

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4391

Appeal PA20-00718

Guelph General Hospital

May 16, 2023

Summary: Guelph General Hospital (the hospital) received a request for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to records relating to the provision of medical oxygen and respiratory services by a named company (the third party). After notifying the third party of the request, the hospital decided to grant access to the responsive records. The third party appealed objecting to the hospital's decision on the basis that the mandatory third party information exemption applies to portions of the records.

In this order, the adjudicator finds that the third party exemption in section 17(1) does not apply to the portions of the records at issue. The adjudicator dismisses the appeal and upholds the hospital's decision to disclose the records to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990., c. F31, section 17(1).

Order Considered: Order PO-2806.

OVERVIEW:

[1] This order disposes of the issues arising from a request for access made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Guelph General Hospital (the hospital). The requester sought access to the following:

A copy of any contract, agreement or other arrangement between [the hospital] and a Service Provider (collectively, "**Agreements**"), together

with: a copy of any correspondence (including emails), reports, business cases, presentations, memoranda, proposals, briefing notes, board meeting minutes, management meeting minutes, resolutions, directives, and other records related to [the hospital's] decision to enter into any Agreement; (ii) a description of the nature and terms of any amendments, modifications, waivers, or extensions to any Agreement; (iii) a copy of any correspondence (including emails), reports, briefing notes, memoranda or other records related to a Service Provider's: (x) performance, under an Agreement; and (y) compliance with the terms and conditions thereof; and (iv) a copy of any payments made under a professional fee sharing arrangement between [the hospital] and a Service Provider. To the extent that an Agreement is unwritten, please provide a description of said Agreement, together with a copy of each of the foregoing records associated therewith. For the purposes of the foregoing, "**Service Provider**" means [a named service provider] and any other company or entity that provides medical oxygen and/or respiratory-related services and/or equipment to [the hospital] or patients discharged from [the hospital]. [Emphasis original]

[2] The hospital notified the company named in the request (the third party) of the request under section 28(1) of the *Act*. The hospital identified three responsive records comprising two renewal agreements and a spreadsheet of fee payments (totalling 12 pages) and invited the third party to comment on disclosure.

[3] The third party objected to the disclosure of the responsive records on the basis of the mandatory third party information exemption in section 17(1) of the *Act*.

[4] The hospital issued an access decision to the requester granting full access to the responsive records. The third party, now the appellant, appealed the hospital's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[5] During mediation, the appellant consented to partial disclosure of the two renewal agreements, maintaining its objection to disclosure of the remaining portions on the basis of the section 17(1) exemption. The hospital provided redacted copies of the renewal agreements to the requester. The requester advised that they wish to pursue access to all the responsive records that the hospital decided to disclose.

[6] As a mediated resolution was not achieved, the appeal was moved to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry. I decided to conduct an inquiry. As the appellant is the party opposing disclosure of the information at issue, I decided to begin my inquiry by inviting the appellant to submit representations addressing the facts and the three part test to be met for the application of the section 17(1) exemption, which I set out in a Notice of Inquiry.

[7] I received a brief email submission from the appellant setting out its position. Given the brevity of the email, I invited the appellant to elaborate on its position and provide further representations. The appellant did not respond. Thereafter, I decided that I did not require further representations from the parties to dispose of the issues in the appeal and closed my inquiry.

[8] It subsequently became apparent that the third responsive record, the spreadsheet of fee payments, had not been identified as a record remaining in issue when the file was transferred to the adjudication stage. Accordingly, I re-opened my inquiry and invited the appellant to submit representations specifically addressing the application of the third party information exemption in section 17(1) to the spreadsheet of fee payments. The appellant reiterated its reasons for objecting to the disclosure of any financial information to the requester. After reviewing the appellant's submission, I decided that I did not require further representations to determine the issues before me.

[9] In this order, I find that the three part test for the application of the third party information exemption in section 17(1) of the *Act* is not met and the exemption does not apply to the portions of the renewal agreements and the spreadsheet of fee payments. Accordingly, I uphold the hospital's decision to grant the requester access to the responsive records and dismiss the appeal.

RECORDS:

[10] The records at issue consist of portions of two renewal agreements (pages 4, 6 and 10, in part) and a spreadsheet of fee payments (page 12, in full), being the portions of the records that the hospital has decided to disclose to the requester and to which the appellant objects.

DISCUSSION:

[11] The sole issue to be decided in this appeal is whether the third party information exemption in section 17(1) of the *Act* applies to the records at issue.

[12] For the reasons that follow, I am not satisfied that the information at issue was supplied by the appellant to the hospital so that the second part of the test for the application of the exemption in section 17(1) is not met.

[13] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,¹ where specific

¹ *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.*).

harms can reasonably be expected to result from its disclosure.²

[14] 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.

[15] 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.

[16] Section 53 of the *Act* provides that where an institution refuses access to a record or a part of a record, the burden of proof that a record or the part falls within one of the specified exemptions in the *Act* lies upon the institution. Previous orders of the IPC have held that when a third party relies upon the exemption provided by section 17(1) of the *Act*, the third party shares with the institution the onus of proving that the exemption applies to the record (or part of it) that is at issue.³

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ See for example, Order P-203.

[17] In this appeal, the hospital has decided to grant access to the parts of the records that are at issue and it is the third party appellant that opposes disclosure under the *Act*. As the party relying upon the exemption in section 17(1) and asserting that it applies to the information at issue, the appellant bears the burden of demonstrating that the exemption applies in this appeal.

[18] The appellant set out its objection to the disclosure of the records at issue in correspondence to the hospital upon first being notified of the request. In this correspondence, the appellant raised three objections: that its agreement with the hospital was entered through a competitive process such that its release would jeopardise the appellant's ability to compete in future competitions, the agreement was entered into with an expectation of confidentiality and the disclosure of financial records would allow for others to determine the appellant's revenues, compromising private and competitive information.

