

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4082

Appeals PA16-489-2 and PA16-604

Peterborough Regional Health Centre

November 6, 2020

Summary: A member of the media filed a request under the *Act* for records relating to the relationship between Peterborough Regional Health Centre (the hospital) and a clinic providing cardiac services (the third party). The hospital notified the third party, which objected to certain financial information being disclosed to the requester based on the third party information exemption under section 17(1). The hospital issued a decision granting the requester partial access to the records. The hospital claimed that the withheld information qualified for exemption under sections 13(1) (advice or recommendations) and 18(1) (economic or other interests). The requester and third party appealed the hospital's decision to this office.

In this order, the adjudicator finds that section 18(1) does not apply, but partly upholds the application of sections 13(1) and 17(1). The adjudicator finds that the public interest override under section 23 does not apply to the information found exempt under sections 13(1) and 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 17(1), 18(1) and 23.

OVERVIEW:

[1] A member of the media (the requester) submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Peterborough Regional Health Centre (the hospital) for records relating to the hospital's relationship with a cardiology clinic, a diagnostic lab and two named doctors (the affected parties), including copies of contracts and records detailing how much the hospital has paid the parties.

[2] The hospital notified the affected parties as required by section 21(1). The only affected party who objected to information being disclosed to the requester was the cardiology clinic and one doctor associated with it. For the remainder of this order, I will refer to the cardiology clinic and doctor jointly as the third party or clinic.

[3] The third party appealed the hospital's decision to release records relating to him to this office, claiming that the mandatory third party exemption in section 17(1) applies to some of the information at issue.

[4] The hospital issued an access decision granting the requester partial access to the requested records. The hospital claims that the withheld information qualifies for exemption under sections 13(1) (advice or recommendations) and 18(1)(c), (e) or (g) (economic or other interests). The requester appealed the hospital's decision to withhold information contained in the records pursuant to sections 13(1) and 18(1)(c), (e) or (g).

[5] A mediator from this office was assigned to both appeals to explore settlement with the parties. During mediation, the requester narrowed the scope of the appeal and the third party consented to the disclosure of some additional records. During mediation, the requester raised the possible application of the public interest override in section 23.

[6] No further resolution was possible and the file was transferred to the adjudication stage in which an adjudicator conducts an inquiry under the *Act*. I decided to join appeals PA16-489-2 (the requester's appeal) and PA16-604 (the third party's appeal) and commenced my inquiry by inviting the written representations of the parties.

[7] The parties submitted representations which were shared in accordance with this office's confidentiality criteria set out in *Practice Direction 7*.

[8] In this order, I find that the exemption in section 17(1) applies to some of the financial information in the records, but order the hospital to disclose to the requester the remaining information subject to the third party's appeal. I uphold section 13(1) regarding a memorandum and briefing note, but order the hospital to disclose the remaining information it withheld under sections 13(1) and 18(1) because I find the exemptions do not apply to it. Finally, I find that the public interest override under section 23 does not apply to the information found exempt under sections 13(1) and 17(1).

RECORDS:

[9] The withheld records, identified as responsive to the request in the hospital's decision letter, are described in the following chart:

Record No.	Description of Records	Exemptions Claimed
1	Memorandum, dated May 2, 2012	Sections 13(1) and 18(1) to withhold information on pages 1-2.
2	Minutes of Meeting, May 9, 2012	Sections 13(1) and 18(1) to withhold information on page 3.
3	Minutes of Meeting, June 27, 2012	Sections 13(1) and 18(1) to withhold information on page 4
4	Minutes of Meeting, July 18, 2012	Sections 13(1) and 18(1) to withhold information on pages 5-6 and Section 17(1) to withhold information on pages 5-6.
5	Briefing Note, dated December 1, 2014	Section 17(1) to withhold information on pages 13-14
6	Briefing Note, dated December 2, 2014	Sections 13(1), 17(1) and 18(1) to withhold information on pages 19-20
8	Email chain	Section 13(1) to withhold information on page 36 and section 17(1) to withhold information on page 25
9	Joint Services Presentation, May 21, 2015	Sections 13(1) and 18(1) to withhold information on page 52 and section 17(1) to withhold information on pages 45, 47 and 49.
10	Cardiology Clinic Fiscal 2016 Report	Section 17(1) to withhold information on page 53.
11	Revised Cardiology Clinic Fiscal 2010-2017 Report	Section 17(1) to withhold information on page 54
12	Cardiology Detailed Fiscal Report, 2010-2017	Section 17(1) to withhold information on pages 55-60.

