Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4300

Appeal PA20-00085

Southlake Regional Health Centre

September 12, 2022

Summary: This order deals with an access request made by the appellant for an agreement between Southlake Regional Health Centre (Southlake) and a private sector organization (the affected party) for the administration of infusion services (the agreement). After notifying the affected party, Southlake issued a decision denying access to the agreement pursuant to the third party information exemption in section 17(1) of the *Act*. During mediation, the affected party provided consent to disclose some portions of the agreement to the appellant, resulting in partial access to the appellant. Also, during mediation, the appellant confirmed that she was seeking access to product names and fees for each infusion (the withheld information) in the agreement. In this order, the adjudicator finds that the withheld information is not exempt under section 17(1) of the *Act*. She allows the appeal and orders Southlake to disclose the withheld information 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 Considered: Orders PO-2018, PO-2384, PO-2435 and PO-4055.

OVERVIEW:

[1] By way of background, private sector companies, like the affected party, are paid by drug manufacturers to set up clinics, where drugs are administered on an outpatient basis by infusion. The site where the clinics are located (in this case, in a hospital) receive payment for each infusion from the private sector company, as part of a Patient Support Program sponsored by the drug company. In this appeal, a media requester (the appellant) is seeking information in an agreement between Southlake Regional

Health Centre (Southlake), a publicly-funded hospital, and the affected party for the administration of infusion services, namely, the drugs administered by the hospital and the fees paid by the affected party to the hospital for administering the drugs.[1]

[2] Specifically, the appellant submitted the following request to Southlake under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> Copies of all agreements between the hospital or regional health centre and any entities that offer infusion services, from January 1, 2014 to the date you begin processing this request. If multiple versions of some agreements have been in force during that period, please include all versions.

[3] After notifying the affected party during the request stage, Southlake issued a decision denying access to records it identified as responsive to the request pursuant to the third party information exemption in section 17(1) of the *Act*.

[4] The appellant appealed Southlake's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] During mediation, the affected party provided consent to disclose some portions of the records to the appellant. As a result, Southlake provided the appellant with partial access to the records, pursuant to the affected party's consent.

[6] The appellant informed the mediator that she is only pursuing access to certain withheld information in a schedule to a Clinic Services Agreement (the agreement), namely, product names and fees for each infusion (the withheld information). The affected party did not consent to disclosure of the withheld information and Southlake maintained its reliance on section 17(1) of the *Act*.

[7] Mediation could not resolve the appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[8] I am the adjudicator assigned to this appeal and I began my inquiry by inviting Southlake and the affected party to make representations in response to a Notice of

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[1] The affected party explains that drugs:

> …are being infused in patients who have been prescribed the drugs in an outpatient setting and dispensed by outpatient pharmacies (i.e., not the hospital's pharmacy). In many locations patients will receive this therapy at a private infusion clinic, however in the area surrounding Southlake they were able to have the drugs infused in the hospital's clinic (again, on an outpatient basis). Southlake itself would not have been involved in the prescribing decisions and the infusion services would have been provided independently of other hospital operations. The drugs infused should be seen as akin to other outpatient drugs – the only difference is that they must be administered by infusion (rather than, for example, swallowing a pill) and support is therefore required in order for the individual (who is not a traditional hospital patient) to take it.

Inquiry, which summarizes the facts and issues under appeal. I received representations from both parties. I then invited the appellant to submit representations in response to the representations of Southlake and the affected party, and in response to the issues and questions set out in the Notice of Inquiry. I received representations from the appellant, which raised the additional issue of the public interest override at section 23 of the *Act*. I decided to add this issue to my inquiry for this appeal.

[9] I shared the appellant's representations with Southlake and the affected party, and invited them to reply to these representations, including the new issue of public interest override. I received reply representations from the affected party and sur-reply representations from the appellant. The representations of the parties were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[10] In this order, I find that the withheld information is not exempt under section 17(1) of the *Act*. I allow the appellant's appeal and order Southlake to disclose the withheld information to the appellant. In the circumstances, it is not necessary for me to decide whether the public interest override applies.

RECORD:

[11] At issue in this appeal is withheld information in the Clinic Services Agreement (the agreement) on the page titled "Schedule A" in section B under the columns of "Product Name" and "Fee per infusion of Qualifying Patient", namely, product names and fees for each infusion, respectively (together the withheld information).

DISCUSSION:

Issue A: Does the mandatory third party information exemption at section 17(1) apply to the withheld information?

