

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4438

Appeal PA22-00008

Alexandra Marine and General Hospital

September 05, 2023

Summary: The hospital received a request under the *Act* for records regarding monies paid to specified companies concerning building service/maintenance contracts. The hospital located a one-page list of payments made to the affected party and after third party notification denied access to the record pursuant to section 17(1) (third party information). The requester appealed the hospital's decision. In this order, the adjudicator finds that the exemption does not apply to the withheld information and orders the hospital to disclose the list of payments to the appellant.

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

OVERVIEW:

[1] Alexandra Marine and General Hospital (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

Building maintenance/software/parts/constructions/service contract for HVAC system, HVAC control system, BAS, BA control system paid to [NAMED COMPANIES]

[2] The hospital sent an email to the requester advising that it attempted to obtain consent from the third-party, consent had been denied, and as a result it was denying access in full to any records.

[3] The requester, now the appellant, appealed the hospital's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the mediator had discussions with both the hospital and the appellant about the issues on appeal.

[5] The hospital advised the mediator that it had identified a responsive record, and notified a third-party (the affected party) under section 28(1) of the *Act* to obtain its views regarding disclosure of the record, and consent was not obtained. The hospital confirmed that it was denying access in full based on section 17(1) of the *Act*.

[6] Also, during mediation, the mediator attempted to get the consent of the affected party, but was unable to.

[7] As mediation did not resolve the appeal, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the *Act*. As the adjudicator assigned to this appeal, I sought and received representations from the parties. The appellant did not provide representations, but provided an order that she believes supports her position on disclosure.

[8] In this decision, I find that the section 17(1) exemption does not apply to the information at issue and order the hospital to provide it to the appellant.

RECORDS:

[9] The hospital identified a one-page list of payments made to the affected party, withheld in full.

DISCUSSION:

[10] The sole issue in this appeal is whether the one-page list of payments is exempt from disclosure under section 17(1) of the *Act*.

[11] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,¹ where specific harms can reasonably be expected to result from its disclosure.²

[12] 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,

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.*).

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

(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.

[13] 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.

[14] The hospital submits that it relies on the third-party information exemption in deciding not to provide the information to the appellant.

[15] The hospital submits that the record reflects the business conducted between itself and the affected party and includes commercial and financial information. It submits that the information supplied to the hospital was treated as confidential as it operates under the Broader Public Sector Directive for procurement of services.

[16] The hospital submits that disclosure of records could result in harm to the affected party based on the identity of the appellant.

[17] The affected party submits that while he consented to the disclosure of technical information, he did not consent to the disclosure of financial information.

[18] The appellant submitted Order PO-4055 and made no other submissions. I will refer to Order PO-4055 as needed in my analysis below.

Finding

[19] As noted on the Notice of Inquiry, parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is

disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.³

[20] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁴ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁵

[21] As set out above, under section 17(1) the head must refuse to disclose certain information that is supplied to the hospital, if the disclosure could reasonably be expected to result in the harms listed from (a) to (d). In my view, I have not been provided with any information that would support a finding that the exemption at section 17(1) applies to the withheld record.

[22] The hospital and the affected party have provided insufficient evidence or arguments to establish that disclosing the record would result in any of the harms set out in section 17(1). Furthermore, based on my review of the record itself, I find no basis for a finding that disclosure of the records would result in any of the harms in section 17(1). As a result, I find that the third part of the three part test for section 17(1) has not been met. Since all parts of the test must be met, I find that the section 17(1) exemption does not apply to the withheld information and will order the hospital to provide it to the appellant.

ORDER:

1. I allow the appeal.
2. I order the hospital to disclose the record to the appellant by October 05, 2023, but not before September 30, 2023.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require the hospital to provide me with a copy of the record disclosed to the appellant.

Original Signed by: _____

Alec Fadel
Adjudicator

September 05, 2023

³ Orders MO-2363 and PO-2435.

⁴ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.