

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3524-R

Appeal PA13-434

Windsor Regional Hospital

August 17, 2015

**Summary:** This is a reconsideration of Order PO-3483 where the adjudicator found that certain records were not exempt under the mandatory third party information exemption in section 17(1). In this order, the adjudicator allows the reconsideration request and finds that some information should be withheld under section 17(1).

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

### OVERVIEW:

[1] After conducting a Request for Proposal (RFP) through a group procurement process, a number of hospitals, which included the Windsor Regional Hospital (the hospital), contracted with an organization to prepare intravenous solutions of two chemotherapy drugs. As a result of this, in 2013, it was reported that due to a diluted medication error, more than 1,200 patients at five hospitals received doses of two chemotherapy drugs that were weaker than doctors had prescribed over the course of about a year. This controversy received significant media coverage.

[2] The hospital received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to this competitive procurement process for pre-mixed IV solutions and for contracts with suppliers of compounding ingredients. The appellant narrowed the request to include the following:

- The scores each of the three bidders received
- All other notes, emails, letters or other documentation related to the competitive procurement process – including correspondence between the named company and the hospital, the named company and the three bidders and the hospital
- Records showing the amount of supplies ordered from the compounding companies, what products/materials were compounded together in the hospital, why the compounding was done and the size of batches of compounded products made with these supplies.

[3] The hospital gave notice under section 28 of the *Act* to several organizations whose interests may be affected by disclosure of the records (affected parties). Subsequently, the ministry issued a decision granting the appellant partial access to the records. The hospital withheld information under the mandatory exemptions in sections 17(1) (third party information) and 21(1)<sup>1</sup> (personal privacy). The hospital also advised the parties that some portions of the records were withheld because they were not responsive to the request.

[4] The appellant appealed the hospital's decision to this office and raised the issue of the possible application of the public interest override in section 23 of the *Act*.

[5] After the inquiry into the appeal, I issued Order PO-3483 where I ordered the hospital to do following:

I order the hospital to disclose the information that I have found not to be exempt under section 17(1) to the appellant by providing her with a copy of the records by June 3, 2015 but not before May 29, 2015. To be clear, I have provided the hospital with a highlighted copy of the records identifying the information which should not be disclosed to the appellant.

[6] On June 1, 2015, I received a request for reconsideration from one of the affected parties, referred to as Affected party 3 in Order PO-3483. The affected party submits that it had not received notice of the information pertaining to it in Record 10 which I had ordered disclosed to the appellant. As they had not received notice of this record and the record contained information that pertained to it, there had been a fundamental defect in the adjudicative process which is grounds for reconsideration pursuant to section 18.01(a) of the IPC's *Code of Procedure*.

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<sup>1</sup> The hospital withdrew its claim of this exemption at the mediation stage to this appeal. A further explanation of this is set out in Order PO-3483.

[7] I subsequently granted an interim stay of order provision 1 of Order PO-3483 solely as it relates to Record 10 pending my determination of the reconsideration. I then sought representations from the hospital and three affected parties whose interests may be affected by the outcome of the disclosure of Record 10. I received representations from the hospital and Affected party 3 only.

[8] In this order, I reconsider my finding in Order PO-3483 and find that the information pertaining to Affected party 3 in Record 10 must be withheld under section 17(1).

### **RECORD:**

[9] At issue is the withheld information on pages 4 and 5 of Record 10 pertaining to Affected party 3 only.

### **ISSUES:**

- A. Are there grounds under section 18.01 of the *Code of Procedure* to reconsider Order PO-3483?
- B. Is Record 10 exempt under section 17(1) of the *Act*?

### **DISCUSSION:**

#### **Issue A: Are there grounds under section 18.01 of the Code of Procedure to reconsider Order PO-3483?**

[10] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[11] As set out in paragraph (a) to section 18.01, this office may reconsider an order where it is established that there is a fundamental defect in the adjudication process.

[12] Affected party 3 submits that following the receipt of Order PO-3483, it contacted the hospital to request copies of the records whose disclosure had been ordered that affect its interests. Upon receipt of these records, Affected party 3 realized that Record 10 had been ordered disclosed in full and it had not had an opportunity to provide representations relating to this record to the hospital during the notice period or to this office during the inquiry.

[13] When this office contacted the hospital in order to clarify this issue, the hospital's Freedom of Information Coordinator confirmed that through inadvertence, copies of this record had not been provided to the affected parties.

[14] During the inquiry into this appeal, Record 10 was listed as a record at issue in documents that was sent to the parties. I carefully reviewed the parties' submissions prior to issuing Order PO-3483 but, as the parties did not make record specific representations, it was not evident that the parties were unaware of the contents of Record 10.

[15] I accept Affected party 3's submission that it did not have prior notice of Record 10. I find that all of the affected parties were entitled to have notice of Record 10 and to make representations on its disclosure and the possible application of the section 17(1) exemption to it. Accordingly, I find that there was a fundamental defect in the adjudication process within the meaning of section 18.01(a) of the *Code of Procedure* and thus I will reconsider the application of section 17(1) to Record 10.