[12] Southlake and the affected party claim that the withheld information is exempt from disclosure under the third party exemption at section 17(1) of the *Act*. This section 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;

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

[13] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[3]

[14] 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

[15] The types of information listed in section 17(1) have been discussed in prior IPC orders, in part, as:

> *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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
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> *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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[2] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[3] Orders MO-1706, PO-1805, PO-2018 and PO-2184.
[4] Order PO-2010.
[5] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[6]

Representations of the parties

[16] Southlake submits that the record reveals commercial information as it includes the names of products, which are capable of identifying the affected party's customer – i.e. the drug manufacturer that hired it (the customer or its customer) and the fees relating to such products.

[17] The affected party submits that the withheld information is commercial and financial in nature. It submits that both the product names (which would also identify its customer) and the fees payable for each product relates to the infusion services that are the subject of the agreement between it and Southlake, which makes it commercial information. It also explains that the fee payable is financial information because it is clearly indicative of its pricing practices.

[18] It refers to Order PO-3761 that held that a service agreement "as a contract, contains both commercial and financial information", and that "it contains financial information since the contract contains pricing information." It also refers to Order MO-3058-F, which found that information created for the purpose of entering into a commercial relationship was commercial. Overall, the affected party submits that the withheld information is contained in a contract, which sets out both the commercial relationship between it and Southlake, and includes financial information relating to that relationship.

[19] The appellant did not specifically address this issue in her representations.

Analysis and findings

[20] Based on my review of the representations of the parties and the record itself, I find that the withheld information contains commercial and financial information for the purposes of part one of the three-part test in section 17(1).

[21] I agree with the affected party and Southlake that the withheld information is commercial and financial in nature. I accept that the withheld information is contained in the agreement between the affected party and Southlake, which governs the commercial relationship between them. I also accept that the withheld information refers to the buying and selling of the administration of infusion services for the products and clearly relates to pricing for such services.

[22] Having found that the withheld information reveals commercial and financial information and accordingly, part one of the three-part test is met, I will now consider the second part of the test.

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[6] Order PO-2010.

Part 2: Supplied in confidence

[23] As explained below, I find that the fees for each infusion were not *supplied in confidence*. I do not need to make a finding on whether the product names were supplied in confidence, given my findings under Part three of the test.

Supplied

[24] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[7]

[25] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[8]

[26] 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.[9]

[27] 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.[10] 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.[11]

In confidence

[28] 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.[12]

[29] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including

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[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] 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*).
[10] Order MO-1706, cited with approval in *Miller Transit*, at para. 33.
[11] *Miller Transit* at para. 34.
[12] Order PO-2020.

whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[13]

Representations of the parties

[30] Southlake submits that the affected party supplied it with the withheld information within a schedule to the agreement. It also submits that this agreement includes a confidentiality provision at section 9, stating that Southlake shall keep the information under the agreement in strict confidence.

[31] Even though contained in a contract, the affected party submits that the withheld information was supplied to Southlake because it was not negotiated and not susceptible to negotiation, with reference to the immutability exception.

[32] It submits that the fees for each infusion "indirectly reveals the pricing that [the affected party] has negotiated with its customer" (i.e. the drug company). It refers to the fact that the IPC has permitted the withholding of pricing information in the past when it "disclosed fixed, underlying costs, agreements struck between the affected party and other third parties and/or were not negotiated."[14] It explains that:

> the price offered to Southlake was influenced in large part by the agreement between [the affected party] and its customer, and revealing the price would therefore provide the recipient with the ability to estimate costs under that agreement, an agreement that would not be subject to [the *Act*] and is considered confidential by [the affected party] and its customer.

[33] Similarly, the affected party submits that the product names (and indirectly the identity of its customer) would have been supplied on a basis that was not susceptible to negotiation. It explains that its negotiation with Southlake related to the ability to administer infusion services and not to the products to be infused.

[34] In response, the appellant submits that it is not compatible to take the position that disclosure will harm the affected party's competitive position and that the withheld

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[13] Orders PO-2043, PO-2371 and PO-2497; *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).
[14] Order PO-3011 at para. 37.

information was not susceptible to negotiation.

[35] In reply, the affected party submits that the withheld information discloses the results of negotiations between it and its customer, and the fact that it was not negotiated with Southlake does not mean that it was not the result of a negotiation – it simply was not the result of a negotiation with an institution that is subject to the *Act* and was therefore supplied in confidence to Southlake, an institution subject to the *Act*.

