

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-4337

Appeal PA20-00469

The Hospital For Sick Children

January 19, 2023

**Summary:** The Hospital For Sick Children (the hospital) received a request for records relating to payments made to the hospital by a named company for a specified period. The hospital identified responsive records and contacted the third party (the named company) for its views on disclosure. Despite the third-party's position that the records should not be disclosed pursuant to section 17(1) (third party information), the hospital's decision was to disclose the records in full to the requester. The third party appealed the hospital's decision. In this order, the adjudicator upholds the hospital's decision, in part, and finds that section 17(1) applies to exempt the unit price and quantity on the credit memo (record 4).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 24(1).

**Orders and Investigation Reports Considered:** Orders P-134, P-880, PO-1791, PO-1813 and PO-2806.

### OVERVIEW:

[1] The Hospital For Sick Children (the hospital) received a request under the *Act* for access to certain hospital records. Following communications between the requester and the hospital, the hospital processed the request as follows:

hospital records relating to payments (however described) made to the hospital by [named company (A)] (between Jan 1, 2007 - Jan 1, 2020)<sup>1</sup>

[2] Based on the adjusted and clarified request, the hospital identified records responsive to the request. The hospital notified a third party under section 28(1) of the *Act* to obtain its views regarding disclosure of the records. Following third party notification, the hospital issued a decision granting the requester full access to the records.

[3] The third party, now the appellant, appealed the hospital's decision to the Information and Privacy Commissioner of Ontario (the IPC) on the basis that the records should be withheld pursuant to the mandatory exemption for third party information at section 17(1).

[4] During mediation, the mediator had discussions with the parties about the records and issue on appeal.

[5] Following discussions with the mediator, the appellant provided the mediator with a description of the records which, with its consent, the mediator shared with the requester.

[6] The parties were unable to resolve the issue under appeal through the process of mediation and the file was referred to adjudication

[7] The original adjudicator assigned to this appeal decided to commence an inquiry and after inviting representations from the appellant and the hospital, only received submissions from the appellant. The adjudicator, after reviewing those representations, added the issue of scope to the appeal and invited the original requester to provide representations. At this point, I was assigned to this appeal to continue with the adjudication and sought further representations from the parties including from the hospital on the scope issue. Representations were received and shared in accordance with the IPC's *Code of Procedure*.

[8] In this order, I partially uphold the hospital's decision. I find that section 17(1) applies to exempt the unit price and quantity on the credit memo (record 4). I find that section 17(1) does not apply to the other records and order the hospital to disclose them to the requester.

## **RECORDS:**

[9] There are five records at issue, described by the appellant in its representations as:

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<sup>1</sup> The original request was for records that pre-dated 2007 but this was narrowed when the hospital referred to section 69(2).

Record 1 – summary of payments

Record 2 – receipt

Record 3 – cheque

Record 4 – credit memo

Record 5 – cheque

## **ISSUES:**

- A: What is the scope of the request for records? Which records are responsive to the request?
- B: Does the mandatory exemption at section 17(1) for third party information apply to the records?

## **DISCUSSION:**

### **Issue A: What is the scope of the request for records? Which records are responsive to the request?**

[10] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
- (a) make a request in writing to the institution that the person believes has custody or control of the record;
  - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[11] To be considered responsive to the request, records must “reasonably relate” to

the request.<sup>2</sup> Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.<sup>3</sup>

### ***Representations***

[12] The appellant raised the issue of scope in its representations. It submits that in the notice it received from the hospital, the request is for "hospital records relating to payments (however described) made to the hospital by the appellant (between 2 specified dates)." The appellant submits that the records at issue relate to

1. credit for the difference between purchases that were made at list prices but ought to have been made at contract prices, and
2. payments made in satisfaction of ordinary commercial term benefits, which ultimately represent a discount enjoyed by the Pharmacy, not a payment by the appellant.

[13] Therefore, the appellant submits that, although the records reflect the transfer of funds from it to the hospital, these were not "payments" made by the appellant to the hospital. It submits that the funds were not provided to the hospital in exchange for goods or services or for any purpose other than the return of hospital funds in satisfaction of contractual obligations.

[14] The original requester was invited to address scope in his representations and submits that the hospital did initially state that the, "records are not responsive to the appellant's request," as the original request was for documents relating to financial exchanges from the 1980's and 1990's between the third party (as well as two others) and the hospital. The requester submits that his original request was improperly stated/worded, and that was expressed to the hospital when they initially stated there were no responsive records.

