Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3237

Appeals PA12-387 and PA12-459

London Health Sciences Centre
and
St. Joseph's Health Care London

August 13, 2013

Summary: The requester sought access to two hospitals' contracts relating to the outsourcing of medical transcription. The hospitals decided to grant access to the contracts, except for the signatures of the contract signatories, which the requester did not seek access to. The service provider appealed the hospitals' decisions to grant access to certain portions of the records claiming the application of the mandatory third party information exemption in section 17(1) to this information. This order upholds the hospitals' decisions.

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

Orders and Investigation Reports Considered: Order PO-3230.

OVERVIEW:

[1] London Health Sciences Centre and St. Joseph's Health Care London (the hospitals) received requests pursuant to the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to the hospitals' contracts relating to the outsourcing of medical transcription.

[2] The Freedom of Information Coordinator (the FOIC) at St. Joseph's Health Care London wrote to the requester, advising that she was responding on behalf of both hospitals. In her letter, she advised that pursuant to section 28 of the *FIPPA*, she would be seeking representations from the company which entered into the contracts with the hospitals to seek its position regarding disclosure of the requested information. The company provided representations to the FOIC objecting to disclosure of certain information in the contracts.

[3] The FOIC responded to the company indicating that the hospitals did not concur with the redactions sought by it. The letter stated:

> We have received and considered your representations concerning disclosure of the complete contract details relating to the outsourcing of Medical Transcription to [the company]. The decision made by [the two institutions] is to grant partial access to the record(s) in keeping with the redacted contracts sent to you on [date].

[4] The company, now the appellant, filed appeals with this office. Two separate appeal files were subsequently opened, appeal PA12-387 and appeal PA12-459:

- Appeal PA12-387 relates to London Health Sciences Centre.
- Appeal PA12-459 relates to St. Joseph's Health Care London.

[5] During mediation:

- The hospitals confirmed their decision to release all information in the contracts, with the exception of the signatures of the contract signatories, citing the mandatory personal privacy exemption in section 21(1).

- The requester confirmed that she is not interested in the signatures of the contract signatories. As a result, the signatures of the contract signatories are not at issue in the appeals.

- The appellant confirmed that it objected to disclosure of all information in the contracts relating to pricing, based on the application of the mandatory third party information exemption in section 17(1) of the *Act*. The appellant also confirmed that it objected to disclosure of the email addresses in the contracts, based on section 21(1). In particular, the appellant objects to disclosure of the following portions of the contracts:

  - Section 5.2 - in full
  - Section 9.1 – last 4 lines
  - Schedule 1 – one severance
  - Schedule 2 – all information in the table

    - Appendix 2.2.B – email addresses

- The requester asserted that section 17(1) was not applicable to the contracts.

- The requester asserted that there is a public interest in the contracts, since the hospitals are spending public health dollars. As a result, section 23 of the *Act,* which is the public interest override provision, was added as an issue in the appeals.

- The requester confirmed that she was not interested in email addresses. Accordingly, section 21(1) is no longer at issue in the appeals.

[6] As the two appeals were not resolved at mediation, the files were transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. Representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] In this order, I find that the mandatory third party information exemption does not apply to the information at issue and uphold the hospitals' decisions to disclose it.

RECORDS:

[8] The records are the transcription services contracts between the hospitals and the appellant. The specific parts of the contracts remaining at issue in these appeals are:

- Section 5.2 - in full
- Section 9.1 - last 4 lines
- Schedule 1 - one severance
- Schedule 2 - all information in the table

DISCUSSION:

Does the mandatory third party information exemption at section 17(1) apply to the information at issue in the records?

[9] Section 17(1) 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[10] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

[11] 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
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> 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

[12] The appellant submits that the information at issue is commercial information as the records consist of the contractual terms relating solely to the purchase of medical transcription services (the "services"). It also submits that some of the information is financial information as it describes the rates payable by the hospitals for the services.

[13] Neither the hospitals nor the requester provided direct representations on part 1 of the test under section 17(1).

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

Analysis/Findings

[14] The types of information listed by the appellant in its representations have been discussed in prior orders:

> *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.[3] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[4]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[5]

[15] I agree with the appellant that the records, as contracts, contain both commercial and financial information. The records contain commercial information because they relate to the buying and selling of transcription services. They contain financial information since the contracts contain pricing information.

