notice issued by the ministry, the appellant no longer has a market for new joint ventures based on its business model and, therefore, the appellant's business model has no future value. The appellant submits that this argument is inaccurate for the following reasons:

- First, the regime articulated in the ministry's notice is based on the ideas that (a) any new joint venture will be a "new vendor" and (b) the ministry's Vendor of Record List (i.e. the list of those vendors who may receive ministry funding) is currently closed – new vendors may not be added to the list. However, the requester overlooks the fact that this is a temporary measure which the ministry may change at any time.
- Second, and more importantly, a new joint venture corporation will not necessarily be excluded from the ministry's Vendor of Record List. A new joint venture corporation can be created and acquire an existing vendor of record license such that this new joint venture corporation would be on the ministry's Vendor of Record List. For this reason, [the appellant] could conclude today the very same joint venture it has with the hospital in a manner that would allow the resulting joint venture corporation to be on the ministry's Vendor of Record List.

¹³ *Important Notice of Hospitals: Providing Home Oxygen Therapy and/or Respiratory Devices.*

- Third, a new joint venture corporation does not have to participate in the program to be on the ministry's Vendor of Record List to conduct business. While it is certainly preferable for it to do so, it is not necessary.

[27] From my review of the records and the representations of the parties, I am satisfied that the records and portions of records at issue contain information that meets the first part of the three-part test in section 17(1). The records relate to the terms of a commercial agreement entered into between the appellant and the hospital, and contain "commercial information" as it relates to the buying, selling or exchange of merchandise or services. Specifically, they contain the details of the arrangement between the parties whereby the appellant delivers home respiratory care to hospital patients.

[28] Portions of the records also contain "financial information" as that term has been defined by this office in previous orders. Specifically, I find that they contain details regarding the financial structure of the commercial arrangement between the parties, information regarding the remuneration and distribution of profits, and specifics of the taxation strategy employed to maximize profits.

[29] As I have found that the information at issue qualifies as commercial and financial information, I am satisfied that the information for which section 17(1) is claimed meets the requirements for part one of the test for the application of that exemption.

[30] In the circumstances, it is not necessary for me to determine whether the information at issue qualifies as any of the other types of information described in section 17(1), including a trade secret.

Part 2: supplied in confidence

Supplied

[31] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.¹⁴

[32] 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.¹⁵

¹⁴ Order MO-1706.

¹⁵ Orders PO-2020 and PO-2043.

[33] The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract have, in general, been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.¹⁶

[34] 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 confidential information supplied by the affected party to the institution. The “immutability” exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.¹⁷

Representations

[35] The appellant acknowledges that previous orders of this office have established a general rule that the contents of a contract generally do not qualify as having been “supplied” for the purposes of the second part of the section 17(1) test. However, it submits that the information contained in the records at issue fall into the “inferred disclosure” and “immutability” exceptions to that general rule and, therefore, should be considered as having been “supplied.”

[36] The appellant submits:

This is not a case where the terms of the RFP [request for proposal] could have been negotiated but were simply transposed into a contract without negotiation. Rather, [the appellant’s] Joint Venture structure *had* to be accepted and implemented into the terms of the requested records. As fully described below, they could not have been negotiated.

The portions of the requested records at issue were prepared solely by [the appellant] and represent the immutable requirements that [the hospital] had to adopt in order to enter into a joint venture with [the appellant]. Aside from the “put option” and boundaries of the joint venture territory contained in the requested records, all other severed portions of these documents reveal [the appellant’s] standard joint

¹⁶ *Supra*, note 1; Orders PO-2018, MO-1706 and 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; 298 D.L.R. (4th) 134, (Div. Ct.).

¹⁷ Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, *ibid.*

venture model that could not have been, and were never, the subject of negotiation. These terms cannot be altered in any way, as it may fundamentally change the entire relationship between the parties, and thus jeopardize the status and effect of [the appellant's] professional advice. Alternative structures or negotiation of terms and conditions would render the required joint venture structure void, with some other relationship substituted in its place.

