Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3938

Appeal PA16-547

Niagara Health System

March 25, 2019

Summary: The Niagara Health System (Niagara Health) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the ten largest annual software contracts that Niagara Health had entered into with software vendors, and the total amount paid to each vendor under the contracts, during a specified period. In response, Niagara Health located ten records. This appeal concerns the contracts of the six companies that did not consent to disclosure of the contracts relating to them. Five resisted disclosure on the basis of the third party information exemption at section 17(1) of the *Act*, and one did so on the basis that their contract is non-responsive to the request. Niagara Health then issued an access decision granting full access to four contracts, and withheld the other six contracts, in full or in part. The requester appealed Niagara Health's decision. In this order, the adjudicator finds that Niagara Health properly withheld one contract because it is not responsive to the request. She also finds that the remaining five contracts are not exempt under section 17(1) and that there is no information at issue that qualifies as "personal information" as defined in section 2(1) of the *Act*, so the mandatory personal privacy exemption at section 21(1) cannot apply. Accordingly, she orders the five responsive records disclosed in full.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 17(1), 17(3), 21(1), and 24.

Orders Considered: Orders PO-2384, PO-2435, PO-2520, PO-2632, PO-2917, PO-3009-F, PO-3327, MO-1194, MO-2833, MO-3485, and MO-3577.

Cases considered: *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *St Joseph Corp. v. Canada (Public Works and Government Services)*, 2002 FCT 274 (CanLII); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 FCT 254 (CanLII); *Ontario (Ministry of*

Transportation) v. Ontario (Information and Privacy Commissioner), 2004 CanLII 11768 (ON SCDC), affirmed 2005 CanLII 34228 (ON CA), application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

OVERVIEW:

[1] The Niagara Health System (Niagara Health) received a request, under *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

> For [a specified period], please provide the 10 largest annual software contracts that the hospital entered into with software vendors, and the total actual amount paid to each vendor under the contracts.
>
> "Largest" for the purpose of this request is defined as the 10 software vendors which the hospital has paid (or agreed to pay) the greatest sum in total dollars for software/or software related services over the term of the contract.

[2] In response, Niagara Health located ten contracts.

[3] Before issuing a decision, Niagara Health clarified the time period covered by the request with the requester, and asked[1] the ten companies involved for their views about disclosure of their respective contracts. Four of the companies consented to full disclosure, so Niagara Health disclosed those contracts. Six companies (affected parties) resisted full or partial disclosure of their respective contracts, five on the basis of the third party exemption at section 17(1), and one on the ground that their contract was not responsive to the request. Niagara Health issued an access decision in accordance with the affected parties' responses: two contracts were withheld in part, and three in full, on the basis of sections 17(1) and 18 (economic interests of an institution), and one was withheld in full for not being responsive to the request. In addition, Niagara Health withheld initials and signatures of company employees on the basis of the personal privacy exemption at section 21(1) of the *Act*.

[4] The requester (now appellant) appealed Niagara Health's decision to the Office of the Information and Privacy Commissioner (the IPC, or this office).

[5] Mediation led to the narrowing of issues on appeal: Niagara Health would only be relying on the application of sections 17(1) (third party information) and 21(1) (personal privacy), and the responsiveness of one record, to withhold the six contracts in full or in part.

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[1] Pursuant to section 28(1) of the *Act.*

[6] As no further mediation was possible, the appeal proceeded to the adjudication stage, where a written inquiry is conducted.

[7] I began my inquiry under the *Act* by sending a Notice of Inquiry to the parties resisting disclosure. At the time, these were Niagara Health and the six affected parties that had contracted with Niagara Health and who had not provided consent at the request stage. Niagara Health and five of the six affected parties provided representations in response. Niagara Health indicated in its representations that it had reconsidered its position and was willing to disclose the contracts. After considering the representations of Niagara Health and the affected parties, and the records themselves, I decided to seek representations from the requester on the sole issue of the responsiveness of one contract. The appellant advised this office that they would not be providing representations in response.

[8] For the reasons that follow, I find that the mandatory third party information exemption at section 17(1) does not apply to five of the contracts, and I allow the appeal with respect to those records. I order Niagara Health to disclose the contracts to the appellant. However, I also find that one contract is not responsive to the request and I, therefore, uphold Niagara Health's access decision to not to disclose it.