[15] The requester submits that the hospital abided by the IPC's guidelines and accepted, to some extent, a reformulated request. The requester notes that while the year of the documents being discussed does not coincide with the original request<sup>4</sup>, it was the hospital's determination and choice to provide him with the records at issue, as they clearly felt that they "reasonably related to the request."

[16] The requester submits that at its core, the purpose and re-wording of his request was, specifically, to gain access to records on financial gifts, payments, donations, or exchanges provided to the hospital by the third party through "untraditional" means. The appellant submits that this appeal should not be dismissed because of semantic

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<sup>2</sup> Orders P-880 and PO-2661.

<sup>3</sup> Orders P-134 and P-880.

<sup>4</sup> Initially the requester requested records that pre-dated 2007.

misunderstanding of the word payment and how it was initially misused/misunderstood.

[17] In its reply representations, the appellant continued to submit that the records at issue are not within the scope of the request. It submits that the records relate to credits and discounts that were applied to purchases made by the hospital or the pharmacy and reflect what are, essentially, price adjustments relating to payments from the hospital to it. It submits that as such, the records do not relate to financial gifts, payments, donations or exchanges provided to the hospital by the appellant.

[18] The appellant submits that the records are related to transactions in which the hospital made payment to the appellant and some amount of that payment was either credited or returned on the basis of a price adjustment for goods or a statutory discount applied retroactively pursuant to the Ordinary Commercial Terms Agreement. In other words, it submits that the records are properly understood as relating to payments made by the hospital, not to the hospital as the requester has clearly stated the request was intended to seek. The appellant submits that the requester has also made clear that he is interested in records related to gifts, payments or donations that were made to the hospital by the third party. It submits that none of the records at issue relates to "gifts, payments or donations" by the appellant to the hospital, and do not reflect gifts, donations or payments from the appellant to the hospital via "untraditional" means. Rather, it submits, the records relate to ordinary business transactions involving the purchase of goods by the hospital from the appellant and are therefore not responsive to the request.

[19] As noted, the hospital was invited to comment on the scope of the request and was provided with the appellant's and requester representations. The hospital provided representations on this issue only and submits that it is of the view that the records are responsive to the request. The hospital submits that as the requester noted, it initially refused the request as it was for records not subject to the *Act* (pursuant to section 65(5.4)). The hospital submits that it engaged with the requester directly and he clarified the nature of what he was seeking. The hospital submits that the requester was clear that he was looking for payments made by the appellant to the hospital in any form. The hospital submits that it understood that clarification to be in relation to the earlier denial for records of donations to its hospital foundation and essentially the requester wanted to be clear he was not merely seeking donations otherwise excluded, but any payments.

[20] The hospital submits that the requester has described the nature of those payments in a variety of ways. It refers to the requester's representations in this appeal where he describes them as including "financial gifts, payments, donations, or exchanges provided to the hospital by the third party through 'untraditional' means," and further explains that "untraditional means" was intended to cover any routes not exempt or excluded from the *Act*. The hospital submits that this is consistent with its own understanding of the clarification. The hospital submits that it, therefore, views the records as responsive.

[21] The hospital notes, however, that the appellant's description of the records is correct. It clarifies that it considers the records responsive because they are "payments," not because they are gifts, donations or exchanges.

[22] The requester responded to the appellant's claim that the records were not responsive, by submitting that it is not the role of this third party to determine whether or not the scope of the original request was addressed or not. He submits that the only focus of this appeal should be whether or not the appellant is able to make a case that the records at issue should be exempt under section 17(1). He submits that even if the disclosure by the hospital was not directly responsive to the original wording [and calendar years of records sought] of his request, the hospital disclosed these records because they obviously felt that these records were responsive to the request.

[23] The appellant was provided with the reply representations received from the hospital and the requester and decided to provide further representations on this issue. Most of its representations repeated its earlier submissions, but it also submitted that the ordinary meaning of "payments from the third party to the hospital" refers to funds that originate with the payor and are transferred to the recipient, and does not include refunds or credits, as is described in the subject records.

### **Analysis and finding**

[24] For the following reasons, I am satisfied that the records at issue are within the scope as they reasonably relate to the request. Despite the appellant's assertions, the hospital confirmed its belief that the records are within the scope of the request.