[10] In its representations, the third party identified errors in the financial (fiscal) reports identified as records 10 and 11.

[11] Record 10 is a financial report the hospital says was prepared by its finance department. In response to the concerns raised by the third party, the hospital conceded that record 10 "is inaccurate and includes significant payments made to vendors other than [the clinic]." The hospital takes the position that record 10 is not responsive to the request as it "does not reflect payment information made by [the hospital] to the clinic." I agree that a record containing information about payments the hospital made to entities other than the clinic is not responsive to the request. On my

review of record 10, I find that it is not responsive to the request and have removed it from the scope of this appeal.

[12] The hospital's financial department also authored the financial report originally identified as record 11. The hospital states that this record "contains errors" as it includes four invoices that were invoiced more than once due to "clerical errors." The hospital provided a corrected version of record 11 to this office and confirmed that the corrected version of it was also provided to the third party.¹ I will review the possible application of section 17(1) to the corrected version of record 11.

[13] The third party also raised a concern that patient names contained in record 12 were not redacted on a consistent basis. The requester is not seeking access to patient names. I find that this information is also not responsive to the request and remove it from the scope of this appeal.

ISSUES:

- A. Does the discretionary advice or recommendations exemption at section 13(1) apply to the withheld information in records 1, 2, 3, 4, 6, 8 and 9?
- B. Does the discretionary economic and other interests exemption at sections 18(1)(c), (e) or (g) apply to the withheld information in records 2, 3, 4 and 9?
- C. Does the mandatory third party information exemption at section 17(1) apply to the withheld information in records 4, 5, 8, 9, 11 and 12?
- D. Did the institution exercise its discretion under section 13(1) to withhold information in records 1 and 6? If so, should this office uphold the exercise of discretion?
- E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13(1) and 17(1) exemptions?

DISCUSSION:

[14] In its representations, the hospital submits that it has a long-standing relationship with the clinic and the named doctor and that over the last several years the parties entered several rounds of negotiations in an "attempt to reach a formal agreement with respect to the provision of cardiac services." The hospital states that at the time the request was received, negotiations between it and the clinic were ongoing

¹ The corrected version of this record included some changes to how the information was organized.

and the parties had not entered into a final contract. The hospital recently confirmed that its negotiations with the clinic are now concluded.

A. Does the discretionary advice or recommendations exemption at section 13(1) apply to the withheld information in records 1, 2, 3, 4, 6, 8 and 9?

[15] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[16] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²

[17] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[18] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.³

[19] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[20] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁴

² *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

³ See above at paras. 26 and 47.

⁴ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd

Submissions, Decision and Analysis

[21] The hospital submits that the withheld information in records 1, 2, 3, 4, 6, 8 and 9 qualifies for exemption under section 13(1). The requester's representations did not specifically address this issue.

Record 1: memorandum

[22] The hospital submits that the memorandum, dated May 2, 2012, is an internal document prepared by its employees in "preparation for a meeting with [the clinic] during which a contract for cardiac services would be discussed and negotiated." The hospital goes on to state:

It highlights what at the time was advice and recommendations with respect to [the hospital's] contractual positions and proposed responses to [the clinic's] positions.

[23] I have reviewed this record and note that it identifies the hospital's needs regarding various contractual terms up for negotiation along with what it anticipates will be the clinic's position. The record also sets out the hospital's recommended response in some cases.

[24] I am satisfied that the withheld portions of this record identify a suggested course of action to be accepted or rejected in relation to a decision the hospital is to make. Accordingly, I find that the withheld portions of this record qualify for exemption under section 13(1).

Records 2, 3 and 4: meeting minutes

[25] The hospital submits that the withheld information in the minutes for the meetings that took place on May 9, 2012, June 27, 2012 and July 18, 2012 capture its contractual discussions and negotiations with the clinic. The hospital states that the withheld information:

... reveal what provisions or language the parties proposed at the time to be added, removed or modified with respect to a draft contractual agreement. They reflect the frank discussions and deliberative process of hospital employees and [of the clinic].