[36] Also, in reply, the affected party submits that the general principle, where the contents of an agreement are considered "negotiated" rather than "supplied", does not apply. It submits that in this appeal, the fees for each infusion were provided by the affected party to Southlake and they were not negotiated, but rather reflects the fixed cost that the affected party is able to pay based on its agreements with its customers.

[37] The affected party also refers to section 9 of the agreement to support that it had a reasonable expectation of confidentiality at the time the withheld information was provided to Southlake. It submits that this provision states that the information relating to financial support and the customer's information is to be held in strict confidence and not be disclosed except as authorized in writing by the affected party. The affected party submits that this provides an objective basis on which to conclude that it had an explicit expectation of confidentiality.

Analysis and findings

[38] Based on my review of the withheld information and the representations of the parties, I find that the fees for each infusion were not supplied. Given my findings under Part three, I do not need to make a finding on whether the product names were supplied in confidence.

[39] Here, I initially address the affected party's representations that the withheld information was supplied to Southlake because it discloses the results of negotiations between the affected party and its customer, and as a result, there was no negotiation between the affected party and Southlake. I disagree. The second part of the test under section 17(1) of the *Act* specifically looks at whether the information at issue qualifies as *supplied* based on if it was *directly supplied to an institution by a third party*, or whether its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party. At issue in this appeal is whether the withheld information was supplied by the affected party to Southlake, irrespective of the agreement between the affected party and its customer, and their negotiations.

Supplied

[40] In this appeal, I am dealing with a request for the withheld information in the finalized agreement between Southlake and the affected party. The IPC has consistently treated the terms of a contract as mutually generated, rather than "supplied" by a third party, even where the contract is preceded by little or no negotiation.

[41] In Order PO-2018, Assistant Commissioner Sherry Liang wrote:

> … this element of the three-part test under section 17(1) has been the subject of a number of prior orders, most of which have concluded that contracts between government and private businesses do not reveal or contain information "supplied" by the private businesses. These findings reflect the common understanding of a contract as the expression of an agreement between two parties. Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of arrangements the parties agreed to accept, this information is not in itself considered a type of "informational asset" which qualifies for exemption under section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party.
>
> Consistent with this general approach, certain cases have recognized that the absence of negotiations does not in itself lead to a conclusion that the information in the contract was "supplied" within the meaning of section 17(1).

[42] The affected party relies on the immutability exception. In Order PO-2384, Adjudicator Faughnan explained this exception in the following way:

> … [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties…The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

[43] While the parties did not provide specific representations on whether the inferred disclosure exception applies to the withheld information, I will consider it below based on the representations made by the affected party that seem to suggest it relies on this.

Fees for each infusion

[44] The affected party submits that the fees for each infusion payable by it to Southlake was "not negotiated and not susceptible to negotiation". I disagree.

[45] While the affected party and its customer may have agreed to certain terms, including price, in their own agreement, the fees for each infusion agreed to by Southlake and the affected party in the agreement before me would have been determined between them. I note that the affected party is not submitting that the fees for each infusion set out in the agreement are the same as the prices agreed to between it and the customer,[15] nor is it submitting that the fees for each infusion set out in the agreement were determined by its customer and could not have been changed by either Southlake or the affected party as part of process of offer and acceptance. What it does say is that:

> [the fees for each infusion] *indirectly reveal* the pricing that it has negotiated with its customer…
>
> the price offered to Southlake was *influenced in large part* by the agreement between [the affected party] and its customer… [emphasis added].

[46] Regardless of this *influence,* ultimately, it would have been up to Southlake and the affected party to agree on the fees for each infusion under the agreement between them, where either party could have rejected the other's proposal or refused to enter into the agreement. It is on this basis that I determine that the fees for each infusion payable to Southlake by the affected party were susceptible to negotiation, even though it may not have been changed after being proposed by the affected party. I will address separately below whether the fees in the agreement indirectly reveal the pricing that was negotiated with the affected party's customer (the inferred disclosure argument).

[47] The affected party also submits that the IPC has upheld the withholding of pricing information when such pricing information reveals "fixed, underlying costs, agreements struck between the affected party and other third parties and/or were not negotiated.[16]

[48] I do not agree that the fees for each infusion would disclose fixed or underlying costs, akin to overhead or labour costs set out in a collective agreement, nor do I agree that the fees for each infusion would disclose an agreement between the affected party and its customer. Again, there is no evidence before me that the affected party's agreement with its customer prescribed a specific fee that the affected party had to offer to Southlake and that could not be modified. Moreover, the affected party does not explain how disclosing the fees for each infusion in the agreement between Southlake and the affected party would reveal underlying non-negotiable information between Southlake and the affected party. It simply indicates that the fees for each infusion were *influenced in large part* by, the price agreed to between the affected party and its customer.

