

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-4049

Appeal PA17-438

Brant Community Healthcare System

July 31, 2020

**Summary:** The sole issue in this appeal is whether records relating to the provision of home oxygen services, which were requested under an access request to the Brant Community Healthcare System (BCHS), are exempt from disclosure under section 17(1) of the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the exemption in section 17(1) applies to some of the information contained in the records. Other information, she finds, does not qualify for exemption under section 17(1), and BCHS is ordered to disclose it to the appellant.

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

**Orders and Investigation Reports Considered:** Orders MO-1706 and MO-3058-F.

### OVERVIEW:

[1] This order disposes of the sole issue raised as a result of an appeal of an access decision made by the Brant Community Healthcare System (BCHS) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access decision was in response to a request for records relating to the provision of home respiratory services, including access to a contract with a named company in respect of BCHS' Home Oxygen Program, as well as all records concerning a review referenced on BCHS' web page entitled "Home Oxygen and Respiratory Services."

[2] BCHS located records responsive to the request and, following notification to a number of third parties and consultations with other institutions, granted the requester

access in full, to a particular sale memo. It also granted access in part, to the requested agreement, a business case and a corporate resources presentation. BCHS denied access to the remainder of the records, claiming the application of the mandatory exemptions in sections 17(1)(a) and (c) (third party information) and 21(1) (personal privacy), as well as the discretionary exemptions in sections 18(1)(a), (c), (d) and (j) (economic and other interests) of the *Act*.

[3] The requester, now the appellant, appealed BCHS' decision to this office.

[4] During the mediation of the appeal, BCHS issued a revised decision to the appellant, disclosing additional responsive records to the appellant, and advising that it was no longer applying section 21(1) of the *Act* to the records. As a result, section 21(1) is no longer at issue in this appeal.

[5] The appellant advised the mediator that he believed additional responsive records should exist. BCHS subsequently conducted a further search and located additional responsive records. BCHS issued another decision to the appellant granting access, in part, to the newly located records, as well as to additional portions of the original records. It denied access to some portions of the newly located records under sections 17(1)(a), (c) and 18(1)(a), (c), (d) and (j) of the *Act*.

[6] The appellant advised the mediator that he also had questions concerning the exemptions applied to attachments to specific emails. The mediator relayed the questions to BCHS, who explained that the attachments were denied under sections 17(1)(a) and (c) of the *Act*. BCHS also advised the mediator that a specific email did not have an attachment, page 41 of the records was blank and page 53 of the records was previously disclosed to the appellant.

[7] The mediator relayed BCHS' explanation to the appellant. The appellant stated that he did not have any further questions about the attachments and as such, the reasonableness of BCHS' search was no longer at issue in this appeal. The appellant also confirmed that he did not take issue with pages 41 and 53 and, as a result, those pages are no longer at issue in this appeal.

[8] The appeal then moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry. The adjudicator assigned to the appeal sought and received representations from BCHS, a third party (the affected party) and the appellant. Representations were shared amongst the parties. However, portions of BCHS' and the affected party's representations were withheld from the appellant, as they met this office's confidentiality criteria set out in *Practice Direction 7*. The appeal was then transferred to me to continue the inquiry.

[9] In BCHS' initial and reply representations, it indicated that it had changed its position with respect to most of the records at issue, and was no longer claiming the application of section 18(1). As a result, section 18(1) is no longer at issue in this appeal.

[10] Although the affected party did not appeal BCHS' decision to disclose some information, it takes the position in this (the requester's) appeal that some of the information BCHS proposes to disclose should not be disclosed because section 17(1) applies to it. It also supports BCHS' decision to withhold some information under section 17(1). In light of the affected party's position and the mandatory nature of the section 17(1) exemption, I will consider the application of section 17(1) to all of the information that the affected party submits is exempt under that section.

[11] For the reasons that follow, I find that the exemption in section 17(1) applies to some of the information contained in the records. Other information, I find, does not qualify for exemption under section 17(1), and I order BCHS to disclose it to the appellant.

### **RECORDS:**

[12] The information remaining at issue in this appeal consists of portions of a business case, a corporate resources presentation, a contract, a letter of intent, emails and two attachments to emails, which are draft agreements.