[26] I have reviewed the meeting minutes and note that they contain information

[2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

which would reveal the contractual terms and language considered by the hospital and clinic in the proposed agreement. In doing so, certain matters are identified as requiring further discussion or having been resolved. However, the information at issue, if disclosed, would not permit the drawing of accurate inferences as to the nature of the actual advice or recommendations hospital decision-makers received. Instead, the record captures the hospital's and clinic's progress in negotiating the terms of the contract.

[27] Accordingly, I find that this information does not qualify for exemption under section 13(1). However, I will go on to determine the hospital's claim that disclosure of this same information qualifies for exemption under section 18(1).

Record 6: briefing note

[28] The hospital submits that the briefing note is an internal confidential document prepared for its senior leadership. The hospital submits that the purpose of the briefing note is to guide the decision-making process. The hospital states that this record:

... clearly identified options that are being considered and recommended with respect to the contractual negotiations with [the clinic]. For example, one of the exempted portions of the record is entitled "Options Considered (pros and cons of each)."

[29] I have reviewed the withheld portions of this record and accept the hospital's description of this record. The briefing note is a lengthy document prepared by hospital employees and addressed to the board and I note that most of it has already been released to the requester. The portion that has been withheld appears at the end of the document where the writers prepared a summary of the pros and cons of considered options. In addition, the withheld portion contains a recommendation hospital employees communicated to the board.

[30] I am satisfied that the withheld portions of this record identify a suggested course of action to be accepted or rejected in relation to a decision the hospital is to make. Accordingly, I find that the withheld portions of this record qualifies for exemption under section 13(1).

Record 8: email attachment

[31] The hospital submits that this record is "an internal progress report on financial numbers" and takes the position that the financial figures withheld on page 36 qualify for exemption under section 13(1).

[32] I have reviewed this record and it appears that it was attached to an email exchanged between hospital staff. However, the information withheld consists solely of numerical information contained in a chart. The information is not accompanied by descriptors which identify a recommended course of action.

[33] I find that this information does not contain advice or recommendations. Similarly, there is insufficient evidence before me to establish that disclosure of the withheld information on page 36 would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given. As such, I find that the withheld portion of record 8 does not qualify for exemption under section 13(1). As the hospital has not claimed that any other exemption applies to this information it will be ordered to be disclosed.

Record 9: presentation slide

[34] The hospital submits that the slide presentation was prepared by hospital employees and "submitted to [hospital] senior leadership as part of a review of cardiac services provided jointly between the hospital and [clinic]." The hospital submits that the withheld information on the slide at page 52 reveals that hospital employees "made recommendations to senior leadership with respect to an approach for the development of a contract."

[35] I have reviewed the portion of the presentation slide the hospital claims is exempt under section 13(1). In my view, the withheld portions do not contain information that could be described as advice or recommendations. Instead, the withheld information describes in very broad terms the hospital's objectives. In addition, I find that the items identified under the heading "Approach for Development of Contract" on page 52 are not described in a manner revealing information that, if disclosed, would permit accurate inferences as to the nature of the actual advice or recommendations given.

[36] I find that the withheld portion on page 52 in record 9 does not qualify for exemption under section 13(1) but will go on to determine whether this information qualifies for exemption under section 18(1)⁵.

Summary

[37] I found that the withheld portions of records 1 and 6 qualify for exemption under section 13(1). I am also satisfied that none of the exceptions under section 13(2) apply to this information. Accordingly, it is not necessary that I also consider whether sections 17(1) or 18(1) also applies. Later in this order, I will consider whether the hospital properly exercised its discretion in claiming section 13(1) to deny access to portions of these records. I will also consider the requester's position that despite the application of the exemption, there is a compelling public interest in the disclosure of the information found exempt under 13(1) as contemplated by section 23.

⁵ The mediator's report did not identify a claim that the discretionary exemptions under sections 18(1)(c),(e) and (g) apply to record 9, but the hospital took this position in its representations.

B. Does the discretionary exemption at sections 18(1)(c), (e) and (g) apply to the withheld information in records 2, 3, 4 and 9?

[38] Sections 18(1)(c), (e) and (g) states, in part:

A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

(g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[39] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.⁶

[40] The requester's representations did not specifically address this issue.