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[15] Nor does it stand to reason that they would be. The fees agreed to between the affected party and its customer, and the price the affected party pays to the hospital for infusing the drugs, are distinct.
[16] Order PO-3011 at para. 37.

[49] In the circumstances of this appeal, I find that, in offering and accepting the fees for each infusion and then including it in a contract for services, the fees for each infusion became "negotiated" information and essential terms of a negotiated contract. This is consistent with Order PO-2435, where Commissioner Brian Beamish observed that the exercise of the government's option in accepting or rejecting an offer is a "form of negotiation." I find that the immutability exception does not apply to the pricing information in the agreement.

[50] The affected party also argues that the fees set out in the agreement would indirectly reveal the price agreed to between the affected party and its customer. While the affected party appears to be arguing that the price negotiated between itself and its customer may be inferred from disclosure of the fees for each infusion, I do not agree. The evidence before me does not explain how disclosure of the fees for each infusion would permit accurate inferences to be drawn about underlying confidential information that was not negotiated between the affected party and Southlake, namely, the price negotiated between the affected party and its customer. The affected party has simply indicated that its competitors, who have industry knowledge of what costs are directly passed through to customers and how these prices are determined generally, would be able to arrive at a price that is accurate enough to be useful in the process of attracting or retaining customers (although a competitor may not be able to determine the exact price with certainty). Absent more detailed evidence to support this assertion, I am not convinced that competitors could deduce the price negotiated between the affected party and its customer. I am not satisfied that the inferred disclosure exception applies to the pricing information in the agreement.

[51] Accordingly, I find that the fees for each infusion were not supplied by the affected party to Southlake. As not all three parts of the test have been met for the fees for each infusion, this information is not exempt under section 17(1) of the *Act*. Therefore, I will allow this part of the appellant's appeal and order Southlake to disclose the fees for each infusion to the appellant.

Product names

[52] With respect to the product names, the affected party submits that this information was supplied because this was not susceptible to negotiation. In other words, it argues that the immutability exception applies here.

[53] The affected party explains that it has a separate agreement with its customer, which permits the affected party to enter into agreements with other parties related to the administration of infusion services for its customer's drugs. It says that:

> The negotiation between [it] and Southlake related to the ability to provide infusion services generally and not to the individual products to be infused, which was not information that was susceptible to negotiation.

[54] I may be willing to accept the argument that the particular products proposed by the affected party for the administration of infusion services would not have been

negotiable with Southlake. However, this does not negate the fact that Southlake could have rejected the proposal made by the affected party, agreed to administer some of the products but not all of them, and/or refused to enter into an agreement with the affected party at all. This would itself be a form of negotiation, as found in Order PO-2435 above, meaning that the products offered would be a fundamental negotiated term of the agreement between the affected party and Southlake. As a result of this, it is difficult for me to conclude that the product names were not negotiated.

[55] This is in line with Adjudicator Diane Smith's findings in Order PO-4055, where she found that:

> Based on the contents of [a record at issue in that appeal], I also disagree with the [third-party appellant] that the [institution] simply adopted its proposal without negotiation. This information at issue [in that appeal] was part of a proposal made to the [institution], which the [institution] had the option of accepting or not.

[56] In addition, while I may be willing to accept that the disclosure of the product names would permit an accurate inference to be made with respect to the identity of the affected party's customer, again, it was always open to Southlake to reject the affected party's offer.

[57] In these circumstances, it seems at least arguable to me that the products names (and indirectly the identity of the affected party's customer) should be treated as mutually generated rather than supplied. However, I need not make such a determination in this appeal because I find below that the harms are not established for the purposes of section 17(1) of the *Act*.

Part 3: Harms

[58] As explained below, the parties have not provided me with sufficient evidence to demonstrate that disclosure of the product names could give rise to a reasonable expectation that one of the harms specified in section 17(1) will occur.

[59] 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.[17]

[60] 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

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[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.

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]

[61] 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).[20]

Representations of the parties[21]

[62] Southlake submits that if the withheld information was disclosed, it could impact the affected party's competitive position in the industry as the withheld information could provide the affected party's commercial information to its competitors.

