Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3369

Appeal PA13-136

Ministry of Health and Long-Term Care

July 25, 2014

Summary: The appellant appealed the Ministry of Health and Long-Term Care's decision to disclose to a requester certain portions of Schedule 2 to two agreements between the ministry and the appellant. The appellant claimed that information in the Schedule 2 to each of the agreements was exempt under sections 17(1)(a), (b) and/or (c) (third party information) of the *Act*. At the representations stage, the appellant also objected to the disclosure of certain information in Schedule 1 to one of the agreements, a schedule that had not been identified by the ministry as responsive to the request. In this decision, the adjudicator orders the ministry to issue an access decision with respect to certain identified information in Schedule 1 to one of the agreements and finds that sections 17(1)(a) and (c) apply only to all but a portion of Schedule 2 to each of the two agreements. The adjudicator upholds the ministry's decision to disclose this portion of the information at issue to the original requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a), 17(1)(b), 17(1)(c), 23.

Orders and Investigation Reports Considered: Orders PO-1695, PO-2378 and PO-3367.

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry or MOHLTC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to:

> any records held by the [ministry] pertaining to funding arrangements with all licensed ambulatory Independent Health Facilities including, but not limited to, any and all capital and operating costs.

[2] The ministry identified two Agreements and a Schedule 2 to each of the two Agreements as being responsive to the request. After notifying an affected party pursuant to section 28 of the *Act* and receiving its position on disclosure, the ministry issued a decision letter. The ministry granted partial access to the responsive records to the original requester.[1] The ministry relied on section 21(1) (invasion of privacy), with special emphasis on the presumption at section 21(3)(f) (information describing an individual's finances) of the *Act*, to deny access to information in Schedule 2 to each of the Agreements pertaining to staff salaries and benefits.[2]

[3] The affected party (now the appellant) appealed the ministry's decision. As set out in its appeal letter, the appellant consented to the disclosure of the Agreements except for a name and certain handwritten signatures that appear on the Agreements (that the appellant claimed was exempt under section 21(1)), and portions of schedule 2 to each of the Agreements (that the appellant claimed were exempt under section 17(1) (third party information) of the *Act*).

[4] During mediation, the original requester advised that no issue was being taken with the ministry's decision to withhold the information pertaining to staff salaries and benefits, pursuant to section 21(1) of the *Act*. Accordingly, that information is no longer at issue in the appeal. Also during mediation, the appellant consented to the disclosure of the name of a signatory that was withheld, but not their signature. The original requester indicated that it was not interested in pursuing access to the withheld signatures. Accordingly, that information is also no longer at issue in the appeal. As a result, the order that I make in this appeal will include a provision that the ministry disclose a copy of the two records entitled "Agreement", with the severances set out above, to the original requester.

[5] At mediation, the requester also took the position that there is a public interest in the disclosure of the withheld information remaining at issue. As a result, the possible application of the public interest override at section 23 of the *Act* is an issue in the appeal.

[6] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

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[1] The ministry's access decision addressed 68 responsive records and also claimed that the discretionary exemption at section 18(1) (economic and other interests) and the exclusion at section 65(5.7) (abortion services) of the *Act* applied to certain of those records. In this Order, however, I am only setting out the position of the original requester, the ministry and the appellant pertaining to the responsive records at issue in this appeal.

[7] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the appellant. The appellant provided representations in response. In its representations, the appellant also objected to the disclosure of certain information that appears in Schedule 1 to one of the Agreements.[3] I then sent a Notice of Inquiry to the original requester and the ministry, along with the appellant's non-confidential representations. Only the original requester provided responding representations.

[8] I determined that the original requester's representations raised issues to which the appellant should be given an opportunity to reply. Accordingly, I sent a letter to the appellant inviting reply submissions, along with a copy of the original requester's representations. The appellant provided representations in reply.

RECORDS:

[9] In light of the manner in which I have addressed the appellant's objection to the release of information in Schedule 1 to one of the Agreements, below, the information remaining at issue appears in Schedule 2 to each of the two Agreements that the ministry identified as responsive to the request. This consists of the Approved Budgets for two independent health facilities. What remains after the severance of the information pertaining to staff salaries and benefits, which were removed from the scope of the request by the original requester, is a variety of information which includes the fiscal period covered by the Approved Budgets and various amounts, including itemized costs and the amounts for "Total Ongoing Costs and Management Fee" and "Monthly Advance Payment".

DISCUSSION:

A. How should the appellant's objection to the release of information in Schedule 1 to one of the Agreements be addressed?