[41] The hospital claims that the exemptions under sections 18(1)(c), (e) and (g) apply to the withheld information in the minutes of meetings (records 2, 3 and 4) and one presentation slide (record 9). However, the hospital did not make submissions addressing the specific exemptions in paragraphs (c), (e) and (g) of section 18(1).

[42] Both section 18(1)(e) and (g) protect the premature disclosure of information being relied upon by an institution to further its economic interests in ongoing matters. For section 18(1)(g) to apply, the hospital must establish that the withheld portions of the records contain information related to proposed plans, policies or projects, not negotiations that have long been completed. For section 18(1)(e) to apply, the hospital must show that the information at issue is information it intends to apply to negotiations that are being carried on currently or will be carried on in the future. Given the hospital's evidence that the negotiations related to the subject-matter of this request have concluded, I find that section 18(1)(g) and (e) do not apply in the

⁶ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.

circumstances of this appeal.

[43] However, I will go on to consider the hospital's argument that section 18(1)(c) applies to the withheld information in records 2, 3, 4 and 9.

The hospital's representations

[44] Regarding the meeting minutes in records 2, 3 and 4, the hospital states:

[I]f minutes [of meetings] detailing the deliberative process involved in contractual negotiations are ordered to be disclosed to the Requester, that disclosure could reasonably be expected to prejudice the Hospital's ability to conduct future open and frank contractual negotiations with [the clinic] and other service providers, [and] deter the Hospital from recording that information and generally prejudice the conduct of contractual negotiations.

[45] The hospital made this same argument in support of its claim that the exemption under section 18(1) applies to the withheld information on page 52 of the presentation slide (record 9).

Section 18(1)(c): prejudice to economic interests

[46] For section 18(1)(c) to apply, the institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁷

[47] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁸

[48] 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

⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁸ Order MO-2363.

positions.⁹

[49] I have reviewed records 2, 3, 4 and 9 along with the hospital's submissions and find that there is insufficient evidence to establish that disclosure of the information at issue could reasonably be expected to prejudice the hospital's economic interests or competitive position. I previously found that the withheld information in the presentation slide (record 9) simply summarized the hospital's broad objectives in the negotiations between the hospital and the clinic. I find that the withheld information is too general to give rise to the harm contemplated in section 18(1)(c).

[50] With respect to the withheld information in the meeting minutes (records 2, 3 and 4), I find that the hospital has failed to adduce sufficient evidence to establish a reasonable expectation of the harms contemplated in section 18(1)(c). The information withheld in the meeting minutes describes various items discussed between the hospital and the clinic during contractual negotiations. However, the information is described in summary fashion in the meeting minutes. For example, a page number of the draft agreement is referenced with a notation of what is to be added, corrected or updated. The hospital's primary argument in opposing disclosure of this type of information is that disclosure of any information relating to ongoing contract negotiations engages section 18(1)(c). However, the hospital has confirmed that the related negotiations have concluded.

[51] Having regard to the above, I find that the exemption at section 18(1)(c) does not apply and will order the hospital to disclose the withheld information in the meeting minutes (records 2 and 3) and presentation slide (record 9) to the requester. I will go on to consider the third party's claim that the withheld information in the meeting minutes at record 4 qualifies for exemption under section 17(1).

C. Does the mandatory third party information exemption at section 17(1) apply to the withheld information in records 4, 5, 8, 9, 11 and 12?

[52] Section 17(1) states:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

⁹ Orders P-1190 and MO-2233.

(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

[53] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹⁰ 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.¹¹

[54] 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.

[55] The third party submits that section 17(1) applies to records 4, 5, 8, 9, 11 and 12.

Part 1: type of information

[56] The third party submits, and the hospital and requester do not dispute, that these records contain commercial¹² or financial¹³ information.

¹⁰ *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.*).

¹¹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

¹² Commercial information has been defined as 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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].

¹³ Financial information has been defined as 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 [Order PO-2010].

[57] The third party refers to the withheld financial information as "budgetary information" and says that it reveals:

- labour costs, equipment costs, leasehold costs and other costs necessary for operating each of the speciality clinics; and
- line by line purchases and expenditures, such as the amount expended for nurses and staffing costs.

[58] Based on my review of the records, I am satisfied that the withheld information in records 4, 5, 8, 9, 11 and 12 constitutes commercial or financial information as defined in past orders of this office.

