Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3967

Appeal PA18-140

Unity Health Toronto

June 14, 2019

Summary: Unity Health Toronto (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records including a one-page fax from a pharmaceutical company to the hospital's pharmacy with a discount offer. After notifying the pharmaceutical company as an affected party, the hospital issued a decision granting full access to the record. The affected party appealed the hospital's decision, and objected to the release of the record, because it argues that the mandatory exemption at section 17(1) (third party information) applies. In this order, the adjudicator finds that the mandatory exemption at section 17(1) of the *Act* does not apply, and upholds the hospital's decision to disclose the record.

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

OVERVIEW:

[1] Unity Health Toronto[1] (the hospital) received an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). Part of the request was for the following information: "Feb 29 fax from [an identified pharmaceutical company] to [the hospital's] pharmacy with the discount offer."

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[1] Known as Providence St. Joseph's and St. Michael's Healthcare at the time the request was submitted.

[2] The hospital notified the pharmaceutical company as an affected party, in accordance with section 28(1) (notice to affected person) of the *Act*, seeking its position on the disclosure of the record at issue. The affected party objected to its disclosure.

[3] The hospital issued a decision granting full access to the record at issue. The record was not released to allow 30 days for the affected party to appeal, in accordance with section 50(1) of the *Act*.

[4] The affected party, now the appellant, appealed the hospital's decision to this office. During mediation, the appellant took the position that the record at issue should be withheld on the basis of the mandatory exemption at section 17(1) (third party information) of the *Act*.

[5] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence the inquiry by inviting representations from the appellant, initially. Representations were received from the appellant and shared with the hospital and the requester in accordance with this office's *Practice Direction 7: Sharing of Representations*. Although I invited the hospital and the requester to submit representations, both parties declined to submit any.

[6] In this order, I find that the mandatory exemption at section 17(1) does not apply, and dismiss the appeal.

[7] I have reviewed and considered all of the representations in this appeal. However, I have only summarized those portions I found relevant to my determination below.

RECORD:

[8] As noted above, the only record at issue is the one-page fax with a discount offer from the appellant to the hospital's pharmacy.

DISCUSSION:

[9] The appellant claims that the mandatory exemption at section 17(1) of the *Act* applies to the record at issue in this appeal, because the record contains financial and commercial information as those terms are understood in section 17(1) of the *Act.*

[10] Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

> supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
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> > (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; …

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

[12] 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.

Part 1: type of information

[13] The types of information listed in section 17(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *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.[6]

[14] The appellant submits that the record at issue contains financial and commercial information, because the record is a unilateral standing offer of specific commercial supply terms from the appellant to the hospital, including pricing information. The appellant argues that it should be "plain and obvious" that the record and its contents are financial and commercial in nature.

[15] As noted above, the other parties in the appeal declined to submit representations.

[16] After reviewing the record at issue and the appellant's representations, I find that the record contains both commercial and financial information, as the terms are used in section 17(1) of the *Act*.

Part 2: supplied in confidence

Supplied

[17] 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.[7]

[18] 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.[8]

[19] The appellant argues that the record was supplied to the hospital, because it was a one-page unilateral offer on company letterhead that was supplied to the hospital's pharmacy. The appellant submits that they prepared the offer and it was not part of a set of negotiated terms, nor was it was part of a contract between the appellant and

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[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.
[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.

the hospital.

[20] After reviewing the record at issue and the appellant's representations, I find that the record was supplied to the hospital by the appellant. Now, I must consider whether or not the record was supplied in confidence.

In confidence

[21] 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.[9]

[22] 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.[10]

[23] The appellant argues that the record was supplied to the hospital with an implicit expectation of confidentiality. The appellant notes that the record comprises discounted terms for the supply of a specific pharmaceutical product, and argues that product pricing information is generally understood and accepted as confidential. The appellant argues that there is a public interest in recognizing and maintaining that confidence. In support of this argument, the appellant relies on *Air Atonabee* v. *Canada (Minister of Transport)*[11] (*Atonabee*).

[24] *Atonabee* is a 1989 Federal Court of Canada case that deals with a request under the *Access to Information Act* (AIA) for airline records, which included public inspector records. The appellant quotes portions of paragraph 274 in support of its argument. However, the quote provided is selective and taken out of context, and does not

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[9] Order PO-2020.
[10] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).
[11] *Air Atonabee v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.). The appellant cites paragraph 274 of the decision.

support the appellant's argument. The specific paragraph deals with public inspector records, and is not relevant to the record at issue in this appeal. Furthermore, the decision states that this type of record (public inspector records) would not be considered confidential for the purposes of the AIA unless there are exceptional circumstances, which does not support the appellant's position. Therefore, I find that *Atonabee* is not relevant to my determination in this appeal.

[25] I am not persuaded by the appellant's arguments that the record was supplied to the hospital in confidence for several reasons. First, the record was a unilateral offer from the appellant, and it does not state that it is confidential. The record contains several detailed terms and conditions, none of which state that the record is to be kept in confidence.

[26] Second, the record was faxed to the hospital pharmacy and it is addressed to hospital pharmacies generically. The record does not specifically address the hospital in this appeal, and it does not specifically address anyone at the hospital as the intended recipient. Further, the record was faxed to the hospital pharmacy's publicly available main fax number, not a private fax number. Overall, the record appears to be an unsolicited mass fax advertisement intended for hospital pharmacies.

[27] Based on the reasons outlined above, even if I accepted that the appellant had a subjective expectation of confidentiality, I am not satisfied that the appellant had an objectively reasonable expectation of confidentiality at the time the record was provided to the hospital. Therefore, I find that the second part of the test for the section 17(1) exemption has not been met.

[28] All parts of the three-part test must be met for the mandatory exemption at section 17(1) to apply. Since the appellant has not established that the record was supplied to the hospital in confidence, I do not need to consider whether disclosure of the record at issue could reasonably be expected to result in the types of harms contemplated by the third part of the test.

[29] I find that the section 17(1) exemption does not apply to the record at issue. Given that the hospital did not claim any exemptions and no mandatory exemptions apply, I uphold the hospital's decision, and order that the record be disclosed to the requester.

ORDER:

1. I order the hospital to disclose the record at issue to the requester by **July 22, 2019** but not before **July 16, 2019**.

2. I reserve the right to require the hospital to provide me with a copy of the record disclosed to the requester.

Original signed by
Anna Truong
Adjudicator

June 14, 2019