Consequently, each element of the joint venture structure had to be adopted by [the hospital]. In fact, [the appellant] would not have entered into the joint venture with [the hospital] unless the structure [the appellant] imposed was adopted.

[37] In support of its position that the terms of the joint venture agreement were never subject to negotiation and not susceptible of change, the appellant explains that its reputation in the industry "hinges on its adherence to its fixed, standard template and approach." It submits that the terms "are in essence [the appellant's] operating philosophy and, as such are immutable."

[38] Additionally, the appellant submits that the disclosure of the information at issue would permit "inferred disclosure" of underlying information that was supplied. Specifically, the appellant submits that disclosure would allow one infer "the underlying professional advice sought that formed the basis of the structure of the joint venture."

[39] Specifically, addressing record 3, the directors' resolution, the appellant submit that it was supplied to the hospital "as an internal corporate document of the parties' joint venture." The appellant's vice-president submits in an affidavit attached to the appellant's representations:

The resolution is an internal corporate document of the joint venture prepared solely by [the appellant] and [the hospital] for corporate governance purposes. It is not a negotiated document and is not akin to an agreement.... Further, the severed portions of the resolution describe the existence of the immutable requirements outlined in the joint venture agreement and [management service agreement] that are required for the joint venture to operate. Accordingly, the severed portions of the resolution were not subject to negotiation.

[40] The appellant states that if I do not agree that the records at issue meet the "supplied" component of the section 17(1) test, it submits that this office has previously misinterpreted the concept of "supplied." It submits that the meaning of that term is

unclear and should be interpreted light of the Williams Commission Report¹⁸ and the French version of the *Act*.

[41] The appellant describes the report as defining the purpose of the exemption for third party commercial information as protecting informational assets of a business firm which, if disclosed, could be exploited by a competitor to the disadvantage of the firm.¹⁹ The appellant states that the report states that the exemption should not be read in an overly restrictive manner.²⁰ As a result, the appellant submits that:

[T]he central concern under this exemption, as envisioned by the report, was not the *type* of document at issue, but rather the document's *content*: if the information at issue is such that its release could reasonably prejudice [the appellant] then its release should be refused, regardless of the category or type of document at issue.

[42] The appellant further submits that to interpret the term "supplied" in the manner in which this office has in the past is incorrect as it renders the harms outlined in sections 17(1)(a), (b), and (c) ineffective. It submits that the exemption was meant to protect the confidential commercial interests of third parties and that objective is no less important if that information was subject to negotiation. It submits that it is instructive to consider the French version of section 17(1) when considering the concept of "supplied." It submits:

[I]n resolving the ambiguity and contextual nature of the word "supplied" in subsection 17(1), neither the IPC nor the courts have considered the provision's French counterpart or the section's original purpose. In the section's English version, the use of the word "supplied" raises a question about whether the exemption applies depending on the manner in which the government body acquired the document at issue and, ultimately, the document's form; in the section's French version, however, the same language is absent, making clear that the exception for third party information should be based on whether the document at issue should be treated as being confidential, and thereby allowing the subsequent harms to be considered.

[43] In his representations, the requester makes separate submissions with respect to records 1 and 2 which are agreements (respectively, the joint venture agreement and the management services agreement) and record 3 which is a directors' resolution.

¹⁸ Ontario, The Report of the Commission on Freedom of Information and Individual Privacy, *Public Government for Private People*, vol. 2 (Toronto: 1980) (the "report").

¹⁹ *Ibid.* pages 312-13.

²⁰ *Ibid.* page 314.

[44] The requester states that it is not disputed that records 1 and 2 are agreements that arose out of a request for proposal issued by the hospital. He submits that prior orders of this office²¹ have found that the mere acceptance of a bid in response to an institution's request for proposal and the transfer of a proponent's proposed contractual terms into a contract signed by the parties has been found to be a form of negotiation. He submits that, as a result, the agreements that are at issue were the subject of negotiation, regardless of whether or not they were in fact negotiated.