[59] Accordingly, I find that the first part of the three-part test in section 17(1) has been met.

Part 2: supplied in confidence

[60] The majority of the third party's representations focus on its position that it supplied in confidence certain budgetary information in records 5 and 8. The third party also says that it supplied in confidence the withheld information in records 4, 9, 11 and 12, but did not make specific representations in that regard. The hospital and requester's representations do not specifically address this issue, though the hospital confirms that its financial department prepared the financial reports at 11 and 12. Based on my review of the records, I note that the hospital was also responsible for preparing records 4, 5 and 9.

[61] The third party submits that it provided the withheld information contained in the briefing note (record 5) and email attachment (record 8) to the hospital as a courtesy to assist with its assessment of future funding options relating to the provision of cardiac services. The third party submits that there was no contractual or other obligation requiring it to provide this information to the hospital. The third party goes on to state that the amounts reflected in the records consist of actual amounts it expended to provide cardiac services and that this information is not available to the public. The third party states that the amounts do not represent monies it received from the hospital and that it supplied the information to the hospital with an expectation of confidentiality.

Decision and analysis

[62] 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.¹⁴

[63] 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.¹⁵

[64] I have reviewed the records along with the representations of the parties and am satisfied that the withheld information contained in records 5 and 8 were supplied by the third party to the hospital. Record 5 is a briefing note prepared by hospital employees. However, pages 13 and 14 of the briefing note contains financial information relating to three cardiac clinic programs that appear to have been "cut and paste" from another document. This information is partially reproduced at an email attachment exchanged between hospital employees (page 25 of record 8) which contains information related to two cardiac clinic programs. I am satisfied that disclosure of this information would reveal or permit the drawing of accurate inferences with respect to information the third party supplied to the hospital.

[65] However, I find that there is insufficient evidence before me to establish that the third party supplied the information withheld from the meeting minutes (record 4), presentation slide (record 9) and financial reports (records 11 and 12).

[66] As noted above, the meeting minutes (record 4) capture the hospital and clinic's progress in negotiating the terms of the contract. In my view, the information contained in the meeting minutes cannot be said to have been directly supplied by the third party to the hospital. Rather, this information is the result of joint discussions between the hospital and third party.

[67] In addition, I note that the presentation slide (record 9) and financial reports (records 11 and 12) were created by the hospital, not by the third party. The third party's representations do not specifically address whether it supplied the withheld information in records 9, 11 or 12. Instead, the third party indicates that it objects to disclosure on the basis that records 11 and 12 "referenced incorrect amounts, erroneously referred to [the clinic] as having been paid fees when no portion of the amounts were paid to [the named doctor] for his services, and most importantly contains confidential patient names."

[68] Having regard to the representations of the parties and the records, I am satisfied that the withheld information in records 4, 9, 11 and 12 was not directly supplied by the third party to the hospital. In addition, I am satisfied that disclosure of it would not reveal or permit the drawing of accurate inferences with respect to

¹⁴ Order MO-1706.

¹⁵ Orders PO-2020 and PO-2043.

information supplied by the third party. Accordingly, I find that the “supplied” test has not been met for these records.

[69] 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.¹⁶

[70] Given the absence of contrary evidence, I accept the third party’s submission that the financial information at issue in records 5 and 8, was supplied in confidence to the hospital. Although the records themselves do not bear any markings that identify them as confidential, I am satisfied that the circumstances in which they were provided to the hospital give rise to an implicit expectation of confidentiality. I am satisfied that the third party treated the information at issue in a manner that indicates a concern for confidentiality and, further that it is not otherwise available from sources to which the public has access. In arriving at this decision, I also took into consideration the submissions of both the hospital and the third party in which they confirm that they have had a longstanding relationship.

Summary

[71] I find that the third party has failed to establish that it supplied in confidence the withheld information in the meeting minutes (record 4), presentation slides (record 9), and financial reports (records 11 and 12). Accordingly, the second part of the three-part test has not been met. As all three parts of the test must be met for the exemption in section 17(1) to apply, I find that it does not and I order the hospital to disclose the withheld portions of these records to the requester.

[72] I also find that the third party has established that it supplied in confidence the withheld information in records 5 and 8. This is the information the third party refers to as “budgetary information.” As a result, I find that the second part of the three-part test has been met and I will go on to determine whether disclosure of this information could reasonably be expected to give rise to any of the harms in section 17(1).