[16] Accordingly, I find that part 1 of the test under section 17(1) has been met.

Part 2: supplied in confidence

Supplied

[17] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[6]

[18] 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.[7]

[19] 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

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[3] Order PO-2010.
[4] Order P-1621.
[5] Order PO-2010.
[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.

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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.[8]

[20] 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 affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[9]

[21] The appellant states that schedule 2 and the last 4 lines of section 9.1 of the contracts set out its service level commitments and the means by which the hospitals may request abatements in fees in the event that a specified service level is not met. It states that these service level commitments and the formula for calculating abatements, form part of the appellant's proprietary sales and business strategies and were directly supplied to the hospitals and were not the subject of negotiation. In the alternative, it states that disclosure of this information would permit accurate inferences to be made with respect to the appellant's business model and proprietary sales and pricing strategies.

[22] The appellant further submits that the remainder of the information at issue was also supplied as it is about the fee rate payable by the hospitals for the services and the estimated annual purchase volume to be derived from each contract.

[23] The hospitals state that the information at issue was not supplied in confidence as the contracts include clause 16.4 which states that:

> In entering this Agreement, the Supplier acknowledges that the Proposal submitted during the competitive process, as well as this Agreement, may be subject to requests for access by the members of the public.

[24] The requester states that the contract was negotiated and that disclosure of the information would not permit a person to make an inference with respect to underlying non-negotiated confidential information that should not be already available to the public.

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[8] See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[9] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above).

[25] The appellant did not provide reply representations.

Analysis/Findings re: supplied

[26] The appellant identifies the information at issue in its representations as follows:

- Section 5.2 - in full (estimated annual purchase volume to be derived from each contract)
- Section 9.1 - last 4 lines (method to calculate service level abatement)
- Schedule 1 - one severance (fee rate payable)
- Schedule 2 - all information in the table (service level commitments)

[27] I have carefully reviewed this information at issue in the contracts. This information consists of the prices charged by the appellant to the hospitals for its services or information about any abatements in these prices the hospitals may request if certain conditions are met.

[28] I find that none of this information, as part of negotiated contracts, was supplied by the appellant to the hospitals. Nor do I find that disclosure of this information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the hospitals. Furthermore, I find that the information as to the fees or abatements provided by the appellant to the hospitals is not immutable information.

[29] Even if this information in the contracts reflects information that originated from the appellant, I find that it has not been supplied within the meaning of that term in section 17(1).[10] This information is not subject to either the immutability or inferred disclosure exceptions. Rather, it is information about how the appellant proposes to fulfill the contracts or how the hospitals can obtain abatements in the price of the services. I find that all of this information could have been subject to negotiation. Although the appellant refers to a formula for calculating abatements, this information is merely the terms upon which the parties have agreed that an abatement in price could be received by the hospitals.

[30] Accordingly, I find that none of the information at issue in the contracts was supplied by the appellant to the hospitals and that part 2 of the test under section 17(1) has not been met and I will order it disclosed. As I am ordering this information disclosed, there is no need to consider whether the public interest override in section 23 applies.

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[10] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[31] Nevertheless, for the sake of completeness, I will also consider whether part 3 of the test under section 17(1) has also been met.

Part 3: harms

[32] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[11]

[33] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[12]

[34] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[13]

[35] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[14]

[36] Under section 17(1)(a), the appellant submits its competitors could use the information to compete against it directly for future contracts with hospitals, or with other public or private customers. It states that, for example, competitors could use the information to develop their own strategies and establish their pricing for the contract, which would prejudice the appellant's competitive position and give competitors an unfair advantage. This is of particular significance in the public tendering process where the bid price is a key factor in each bid's overall score.

[37] The appellant also states that private sector customers could use the information in negotiations with it to obtain more favourable contractual terms than they would otherwise have been able to obtain without the benefit of this information. It points out that public bodies are often offered more favourable terms due to the high volume nature of such contracts. If disclosed, private sector customers could use this information as a starting point for future negotiations with the appellant, which would interfere with its ability to effectively negotiate with them.