### **DISCUSSION:**

[13] The sole issue in this appeal is whether the information at issue is exempt from disclosure under section 17(1). BCHS advises that in preparing its representations, it reviewed the exemptions it had claimed to the records noted in the Notice of Inquiry. As a result, it stated that it revised its position on the application of the exemptions.

[14] BCHS is now claiming the application of section 17(1) to only the following records:

- Article 2(1)(b) and (e) and Article 2.2.1(a) of a 27 page attachment to page 58 (an Asset Purchase Agreement); and
- pages 100-130 (Letter and Non-Binding Letter of Intent).

[15] The affected party advised in its reply representations that, after reflection and review, it is claiming the application of section 17(1) to only the following records:

| <b>PAGE NUMBER</b> | <b>DESCRIPTION OF RECORD</b>  |
|--------------------|---|
| 10                 | Second sentence of Article 6.2 of the contract between BCHS and the affected party. |
| 28                 | Schedule E to the contract between BCHS   |

|         |  |
|---------|--|
|         | and the affected party.  |
| 31      | Business Case, Cost Analysis, first bullet in whole or the dollar figure of the purchase.                      |
| 39-40   | Business Case, Appendix I, responses to questions 3, 4 and 7.  |
| 44      | Corporate Resources Presentation, The Proposal, second bullet, cash settlement price.                          |
| 45      | Corporate Resources Presentation, Business Drivers and Financial Impact, second bullet, cash settlement price. |
| 58      | Attachment to email at page 58, Asset Purchase Agreement.  |
| 71      | Attachment to email at page 71, Purchase Price Allocation.   |
| 87-92   | Email dated March 27, 2017, purchase price and purchase price allocation (sale details) set out in the email.  |
| 100-130 | Letter and Non-Binding Letter of Intent.   |

[16] Because both BCHS and the affected party are no longer claiming any exemptions to several pages of the records (for which previous claims were made), I will order BCHS to disclose them to the appellant.

[17] Turning to the remaining pages of records that remain at issue, 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,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; ... result in undue loss or gain to any person, group, committee or financial institution or agency; or

...

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

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

[19] 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**

[20] The meaning of commercial, financial and labour relations information 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 both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>3</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>4</sup>

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

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<sup>1</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>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>3</sup> Order PO-2010.

<sup>4</sup> Order P-1621.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>5</sup>

*Labour relations* means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute<sup>6</sup>
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,<sup>7</sup>

but not to include:

- names, duties and qualifications of individual employees<sup>8</sup>
- an analysis of the performance of two employees on a project<sup>9</sup>
- an account of an alleged incident at a child care centre<sup>10</sup>
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation.<sup>11</sup>

### ***Representations***

[21] BCHS submits that all of the information for which it is claiming section 17(1) constitutes or reveals commercial information. It argues that the severed portions in the agreement (the attachment to page 58) contain commercial information, as they reveal components of the constituent elements of the agreement between BCHS and the affected party, as well as the amount to be paid and how it was allocated. With respect to pages 100-130, BCHS' position is that the non-binding letter of intent contains commercial information, as it captures the intent of one entity to enter into a commercial agreements with the other party on certain general terms as set out in the record.

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<sup>5</sup> Order PO-2010.

<sup>6</sup> Order P-1540.

<sup>7</sup> Order P-653.

<sup>8</sup> Order MO-2164.

<sup>9</sup> Order MO-1215.

<sup>10</sup> Order P-121.

<sup>11</sup> Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[22] By way of background, the affected party advises that it has developed a business model and quality management system for providing a preferred supplier agreement to BCHS, as a competitive offering. In addition, the affected party advises that it offered to purchase BCHS' home oxygen program, a program it notes was not core to BCHS, nor was it subject to the broader public sector procurement guidelines. It submits that no public dollars were used to procure any goods or services, and the agreement to purchase was created in confidence.

[23] The affected party submits that the information at issue consists of commercial, financial and labour relations information. It argues that Article 6.2 contains labour relations information because it contains staffing information about its business, which is information concerning the collective relationship between an employer and its employees. The affected party goes on to submit that the remaining information at issue consists of commercial information, as it relates solely to the buying, selling or exchange of merchandise or services or financial information, such as pricing information.