Part 3: harms

[73] 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

¹⁶ Order PO-2020.

disclosure will in fact result in such harm.¹⁷

[74] 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.¹⁸ 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*.¹⁹

Sections 17(1)(a) and (c): prejudice to competitive position/undue loss or gain

[75] The third party states:

If the confidential Budget Information is disclosed, the [clinic's] competitive position will be seriously jeopardized and it will suffer undue loss (and a corresponding gain to competitors).

If the confidential Budget Information is disclosed, then a competitor or supplier will use such information to undermine [the clinic].

[T]he Budget Information is a line by line list of expenditures made by the [clinic for each of the cardiac clinic programs]. This information would be of interest to competitors – especially those that wish to recruit nurses and staff currently working at [the clinic] as the hourly wages for nurses and staff are listed in the Budget Information.

[76] The requester questions the application of section 17(1) and states:

I dispute that the withheld information is covered by exemptions under the *Freedom of Information and Protection of Privacy Act*.

Even if it is, I believe that there is a compelling public interest to disclose it, particularly because this involves transactions using taxpayer dollars.

If these transactions were not subject to public tendering rules, as it appears they were not, this is something the public is entitled to know.

¹⁷ *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.

¹⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹⁹ Order PO-2435.

I find it interesting that the [clinic] is concerned that the release of the information would put it at a competitive disadvantage, given that it appears there has not been much if any competition during the history of this business relationship.

[77] In its reply representations, the third party submits that the dollar amounts set out in records 5 and 8 represent sums that were never paid by the hospital. The third party submits that:

All funds paid were for out of pocket expenses and wages of nurses and staff and/or to technologists employed by [the clinic] who attend at the Hospital to implement cardiac diagnostic testing for in-patients.

[78] The hospital responds by agreeing with the third party that it never paid the sums outlined in records 5 and 8.

[79] Given the nature of the information, along with the submissions of the parties, I find that the third party has adduced sufficient evidence demonstrating that disclosure of the withheld financial information in records 5 and 8 could reasonably be expected to result in the harms contemplated by section 17(1)(a) and (c).

[80] Specifically, I am satisfied that disclosure of the withheld information in records 5 and 8 could reasonably be expected to prejudice significantly the competitive position of the third party. Despite the requester's evidence that presently there is little competition in the provision of cardiac services, I find that disclosure of the information revealing the third party's actual expenses could reasonably be expected to place a potential competitor at a significant advantage/or interfere significantly with future contractual negotiations. I am also satisfied that disclosure of this information could reasonably be expected to result in undue loss to the third party, to its detriment.

Summary

[81] I find that the third party has failed to establish that part 2 of the three-part test in section 17(1) has been met for the withheld information in the meeting minutes (record 4), presentation slides (record 9) and the financial reports (records 11 and 12) and order the hospital to disclose the withheld portions of these records to the requester. The hospital will have to ensure that corrected versions of the responsive records are provided, and that no patient names are disclosed to the requester.

[82] I find that all three parts of the three-part test in section 17(1) has been met for the withheld information in records 5 and 8 and as result, this information is not to be disclosed to the requester, subject to my finding about the application of the public interest override in section 23 below.

D. Did the institution exercise its discretion under section 13(1) to withhold information in records 1 and 6? If so, should this office uphold the exercise of discretion?

[83] I found that the discretionary exemption under section 13(1) applies to the information withheld from the memorandum (record 1) and briefing note (record 6). The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[84] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[85] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁰ This office may not, however, substitute its own discretion for that of the institution.²¹

[86] Although the hospital's representations did not specifically address this issue, I am satisfied that its submissions in support of the application of the section 13 exemption reflect the manner in which its discretion was exercised. In particular, I note that in severing the records, the hospital considered the relevant factor that exemptions from the right of access should be limited and specific. In addition, I note that the purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²²

[87] I am satisfied that the hospital did not exercise its discretion in bad faith or for an improper purpose and only took relevant factors into account. I am satisfied that the hospital considered the purposes of the *Act*, the wording of section 13(1) and the interests this exemption seeks to protect, as well as the nature of the information sought and the extent to which it is significant to the hospital. Accordingly, I uphold the hospital's exercise of discretion under section 13(1) to withhold the memorandum

²⁰ Order MO-1573.