**Issue B: Is Record 10 exempt under section 17(1) of the Act?**

[16] Affected party 3 submits that the information that I ordered disclosed would result in the harm set out in section 17(1) which states:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other

negotiations of a person, group of persons, or organization;

- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[17] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.<sup>2</sup> 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.<sup>3</sup>

[18] 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
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.

[19] As stated above, while Record 10 contains the information relating to all three affected parties, I only received representations from Affected party 3. I considered and rejected the representations of Affected parties 1, 2 and 4 in regards to Record 10 in Order PO-3483. Because I did not receive submissions when I contacted them about the reconsideration, I will not be reconsidering my decision relating to their information in Record 10 in this order. Moreover, the information that Affected party 3 has asked not to be disclosed relates to itself only. This information is located on pages 4 and 5 of Record 10.

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<sup>2</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

<sup>3</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

## **Part 1: type of information**

[20] Affected party 3 identified specific information on pages 4 and 5 of Record 10 which it says will give rise to harm to its interests if disclosed. The information on these pages consists of Affected party 3's responses to questions about its proposal for the supply of its products to the hospital. I find this information to be commercial information for the purposes of section 17(1) which has been defined by this office to be:

.... 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.<sup>4</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>5</sup>

[21] Affected party 3's responses relate to the provision of its products to the hospital. This is commercial information for the purposes of section 17(1) and thus part 1 of the test has been met.

## **Part 2: supplied in confidence**

### ***Supplied***

[22] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.<sup>6</sup>

[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.<sup>7</sup>

### ***In confidence***

[24] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>8</sup>

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<sup>4</sup> Order PO-2010.

<sup>5</sup> Order P-1621.

<sup>6</sup> Order MO-1706.

<sup>7</sup> Orders PO-2020 and PO-2043.

<sup>8</sup> Order PO-2020.

[25] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.<sup>9</sup>

[26] In Order PO-3483, I considered the affected parties' submission that their information, specifically in response to the RFP, were supplied to Affected party 1<sup>10</sup> and thus the hospital for the purposes of section 17(1). The appellant also conceded during the inquiry that Affected parties 3 and 4 supplied their information to the hospital with a reasonable expectation of confidentiality.

[27] I find no reason to reconsider this part of my section 17(1) analysis. The information withheld on pages 4 and 5 of Record 10 consist of Affected party 3's responses to questions about the supply of its products to the hospital. I find that this is information that would have been supplied by Affected party 3 to the hospital and that it would be reasonable for Affected party 3 to have both an implicit and explicit expectation of confidentiality in the supply of this information.

[28] I find that part 2 of the test has been established.

### **Part 3: harms**

[29] Affected party 3 submits that disclosure of some of the information in its responses on pages 4 and 5 of Record 10 could result in the harm set out in section 17(1)(a). Affected party 3 submits:

...the information reveals [Affected party 3's] proposed pricing, rebate, discount and other value-added benefits which, in and of itself, have inherent value for [Affected party 3]. This information reveals [Affected party 3's] approach to its business relationships with hospitals and is a direct indication of its values, strengths and marketing strategies.

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<sup>9</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

<sup>10</sup> Affected party 1 is the organization that conducted the RFP on behalf of the member hospitals.

...

The scoring in the Records relates directly to [Affected party 3's] answers that it supplied in confidence in response to the RFP. The scoring contains proprietary information that should not be disclosed.

...

This scoring has already been harmful to [Affected party 3]. [Affected party 3] lost the contract with the hospitals, including the Hospital. To have the scoring in the public domain would result in additional harm to [Affected party 3] as it is subject to misinterpretation that [Affected party 3] was in some way non-compliant or did not have high-level standards.

[30] Affected party 3 also provided confidential representations regarding the harm which would result from the disclosure of the scoring information which was not shared with the other parties in the appeal.

[31] Based on my review of the information that Affected party 3 submits is exempt on pages 4 and 5 of Record 10 and its representations, I find that Affected party 3 has provided me with sufficiently detailed and convincing evidence that disclosure of its commercial information could reasonably result in the harm in section 17(1)(a).

[32] I find that disclosure of the information relating to the delivery of its product and the terms of payment could reasonably be expected to prejudice Affected party 3's competitive position. Accordingly, I reconsider my earlier decision in Order PO-3483 regarding the complete disclosure of Record 10. I find that some of Affected party 3's responses to four questions set out on pages 4 and 5 of Record 10 are exempt under section 17(1)(a). I find that the remaining information in Record 10 is not exempt under section 17(1) and should be disclosed to the appellant.

[33] In Order PO-3483, I considered the application of the public interest override in section 23 to any information I found exempt under section 17(1). Without repeating my analysis here, I found that the information I found exempt under section 17(1) would not serve the purpose of shedding light on the hospital's decision to contract with Affected party 2 over Affected party 3. Similarly, I find that section 23 does not apply to the information that I have found exempt on pages 4 and 5 of Record 10 under section 17(1).

**ORDER:**

1. I find that certain information on pages 4 and 5 of Record 10 is exempt under section 17(1) and should not be disclosed to the appellant.



2. I order the hospital to disclose the remaining information in Record 10 to the appellant by providing her with a copy of Record 10 by **September 22, 2015** but not before **September 17, 2015**. To be clear, I have provided the hospital with a highlighted copy of Record 10 identifying the information that should not be disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ August 17, 2015