[10] As set out above, in its representations, for the very first time, the appellant objected to the disclosure of information in Schedule 1 to one of the Agreements. This record was not identified by the ministry as being responsive to the request. The appellant's response to the ministry's notice under section 28 of the *Act* did not address this Schedule 1. The ministry's decision was based on the appellant's objection to disclosure of information in the records that it had identified as responsive to the request. The processing of the appeal was also based on the records the ministry identified as responsive to the request, which did not include Schedule 1. In my view, in all the circumstances, considering that section 17(1) is a mandatory exemption, the most reasonable way to proceed is for me to order the ministry to issue an access decision to the original requester, with respect to access to the information that is

[3] This is addressed in more detail in the body of this Order, below.

circled on the copy of Schedule 1 to one of the Agreements that accompanies this order, treating the date of this order as the date of the request, all in accordance with sections 28, 29 and 30 of the *Act*.

B. Does the mandatory exemption in sections 17(1)(a),(b) and/or (c) apply to the information at issue in Schedule 2?

[11] Sections 17(1)(a), (b) and (c) of the *Act* state:

> 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 be continued to be supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[12] 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]

[13] 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

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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.).
[5] 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) and/or (c) of section 17(1) will occur.

Part 1: Type of Information

[14] The appellant submits that Schedule 2 to each of the two Agreements contains commercial and financial information about the two independent health facilities, thereby satisfying the first part of the test under section 17(1).

[15] Based on my review of the records, I am satisfied that the two schedules at issue contain commercial and financial information for the purposes of the first part of the test for exemption under section 17(1) of the *Act*.

[16] The meaning and scope of these two types of information have been discussed in past orders of this office, 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 (Order PO-2010). The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information (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 (Order PO-2010).

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

[18] The information at issue is contained in two schedules that, as discussed in more detail below, are related to the two Agreements between the appellant and the ministry for the provision of specified health services. The two schedules represent Approved Budgets associated with the provision of those health services for a specific fiscal period.

[19] In my view, and as I determined in Order PO-3367[6],which dealt with the same type of information, the information in Schedule 2 to the Agreements qualifies as commercial and financial information within the meaning of those terms as defined

[6] Released concurrently with this Order.

above.[7] Accordingly, I find that the two schedules remaining at issue contain commercial and financial information for the purposes of part 1 of section 17(1).

[20] I will now consider whether this commercial or financial information was "supplied in confidence" to the ministry under part 2 of the test.

Part 2: Supplied in Confidence

[21] In order to satisfy part 2 of the test under section 17(1), the appellant must provide evidence to satisfy me that information was "supplied" to the ministry in confidence, either implicitly or explicitly.

[22] 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.[8]

[23] 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]

[24] 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, 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*[10].

[25] 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. [11]

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[7] See also in this regard, Orders PO-1695 and PO-2378.
[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] Cited above. See also 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 (Div. Ct.)].
[11] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above).

[26] In order to satisfy the "in confidence" component of part 2, the appellant must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[12]

[27] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the appellant prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[13]

Representations

[28] The original requester provided no specific representations on the application of this part of the section 17(1) test.

[29] The appellant submits that it supplied the information at issue to the institution with the expectation of confidentiality. The appellant submits that:

> Budget Item pricing is provided by the appellant to MOHLTC with the expectation that it will be treated with strict confidence. This expectation is based on at least two factors. First, given the highly commercial and confidential nature of Budget Item pricing, it is standard practice to treat this information as confidential in the course of public procurement processes. It is simply expected in business that this information will remain confidential. Without promises of confidentiality, businesses such as the appellant would be hesitant to disclose this information. …
>
> …

[12] Order PO-2020.
[13] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No 3475 (Div. Ct.).

Second, the Agreements contain a confidentiality provision which states that "MOHLTC shall keep confidential information submitted by the Licensee to MOHLTC under this agreement and information concerning the licensee in connection with this agreement, and shall disclose it only with the consent of the Licensee." The appellant is not aware of any statements by MOHLTC, either verbally or in writing, to suggest that this confidentiality provision has been modified so that it would not apply to Budget Item pricing. This confidentiality provision therefore gives rise to an explicit expectation of confidentiality.

It is relevant to note that Budget Items supplied to MOHLTC are provided through a technically secure system that uses encryption to ensure the information is only accessed by authorized staff at MOHLTC. This is further evidence of the confidential nature of the Budget Items and expectations that they will be treated as such.