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[11] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[12] Order PO-2020.
[13] Order PO-2435.
[14] Order PO-2435.

[38] With respect to section 17(1)(b), the appellant states that if the information at issue is disclosed that it would be reluctant to negotiate favourable financial terms with the hospitals and other public institutions in Ontario, for fear that this information being used by other public and private sector customers seeking to negotiate similar terms. It states that it is in the public interest for the appellant and other suppliers to provide favorable financial terms to these institutions.

[39] Finally, referring to section 17(1)(c), the appellant states that disclosure would cause undue loss to it and undue gain to its customers as the information could be used by other public and private sector customers to negotiate more advantageous terms, making it difficult for the appellant to obtain the best contractual arrangements possible and providing an unfair advantage to its customers.

[40] The hospitals state that the appellant has not met part 3 of the test under section 17(1).

[41] The requester addressed section 17(1)(b) as follows:

> As noted by the appellant, providers in the for-profit medical transcription business operate in a highly competitive industry with similar operating costs. As a result, providers are readily available. If [the appellant was] reluctant to negotiate favourable financial terms with the hospitals as suggested in the written submission, the organization could decide to provide the service in-house as it had for several decades, and it would not result in any harm to the organization. Bringing the services in-house would arguably save Ontario taxpayers millions of dollars in contract management fees and shareholder profits.

[42] The appellant did not provide reply representations.

Analysis/Findings

[43] The appellant has appealed the hospitals' decisions to disclose certain very specific information in the contracts, yet it has not provided representations as to how disclosure of this particular information at issue could reasonably be expected to cause the harms outlined in these sections. I find that the appellant has only provided general allegations of harm, not the kind of detailed and convincing evidence required to establish a reasonable expectation of harm as outlined in sections 17(1)(a), (b) or (c) of the *Act*.

[44] In finding that part 3 of the test under section 17(1) has not been met, I adopt the analysis of Assistant Commissioner Brian Beamish in Order PO-3230. In that order, at issue were the withheld portions of vendor contracts for infant formula and infant formula products supplied to a hospital. Assistant Commissioner Beamish stated that:

The appellant provides no support for its assertions that disclosure "could allow" competitors to develop similar technologies, "could interfere" with its negotiations with other parties through the possibility that those parties "could demand" favourable terms in future negotiations, or that competitive disadvantage "could arise" since competitors "could prepare proposals" adopting the appellant's terms. In Order PO-3032, cited by the appellant on other grounds, above, this office rejected similar "bald assertions" of harm without specific explanation or evidence as being insufficient to meet part three of the section 17(1) test. I agree that these speculative statements, without more, do not support a finding of reasonable expectation of harm.

As no explanation is provided as to how disclosure of the information at issue could reasonably be expected to produce specific harms, and as I do not find that such harms are self-evident, I am not satisfied that part three of the test for the application of section 17(1) has been met.

Further, there are other deficiencies in the appellant's position. It is the appellant's position that disclosure of the unsevered agreement could interfere with its negotiations with other parties. As I noted in Order PO-3185, where the appellant in that appeal made a similar claim:

> …the appellant is a sophisticated company with ample resources at its disposal. I am not convinced that disclosure of an agreement entered into with this particular hospital would place it in a position of weakness in future discussions with other organizations.
>
> Most importantly, previous orders of this office have rejected the argument that the ability of competitors to prepare more competitive proposals constitutes "harm" as contemplated by section 17(1). For example, in Order PO-2435, I stated:
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> > I also accept that the disclosure of this information could provide the competitors of the contractors with details of the contractor's financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs…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.

[45] Accordingly, after reviewing the appellant's representations and the records, and taking into account this analysis of Assistant Commissioner Beamish, I find that the appellant has not met part 3 of the test under section 17(1).

[46] Because both parts 2 and 3 of the test under section 17(1) have not been met, the information at issue is not exempt under section 17(1) and I will order it disclosed.

ORDER:

1. I uphold the hospitals' decisions to disclose the information at issue in the records and order them to do so by **September 18, 2013** but not before **September 12, 2013**.

2. In order to verify compliance with order provision 1, I reserve the right to request the hospitals to provide me with copies of the records provided to the requester.

Original Signed By: August 13, 2013
Diane Smith
Adjudicator