[25] As noted, institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Previous orders of the IPC have held that to be consistent with the spirit of the freedom of information legislation, ambiguities regarding the scope of a request should be resolved in the requester's favour. In Order P-880, Adjudicator Anita Fineberg adopted this approach and stated:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[26] Similarly, in the appeal giving rise to Order P-134, former Commissioner Sidney B. Linden resolved the ambiguity between the parties with reference to the spirit of the *Act*, stating:

... the appellant and the institution had different interpretations as to what [is] meant: the institution felt that the files were outside the scope of the

original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the *Act* compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[27] I agree with this approach and have adopted it in this appeal. In its representations, the hospital confirmed that the appellant's description of the records is correct, however, it confirms that it considers the records responsive because they are "payments," not because they are gifts, donations or exchanges.

[28] Therefore, I accept that the records at issue are within the scope of this appeal and I will now address the main issue.

**Issue B: Does the mandatory exemption at section 17(1) for third party information apply to the records?**

[29] The appellant provided some background for the records in its representations. It submits that the hospital was a party to a contract with the appellant that provided group pricing and other terms to the members. The appellant submits that records 1-4 contain information regarding a credit that was applied to the hospital pursuant to the contract. In its confidential reps, the appellant explains some of the information in the records and argues that the information, if disclosed could be used by its competitors and other individuals to reasonably infer information about contract prices.

[30] The appellant submits that the information in record 5 relates to a transaction that is governed by an Ordinary Commercial Terms Agreement (OCTA). It submits that pursuant to regulations under the *Ontario Drug Benefit Act* (the *ODBA*), ordinary commercial term benefits are payments made by drug manufacturers to pharmacies and relate to an ordinary commercial relationship. It submits that the payments are applied in one or more of three specified areas: (1) a prompt payment discount; (2) a volume discount; or (3) a distribution service fee. The appellant submits that at the material time, this discount, which is realized in the form of a payment by the manufacturer to the pharmacy, was subject to a regulatory maximum of 10% of the value of the drug. However, it submits that each customer could receive a different discount in one or more of the areas. The appellant submits that as the rates differ between customers, confidentiality regarding the rates contained within any particular agreement is commercially important to it.

[31] The appellant submits that record 5 contains information regarding a payment made by it in satisfaction of the ordinary commercial terms. It submits that the information contained in record 5 could be used to reasonably infer information

regarding the specific ordinary commercial term benefits the pharmacy received from the appellant.

[32] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>5</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>6</sup>

[33] 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, if 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[34] For section 17(1) to apply, the party arguing against disclosure 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;
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.

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<sup>5</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>6</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.



### ***Type of Information***

[35] The appellant submits that the information at issue (receipt, cheques and credit memo) meets the definitions for commercial and/or financial information. It submits that all of the records relate to the buying, selling or exchange of product by the hospital from the appellant. It submits that the records at issue provide details regarding the purchase and subsequent credit in relation to specified product, including quantum, unit price and total, as well as the reason for credit.

[36] In addition, the appellant submits that records 3 and 5 contain financial information in that they are cheques that include the appellant's banking information. It also submits that record 4 contains information regarding pricing practices.

[37] The IPC has defined commercial and financial information as follows:

***Commercial information*** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.<sup>7</sup> The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.<sup>8</sup>

***Financial information*** is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>9</sup>

[38] After reviewing the information in the records, it is clear that they contain financial information and some of the information would be considered commercial information. As a result, part one of the test is met.

### ***Supplied***

[39] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.<sup>10</sup>

[40] 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>11</sup>

[41] The appellant refers to Order PO-2097 where the adjudicator confirmed that the

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<sup>7</sup> Order PO-2010.

<sup>8</sup> Order P-1621.

<sup>9</sup> Order PO-2010.

<sup>10</sup> Order MO-1706.

<sup>11</sup> Orders PO-2020 and PO-2043.

third party exemption "is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself."

[42] The appellant submits that records 3-5 are documents that were prepared by the appellant and supplied directly to the hospital. It submits that these records contain information that was generated by the appellant either for the purpose of completing a commercial transaction involving the sale and subsequent credit for specified product, or to provide payment in satisfaction of ordinary commercial term benefits.