[45] The requester states that despite the appellant's position that the joint venture was never subject to negotiation, paragraph 11 of the affidavit sworn by the appellant's vice-president states: "[The hospital] and [the appellant] negotiated certain limited issues." He submits:

Notwithstanding that aspects of the joint venture were negotiated, and other aspects were not, these contracts were inherently negotiable. A hospital is under no obligation to simply agree to a joint venture structure proposed by a prospective business partner. A hospital is free to have its own say in how the joint venture is structured and how the managed services are provided in support of the joint venture. That is the essence of a joint venture: each part is involved in the operation of, and success of, the venture.

[46] Further, the requester disagrees that the information falls within either of the exceptions to the rule. He disputes the appellant's characterization of the joint venture as "immutable" for several reasons. First, he rejects the appellant's position that it would have refused to negotiate any changes to it. He submits that given the efforts put into preparing a proposal for the procurement process and the anticipated profit that it would lose by walking away from the arrangement, it is not reasonable to believe that it would have refused to do business with the hospital if the hospital had sought to negotiate any aspect of the arrangement.

[47] Second, the requester submits that "a business arrangement such as a joint venture is not an immutable 'operating philosophy'" as "[t]here is no 'philosophy' in an allocation of responsibilities, risks, and payment that arose out of a negotiation process."

[48] Third, the requester submits that "[t]he fact that the appellant obtained professional advice does not make the provisions of the contracts immutable, or, if disclosed they would reveal underlying confidential information supplied by the appellant to the hospital." He submits that parties routinely seek various types of advice regarding their contractual negotiations and this does not make that information "immutable."

²¹ Including Order PO-2435.

[49] Fourth, the requester submits that he does not accept the fact that the appellant strives to treat each hospital identically in its business arrangements makes the information contained in the records immutable. He submits:

Hospitals are free to seek variations in their arrangements, and the affected party is free to determine how it can accommodate those variations. That the affected party has not had to accommodate variation in its prior dealing with hospitals does not make the records immutable.

...

Identical treatment is a common feature in supplier and similar arrangements, where the supplier uses standard terms and conditions for all of its customers. The rationale being that the supplier will have consistent obligations to all of its customers. The use of identical terms and conditions cannot be said to mean that those terms and conditions are immutable.

[50] Regarding whether the information contained in record 3, the directors' resolution, was supplied by the appellant the requester submits:

The hospital is a shareholder and board member of the joint venture corporation. On that basis, the hospital has an independent right to corporate records of its subsidiary, as the hospital is part-owner of that entity and is partly responsible for its affairs. It is not proper to characterize a record as being "supplied" where the record is itself subject to legal obligations of disclosure or is obtained as a matter of corporate law.

[51] In reply, the appellant submits that the requester's argument that given the efforts that it put into preparing a proposal for the procurement process it is not reasonable to believe that the appellant would have refused to do business with the hospital if it had sought to negotiate any aspect of the joint venture, is inaccurate. The appellant submits that it has refused to negotiate key terms of a joint venture model and, on that basis, has refused to enter into a joint venture with at least one other hospital.

[52] Addressing the directors' resolution, the appellant submits that the requester is mistaken in his assumption that as the hospital is a shareholder and board member of the joint venture corporation, the hospital has an independent right to the corporate records that are at issue.

To be clear, the hospital is not a board member of the joint venture corporation; at most, the hospital has the ability to appoint three

representatives to the corporation's board. More importantly, even if the hospital were entitled to the corporate records that are, in part, at issue in this appeal, that entitlement does [not] mean that the requester is entitled to these documents by virtue of [the *Act's*] existence...