RECORDS:

[9] There are six records in dispute, identified in the file as Records 5, 6, 7, 8, 9 and 10, involving six affected parties. For ease of reference, I will refer to each of the affected parties by a number corresponding to their record (Affected Party 5, Affected Party 6, and so on).

[10] Affected Parties 6, 7, 8, 9, and 10 each described their respective record as an agreement or contract with Niagara Health, and having reviewed their respective records, I find that this is the case. Although Affected Party 5 did not provide representations in this inquiry, it is clear to me that Record 5 is also a contract.

[11] During the inquiry process, Affected Party 9 changed its initial position. Only the pricing information in Record 9 remains at issue in this appeal.

ISSUES:

A. What is the scope of the request? Which records are responsive to the request?

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

C. Do Records 5, 6, 7, and 9 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

DISCUSSION:

Issue A: What is the scope of the request? Is Record 10 responsive to the request?

[12] Niagara Health initially withheld Record 10, in full, on the basis that it is not responsive to the request, a decision which I uphold for the reasons that follow.

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

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

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

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

[16] As mentioned, the appellant was given an opportunity to provide representations in response to Affected Party 10's representations that Record 10 is not responsive to the request, but the appellant advised this office that they would not be doing so.

[17] Affected Party 10 submits, and I find, that the appellant's request provided sufficient detail to identify the records responsive to the request as being the "10 largest software contracts" entered with "software vendors" (emphasis added).

[18] Affected Party 10 submits that its contract relates to the sale of equipment rather

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

than software and does not "reasonably relate" nor is it responsive to the request. Having reviewed Record 10, I agree and find that Record 10 is not responsive to the request.

[19] Since Record 10 is not responsive to the request, I uphold Niagara Health's decision to withhold it.

Issue B: Does the mandatory exemption at section 17 apply to the remaining records (Records 5, 6, 7, 8, and 9)?

[20] For the reasons discussed below, I find that section 17(1) does not apply to the remaining contracts at issue, and will order them disclosed in full. Where any of the contracts incorporate by reference other documents into the contract, I will still refer to these documents together as "Record [number]", "the record," or "the contract".

[21] I note that Affected Party 9 indicated that it reconsidered its initial position and seeks only to protect "limited sensitive business information" from disclosure, specifically its pricing information. It takes the position that the non-pricing information is still exempt under section 17(1), but it is willing to consent to its disclosure under section 17(3). Because this affected party does not object to the non-pricing information in its contact being disclosed, and because Niagara Health no longer seeks to withhold it, I will order that it be disclosed without further comment in this order.

[22] The relevant portions of section 17(1) state that:

> 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, if 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;

[23] 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]

[24] For section 17(1) to apply, the party resisting disclosure must prove that each part of the following three-part test applies to the record:

> 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 10(1) will occur.

[25] In this appeal, Affected Parties 6, 7, 8, and 9 provided representations on the application of section 17(1), and Affected Party 5 declined to do so. Because the exemption at issue is a mandatory exemption, I examined each record and came to a determination of the applicability of section 17(1) to it, whether or not I had representations from an affected party.

[26] A party resisting disclosure of a contract in an appeal before the IPC bears the onus of proof to show that the third party exemption applies to it. In this appeal, only the affected party companies remain as parties resisting disclosure, since Niagara Health changed its position on disclosure in its written representations during the inquiry.

[27] Affected Party 6 argues that "the IPC cannot place any burden of persuasion on [Affected Party 6], as to do so would be inconsistent with the Supreme Court's ruling in *Merck Frosst Canada Ltd. v. Canada (Health)*,[6] but that is not correct. The passages Affected Party 6 relies on for its position relate to the initial notification and decision stages of the processing of a freedom of information request. However, answering the specific question about the burden of proof and a third party claiming the federal equivalent of section 17(1) after an institution's decision has been made, the Supreme Court of Canada said:

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[4] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[6] [2012] 1 SCR 23, 2012 SCC 3 (CanLII).

> Who bears the burden is not controversial. The third party bears the burden of showing why disclosure should not be made when it seeks judicial review . . . of the head's decision to disclose material which has been the subject of a notice under s. 27. This has been clear since the early case law construing the Act: see, e.g., *Maislin Industries*.

Part 1: Type of information

[28] Records 5, 6, 7, 8, and 9 are contracts, as identified by the affected parties that provided representations, and from my own review of these records.