[63] The affected party submits that the withheld information discloses the results of negotiations between it and its customer and provides valuable insight, and if disclosed, competitors could use the withheld information in its negotiations and in the process of attracting and retaining customers, which could constitute an undue gain to competitors and could impact the affected party's competitive position in the market and result in an undue loss to the affected party.

[64] While the affected party also submits that disclosure of its customer's name (indirectly through disclosure of the product names) could harm its relationship with its customer, who expects that its identity will remain confidential, as well as its other customers, it also explains that "It is known that Southlake was being paid a fee in order to infuse certain medications to certain patients. It is the simply the fee that is not known."

[65] In addition, the affected party submits that disclosure of the product names could result in the inadvertent release of patients' personal health information. It explains that if someone already has access to the names of individuals who attend the clinic, disclosure of the product names would give them insight into the potential health conditions of those patients. It points out that while not a harm to it, this could result in harm to patients.

[66] Generally, the appellant submits that Southlake and the affected party have not established how the affected party could reasonably be expected to be harmed by disclosure of the withheld information.

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[19] Order PO-2435.
[20] Order PO-2435.
[21] The majority of the affected party's representations deal with the harm that could arise from the disclosure of the fees for each product, as do the representations of the appellant. Given my finding above, I do not need to consider whether this specific information meets this part of the three-part test. However, to the extent that these same representations may have some bearing with respect to the harms issue for the product names, I also consider them generally although I do not specifically summarize them in this order.

Analysis and findings

[67] On my review of the product names and the representations of the parties, I find that this information does not meet the *harms* part of the test for exemption under section 17(1) of the *Act*.

[68] The affected party submits that the disclosure of the product names could reasonably be expected to result in harm to its relationship with its customer and even other customers, which in turn could harm the affected party's competitive position in its industry and could lead to undue loss to it and undue gain to its competitors. It takes this position because the product names would reveal the identity of its customer (the drug company).

[69] It is my view that the product names (and even the identity of the affected party's customer) may already be known. Firstly, I note that the affected party indicates that it is known that "Southlake was being paid a fee in order to infuse certain medications to certain patients." In addition, recipients of the drugs at Southlake are presumably aware of the drugs they are receiving and could in turn easily determine the manufacturer of those drugs. Workers at Southlake who are administering the drugs would also presumably know the drugs being administered, as well as the manufacturer of the drugs they are administering to patients.

[70] It is for this reason that I find that it is reasonable that those in the medical field and patients may already know the product names being administered and the identity of the affected party's customer as the manufacturer.

[71] In any event, I am not convinced that disclosure of the product names (and the affected party's customer indirectly) could reasonably be expected to result in the harms contemplated by section 17(1). The affected party submits that the product names disclose the results of negotiations between it and its customer. However, that is not the issue – the issue is whether disclosure of the product names could reasonably be expected to result in harm to the affected party. Even if the product names were not widely known, the affected party has not explained to my satisfaction how disclosing the product names could provide its competitors with valuable insight into its negotiations with its customers or how competitors could use the product names in such a way as to significantly impact its competitive position, or to result in undue gain to its competitors and undue loss to it.

[72] I am also mindful of Assistant Commissioner Brian Beamish's comments in Order PO-2435 that:

> The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[73] I find, therefore, that there is no reasonable expectation that one or more of the

harms in section 17(1) could occur if the product names were disclosed. Accordingly, as not all three parts of the test have been met for the product names, this information is not exempt under section 17(1) of the *Act* and must be disclosed.

[74] Finally, the affected party submits that disclosure of the product names could result in the inadvertent release of patients' personal health information. While I appreciate the affected party's concern for the privacy of patients' personal health information, neither the affected party's limited representations on this topic, nor my review of the record itself satisfy me that disclosing the product names would result in the disclosure of any individual's personal health information. I note that the hospital did not raise a similar concern.

[75] In light of my findings that the withheld information is not exempt under section 17, I do not need to consider the application of the public interest override.

ORDER:

1. I order Southlake to disclose to the appellant the product names and the fees for each infusion, as contained in the agreement on the page titled "Schedule A" in section B under the columns of "Product Name" and "Fee per infusion of Qualifying Patient", by **October 17, 2022**, but not earlier than **October 12, 2022**.

2. In order to verify compliance with this order, I reserve the right to require Southlake to provide me with a copy of the record disclosed to the appellant in accordance with order provision 1 above.

Original signed by: September 12, 2022

Valerie Silva
Adjudicator