Analysis and finding

[53] In its representations, the appellant suggests that this office has, in the past, misinterpreted the meaning of "supplied" because it has construed that term in a restrictive manner that is inconsistent with the legislative history of the *Act*, as well as the wording of the legislation itself. The appellant submits that the Williams Commission Report and the French version of the *Act* should be considered when contemplating the concept of "supplied" in part two of the section 17(1) test.

[54] Previous orders issued by this office, as well as decisions issued by the courts, have addressed arguments that are similar to those raised by the appellant in this appeal.²² In Order PO-3032, former Senior Adjudicator John Higgins considered similar arguments raised by one of the affected parties in that appeal. Following his consideration of the affected party's arguments he stated:

One of the drug manufacturers argues that this jurisprudence about the meaning of "supplied," and in particular, its exclusion of the information that is the product of negotiations, must be rejected because the word "supplied" does not appear in the French language version of the *Act*. The same argument was rejected by the Divisional Court in *Canadian Medical Protective Association v. John Doe*.²³ The Court stated:

In any event, the French version of s. 17(1) may be read in a way that implicitly includes the notion of "supplied", as the purpose of s. 17(1) incorporates the idea that the exemption is designed to protect information "received from" third parties, a notion that conforms with the concept of "supplied." Thus, the presence or absence of the verb "supplied" in the French version is not determinative, and the English and French versions may be read harmoniously.

This same manufacturer also alleges that this interpretation is overly narrow; is inconsistent with the legislative history of the *Act*, which counsels against a restrictive application;²⁴ and is inconsistent with the purpose of avoiding interference with negotiations. I disagree. In addition to being upheld in *Canadian Medical Protective Association*, this

²² Orders MO-2164 and PO-3032.

²³ *Supra*, note 16.

²⁴ *Williams Commission Report*, *supra* note 18, v. 2 at 314.

approach was also expressly upheld by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.²⁵ In my opinion, this is not a restrictive interpretation, but rather, one that respects the purposes of the section as reflected in the extract from *Canadian Medical Protective Association* that I have just quoted. As well, the legislative history implicitly accepts the requirement that in order to be exempt, information must have been “supplied,” given its advice to enact a broad exemption for information “submitted by a business to the government ...” (emphasis added). Moreover, the purpose of avoiding interference with negotiations relates to ongoing or future negotiations, which this interpretation does not affect, since it deals with the contractual results of negotiations that have concluded.

[55] I agree with Senior Adjudicator Higgins’ reasoning and adopt it for the purposes of this appeal.

[56] Additionally, as previously noted, this office has generally found that absent evidence to the contrary, the content of a negotiated contract involving a government institution and a third party is presumed to have been generated in the give and take of negotiations and therefore not “supplied” for the purposes of exemption under section 17(1). This interpretation of the “supplied” component of the section 17(1) test in the context of contracts was recently considered again and upheld by the Divisional Court in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*²⁶ In response to an argument that the approach approved in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)* was no longer good law in light of a decision of the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*,²⁷ the Court stated:

Merck does not alter the law on this point. Rather, the presumption that contractual information was negotiated and therefore not supplied is consistent with *Merck*. A party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the “inferred disclosure” or “immutability” exception applies.

[57] I adopt the reasoning of the Divisional Court for the purposes of this appeal.

[58] I have considered the Divisional Court’s findings in *Canadian Medical Protective Association v. John Doe* and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, Senior Adjudicator Higgins’ reasoning in Order PO-3032,

²⁵ *Supra*, note 1.

²⁶ 2013 ONSC 7139 (CanLII).

²⁷ 2012 SCC 3 (CanLII); [2012] 1 S.C.R. 23.

the appellant's representations on the interpretation of "supplied", the relevant portions of the Williams Commission Report and the French version of section 17(1) of the *Act*. I find that I have not been provided with sufficient evidence for me to determine that the concept of "supplied" in part two of the section 17(1) should be interpreted any differently than it has been in prior orders, particularly given that line of reasoning has been consistently upheld by the courts. Accordingly, I find that in order for part two of the section 17(1) test to be established in this appeal, the information must have been directly "supplied" to the hospital by the appellant.