[24] The appellant submits that neither BCHS nor the affected party has sufficiently explained the nature of the information at issue to show that it is truly commercial or financial information, or that it relates to labour relations. It argues that the affected party's representations use extremely broad terms that could be applied to vast amounts of information and have failed to make clear how the specific information meet the criteria for commercial or financial information.

[25] Turning to the representations provided by BCHS, the appellant submits that BCHS has not clarified whether the payment terms in Article 6.2 consist of set prices, a method to calculate prices on an ongoing basis or the estimate for future costs. Concerning the slide deck, the appellant submits that referring to the presence of commercial information related to the operation of the program is invalid, and that costs associated with the program that are unrelated to the buying or selling of services cannot be included in part one of the three-part test. Further, the appellant argues that it is highly unlikely that all 27 pages of the first attachment consist of information that solely relates to the buying, selling or exchange of merchandise or other services. It goes on to argue that the allocation of the purchase price does not relate exclusively to the buying, selling or exchange of merchandise or service, but rather to internal budgeting and planning considerations. Turning to the non-binding letter of intent, the appellant submits that this 30 page record may contain some information that meets the required definition, but BCHS has not provided any justification why it must be withheld in its entirety, and that it is likely that this record contains information relating to other facets of the relationship between BCHS and the affected party.

[26] In reply, BCHS submits that the crux of the appellant's argument is that in order for the information to qualify as "commercial" information, the record must consist solely of this information, and that this information has to have a "commercial purpose" in order to be "commercial" information. BCHS goes on to argue that there is no

requirement in the *Act* that a record contain solely this type of information, nor is there any reference that the entire record has to be related to, for example, the “buying, selling or exchange of merchandise or services.”

[27] BCHS states:

. . . [T]he Appellant’s reference to the “purpose” of the content of a record is totally irrelevant to the application of the s.17(1) exemption. It is not possible for anyone to ascertain the purpose of a record, except by looking at the document as a whole. The information at issue in this appeal is found in a commercial agreement and letter of intent – how one could say that even portions of these records do not have a commercial purpose belies the nature of the documents.

[28] Also in reply, the affected party submits that the information for which it is claiming section 17(1) consists of commercial information, including Article 6.2 of the contract between it and BCHS.

[29] In sur-reply, the appellant reiterates that BCHS’ representations do not establish that the remaining records qualify as commercial information, arguing that the severed portion of the attachment to page 58 may not necessarily relate solely to commercial information and may relate to internal budgetary and planning considerations. Similarly, the appellant argues that BCHS has not established that the entirety of the letter of intent is information that meets the definition of commercial information. With respect to the affected party’s representations, the appellant argues that the affected party characterizes the records as either cost/client information, performance indicators, valuations or prices, which are “bald statements” that do not sufficiently show that the records consist of financial or commercial information.

### ***Analysis and findings***

[30] Having reviewed the parties’ representations and the records themselves, I find that the information at issue contains either commercial or financial information for the purposes of part one of the three-part test in section 17(1). The records relate to the buying of BCHS’ home oxygen services program by the affected party, thus qualifying as “commercial information” for the purposes of the first part of the three-part test in section 17(1). In addition, the records contain the affected party’s pricing practices, which qualify as “financial information” for the purposes of part 1 of the three-part test in section 17(1).

[31] In particular, I find that the following information qualifies as commercial information for the purpose of part one of the three-part test:

- Schedule E to the contract between BCHS and the affected party, as it relates to the buying of BCHS’ home oxygen services program by the affected party;



- Business Case, Appendix I, response to question 4, as it relates to the buying of BCHS' home oxygen services program by the affected party;
- The attachment to the email at page 58, which is an Asset Purchase Agreement, as it relates to the buying of BCHS' home oxygen services program by the affected party; and
- The Letter and non-binding Letter of Intent, as they relate to the buying of BCHS' home oxygen services program by the affected party.

[32] I also note that in the case of the Asset Purchase Agreement and the Letter and non-binding Letter of Intent that these records, as a whole, contain commercial information, as they relate to the many aspects of the commercial relationship between BCHS and the affected party. I disagree with the appellant that, in the case of these records, only certain portions may contain commercial information.