[43] The appellant submits that records 1 and 2, although prepared by the hospital, contain the same information that was supplied by the appellant, including the quantum of the credit payment and the payment for benefits, each of which reflect pricing practices.

[44] The appellant refers to Order PO-3512 where the adjudicator held that information contained within a document created by the ministry that was verbatim information originally supplied by the appellant was not information generated by the ministry, nor was it information that was mutually generated by the ministry and the appellant. It was held that such information was appropriately described as information "supplied" by the appellant to the ministry.

[45] The appellant submits that the records in this appeal, do not themselves constitute or contain the terms of a negotiated contract between the appellant and the hospital. Rather, it submits, they contain information regarding transactions that were carried out pursuant to and subject to the terms of commercial contracts.

[46] The appellant' submits that the disclosure of each of the records and the information contained therein would permit someone to make accurate inferences about underlying information that was supplied by the appellant to the hospital.

[47] The requester submits that the Notice of Inquiry outlines what is meant by the term, "supplied in confidence," noting that the contents of a contract will not normally qualify as having been "supplied" for the purpose of section 17(1). He submits that contractual provisions are generally treated as mutually generated, rather than supplied by the appellant.

[48] The requester refers to the appellant's submission that "...all of the requested records relate to the buying, selling or exchange of product by the hospital...". Therefore, the requester submits that it should be understood that these basic business transactions involving public funds and institutions don't qualify as a protected type of 'trade secret or scientific, technical, commercial, financial or labour relations information as described by the IPC.'

[49] The appellant did not comment further on this issue in its reply representations.

## **Finding**

[50] For the reasons that follow, I find that the information in the cheques and credit memo were supplied by the appellant to the hospital and the information in records 1 and 2 was recorded by the hospital but reflects information that was supplied by the appellant. Although the requester correctly submits that information that can be found in the contents of a contract will not normally qualify as having been supplied, I find that the information in the cheques and credit memo do not contain information that directly appears in the contract. As a result, I find that the information at issue was supplied to the hospital by the appellant.

*Were the records supplied in confidence by the appellant?*

*In confidence*

[51] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.<sup>12</sup>

[52] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

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

## **Representations**

[53] The appellant submits that in Order PO-1791, it was held that an explicit assurance of confidentiality of pricing information was not required in order to establish this part of the test. It submits that the adjudicator held that even though the requirement is that there be a demonstrated expectation of confidentiality on the part of the supplier, an implicit expectation could be inferred on the basis of representations made by the institution that received the information. Therefore, the appellant submits that even in the absence of direct evidence of the actual expectation at the time the

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<sup>12</sup> Order PO-2020.

<sup>13</sup> Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

information was provided, an inference may be made regarding an implicit expectation of confidentiality, particularly when consistent with prior decisions that have accepted the general proposition that a reasonably held expectation of confidentiality exists with respect to unit prices and other proprietary information.

[54] The appellant submits that with respect terms of confidentiality, it was held in Order PO-2569 that the provisions of the *Act* apply to information contained in records, notwithstanding the existence of a confidentiality provision. However, the appellant submits that it was also confirmed that the existence of such an explicit arrangement may provide evidence of the confidentiality expectations of the parties.

[55] The appellant submits that at all times, its normal and consistent practice was to treat the information contained within the subject documents as confidential. It refers to the OCTA and submits that it contains an explicit term of confidentiality. The appellant submits that in the agreement, it is stated that, the customer "agrees to maintain the Terms of this agreement confidential and not disclose the Terms set out herein to third parties." The appellant submits that its position is that transactions conducted pursuant to the OCTA, such as those reflected in the record, are subject to this contractual requirement of confidentiality. It submits that the intention of the confidentiality provision is to keep confidential not just the details of specific transactions but also the fact of the transactions themselves. Therefore, it submits that the disclosure of the cheque (record 5) would reveal information that was explicitly intended to be kept confidential.

[56] With respect to the other contract, between the appellant and the hospital, the appellant submits that although there is no explicit confidentiality term contained within it, it is the normal and consistent practice of the appellant to treat information that may be supplied to the customer pursuant to such a contract, such as pricing information and marketing strategies, strictly confidential. It submits that the disclosure of the information contained in records 1-4 would permit the drawing of reasonable inferences regarding such information, which was at all times intended to be kept confidential.

[57] The appellant submits that is its consistent practice to treat all of the information contained within the records (i.e. specific customer transactions, credits, product unit or services prices and banking information) as strictly confidential given the nature of the information and its importance to the appellant's market position.