[59] Based on my review of the records at issue and having considered the representations of the appellant and the requester, I find that none the records at issue qualify as having been "supplied" as required by part two of the section 17(1) test.

[60] I will first consider whether records 1 and 2, the joint venture agreement and the management services agreement, can be said to have been "supplied" for the purposes of part two of the section 17(1) test. In Order PO-2632, Adjudicator Daphne Loukidelis set out this office's approach with respect to the determination of whether information has been supplied for the purposes of section 17(1) in the context of an agreement. She stated:

Many previous orders have reached the conclusion that contracts between government and private businesses do not reveal or contain information "supplied" by the private business since a contract is thought to represent the expression of an agreement between two parties. Although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with the other party or parties, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by section 17(1) [Order PO-2018].

In Order PO-2226, former Assistant Commissioner Tom Mitchinson considered the appeal of a decision regarding a request for access to various sale agreements entered into by the Ontario government and Bombardier Aerospace relating to de Havilland Inc. As in the present appeal, the records at issue in Order PO-2226, consisted of a complex, multi-party agreement with other smaller agreements that flowed from the main one, all of which were multi-faceted with customized terms and conditions. In that appeal, the former Assistant Commissioner was not persuaded by the evidence that the records were "supplied" to the Ministry or would reveal information actually supplied to the Ministry, and had the following to say about the complex multi-party agreement at issue:

[I]t is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and-

forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as "the informational assets of non-government parties", but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of "the de Havilland business".

Further, Adjudicator Steve Faughnan provided the following summary with respect to the interpretation of "supplied" in Order PO-2384:

As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, **agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation.** In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".

As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1) ... **The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed** [see also *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.), Orders PO-2433 and PO-2435] [emphasis added].

In Order PO-2435, the Ministry of Health and Long-Term Care argued that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish rejected that position and observed that the

government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

[61] I agree with the reasoning articulated in Order PO-2632 and the orders excerpted above, and will apply it in my analysis of the records before me.

[62] Having considered the representations of the parties and having reviewed record 1 (the joint venture agreement) and record 2 (the management services agreement) carefully, I am satisfied that the terms of these agreements were mutually generated and therefore do not qualify as having been "supplied" for the purposes of part two of the section 17(1) test.

[63] The records are executed agreements setting out a joint venture between the hospital and the appellant. Although the appellant repeatedly submits that there was no negotiation regarding the terms, there is some indication in the affidavit sworn by the appellant's vice-president that some aspects of the joint venture were negotiated. Moreover, as explained in Order PO-2384 by Adjudicator Faughnan, except in unusual circumstances, agreed upon terms of a contract are considered to be the product of a negotiation process and not "supplied" for the purposes of section 17(1) whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. Additionally, in Order PO-2435, Assistant Commissioner Brian Beamish observed that the government's option of accepting or rejecting a consultant's bid is a "form of negotiation." Therefore, in keeping with prior orders, whether or not the specific terms of the agreements at issue in this appeal were subject to negotiation

is not determinative. In my view, the fact that these agreements were executed indicates that their terms were not "supplied."

[64] Accordingly, I find that records 1 and 2 clearly fall within the general rule that has been well established by this office and upheld by the courts that the provisions of a contract are treated as having been mutually generated, rather than supplied, even where the contract or agreement is preceded by little or no negotiation.

[65] I do not accept the appellant's arguments that the information in records 1 and 2 falls under either of the two exceptions to the general rule that the contents of a contract do not qualify as having been "supplied" for the purposes of section 17(1).

[66] The appellant submits that the information contained in these two agreements represent the immutable requirements that the hospital had to adopt in order to enter into a joint venture with the appellant and that these terms could not be altered in any way. It submits that it would not have entered into the joint venture with the hospital unless the structure imposed was adopted. It also submits that the terms are "in essence" its operating philosophy and are therefore immutable.

