Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3978

Appeal PA17-180

Cambridge Memorial Hospital

August 14, 2019

Summary: The hospital received a request, pursuant to the *Freedom of Information and Protection of Privacy Act*, for the correspondence it sent to an affected party regarding construction delays. Following notice to the affected party, the hospital decided to grant full access to all the responsive records. The affected party appealed the hospital's decision citing the mandatory exemption at section 17(1) (third party information). During mediation, the appellant also raised the issue of the possible application of the discretionary exemption at section 19 (solicitor-client privilege) while the requester raised the issue of the public interest override at section 23. During the inquiry, the appellant also raised the issue of the discretionary exemptions at sections 18(1) (economic and other interests) and 22 (information published or available to the public). In this order, the adjudicator upholds the hospital's decision to disclose the records at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(1), 19 and 22.

Orders and Investigation Reports Considered: Orders PO-3970, PO-3841, PO-3601, MO-2635, MO-2792, and MO-3700.

Cases Considered: *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 and *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

BACKGROUND:

[1] Cambridge Memorial Hospital (the hospital) received a request, pursuant to the *Freedom of Information and Protection of Privacy Act (*the *Act)*, for the correspondence

it sent to an affected party regarding construction delays.

[2] Under section 28 of the *Act*, the hospital notified the affected party prior to issuing its access decision. Following receipt of the affected party's representations, the hospital issued its access decision, which was to grant full access to the records, which consisted of letters from the hospital to the affected party relating to the construction delays.

[3] The affected party, now the appellant, appealed the hospital's decision to this office.

[4] During mediation, the appellant continued to object to the disclosure of the responsive records, citing the mandatory third party information exemption at section 17(1) of the *Act*. It also raised the issue of the possible application of the solicitor-client privilege exemption at section 19 of the *Act*. The requester raised the issue of the public interest override at section 23 of the *Act*. As such, the issue of solicitor-client privilege (and whether the appellant can claim this discretionary exemption) and public interest have been added as issues to this appeal.

[5] As further mediation was not possible, the parties advised the mediator that they would like the appeal to move to the next stage, where an adjudicator conducts a written inquiry under the *Act*.

[6] During the inquiry, I sought and received representations from the appellant and the requester. The hospital confirmed that it would not be providing representations. Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the appellant's representations were shared with the requester.[1]

[7] In its representations, the appellant also raised the issue of the possible application of the discretionary exemptions at sections 18(1) (economic and other interests) and 22 (information published or available to the public). As such, these exemptions, and whether the appellant can claim these discretionary exemptions were added as issues to this appeal.

[8] In this order, I uphold the hospital's decision and order it to disclose the records to the requester.

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[1] Some portions of the appellant's representations were withheld as they met the criteria for withholding representations found in this office's *Practice Direction Number 7: Sharing of representations*.

RECORDS:

[9] The records at issue consist of 23 letters relating to construction delays from the hospital to the appellant dated from April 9, 2015 to January 16, 2017.

ISSUES:

A. Should the appellant be allowed to raise the application of the discretionary exemptions at sections 18(1), 19 and 22?

B. Does the mandatory exemption at section 17(1) apply to the records?

DISCUSSION:

Should the appellant be allowed to claim the discretionary exemptions in sections 18(1), 19 and/or 22?

Introduction

[10] During mediation, the appellant raised the application of the discretionary exemption at section 19.

[11] During the inquiry, I sought representations on section 19 and also asked the parties to respond to the following:

> The *Act* expressly contemplates that the head of an institution (in this case, the hospital) is given the discretion to claim, or not claim, these exemptions. Generally speaking, affected parties and third party appellants are not permitted to claim discretionary exemptions not relied upon by the institution. As Adjudicator Anita Fineberg stated in Order P-1137:
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> > Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be

> considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.[2]

[12] I also asked the appellant to provide submissions on why this appeal might constitute the "most unusual of circumstances," which is the threshold for this office to permit an affected party to claim a discretionary exemption.

[13] Subsequently, the appellant provided representations, where it also raised the discretionary exemptions at sections 18(1)(c) and 22.

[14] This office has previously addressed whether a third party may raise discretionary exemptions. In Order P-777, former Assistant Commissioner Irwin Glasberg stated:

> As a general rule, the responsibility rests with a Ministry to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by a Ministry during the course of an appeal. This result would occur, for example, where the release of a record would seriously jeopardize the rights of a third party.

[15] In Order P-257, former Assistant Commissioner Tom Mitchinson, in considering the question of when an affected party, or a person other than the institution that received the access request, may be entitled to rely on one of the discretionary exemptions in the *Act*, stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. . . .
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> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, *there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the*

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[2] Sections 17 and 21(1) of the provincial statute find their equivalent in sections 10(1) and 14(1) in the municipal *Act*.