[58] The appellant submits that the information contained within the records is not otherwise disclosed or available from sources to which the public has access and the records were prepared for a purpose that would not entail disclosure. Specifically, it submits that the records were prepared in furtherance of a commercial transaction in regards to which the appellant at all times had an expectation of confidentiality.

*The requester's representations*

[59] The requester submits that the Notice of Inquiry outlines what is meant by the term, "supplied in confidence," noting that the contents of a contract will not normally qualify as having been "supplied" for the purpose of section 17(1). He submits that contractual provisions are generally treated as mutually generated, rather than supplied by the third party.

[60] The requester submits that the third party does not meet the criteria in the second part of test under section 17(1). Specifically, he submits that the appellant's business partner, the hospital does not view the transactions in question as being confidential – neither implicitly or explicitly. He submits that the hospital's actions here (and lack of defense for the claim of confidentiality being made by the appellant) should be sufficient evidence to find that section 17(1) does not apply and the information should be disclosed.

[61] The requester refers to the Notice of Inquiry that outlined what is meant by the term, "supplied in confidence". He submits that, "[t]he contents of a contract...will not normally qualify as having been 'supplied' for the purpose of section 17(1). Contractual provisions are generally treated as mutually generated, rather than supplied by the third party..."

[62] The requester refers to the appellant's submission that "...all of the requested records relate to the buying, selling or exchange of product by the hospital...". Therefore, the requester submits that it should be understood that these basic business transactions involving public funds and institutions don't qualify as a protected type of 'trade secret or scientific, technical, commercial, financial or labour relations information as described by the IPC.'

[63] The appellant did not comment further on this issue in its reply representations which dealt mainly with the issue of scope.

***Analysis and finding***

[64] Although I have found that the appellant supplied the information in the records to the hospital, for the following reasons, I find that the appellant did not have a reasonable expectation of confidentiality when it supplied most of the information.

[65] After a review of the records at issue, I find that they were not supplied to the hospital with an explicit expectation of confidentiality. Although the appellant refers to Order PO-1791 to support an implicit expectation of confidentiality could be inferred on the basis of representations made, given the type of information at issue, I find that an expectation of confidentiality regarding the information in this appeal is not reasonable. Further, the information at issue in Order PO-1791 involved unit price quotations submitted in response to a request for prices, whereas the information in this appeal concern calculations based on negotiated contracts.

[66] In this appeal, the appellant acknowledges that the information at issue is regarding transactions that were carried out pursuant to and subject to the terms of commercial contracts and to provide payment in satisfaction of ordinary commercial term benefits. In my view, the information in the records relates to and was created as a result of contracts between the appellant and the hospital for the purchase of goods by the hospital from the appellant.

[67] As noted, the information at issue in records 1, 2, 3 and 5 consists of cheques, receipts and a summary of payments. Records 1 and 2 were records prepared by the hospital itself. While I am prepared to accept that disclosure of these records would reveal information supplied by the appellant to the hospital, I do not accept that there was an implicit or explicit expectation that the hospital would keep this information confidential. Moreover, for the cheques, I do not accept that these records were supplied to the hospital with an expectation of confidentiality. I presume that the cheques would have been sent to the hospital's accounting department and then eventually deposited at a bank. I do not accept that there was any expectation of confidentiality that the information contained in these records would be kept confidential.

[68] I also do not accept the appellant's argument that the confidentiality term in OCTA establishes that the records and relevant information at issue in this appeal were supplied in confidence, either explicitly or implicitly.

[69] However, I find that record 4 (the credit memo) was supplied in confidence by the appellant to the hospital because it contains some information that the appellant could reasonably expect that the hospital would keep confidential. This record which is essentially a summary of the calculation of the amount of the cheque in record 3 contains unit prices that would not appear to be available otherwise and therefore, I accept that this credit memo was provided to the hospital by the appellant with a reasonable expectation of confidentiality.

[70] As I do not find that the appellant has met part 2 of the test for the application of section 17(1), I find that records 1, 2, 3 and 5 are not exempt under section 17(1) and will order the hospital to disclose this information to the requester. I will now address the third part of the test with regard to record 4, the credit memo.