Budget Items and related information have always been treated as confidential information by the appellant. The appellant would only share this information with an expectation of confidentiality, and would never make this information public.

[30] The appellant also submits in its representations:

There is no question that the pricing for the various Budget Items is supplied by [the appellant] to MOHLTC. This pricing information is not negotiated. [The appellant], based on many factors, including the fixed and variable costs incurred by [the appellant], salary expenses, and business model, develops the Budget Items. MOHLTC has no input or role in determining such pricing, as this would require MOHLTC to advise [the appellant] on how to organize, manage and run its business. To the extent that an overall budget may be unaffordable, MOHLTC does not give feedback or input on the specific Budget Items.

…

… The Budget Items are non-negotiated cost elements associated with providing services to MOHLTC. In fact, there is no need to "infer" the underlying confidential information, as the information the appellant seeks to protect is the actual information provided by the appellant. It has in no way been transformed, reworked or otherwise modified by [the ministry] - it is precisely the "non-negotiated costs for materials, labour or administration" referred to in Order MO-1706.

Analysis and Findings

[31] There are a number of confidentiality provisions in the two Agreements. For example, paragraphs 9.3 and 9.4 of one of the Agreements provides as follows:

> 9.3 MOHLTC shall keep confidential information submitted by the Licensee to MOHLTC under this agreement and information concerning the Licensee in connection with this agreement, and shall disclose it only with the consent of the licensee.
>
> 9.4 Paragraph 9.3 is subject to applicable legislation and regulations including FIPPA and regulations under that Act.

[32] Section 9.1 of the second agreement reads:

> … The Licensee acknowledges that the ministry in bound by the *Freedom of Information and Protection of Privacy Act (Ontario)* and that any information provided to the ministry in connection to the service plan or otherwise in connection with the Agreement may be subject to disclosure in accordance with that Act.

[33] Based on the evidence before me, and in keeping with the determinations in Orders PO-1695 and PO-2378, which dealt with similar types of information, and as I determined in Order PO-3367[14], which dealt with the same type of information, I am satisfied that the information remaining at issue in this appeal was supplied by the appellant with a reasonably held expectation of confidentiality. Accordingly, I am satisfied that part two of the test under section 17(1) has been met.

Part 3:

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

[35] 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, such a determination would only be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus in exceptional circumstances.[16]

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[14] Released concurrently with this Order.
[15] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[16] Order PO-2020.

[36] 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]

[37] 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]

[38] The original requester provided no specific representations on the application of this part of the section 17(1) test.

[39] In the affidavit provided by the appellant with its representations, the appellant's President states:

> Although there are many factors that define [the appellant's] business model, few are as significant, and as sensitive, as the individual components that comprise the overall pricing of [the appellant's] services. As a private business, the fixed and variable costs that [the appellant] incurs in the course of providing services in a competitive sector speak to the most fundamental elements of [the appellant's] business model.
>
> The determination of Budget Item pricing - which is derived largely from the allocation of fixed and variable costs - is based on a number of factors. Such determinations take into consideration many years of experience in our area of expertise and it sets us apart from other health care providers. In other words, how we determine our Budget Items is a differentiator within the market place and our Budget Items are unique to us.
>
> Allowing public access to Budget Item pricing information would put [the appellant] at a significant competitive disadvantage, for several reasons.
>
> First, it allows our competitors to see exactly how we price our services to MOHLTC. Knowing the specific costs that comprise our overall price provides a competitor with our pricing formula. This allows a competitor to accurately predict how much [the appellant] is likely to bid in the future. Given the importance of pricing when competing for contracts, the resulting harm to [the appellant] is obvious, as competitors would be able to adjust their bids based on what they determine our bid to be.
>
> As [the appellant] provides a variety of health-related services across Canada, our competitors could also use this information to gauge our bids to other government institutions, either for related or unrelated services.

[17] Order PO-2435.
[18] *Ibid*.

> Furthermore, the disclosure of Budget Item pricing provides a more fundamental view into our overall business model. Competitors can simply draw on our years of experience in establishing and/or improving their own businesses. They can immediately emulate our business model by knowing how we price our various inputs, how we negotiate with suppliers and employees/contractors, and how we determine our unit pricing. This type of information is strictly confidential and proprietary, the disclosure of which is both harmful and unfair to [the appellant].
>
> In my view, this is harmful both to [the appellant] and to the marketplace in which we compete. Such disclosure may lead to lower prices in the short term, as providers compete based on the proprietary information of their competitors. However, it undermines the sustainability and overall growth of the industry by forcing providers to focus more on the pricing of their competitors as opposed to their own business models. This directly impacts the quality of patient care in a negative way. Our pricing is based on our own costs, our business judgment, and the best possible pricing that we can sustainably offer. Opening up proprietary pricing information to our competitors will force [the appellant] - and other providers - to focus less on sustainable business models and quality service delivery, and more on the bottom lines of our competitors.