> *application of a mandatory exemption provided by the Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it. [Emphasis added by me.]

[16] I agree with the reasoning in the above orders. The issue, therefore, is whether this is one of those "rare occasions" where a third party should be permitted to raise a discretionary exemption not claimed by an institution.

[17] Although the appellant provided representations on the other issues in the appeal, these representations did not address whether it should be allowed to raise each discretionary exemption it claims applies to the records at issue, even though the Notice of Inquiry asked the appellant to do so. Instead these representations address the issue of whether the exemptions, in fact, apply. However, I do not need to decide whether the exemptions apply, if I find that the appellant cannot raise them. I only need to determine whether this is one of those "rare occasions" where the appellant should be permitted to raise a discretionary exemption not claimed by the hospital.

Section 18(1)(c)

[18] The purpose of section 18(1) of the Act is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*[3], explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.

[19] The appellant argues that section 18(1)(c) is applicable in this appeal, which states:

> A head may refuse to disclose a record that contains,

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[3] Vol. 2 (Toronto: Queen's Printer, 1980) (The Williams Commission Report).

> Information where the disclosure could reasonable be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[20] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[4]

[21] The appellant relies on Orders P-163 and PO-1639. With respect to the former, the appellant argues that former Commissioner Sidney Linden considered that the evidence provided with respect to reasonable expectation of harm or loss under section 17(1) must be "detailed and convincing". It argues that the harms portion of section 18(1)(c) is extremely similar to the one in section 17(1)(c).

[22] With respect to the latter, the appellant relies on it for the principle that section 18(1)(c) requires the institution to demonstrate a reasonable expectation of harm as opposed to certainty. The appellant also relies on its submissions on the harms portion of its arguments to establish the harms under section 18(1)(c). The appellant argues that its economic interests have already been harmed due to negative press associated with false assertions made regarding its construction delays on other projects.

[23] Having reviewed the appellant's representations and the records at issue, I am not satisfied that this qualifies as one of those unusual of cases where an appellant could raise the application of an exemption which has not been claimed by the head of an institution. Discretionary exemptions all indicate that the head "may refuse to disclose…." In other words, the Legislature expressly contemplated that the head of the institution is given the discretion to claim, or not claim, these exemptions. In this case, the hospital has not claimed the additional discretionary exemptions raised by the appellant. In my view, the appellant's concerns regarding disclosure of the records are addressed in the consideration of the application of section 17(1) of the *Act*. The appellant has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary measure of permitting the appellant to claim the discretionary exemption at section 18(1) when the head has elected not to do so.

Sections 19 and 22

[24] The appellant has also raised the issue of the possible application of the

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[4] Orders P-1190 and MO-2233.

discretionary exemptions in sections 19 and 22 to the records at issue.

[25] These sections read:

> 19. A head may refuse to disclose a record,
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> (a) that is subject to solicitor-client privilege;
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> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
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> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.
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> 22. A head may refuse to disclose a record where,
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> (a) The record or the information contained in the record has been published or is currently available to the public; or
>
> (b) The head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

[26] With respect to section 19, the appellant argues that section 19(c) is applicable in this appeal. It argues that the records, which are correspondence relating to construction delays on the project, were prepared wholly or partially by the hospital's counsel in contemplation of or for use in litigation. It relies on Order PO-1937 where Adjudicator Donald Hale cited the Court of Appeal in *General Accident Assurance Co. v. Chrusz (1999)*[5] for the principle that the creation of a record must have reasonably contemplated litigation in order for it to qualify for litigation privilege.

[27] The appellant argues that if the delays are not resolved through the dispute resolution mechanisms provided for in the project agreement then it believes these matters will proceed to litigation. It argues that during litigation the hospital will seek to use the records to support its claim. Thus, the appellant submits that the records should be protected by litigation privilege because the dominant purpose in their formulation was in contemplation of potential litigation.

[28] With respect to section 22, the appellant argues that there is a public interest in

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[5] 45 O.R. (3d) (C.A.).

its performance at certain construction projects. As an example, it points out that there are numerous articles about the delayed construction of the Burlington GO. It argues that as the requester is a media requester, it is concerned that the records, if disclosed, will be published within 90 days of disclosure. The appellant also asserts that the requester will make the information public knowledge. As such, it is relying on section 22.