### *Harms*

[71] The appellant submits that there is a reasonable expectation that the harm specified in section 17(1)(a) would occur if the records are disclosed. Specifically, the appellant argues that disclosure would prejudice it significantly with respect to its competitive position or interfere significantly with its contractual negotiations.

[72] While I have reviewed and considered the appellant representations fully, they will not be set out here. In summary, the appellant submits that disclosure of the

information at issue in this appeal (now only examining record 4) would:

- Reveal unit price information and cost breakdowns that could allow a competitor to alter their prices and outbid it<sup>14</sup>
- Reveal the existence of a commercial and contractual arrangement between it and the hospital
- Go against its consistent practice of treating contract pricing with customers as strictly confidential
- Reveal pricing and marketing strategies that could reasonably be expected to be used by its competitors
- Impact its commercial contracts with other similarly placed institutions with the appellant suffering harm in the form of increased competition
- Undermine the explicit or implicit expectation of confidentiality the appellant has in conducting its commercial transactions resulting in it re-evaluating what information will be supplied in future
- Make public the confidential commercial relationship between it and the hospital providing insight to its competitors concerning confidential commercial arrangements.

[73] The appellant confirms in its representations that if record 4 is disclosed the information could be used to reasonably infer information about contract prices.

[74] The requester submits that the appellant's attempt to prevent disclosure is not in keeping with the provisions of the *Act* or the hospital's decision to disclose. He submits that there should not be a circumstance where a corporate law or practice supersedes the basic principles of the *Act*.

### ***Analysis and finding***

[75] The only record I am considering the application of section 17(1)(a) to is the credit memo. The credit memo details the amount credited by the appellant to the hospital. The information set out in the credit memo includes the quantity of two drugs, information concerning the unit price and the total amount of the credit payment. I note that this total amount is reflected in one of the two cheques at issue.

[76] Based on my review of the withheld information in the credit memo and the appellant's representations, I find that disclosure of the unit price listed in the memo, could reveal the appellant's confidential unit price information which would reasonably

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<sup>14</sup> Orders PO-1791 and PO-1813.

be expected to significantly prejudice its competitive position. Disclosure of the unit price would reveal information that the appellant considers confidential, is otherwise not available to the public, and is not set out in a contract between the parties. I also accept that the quantity of the drug combined with the total amount of the credit (which will be disclosed) would reveal the unit price in the memo and, as a result, I find that the information listing the quantity of the drug is also exempt under section 17(1)(a).

[77] I agree with the appellant that disclosure of information in the record concerning its unit prices, that are not set out in a contract with the hospital, would result in harm to it. In making this finding, I rely on Orders PO-1791 and PO-1813. In order PO-1791, the adjudicator noted:

A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records: Orders P-166, P- 610 and M-250. Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.

[78] Also, in Order PO-1813, it was held that unit price information and cost breakdowns could reasonably be expected to permit competitors to alter their prices and potentially outbid the affected party in future competitions and could reasonably be expected to impact their ability to carry on its business and compete in their own markets.

[79] In this appeal, the appellant's unit prices are not set out in a contract between it and the hospital as they were in Order PO-2806, where the adjudicator found that the unit prices at issue were negotiated. I accept the appellant's submission that it treats information concerning product unit prices confidentially and, considering the past IPC decisions, I find that disclosure of same could harm it by potentially disclosing information to its competitors that would otherwise not be available. As noted in the earlier decisions, information that would enable a third party's competitor to gain an advantage by adjusting a bid in order to underbid for future contracts meets the harms test.

[80] However, I find that disclosure of the remaining information including the name of the drugs and the total credit amount could not reasonably be expected to significantly prejudice the appellant's competitive position. The appellant has not established that disclosing this information could reasonably be expected to significantly



prejudice its competitive position or interfere significantly with the contractual or other negotiations. As a result, I will sever out the unit pricing and quantity information from the records and uphold the remainder of the hospital decision to disclose this record.

**ORDER:**

1. I uphold the decision of the hospital to disclose the records to the requester, in part, and order it to disclose the information that is not highlighted in record 4, by **February 24, 2023** but not before **February 17, 2023**. To be clear, according to this same timeline, the hospital should disclose records 1, 2, 3 and 5, in their entirety.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the hospital to provide me with a copy of the record disclosed to the requester.

Original Signed by: \_\_\_\_\_  
Alec Fadel  
Adjudicator

\_\_\_\_\_ January 19, 2023