[33] I also find that other information contained in the records qualifies as financial information for the purposes of part one of the three-part test in section 17(1). I find that this information relates to money and its use referring to specific data, including pricing practices. In particular, I find that that following information qualifies as financial information:

- The second sentence of Article 6.2 of the contract between BCHS and the affected party;
- Business Case, Cost Analysis, first bullet;
- Business Case, Appendix I, responses to questions 3 and 7;
- Corporate Resources Presentation, The Proposal, second bullet – cash settlement price;
- Corporate Resources Presentation, Business Drivers and Financial Impact, second bullet – cash settlement price;
- The two page attachment to the email at page 71, which is the purchase price allocation; and
- The email dated March 27, 2017, which contains the purchase price and the purchase price allocation.

[34] Having found that the first part of the three-part test in section 17(1) was met, I will now determine whether the commercial and/or financial information in the records was "supplied in confidence" by the affected party to BCHS.

## Part 2: supplied in confidence

[35] 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>12</sup>

[36] 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>13</sup>

[37] 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.<sup>14</sup>

[38] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.<sup>15</sup> The immutability exception arises 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.<sup>16</sup>

[39] 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>17</sup>

[40] 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;

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<sup>12</sup> Order MO-1706.

<sup>13</sup> Orders PO-2020 and PO-2043.

<sup>14</sup> 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*).

<sup>15</sup> Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

<sup>16</sup> *Miller Transit*, above at para. 34.

<sup>17</sup> Order PO-2020.

- 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; and
- prepared for a purpose that would not entail disclosure.<sup>18</sup>

### **Representations**

[41] BCHS submits that Article 2(1)(b) and (e) and Article 2.2.1(a) of a 27 page attachment to page 58 (an Asset Purchase Agreement) and the Letter of Intent (pages 100-130) were supplied to the hospital by the affected party as part of a commercial transaction. In support of its position, BCHS relies on the “inferred disclosure” and “immutability” exceptions to past findings of this office that contracts involving an institution and a third party will not normally qualify as having been “supplied.”

[42] With respect to the “in confidence” portion of the second part of the three-part test in section 17(1), BCHS submits that the affected party had a reasonable expectation of confidentiality when it supplied the information at issue to it, and that BCHS treated this information as confidential upon its receipt and in accordance with the confidentiality clause set out in section 9.7 of the contract.

[43] The affected party’s position is that the information it objects to being disclosed under section 17(1) was supplied in confidence by it to BCHS, as follows:

| <b>PAGE NUMBER</b> | <b>DESCRIPTION OF RECORD</b>  | <b>POSITION RE: SUPPLIED</b>   |
|--------------------|---|--|
| 10                 | Second sentence of Article 6.2 of the contract between BCHS and the affected party – a cost quotation specific to labour costs. | Supplied on a non-negotiable basis.  |
| 28                 | Schedule E to the contract between BCHS and the affected party – key performance indicator chart.                               | Supplied on a non-negotiable basis and is based on its internal business model, which would not be modified. |

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<sup>18</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

|         |   |   |
|---------|---|---|
| 31      | Business Case, Cost Analysis, first bullet in whole or the dollar figure of the purchase price.                 | Supplied as it offer to purchase was based on an unsolicited valuation and was not part of a bid or contract proposal.  |
| 39-40   | Business Case, Appendix I, responses to questions 3, 4 and 7.   | Q3 answer is a valuation offer and the formulas used to determine the value. Q4 answer relates to the affected party's client volumes. Q7 answer relates to the valuation of the business. All were supplied in confidence. |
| 44      | Corporate Resources Presentation, The Proposal, second bullet, cash settlement price.                           | This relates to the valuation of the business as part of the offer to purchase. It was supplied and was non-negotiable.   |
| 45      | Corporate Resources Presentation, Business Drivers and Financial Impact, second bullet, cash settlement price.  | This relates to the valuation of the business as part of the offer to purchase. It was supplied and was non-negotiable.   |
| 58      | Attachment to email at page 58, Asset Purchase Agreement.   | Supplied in confidence and was non-negotiable.  |
| 71      | Attachment to email at page 71, Purchase Price Allocation.  | Supplied in confidence and was non-negotiable.  |
| 87-92   | Email dated March 27, 2017, purchase price and purchase price allocation (sale details) contained in the email. | Supplied in confidence and was non-negotiable.  |
| 100-130 | Letter and Non-Binding letter of Intent.  | Supplied as part of a valuation and offer to purchase. Was utilized in a proposal overview and was  |

|  |  |                 |
|--|--|-----------------|
|  |  | non-negotiable. |
|--|--|-----------------|

[44] The appellant submits that past decisions of the Divisional Court<sup>19</sup> clearly indicate that the contents of a contract are not supplied, but are mutually generated and that this is a clear rule that should be relied upon, subject to any specific exceptions. In addition, the appellant argues that BCHS and the affected party have failed to prove that any information at issue could be used to permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to BCHS, as is required to qualify for the “inferred disclosure” exception. All of the information at issue, the appellant submits, would clearly be susceptible to negotiation and is the very type of information which would be negotiated in a contract, so it is not subject to the “immutability” exception either.