[19] As I noted above, as part of my inquiry, the appellant initially provided brief submissions in an email setting out its reasons for objecting to the disclosure of the portions of the two renewal agreements. Subsequently, the appellant also set out its reasons for objecting to the disclosure of the spreadsheet. In summary, the appellant's position is that disclosure of the information at issue will cause financial harm. The appellant states that financial information forms a major component of competitive bids and its disclosure would undermine the appellant's ability to compete in future processes.

Analysis and findings

[20] As stated above, for the third party information exemption in section 17(1) to apply, the party resisting disclosure must establish that all three parts of the test are met. I have considered the appellant's submissions and reviewed the records at issue and I am not satisfied that the information at issue was supplied to the hospital, so that the three part test is not met.

[21] The second part of the test to determine the application of the third party information exemption in section 17(1) requires that the information must have been *supplied* to the institution in confidence, either implicitly or explicitly. The requirement that the information at issue has been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁴

[22] 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.⁵

[23] The contents of a contract between an institution and a third party will not

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

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, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.⁶

[24] There are two exceptions to this general rule:

1. The “inferred disclosure” exception, which applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.⁷
2. The “immutability” exception, which applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.⁸

[25] The appellant does not directly address whether the information at issue was supplied to the hospital in its submissions. I note that one of the appellant’s objections to the disclosure of the spreadsheet is that it represents pricing that has been negotiated.

[26] From my review of the portions of the renewal agreements that are at issue, I find that they are the contract terms that have been agreed by the parties. The portions that are at issue are the clauses relating to the payment for services to the appellant for the supply of oxygen (clause 8, page 4) and the duration of the two renewal agreements (clause 12, pages 6 and 10).

[27] As already noted, the IPC generally treats the terms of a contract as “mutually generated” and the product of a negotiation process, rather than “supplied.” The appellant states that its agreement with the hospital was entered into as a result of a competitive process and based upon the appellant’s creative solutions to home respiratory care. In competitions for government contracts where potential suppliers of services respond to government requests for proposals, this office has held that an institution’s acceptance or rejection of a proposal is considered a form of negotiation.⁹ I am satisfied that the renewal agreements are contracts for the supply of oxygen and respiratory services that are the product of the parties’ negotiation process and that they are not information that has been supplied by the appellant.

[28] Regarding the spreadsheet of fee payments, from my review of the spreadsheet

⁶ 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*).

⁷ Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

⁸ *Miller Transit*, cited above at para. 34.

⁹ Order PO-2435.

it is a document prepared by the hospital in response to a freedom of information request and setting out payments made to the appellant during a specified period for the supply of home oxygen. Being a record generated by the hospital, I have considered whether the financial information it contains has been “supplied” by the appellant for the purposes of section 17(1).

[29] Previous IPC orders have examined whether records detailing payments meet the “supplied” requirement of the section 17(1) test. In Order PO-2806, the adjudicator considered whether information in spreadsheets showing annual sums owed by the Ontario Power Generation to a third party had been supplied within the meaning of section 17(1). The adjudicator determined that the payments could readily be traced back to the negotiated agreements between the parties and payment information was not therefore “supplied” by the third party.

[30] I agree with and adopt this approach in this appeal. The spreadsheet of fee payment information was generated by the hospital and it reflects the fee sharing terms set out in the hospital’s agreement with the appellant. Accordingly, I find that the information in the spreadsheet is not information that was supplied by the appellant to the hospital.

[31] I will now consider whether either of the two exceptions apply to my finding that the information at issue in the renewal agreements is negotiated rather than supplied.

[32] For the “inferred disclosure” exception to apply, the inference that could be made by the disclosure of the information at issue needs to relate to “underlying non-negotiated confidential information supplied by the third party.”¹⁰ There is no reasonable basis for me to find that such underlying information exists in this appeal. The appellant submits that disclosure of the information at issue will allow others to determine its revenue. I am not persuaded that this is a determination to which the “inferred disclosure” exception applies. The portions of the renewal agreements at issue set out the appellant’s revenue *from the agreements*. This information is the product of the parties’ negotiation and is not *underlying* information. The appellant has not identified any other information that could be inferred from the disclosure of the withheld clauses.

[33] Accordingly, I am not satisfied that the “inferred disclosure” exception applies to the portions of the renewal agreements that are at issue.

[34] In my view, the financial information reflected in the payment terms of the renewal agreements is not the type of financial information that might fall within the “immutability” exception, specifically information that is *incapable* of being negotiated. The fee sharing arrangement between the parties to the agreement is, by its very nature, mutable and negotiable.

¹⁰ See *Miller Transit*, cited above at para 33.

[35] Accordingly, I am not satisfied that the information in the portions of the records at issue in the renewal agreements and the spreadsheet were supplied by the appellant for the purposes of section 17(1) of the *Act*. The second part of the test is not met.

[36] As all three parts of the test must be established, I find that the mandatory third party information exemption in section 17(1) of the *Act* does not apply to the records at issue that the hospital decided to disclose. Accordingly, I uphold the hospital's decision and dismiss this appeal.

ORDER:

1. I dismiss this appeal and uphold the hospital's decision to grant access to the records at issue.
2. By **June 20, 2023** but not before **June 15, 2023**, I order the hospital to disclose to the requester the responsive records.
3. In order to verify compliance with this order, I reserve the right to require the hospital to provide me with a copy of the records disclosed pursuant to provision 2.

Original signed by: _____
Katherine Ball
Adjudicator

_____ May 16, 2023