[67] As discussed above, prior orders which have been upheld by the courts have found that information that is "immutable" is defined as that which is not susceptible of change such as the operating philosophy of a business, financial statements, underlying fixed costs or a sample of its products. Having reviewed the agreements, I do not agree that any of the information at issue qualifies as "immutable". I understand that the appellant believes that maintaining its fixed, standard template and approach to joint ventures with hospitals regarding the provision of respiratory services is important and, perhaps crucial. In my view, however, this does not make the terms of the agreements that it enters into in that respect "immutable." Clearly, if the appellant chooses to do so, it is free to alter those terms. I do not accept that simply because the appellant may *choose* not to negotiate with the hospital regarding some of the terms that it has proposed this alters the character of that information and makes it "not susceptible of change." Additionally, having reviewed records 1 and 2, I do not accept that any of the information at issue consists of the appellant's operating philosophy or any other information that can be said to be "immutable."

[68] I also do not accept that the disclosure of the information in records 1 and 2 would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution, thereby meeting the "inferred disclosure" exception. The appellant submits that disclosure would reveal underlying professional advice that it sought from other parties. While I do not accept, based on my review of the agreements, that the professional advice received by the appellant would be revealed by their disclosure, the "inferred disclosure" exception is intended to refer to non-negotiated information that was supplied by the affected party (in this case, the appellant) to the institution (in this

case, the hospital). In my view, any professional advice that was received by the appellant on how to structure certain aspects of its joint venture agreement does not qualify as underlying non-negotiated confidential information supplied by the appellant to the hospital.

[69] Accordingly, I find that neither the “immutability” nor the “inferred disclosure” exception applies in the circumstances of this appeal and records 1 and 2 do not qualify as having been “supplied” to the hospital by the appellant for the purposes of part two of the section 17(1) test.

[70] I will now consider whether record 3, the directors’ resolution, qualifies as having been “supplied” to the hospital by the appellant.

[71] The appellant submits that the directors’ resolution is not a negotiated document akin to an agreement and describes this record as “an internal corporate document of the joint venture prepared solely by [the appellant] and [the hospital] for corporate governance purposes.”

[72] Having reviewed the directors’ resolution, I do not accept that it was “supplied” by the appellant to the hospital within the meaning of section 17(1). The appellant describes it as an internal corporate document prepared by the appellant *and* the hospital. From my review of the record, it is not prepared by either the appellant or the hospital, but rather by the directors of the corporate entity that was formed as a result the joint venture, some whom appear to represent the appellant company while others appear to represent the hospital. Regardless, based on its content, I do not accept that this record can be said to represent information that was “supplied” directly to the hospital by the appellant. I also do not accept that its disclosure would reveal or permit the drawing of accurate inferences with respect to information that was supplied directly by the appellant to the hospital. Accordingly, I find that record 3 does not satisfy the “supplied” component of part two of the three-part test under section 17(1).

[73] I have found that none of records 1, 2 or 3 qualify as having been “supplied” within the meaning of that term. Accordingly, part two of the section 17(1) test has not been established. As all three parts of the three-part test must be established for the exemption at section 17(1) to apply, I find that it does not. No other exemptions have been claimed for these records. Therefore, I uphold the hospital’s decision and order them disclosed to the requester.

ORDER:

1. I uphold the hospital’s decision to disclose the records at issue to the original requester and dismiss the third party appeal.

2. Recognizing that not all portions of the records at issue were in dispute, in the interest of the original requester obtaining a complete copy, I order the hospital to disclose the records in their entirety to him, by sending him copy of the records by **January 29, 2014** but not before **January 23, 2014**.
3. To verify compliance with this order, I reserve the right to require the hospital to send me a copy of the records disclosed pursuant to order provision 2.

Original Signed By: _____ December 19, 2013
Catherine Corban
Adjudicator