[45] With respect to whether the information at issue was supplied “in confidence,” the appellant submits that both BCHS and the affected party have failed to show that the information was communicated in confidence. It goes on to argue that the mere fact that a confidentiality clause exists in the contract is not evidence that the record was communicated in confidence, especially where they were prepared for a purpose that would ordinarily entail disclosure. The appellant further submits that if that were the case, any public body could frustrate the purposes of the *Act* simply by inserting confidentiality clauses into all of its contracts. The appellant also argues that while BCHS and the affected party submit that the records should not be disclosed, they were produced for the purchase of a public healthcare program by a private organization. The appellant states:

This commercial transaction, which involved the sale of a public asset/program into the control of a private entity is exactly the kind of activity that would normally be subject to public scrutiny and disclosure under the *Act*. Considerations about the privatization of government programs, government funding and revenue, and the control of Canadian healthcare are all issues of public concern. This sort of contract, if otherwise subject to a public tendering process, would be disclosed.

[46] In reply, BCHS submits that the appellant has misstated BCHS’ position in that it appears to equate doing business with the government and waiving all rights to maintain the confidentiality of information that satisfies the test in the exemption. It goes on to argue that past decisions of this office have allowed for exceptions to a finding that a contract was negotiated and not supplied, as well as the evidence of

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<sup>19</sup> *Boeing Co. v. (Minister of Economic Development and Trade) (Boeing)*, [2005] OJ No. 2851 and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al. (Miller Transit)*, 2013 ONSC 7139.

confidentiality provided by an institution and/or an affected party. BCHS also submits that the affected party held a reasonable expectation of confidentiality when it provided BCHS with the information that remains at issue in this appeal.<sup>20</sup>

[47] In sur-reply, the appellant submits that the decisions in *Boeing* and *Miller Transit* clearly indicate that the contents of a contract are not supplied, but are mutually generated. In addition, the appellant argues that the affected party has not demonstrated that the information, which emerged in the process of contractual negotiations, was supplied by it to BCHS. The appellant also submits that the records were prepared for a purpose that would ordinarily entail disclosure.

### ***Analysis and findings***

[48] I have carefully reviewed the representations of the parties and the records themselves. I find that some of the information at issue was “supplied in confidence” by the affected party to BCHS, while other information was not. In particular, I find that the following information qualifies as having been “supplied in confidence” by the affected party to BCHS for the purposes of the second part of the three-part test in section 17(1):

- page 31 – first bullet;
- pages 39-40;
- page 44 – second bullet;
- page 44 – second bullet;
- page 58 – the attachment to the email;
- page 71 – the attachment to the email;
- pages 89-92; and
- pages 100-130.

[49] I find that the financial and commercial information listed above was either directly supplied to BCHS by the affected party, or that the disclosure of this information would reveal information that was supplied by the affected party to BCHS. I am also satisfied that there was a reasonable expectation that the information was supplied “in confidence,” thus meeting the second part of the three-part test in section

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<sup>20</sup> For clarity, BCHS is claiming the application of section 17(1) to portions of the attachment to an email located at page 58, as well as pages 100-130.

17(1). It is clear from my review of the records that some of the information listed above<sup>21</sup> was supplied by the affected party to BCHS prior to the negotiations between them.

[50] Past orders of this office are instructive in this regard. For example in Order MO-1706, Adjudicator Bernard Morrow found that information contained in a proposal was supplied by an affected party to the institution, and was not the product of negotiations. Similarly, Assistant Commissioner Sherry Liang found, in Order MO-3058-F, that an RFP submission is not a contract even if the resulting contract may contain terms that formed part of an RFP submission.