[40] In closing, the deponent states:

> Finally, it will discourage honest disclosure of specific pricing information. Knowing that this information will be shared with competitors will create incentives for providers to misconstrue and falsify pricing information in an attempt to obscure actual costs and business models. This is both highly inefficient and unhelpful to government institutions that are required to effectively evaluate the information we supply to them.

[41] I will address the last statement first. This is essentially an argument that disclosure will result in similar information no longer being supplied to the institution. This appears to be the foundation for the appellant's argument that the information qualifies for exemption under section 17(1)(b) of the *Act*. I do not accept this position. The information at issue in this appeal is supplied to the ministry under the terms of the Agreements which require the independent health facility to submit financial and other information as a condition of funding. Should the information not be provided, the ministry would no doubt have an obligation to pursue it as a matter of sound public administration, and the non-compliance with reporting requirements would presumably have a negative impact on future funding decisions. Furthermore, the assertion that providers will "misconstrue" or falsify pricing information if this information is disclosed is highly speculative. Therefore, I find that the appellant has not provided me with

sufficiently detailed and convincing evidence to establish the section 17(1)(b) harm alleged.

[42] That said, based on my review of the information at issue and considering the submissions of the appellant, I am satisfied that, with two exceptions, disclosing the information remaining at issue in the two schedules could reasonably be expected to cause the section 17(1)(a) and (c) harms alleged. The information is itemized, detailed and specific and I agree that disclosure of it would provide the two independent health facilities' competitors with confidential details about their internal processes and expenditures, which may thereby cause undue loss and/or jeopardize their competitive position.[19] The two exceptions to these findings are the amounts set out on the first page of the two schedules representing the Total Ongoing Costs and Management Fee, as well as the Monthly Advance Payment. I am not satisfied that the disclosure of this general information would cause the sections 17(1)(a) and (c) harms alleged.

[43] Accordingly, with the two exceptions noted above, I find that the sections 17(1)(a) and (c) exemptions apply to the remaining information at issue in Schedule 2 to the two Agreements.[20]

[44] I will now consider the original requester's arguments that it is in the public interest that the information, which I have found to qualify for exemption under sections 17(1)(a) and (c) of the *Act*, be disclosed.

C. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 17 exemption?

[45] Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[46] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

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[19] Also see in this regard Orders PO-1695, PO-2378 and Order PO-3367 released concurrently with this Order.

[20] In making this finding I have determined that disclosing any other information in the schedules would reveal information that also qualifies for exemption under section 17(1)(a) or (c), or would reveal only disconnected snippets or worthless, meaningless or misleading information. See section 10(2) of the *Act*, Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.).

[47] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operation of government[21]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion to make political choices.[22]

Any public interest in *non*-disclosure that may exist also must be considered.[23] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[24] Further, the existence of a compelling public interest is not sufficient on its own to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claimed in the circumstances of the appeal.

Representations

The original requester

[48] The original requester submits that:

> In August [2013] the Ontario government proposed two regulations to move public hospital and diagnostic work to Independent Health Facilities (IHFs). These are sometimes referred to as private surgical and diagnostic clinics, but are perhaps better thought of as specialized private hospitals. New guidelines for the rollout of this process were issued December 17. Under the new guidelines [the ministry] now says it will consider various models for delivering specific procedures – including both public hospital ambulatory care as well as so-called "Independent Health Facilities" (i.e. private clinics).
>
> While we understand the desire of private businesses and governments to keep their records private, our interest is not in any way a private interest. We will not assist any entity (hospital or otherwise) with their applications for work through the government's proposed process. Instead we wish to see a thorough-going public debate on this major new government policy, particularly its financial implications.

[21] Orders P-984 and PO-2607.
[22] Orders P-984 and PO-2556.
[23] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[24] Orders PO-2072-F, PO-2098-R and PO-3197.