[29] Based on my review of the appellant's representations and the records at issue, I am not satisfied that the appellant has established that this is one of those unusual cases where it should be permitted to claim the exemptions at section 19(c) and/or section 22. The appellant has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary approach of permitting it to claim a discretionary exemption when the head has elected not to do so. In any event, I do not find that section 22 applies as the information contained in the records has not been published or is currently available to the public, nor was it published within 90 days after the request was made. As well, I find the appellant's argument on section 19(c) to be speculative. The appellant is speculating about the hospital's reasons for drafting and sending the records. I also observe that the letters, which were sent to the appellant, do not appear to have been sent in the context of a "zone of privacy" that is required for litigation privilege to apply.[6]

Does the mandatory exemption at section 17(1) apply to the records?

[30] The appellant relies on the mandatory exemptions in sections 17(1)(a) to (c), which read:

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

[6] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

[31] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[7] 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.[8]

[32] 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

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

[33] To satisfy the first part of the section 17(1) test, the appellant must show that the records reveal information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

[34] Past orders of this office have defined commercial and technical information 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.[9] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[10]
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> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture,

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[7] *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.*).
[8] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[9] Order PO-2010.
[10] Order P-1621.

> engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[11]

[35] The appellant submits that the records contain information that is commercial and/or technical in nature. Concerning the latter, it explains that the majority of the correspondence relates to construction schedules and delays that the hospital asserts are associated with the appellant's alleged failure to adhere to these schedules. The appellant submits the construction schedules were drafted by its scheduling experts who reviewed and analyzed the contract specifications and estimated how and to what duration different construction activities will be completed. It, therefore, submits that any and all correspondence generated from the delays to the construction schedule is inherently based on technical information.

[36] Further, the appellant submits that all of the information contained in the letters is commercial as the correspondence primarily relates to the performance of its work in accordance with the project agreement. It submits that the letters clearly relate to the exchange of services between it and the hospital.

[37] The requester submits that it is difficult to determine what type of information is contained in the records as he has not reviewed them. However, the requester submits that the records is unlikely to contain "trade secret" information as the work being conducted at the hospital is not of a proprietary nature.

[38] Based on my review of the records, I find that they contain commercial information as they relate to the appellant's services to the hospital with respect to the hospital's redevelopment.

[39] As I have found that the records contain commercial information, part 1 of the test under section 17(1) has been met and it is not necessary for me to consider whether they also contain technical information.

Part 2: supplied in confidence

Supplied

[40] 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.[12]

[41] Information may qualify as "supplied" if it was directly supplied to an institution

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[11] Order PO-2010.
[12] Order MO-1706.

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.[13]

[42] The appellant submits that certain letters written by the hospital contain information it supplied.[14] In these letters, the hospital was responding to the appellant's notices advising that the hospital has delayed the project. It submits the hospital received its notices then formulated a response to them, which resulted in the existence of these specified letters, which are some of the records on this appeal.

[43] The appellant cites and relies on the following passage from Order PO-3601:

> Under the heading "Information is supplied' where disclosure would reveal sensitive third party information," the appellant appears to suggest that the "supplied" requirement will not be strictly applies if "disclosure of the seemingly innocuous information would allow an industry player to see into the financial and commercial affairs of the third party…" In support of this submission, the appellant cites three further cases, which I will now review.

[44] Similarly, the appellant submits that information relating to its performance on the project certainly qualifies as information that would allow an industry player to see into its financial and commercial affairs. In support of this argument, it points out that section 38.2 of the project agreement specifically precludes the hospital from disclosing information related to its performance on the project. The appellant, therefore, submits that the test to determine whether the information was supplied should be less stringent than normally applicable.

[45] In addition, the appellant relies on the inferred disclosure exception. It explains that the information which the hospital relies upon to draft the records is based on information that the appellant supplied to the hospital during the course of their contractual relationship. The appellant submits:

> … More specifically, the inference that can be drawn is based on the Contractor's construction schedule that forms part of the negotiated agreement between the parties but does not actually form part of the Project Agreement. … This date [the Scheduled Substantial Completion Date] may in fact be public knowledge and could very well be seen on Infrastructure Ontario's website, however, the more detailed schedules supplied by [the appellant] to [the hospital] as work progresses is not

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[13] Orders PO-2020 and PO-2043.
[14] See letters dated January 11, 2017, December 1, 2016, November 15, 2016, August 10, 2016, July 12, 2016, June 23, 2016, May 24, 2016, May 9, 2016 and December 10, 2015 (specifically page 6 at item (h)).