[51] I further find that other information listed above<sup>22</sup> consists of information in draft form, and was supplied in confidence by the affected party to BCHS, as its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected party, including the affected party's additions and deletions to these draft agreements.

[52] The appellant argues that the contents of a contract are not supplied, but are mutually generated. I agree that this is generally true. The appellant also argues that the affected party has not demonstrated that the information, which emerged in the process of contractual negotiations, was supplied by it to BCHS. Further, the appellant submits that the records were prepared for a purpose that would ordinarily entail disclosure. With respect to the information I have found to be supplied in confidence to BCHS by the affected party, I disagree with the appellant's assertions. On my review of the records, I find that this information at issue preceded the completion of the contract and does not comprise the contents of the contract. I further note that these particular records were not prepared for a purpose that would ordinarily entail disclosure.

[53] Conversely, I find that the information in pages 10 and 28 of the records does not qualify as having been "supplied in confidence" by the affected party to BCHS. This information is contained in the service agreement, i.e., the contract between the affected party and BCHS, and I am not satisfied that either the "inferred disclosure" or "immutability" exceptions applies to it. Therefore, I find that this information was not "supplied" by the affected party to BCHS for the purposes of the second part of the three-part test in section 17(1). I further find that neither the inferred disclosure nor the immutability exception apply to this negotiated information.

[54] Similarly, I find that the information contained in the emails on pages 87 and 88 was not supplied in confidence to BCHS. These emails consist of internal discussions at

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<sup>21</sup> Page 31 – first bullet, pages 39-40, page 44 – second bullet, page 44 – second bullet and pages 100-130.

<sup>22</sup> The attachments to the emails at pages 58 and 71, as well as the emails at pages 89-92.

BCHS regarding the sale of the oxygen business, but do not contain information that was supplied to BCHS.

[55] As all three parts of the three-part test have to be met in order for the exemption in section 17(1) of the *Act* to apply, I find that the information in pages 10, 28, 87 and 88 is not exempt from disclosure. As no other exemptions have been claimed with respect to this information and no mandatory exemptions apply, I will order BCHS to disclose it to the appellant.

[56] With respect to the information I have found to be “supplied in confidence” by the affected party to BCHS, I will now determine whether the third part of the three part test applies.

### **Part 3: harms**

[57] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.<sup>23</sup>

[58] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>24</sup> The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.<sup>25</sup>

[59] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1).<sup>26</sup>

### ***Representations***

[60] The affected party submits that the disclosure of the information at issue could interfere significantly with its ability to be competitive in the marketplace, and could be used for gain by competitors. For example, the affected party argues, the information could be replicated and/or used by competitors in their bids with customers. In

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<sup>23</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>24</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>25</sup> Order PO-2435.

<sup>26</sup> *Ibid.*



addition, the information could also be used by competitors to gain insight into the affected party's valuation methodology, its success, and market share information. A competitor could also use the information to disparage the hospital's decision to sell the program, as well to undermine future bids of a similar nature.<sup>27</sup>

[61] BCHS supports the affected party's position regarding the harms that could reasonably be expected to occur should the information at issue be disclosed. In support of its position, BCHS relies on the decision of the Divisional Court in *Trustees of the Bricklayers and Stonemason's Union Local 2 v. Information and Privacy Commissioner of Ontario and Canadian Bricklayers and Allied Craft Union Members v. Information and Privacy Commissioner of Ontario (Bricklayers)*.<sup>28</sup> BCHS submits that the Court found in *Bricklayers*, among other things, that the standard of proof applied by this office to the facts of the appeal was too burdensome, and that the causation test for harm imposed was too stringent, when all of the facts were viewed in context. BCHS goes on to argue that the context of this request must be considered when evaluating the affected party's representations with respect to the "harms" and the standard of evidence required to satisfy the third part of the three-part test in section 17(1).

[62] The appellant submits that the affected party has provided only a brief analysis of the harm that it believes may be caused by the disclosure of the information at issue, and that, given that the contract has already been awarded, the affected party is deemed to know that the *Act* generally requires disclosure. The appellant goes on to submit that BCHS' representations merely note that an analysis of harm must be contextual. While a contextual analysis is necessary, the appellant notes, it argues that any contextual analysis of this case will show that there is no real harm in disclosing the information at issue.