> Towards this end, the [named entity] has put out media releases, brought over the British health secretary to speak across the province, and helped organize public campaigns. All of this was designed to bring the issue of the transfer of services from public hospitals to private clinics to the public's attention. We will do more.
>
> The government routinely puts out media releases touting its policy. Its latest, dated December 17 and dealing with its proposal to move cataract, colonoscopy, dialysis, and other procedures out of hospitals,…. They apparently view this issue as very significant.
>
> Currently we are planning with our community allies to organize door to door and workplace canvasses on this issue. … This is very much a public, not a private interest.

[49] The original requester submits that the release of records related to funding arrangements of clinics providing public services "can play a decisive role in helping the public understand what is at stake in privatization initiatives".

[50] The original requester submits:

> … there is a compelling public interest in records related to the funding arrangements of publicly funded private clinics. The government's proposal opens the door to private hospitals and raises several major problems.
>
> A large part of the government's justification for this move has been its claim that this will save the public money. As a result we believe that the public has a compelling interest in knowing whether earlier attempts at the policy have led to the claimed savings.
>
> In the recent years, the Ontario government efforts to privatize public services have led to what can only be described as stupendous and costly blunders. These privatization issues have been the main scandals that have dogged the Liberal government.
>
> These blunders became common knowledge only after the fact - often, but not always, through the investigations of the Auditor General. Had the information been available and reported earlier, a much better discussion of public policy would have been possible. Indeed, the public could have realized significant savings - and the government significant embarrassment.

[51] The original requester provides the following examples in support of its position:

- Brampton Civic Hospital: as the development of the "public private partnership" unfolded the original requester, along with several other parties, "went to considerable legal efforts to get information about this privatization initiative, but only with limited success, greatly restricting our ability to inform the public." The appellant submits that after public monies had been committed the Auditor General was able to "get significant information, confirming the concerns we had about this project".

- ORNGE: The Auditor General was given access to "only those documents relating to entities that were controlled by ORNGE or of which ORNGE was the beneficiary." The Auditor General was unable to obtain other important information and ORNGE was thereby permitted to use "private business to obscure public accountability". The original requester submits that:

> If the public would have been able to access the financial information earlier, the public would in all likelihood have ensured that ORNGE would not move public sector work to the not-for-profit and for-profit entities it established.

- eHealth: the scandal was revealed "only after the damage was done".

- Gas Plants: "Again the Auditor General revealed problems-after the damage was done." The original requester submits:

> Ultimately, when the financial information … did become public, they became major news items that helped shape public opinion on these issues.
>
> Notably, it was only through the release of the detailed financial information of the entities concerned that [issues were revealed]. Hence our determination to receive detailed information about the private clinics. Nothing else will do.

[52] The original requester also refers to "the experience with private surgical and diagnostic clinics" submitting that the experience to date suggests that there is a compelling public interest in greater public accountability and scrutiny.

[53] The original requester cites the following in support of its submission:

- Cherry picking and the threat to community hospitals – the original requester refers to the US experience submitting that "… even in that privatized system, full service hospitals have assailed specialty

hospitals for cherry picking the most profitable procedures from general hospitals".

[54] The original requester submits that:

> Already the Ontario Government is closing down and stripping community hospitals (e.g. in Shelbourne, Burk's falls, Fort Erie and Port Colbourne). By moving core work over to private specialty hospitals, this threat is deepened. Such facilities will only seek to provide services where they can make money. Instead of being able to provide a range of services community hospitals will see more and more services creamed off, leaving them with the most difficult and least 'profitable'.

- Quality: The original requester asserts that in the US there is a concern that specialty hospitals being owned and run by the doctors "have a financial incentive in sending patients to their own facilities, even when those patients might be better off having their surgery in regular hospitals."

- Public Reporting: The original requester submits that there have been ongoing problems with public reporting of quality assurance problems at independent health facilities. The original requester further asserts that the processes adopted are insufficient, submitting:

> It may be fine to tolerate secrecy regarding the production of widgets, but it is not appropriate to keep secrets about the production of health care services. We need our providers to cooperate and share their knowledge, not keep it to themselves. This is even more important when those providers are funded by private dollars.

- Questionable Billings: The original requester submits that the experience in the past in Ontario is that private clinics aggressively try to find extra forms of funding, often from private citizens. The initial requester submits:

> The attempted (and failed) introduction of private MRIs and CT clinics by the former Progressive Conservative government saw the clinics try to bill the public directly for what they claimed were "non-medically necessary" MRI and CT tests.

- Recent private clinic debacle: The original requester submits that the "Ontario government has gone through a protracted and nasty public battle with private physiotherapy clinics, ultimately revealing that the majority of 15,000 documents submitted by the clinics did not support their billings. Moreover, the private clinics repeatedly went over their budgets."