²¹ Section 54(2).

²² *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

(record 1) and briefing note (record 6).

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) and 17(1) exemptions?

[88] I found that pages 1-2 of a memorandum (record 1) and pages 19-20 of a briefing note (record 6) qualify for exemption under section 13(1). I also found that the withheld information at pages 13-14 of a briefing note (record 5) and page 25 of an email attachment (record 8) qualify for exemption under section 17(1).

[89] As noted above, the requester takes the position that the compelling public interest override in section 23 applies to any record that I found exempt. Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Representations of the parties

[90] The third party submits that there is no compelling public interest in disclosure of the withheld information in records 5 and 8 and states:

As the public interest override is intended to inform the citizenry about the activities of their government, and the Hospital did not contribute any funding for the amounts listed in the Budget Information, it is submitted that privacy of the Budget Information cannot be overridden by the public interest override.

[91] The requester takes the position that there is compelling public interest in the disclosure of the records because the records involve "transactions using taxpayer dollars." The requester also questions whether the transactions were subject to public tendering rules.

[92] As stated earlier, the hospital confirmed that the financial information described in records 5 and 8 does not consist of, or reveal, monies it paid to the clinic.

[93] The hospital submits that the public interest override should not be applied to records 1 and 6, which are exempt under section 13(1). In support of its position, the hospital states:

There is no compelling public interest that mitigates in favour of disclosure. To the contrary, the public has an interest in ensuring that public institutions can maintain the confidentiality of the advice and recommendations they receive with respect to negotiating positions and possible compromises.

Decision and Analysis

[94] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[95] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by a requester. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.²³

[96] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.²⁴ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.²⁵

[97] Having regard to the representations of the parties along with the records themselves, I find that the withheld portions of records 5 and 8 do not contain information that would inform the requester about the hospital's activities or add to the public discourse about the hospital's contractual relations with the third party. Accordingly, I find that there is no public interest in the disclosure of the withheld financial information of the third party in records 5 and 8. In making my decision, I note that a public interest is not automatically established where the requester is a member of the media.²⁶

[98] Regarding the information in records 1 and 6 to which I found section 13(1) applies, I agree with the requester that disclosure of the withheld information in the memorandum and brief would rouse strong interest. The word "compelling" has been defined in previous orders as "rousing strong interest or attention".²⁷ Accordingly, I find that there is compelling public interest in the disclosure of the memorandum and briefing note in records 1 and 6.

²³ Order P-244.

²⁴ Orders P-984 and PO-2607.

²⁵ Orders P-984 and PO-2556.

²⁶ Orders M-773 and M-1074.

²⁷ Order P-984.

[99] However, the existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption in the specific circumstances. An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.²⁸

[100] In my view, the withheld information in the memorandum and brief squarely fit within the type of information to be protected by the section 13(1) exemption. The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making.²⁹

[101] Having regard to the above, I find that the requester has not established a compelling public interest in the disclosure of the information I found exempt under section 13(1) that would override the purpose of that exemption.

[102] For the reasons stated above, I find that the public interest override does not apply to the records found exempt under sections 13(1) and 17(1) and uphold the hospital's decision to deny the requester access to this information in records 1, 5, 6 and 8.

ORDER:

1. I order the hospital to disclose the withheld information in records 2, 3, 4, 9, 11 and 12 to the requester by **December 14, 2020** but not before **December 9, 2020**. The hospital will have to ensure that corrected copies of the records, containing information responsive to the request, and no patient names are disclosed to the requester.
2. I find that the advice or recommendation exemption under section 13(1) applies to the withheld information in records 1 and 6 and that the public interest override in section 23 does not apply. As a result, I uphold the hospital's decision to not disclose the withheld information in records 1 and 6.
3. I find that the third party information exemptions under sections 17(1)(a) and (c) apply to the withheld information in records 5 and 8 and that the public interest

²⁸ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

²⁹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

override in section 23 does not apply. I uphold the hospital's decision to not disclose the withheld information in records 1 and 6.

4. I reserve the right to require the hospital to provide me with copies of the records it discloses to the requester in accordance with this order.
5. The timelines noted in order provision 1 may be extended if the hospital 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: _____
Jennifer James
Adjudicator

November 6, 2020 _____