[63] The appellant further states:

It is important to note that BCHS and [the affected party] bear the burden of showing that an exception under the *Act* exists **and** must show that the risk of harm is "well beyond the merely possible or speculative." The Notice of Inquiry specifically states that "the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1)." [The affected party] argues that the disclosure of the record in question will have a negative impact on their competitiveness as other actors will have access to their business model. This is nonsense as the information that would be revealed by the disclosure of the record in this case would be no more than what would be disclosed in a regular tendering process. Had

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<sup>27</sup> These arguments represent the original and the reply representations of the affected party.

<sup>28</sup> 2016 ONSC 3821 (CanLII).

BCHS and [the affected party] engaged in a competitive bidding process that [the affected party] now raises as a concern, the record in this case would be disclosed pursuant to the *Act*. [The affected party] insists that in order to remain competitive, then all records relating to it must not be subject to public scrutiny. That would place [it] in a privileged position amongst companies that deal with public bodies – it would be alone amongst them in preventing disclosure of relevant part of its business dealings with a public body, which cannot be the case. . .

[64] In reply, BCHS supports the position of the affected party and submits that it is “obvious” that the harms described in section 17(1) of the *Act* have a “futures” component, and are not restricted to contracts that have previously been awarded. Such an interpretation, BCHS argues, does not reflect the real world of any competitive market in which various entities, including the appellant’s client, are vying for the same contracts within the public sector. In addition, BCHS submits that neither it nor the affected party have argued that the nature of the contract, as well as the process leading up to the contract make any difference to the application of the exemption. BCHS and the affected party engaged in a sanctioned legal process which resulted in the agreement.

[65] BCHS goes on to state:

The Appellant’s suggestion that this other process was somehow designed to avoid disclosure of the records has no merit, nor evidentiary basis whatsoever. Nor does its faulty submission that the records would be disclosed had the process been an RFP.

[66] In sur-reply, the appellant submits that the affected party provides only brief explanations to justify the non-disclosure of the records, not meeting the strict burden of proof in the *Act*, particularly where BCHS has already agreed to disclose those records. The appellant further submits that the affected party’s arguments with respect to the harms are merely speculative and nebulous, and that the affected party cannot rely on its claims that the information in the records will benefit competitors and cause it harm.

### ***Analysis and findings***

[67] Having reviewed the parties’ representations, and on my review of the records remaining at issue, I am satisfied that the harms in section 17(1)(a) have been established. In other words, I am satisfied that the disclosure of this information could reasonably be expected to prejudice significantly the competitive position of the affected party, or interfere significantly with future contractual negotiations of the affected party. I find that the disclosure of the remaining information at issue could be used by a competitor in future negotiations, which could reasonably be expected to place a competitor at a significant advantage in terms of its competitive position, to the detriment of the affected party’s competitive position.

[68] The appellant's appears to take issue with the type of tendering process that took place between BCHS and the affected party, in that it was not a competitive process. The appellant also argues that information that would be revealed by the disclosure of the records in this case would be no more than what would be disclosed in a regular tendering process, and that had BCHS and the affected party engaged in a competitive bidding process, the records at issue would be disclosed pursuant to the *Act*.

[69] Regardless of the process which BCHS and the affected party used to negotiate and, ultimately enter into a contractual relationship, the test is whether the information at issue meets all of the requirements of the three-part test under section 17(1), and, if so, that information is exempt from disclosure under the *Act*. In this case, I find that the remaining information at issue has met the third part of the three-part test in section 17(1) and is, therefore, exempt from disclosure under the *Act*.

## **ORDER:**

1. I order BCHS to disclose pages 1-30, 32-38, 42-43, 46-52, 54-57, 59-70, 72-88, 93-99 and 131-135, in their entirety, to the appellant by **August 24, 2020** but not before **August 18, 2020**.
2. I order BCHS to disclose pages 31, 39, 44, 45, 58 and 71 in part, to the appellant by **August 24, 2020** but not before **August 18, 2020**. I have enclosed copies of these records to BCHS and have highlighted the portions that are not to be disclosed to the appellant.
3. I reserve the right to require BCHS to provide me copies of the records it discloses to the appellant.
4. The timelines noted in order provisions 1 and 2 may be extended if BCHS is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by: \_\_\_\_\_

Cathy Hamilton  
Adjudicator

July 31, 2020  
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