- Similar Issues in Quebec: The original requester submits that billing problems are also evident in Quebec, citing the allegation that an identified entity was charging "illegal facility fees (a charge often levelled against private clinics)". The original requester submits that Quebec now plans to bring all the surgeries back into the public system.

- User fees: The original requester refers to a report "based on interviews with private clinics which revealed widespread extra-billing by existing private clinics". The original requester also submits that "the Ottawa Citizen recently revealed extra-fees billed to the public at a private endoscopy clinic."

- Doctors' incomes: The original requester submits that "[d]octors have lobbied for this new delivery form and it will create a new form of payment for doctors. The original requester submits however that:

  > … the introduction of alternate forms of payment for doctors under the Liberal government has gone hand-in-hand with huge payment increases to doctors, not savings.

- Inappropriate consultation: The original requester submits that this is a major change in policy, yet few Ontarians are even aware of the proposed change as consultation with the public was "very limited".

[55] The original requester submits:

> … these [above-noted] items suggest that there is a compelling public interest knowing fully about the performance of private health care clinics. Given the significant impact on public hospitals and public health care suggested in the foregoing, we also submit that this public interest significantly outweighs any private financial interest in confidentiality.

[56] In closing, the original requester submits:

> Finally, the newly proposed process (a "Call for Applications") to transfer services from hospitals to clinics provides for no negotiation of direct costs

> between the government and private clinics. Instead there will be standardized funding. As a result, under this system, the release of existing information will have limited impact. Without a negotiation process there is little opportunity for applicants to seek greater funding for direct costs or to underbid.

The appellant

[57] The appellant takes the position that section 23 does not apply in the circumstances of this appeal.

[58] The appellant submits in reply that:

> … the requestor's overall submission intimates that [the appellant's] budgetary information must be released to ensure added accountability, this also misses the point. First, there are a myriad of internal reporting requirements established to ensure that all public money is being spent properly. For example, reports indicating the number of patients served are filed monthly and tracked to the overall budget, and audited financial statements are filed on an annual basis. Second, having access to our client's detailed internal budgetary information associated with fixed and variable costs does nothing to promote accountability within the health care system. Accountability for the spending of public money is achieved through other robust mechanisms already built into the process.

Analysis

[59] The only information I have found exempt from disclosure is itemized, detailed and specific information relating to internal processes and expenditures. As a result of this order, the two base Agreements (with the signatures severed) will be disclosed to the original requester, along with amounts set out on the first page of the two schedules at issue representing the Total Ongoing Costs and Management Fee, as well as the Monthly Advance Payment.

[60] In my view, disclosing the remaining information at issue would not assist the initial requester in enhancing "the public debate on this major new government policy, particularly its financial implications" nor would it "serve the purpose of informing the citizenry about the activities of government or its agencies". In my view, the information sought by the appellant to assist the public debate is to be found on a macro level, rather than the disclosure of the specific line items that I have found to qualify for exemption.

[61] In addition, I am not satisfied that the disclosure of the specific line items that I have found to qualify for exemption would not address the other concerns raised by the

original requester such as "Cherry picking" and the threat to community hospitals; nor would it speak to the other issues identified.

[62] Finally, considering the information that will be disclosed to the original requester as a result of this order, even if there were a public interest in disclosure of the remaining information, I am not convinced that it clearly outweighs the purpose of the section 17(1) exemption.

[63] In conclusion, I find that, with the two exceptions noted above, the undisclosed information remaining at issue in Schedule 2 to each of the Agreements is exempt under section 17(1) of the *Act* and the public interest override does not apply. The amounts set out on the first page of the two schedules representing the Total Ongoing Costs and Management Fee, as well as the Monthly Advance Payment, is not exempt under section 17(1), and I will order it disclosed.

ORDER:

1. I order the ministry to issue an access decision to the original requester, with respect to access to the information that is circled on the copy of Schedule 1 that accompanies this order, treating the date of this order as the date of the request, all in accordance with sections 28, 29 and 30 of the *Act*.

2. I uphold the ministry's decision in part and order it to disclose the two Agreements (with the signatures severed) as well as the amounts set out on the first page of the Schedule 2 to each of the two Agreements representing the Total Ongoing Costs and Management Fee and the Monthly Advance Payment, to the original requester by **September 2, 2014** but not before **August 27, 2014.**

3. In order to verify compliance with provision 2 of this Order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the original requester.

Original Signed By: July 25, 2014
Steven Faughnan
Adjudicator