[29] As contracts, each of these records meets the first part of the test because they contain two of the types of information listed under section 17(1): commercial and financial information. Each affected party entered into a contract with Niagara Health for their respective software and/or software services. Since the contracts relate to the provision of services and the payment for those services, they contain commercial and financial information. This finding is consistent with the IPC's definitions of those types of information:

> *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.[7] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[8]
>
> *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.[9]

[30] In light of my finding, I do not need to also decide whether any of these contracts contain any other type of information listed under section 17(1), as argued by some of the affected parties.

[31] Therefore, I find that Records 5, 6, 7, 8, and 9 meet part one of the test because they contain financial and commercial information.

Part 2: Supplied in confidence

[32] Part two of the three-part test itself has two parts: the information at issue must

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[7] Order PO-2010.
[8] Order P-1621.
[9] Order PO-2010.

have been "supplied" to Niagara Health by each affected party, respectively, and each affected party must have done so "in confidence", implicitly or explicitly. If the information was not supplied, section 17(1) does not apply, and there is no need to decide the "in confidence" element of part two (or part three) of the test. For the reasons that follow, that is the case here.

"Supplied"

[33] 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.[10]

[34] 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.[11]

[35] As mentioned, Records 5, 6, 7, 8, and 9 are contracts.

[36] 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.[12]

[37] Having reviewed Records 5, 6, 7, 8, and 9, in my view, each record as a whole reflects the agreed-upon terms (including pricing terms) that were the result of negotiated contract between Niagara Health and each respective affected party. Once Niagara Health accepted an affected party's bid, the information in the contract became negotiated, rather than supplied.[13] This includes the pricing information, which is at issue in all of these records. It is worth noting that Niagara Health was free to accept or reject the prices put forward by each of the affected parties in their respective bids and now found in the contracts. This type of information is precisely the type of information that is negotiable between contracting parties, as many IPC orders have held.[14] None of the affected parties addressed this in their representations. Therefore, as I will explain in more detail below, none of the affected parties has established that the pricing information, or any other information in these contracts for that matter, was not negotiated.

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[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*),.
[13] Order PO-2384.
[14] See, for example, Orders PO-2435 and MO-3577.

Does one of the two exceptions apply to the information at issue in Records 5, 6, 7, 8, and/or 9?

[38] There are two exceptions to the general rule that contracts are not "supplied": the "inferred disclosure" exception or the "immutability" exception. As parties resisting disclosure, Affected Parties 5, 6, 7, 8, and 9 each had to show that one of these exceptions applied to their respective record.

[39] Affected Parties 5, 7, 8, and 9 did not make representations on the issue of whether an exception applies. In the absence of representations demonstrating that either exception applies, I find that neither does. Based on my review of the contracts, I would be engaging in speculation to find that any of them contain information that would fall under either exception. Accordingly, I find that Records 5, 7, 8, and 9 were not "supplied" to Niagara Health. It is, therefore unnecessary to consider the "in confidence" portion of part two of the test, or part three, which concerns harms, because both portions of part two must be met for the third party exemption at section 17(1) to apply. As all three parts of the test must be met for the exemption to apply, and Records 5, 7, 8, and 9 do not meet part two, the section 17(1) exemption does not apply to them and I will be ordering their full disclosure to the appellant.

[40] Affected Party 6 argued that the inferred disclosure exception applies, but unpersuasively. 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 third party to the institution.[15] Affected Part 6 submits that disclosure of Record 6 would allow a reader to "derive inferences about the underlying confidential information and insights into [Affected Party 6's] confidential information, amounting to constructive disclosure of [Affected Party 6's] confidential information contrary to section 17(1)" of the *Act*. However, I find this submission to be vague. Without sufficient evidence to demonstrate that the contract between Niagara Health and Affected Party 6 contains confidential information that was not subject to negotiation, I find that the inferred disclosure exception does not apply to Record 6.

[41] In addition, Affected Party 6 flagged confidentiality-related portions of the contract, which characterize the information at issue as confidential and protected from disclosure under the *Act*, as being a "complete answer" to the part two of the three-part test. However, I do not accept that the presence of confidentiality clauses is sufficient evidence to meet part two of the test. There is no explanation before me as to how the provision relied on by Affected Party 6 is consistent with two other provisions in the same contract that specifically identify the institution's disclosure obligations under the *Act* and the institution's inability to guarantee withholding information within its custody or control if a request is made under the *Act*. In any

[15] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

event, parties cannot contract out of their disclosure obligations under the *Act*. This principle has been upheld by the courts,[16] and consistently applied by this office.[17]

[42] Affected Party 6 did not claim that the "immutability exception" applies. The "immutability exception" applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[18] In the absence of representations demonstrating that the immutability exception applies, I find that it does not. Based on my review of Record 6, I would be engaging in speculation to find that this record contains information that would fall under this exception.