> public knowledge and is information that is commercially sensitive information.
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> [The hospital's] letters largely criticize [the appellant]'s ability to meet these detailed and highly technical schedules, i.e. baseline schedules or look ahead schedules. These schedules are formulated by [the appellant] and their scheduling experts. They do not form part of the Project Agreement and/or the Contract Documents and are only generated as construction activities are planned and sequenced. In order for [the hospital] to assess its progress, [the hospital] would obviously have to analyze the schedule that was supplied by [the appellant] in order to draft the letters which are seeking to be disclosed. In that regard, the inference that it is behind schedule is drawn only based on the fact that it has previously supplied underlying confidential information in the form of baseline schedules.

[46] The requester submits that much of the information contained in the records is about delays with construction and the appellant's performance in relation to the contract it signed with the hospital and Infrastructure Ontario. He states:

> It's logical to conclude then, that any information included in [the records] was not supplied – but rather was "mutually generated" as part of the natural back-and-forth that occurs when two more parties enter into an agreement.

[47] For the reasons that follow, I find that the appellant has not demonstrated, on an evidentiary basis, that the information contained in the records was "supplied" to the hospital.

[48] As stated above, the appellant relies on the inferred disclosure exception. This exception, along with the immutability exception, applies when the information at issue is contained within a contract. In *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*,[15] the Ontario's Divisional Court succinctly stated, when commenting on the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd. V. Canada (Health)*, [16] the following:

> The specific information said to have been "supplied" consisted of reviewers' notes prepared by scientists retained by Health Canada to evaluate the drug and correspondence between Merck and Health Canada. The information was not contained within a contract … The

[15] 2013 ONSC 7139.
[16] 2012 SCC 3.

> interpretive principle employed by the IPC adjudicator in this case and many past IPC decisions – that contractual information is presumed to have been negotiated, not supplied – flows from this key factual distinction.
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> *Merck* does not alter the law on this point. Rather, the presumption that contractual information was negotiated and therefore not supplied is consistent with *Merck*. A party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the "inferred disclosure" or "immutability" exception applies.

[49] As the information at issue in this appeal is information contained in correspondence from the hospital to the appellant and not in a contract, the two exceptions do not apply. In any event, the appellant is still able to proceed with its argument that disclosure of the records would reveal or permit the drawing of accurate inferences about information the appellant supplied to the hospital.

[50] The appellant argues that information about its construction schedules (i.e. baseline schedules or look ahead schedules) can be inferred from the records. It argues that it formulated these schedules with its scheduling experts. It points out that they do not form part of the project agreement. As such, the appellant argues that the records contain information it supplied to the hospital.

[51] On my review of the records, I do not find that the appellant (and its scheduling experts) solely created the baseline schedules and look ahead schedules. The records indicate that the hospital had input with respect to the formulation of these schedules. I am unable to say anything further without disclosing the information contained in the records. In any event, I find that the information regarding the schedules lacks the specificity necessary to establish that the appellant's information would be disclosed by ordering the letters disclosed. As such, they do not reveal or permit the drawing of accurate inferences about the actual schedules. Accordingly, I do not find that disclosure of the letters would reveal or permit accurate inferences to be made about any information the appellant supplied to the hospital.

[52] As noted above, the appellant argues vigorously that certain of the hospital's letters contain information that the appellant supplied. It submits that the hospital's letters were responses to the appellant's letters/notices sent to the hospital. From my own review of the records, although some of the hospital's letters are responses to the appellant's letters/notices, it appears that the appellant's letters may be themselves have been responding to the hospital's letters expressing concerns about the construction delay or requesting a certain type of information. I am unable to provide any further details without revealing the information contained in these letters.

[53] As I do not have all the appellant's correspondence referenced in the hospital's letters, it is difficult to parse out what actually happened between the parties and the

appellant failed to identify the specific information in the hospital's letters that it claims would reveal information supplied by the appellant. However, the letters appear to indicate that the parties were exchanging concerns and issues about the construction with one another. As such, I find that the correspondence arose from the relationship arising out of the project agreement, which was mutually generated by the parties; further, as explained above, the appellant has not satisfied me that the correspondence contain or would permit accurate inferences to be made about any information supplied by the appellant to the hospital. Accordingly, I do not find that the specific letters from the hospital that the appellant refers to, or indeed any of the letters at issue, contain information that the appellant has supplied to the hospital.

[54] As I find that the "supplied" portion of the second part of the test has not been met, I do not need to consider the "in confidence" part of the test, nor do I need to consider the harms portion. As *all* three parts of the test must be made out, I find the records are not exempt from disclosure under section 17(1).

[55] Due to my findings above, it is also unnecessary for me to consider whether the public interest at section 23 applies.

ORDER:

1. I uphold the hospital's decision.

2. I order the hospital to disclose the records to the requester by **September 19, 2019** but not before **September 11, 2019**.

Original signed by
Lan An
Adjudicator

August 14, 2019