[43] As neither exception applies to Record 6, I find the information at issue within this contract was not "supplied" to Niagara Health. It is therefore unnecessary to make a finding on the "in confidence" portion of part two, or to address arguments about harms under part three, and I will be ordering Record 6 fully disclosed.

[44] To summarize, part two of the test has not been met for Records 5, 6, 7, 8, and 9 because each affected party has not shown that its respective contract was "supplied" to Niagara Health. It is, therefore, unnecessary for me to examine whether the contracts meet the "in confidence" element of part two of the test, or the harms requirement in part three. Since all three parts of the test must be met, and part two has not been, I find that the section 17(1) exemption does not apply to Records 5, 6, 7, 8, and 9, and I will order Niagara Health to disclose them to the appellant, in full.

Issue C: Do Records 5, 6, 7, and 9 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[45] Niagara Health had initially withheld the names, initials, signatures, and/or business contact found in four of the contracts, Records 5, 6, 7, and 9. However, for the reasons that follow, I find that this information is not personal information as defined by the *Act*, and will order it disclosed.

[46] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. "Personal information" is a term is defined in section 2(1) as meaning recorded information about an identifiable individual such as name, race, age, identifying

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[16] Among others, see *St Joseph Corp. v. Canada (Public Works and Government Services)*, 2002 FCT 274 (CanLII); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 FCT 254 (CanLII); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner),* 2004 CanLII 11768 (ON SCDC), affirmed 2005 CanLII 34228 (ON CA), application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.
[17] See, for example, Orders PO-2520, PO-2917, PO-3009-F, PO-3327 and MO-2833.
[18] *Miller Transit*, above at para. 34.

symbols, address, or views. The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[19]

Names, titles, and business contact information in the remaining records

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

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

[48] Based on sections 2(3) and 2(4), I find that any withheld names, titles, and/or business contact information (such as business e-mail addresses) found within Records 5, 6, 7, and 9 do not qualify as personal information, and will order them disclosed.

Initials and/or signatures

[49] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[20] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[21]

[50] Niagara Health's access decision withheld the initials and/or signatures in the Records 5, 6, 7, and 9 on the basis that a signing employee's initials and/or personal information and disclosure of them would be an unjustified invasion of personal privacy.

[51] At adjudication, Niagara Health agreed to disclose all the information initially withheld in the interest of transparency, and has left the question of whether any exemptions apply to the affected parties.

[52] The affected parties did not provide representations on the question of whether the initials and/or signatures withheld qualify as personal information as defined in section 2(1) of the *Act*.

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[19] Order 11.
[20] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[21] Orders P-1409, R-980015, PO-2225 and MO-2344.

[53] However, this office has discussed the treatment of signatures in a number of contexts in previous orders. The IPC has held that if "the signature is contained on a record created in a professional context…, it is not generally 'about an individual' in a personal sense, and would not normally fall within the scope of the definition [of personal information]."[22]

[54] I find that the withheld initials and signatures do not qualify as personal information as defined in the *Act*. In this appeal, the initials and signatures appear within contracts between Niagara Health and software companies. The contracting of software and/or software services to a government body is a professional and official government context. I find that the initials and/or signatures appearing in Records 5, 6, 7, and 9 in this context do not fall within the definition of personal information under section 2(1) of the *Act*, as they do not reveal something of a personal nature about the individuals who signed these contracts. Because these initials and/or signatures are not personal information under the *Act*, they could not be exempt from disclosure under the personal privacy exemption found at section 21(1) of the *Act*. Therefore, I will order them disclosed.

ORDER:

1. Record 10 is not responsive to the request, so that portion of the appeal is dismissed.

2. I order Niagara Health to disclose Records 5, 6, 7, 8, and 9 in their entirety to the appellant by **April 30, 2019** but not before **April 26, 2019**.

3. In order to verify compliance with this order, I reserve the right to require Niagara Health to provide me with a copy of the records sent to the appellant, pursuant to paragraph 2 of this order.

Original signed by
Marian Sami
Adjudicator

March 25, 2019

[22] Order MO-1194.