Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3283

Appeal PA12-439

The Hospital for Sick Children

December 12, 2013

Summary: An individual submitted a request to the Hospital for Sick Children (the hospital) for access to information related to the number of drug and alcohol hair tests performed by the Motherisk laboratory in 2011, including the number of such tests paid for by government agencies. The hospital created a one-page record containing this information, but denied access to it, pursuant to sections 18(1)(a), (c) and (d) (valuable government information). The hospital's access decision was appealed to this office. In this order, the adjudicator does not uphold the hospital's exemption claim, and she orders the record disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1)(a), (c) and (d).

OVERVIEW:

[1] This order addresses the issues raised by an appeal of an access decision issued by the Hospital for Sick Children (the hospital) in response to the request filed by an individual under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> … the number of drug &/or alcohol hair tests performed by the Motherisk[1] laboratory division in the year of 2011… [and] the number of such tests paid for by government agencies including the Children's Aid Societies.

[1] Motherisk is a clinical research and teaching program at the Hospital for Sick Children that provides evidence-based information and guidance about the safety or risk to the developing fetus or infant as a

[2] The hospital issued a decision denying access to the figures under sections 18(1)(a), (c) and (d) on the basis that it has a proprietary interest in this information and that its disclosure could reasonably be expected to prejudice the hospital's economic, commercial and financial interests.

[3] The requester, now the appellant, appealed the hospital's decision to this office, which appointed a mediator to explore the possibility of resolution. During mediation, the hospital produced a one-page record containing the requested information. As it was not possible to achieve a mediated resolution of this appeal, it was transferred to the adjudication stage for an inquiry.

[4] I started my inquiry by sending a Notice of Inquiry outlining the issues to the hospital, initially, seeking its representations. I received the hospital's representations, which were accompanied by an affidavit sworn by the manager of the Motherisk lab. Once issues related to the sharing of those representations were resolved, I sent the hospital's non-confidential representations to the appellant, along with a Notice of Inquiry. The appellant submitted brief comments in response.

[5] In this order, I find that section 18 does not apply to the information, and I order it disclosed to the appellant.

RECORDS:

[6] At issue in this appeal is a one-page record created by the hospital to summarize the number of drug and/or alcohol hair tests performed by the Motherisk laboratory division in the year 2011 and the number of such tests paid for by public agencies.

DISCUSSION:

Does the information qualify for exemption under section 18?

[7] The hospital relies on sections 18(1)(a), (c) and (d) to deny access to the record. The relevant provisions state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value; …

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result of maternal exposure to drugs, chemicals, diseases, radiation or environmental agents. Source: http://www.motherisk.org/prof/commonDetail.jsp?content_id=945, and as paraphrased in the hospital's representations.

> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[8] The purpose of section 18 is to protect certain economic interests of institutions. The following excerpt from the Williams Commission Report[2] explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[9] Sections 18(1)(c) and (d) take into consideration the consequences that would result to an institution if a record was released.[3] In order for me to find that sections 18(1)(c) or (d) apply, I must be satisfied by "detailed and convincing" evidence that disclosure of the record "could reasonably be expected to" lead to the specified result. Evidence amounting to speculation of possible harm is not sufficient.[4] This contrasts with the exemption in section 18(1)(a), which is concerned with the type of the information, rather than the consequences of disclosure.[5]

[10] 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 18.[6]

Representations

[11] For context, the hospital describes the history and mandate of the Motherisk program, which was established in 1985, and its laboratory, which began offering the service of hair and meconium testing and analysis in 1989. The hospital notes that the

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[2] The full title of the Williams Commission Report is *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980).
[3] Order MO-1474.
[4] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[5] Orders MO-1199-F, MO-1564 and PO-2632.
[6] Orders MO-1947 and MO-2363.

Motherisk lab offers this service to social service agencies as a method of long-term substance abuse monitoring, and that it is the primary provider of this service in Canada. According to the hospital, the information at issue is precisely the type of information that section 18 of the *Act* was intended to protect.

[12] In support of the exemption claim under section 18(1)(a), the hospital submits that the information is commercial information because the analysis conducted by the lab relates to the buying, selling or exchange of services. Regarding whether the information "belongs to" the hospital for the purpose of the second requirement of the test for exemption under section 18(1)(a), the hospital submits that:

> … there is an inherent monetary value in knowing the number of drug and alcohol tests performed by the Motherisk laboratory division and how many were paid for by government agencies. This information was developed through the expenditure of money and the application of skill and effort by the Hospital. There is also a quality of confidence about the information, in the sense that it has always been treated in a confidential manner and derives its value to the Hospital from not being generally known. Therefore, there is a valid interest in protecting the confidential business information … from misappropriation by others.[7]

[13] The hospital's affidavit provides additional information about the "highly specialized" nature of the testing that is done by the lab, as well as describing its other activities. According to the Motherisk lab manager, the information at issue "can be equated in part to a detailed customer list … [as the lab] is the primary lab in Canada that provides hair testing for social service agencies like Family and Children's Services."

[14] With respect to the final part of the test for exemption under section 18(1)(a), the hospital asserts that the information has intrinsic monetary value and that its value would be lost if it was disclosed to the public. The Motherisk lab manager asserts that the value of the program through development, research, marketing, instruments and staffing is in the millions of dollars. The hospital suggests that the information "could have considerable monetary value to the appellant and others," if disclosed.

[15] Regarding the application of section 18(1)(c), the hospital relies primarily on its affidavit evidence in asserting that the disclosure could reasonably be expected to prejudice the economic interests or competitive position of the hospital. Disclosure, the hospital argues, would allow its competitors to "ascertain key marketing insight into the value of the Motherisk service" which would, in turn, "put the sustainability of the program at great risk." The Motherisk laboratory manager advises that as health care costs continue to rise, this program is one of the ways the hospital generates revenue, which is an endeavor that is ultimately in the public interest. Further, "the Hospital

[7] The hospital cites *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.) (*Lac Minerals*).

operates in an extremely competitive market when it comes to this type of service" and providing such services is becoming increasingly attractive to private labs. The hospital submits that disclosure of the information relating to "potential revenue" would result in the requester and others targeting Motherisk's social services customer base. According to the hospital, therefore, disclosure would significantly prejudice its competitive position, resulting in undue loss to the hospital and undue gain to its competitors because:

> They will be able to create more competitive business models by targeting social services agencies and offer more preferential terms, thereby undermining the program's position in the marketplace.

[16] The hospital submits that disclosure of the information could reasonably be expected to be injurious to Ontario's financial interests within the meaning of section 18(1)(d). According to the Motherisk lab manager's affidavit, disclosure of the information is not in the public interest because:

> … the money that the Hospital receives [from the Ontario government through funded social service agencies] is reinvested into research that benefits both Ontarians and Canadians. Monies paid to private labs that are not tied to research will not be reinvested and have no public interest component.
>
> It is in the public interest that the Hospital's Motherisk program be in a position to continue and profit. Non-disclosure of the information in the record allows our program to continue providing this service to the citizens of Ontario through our social services client base. The Hospital's research mandate also allows for the dollars to be reinvested in ground-breaking research that benefits Ontario without additional cost.

[17] The appellant's representations are brief and do not directly address the section 18 exemption. Rather, the appellant indicates that she:

> … was quite surprised to learn that answering the two posed questions could result in disastrous consequences to medical research in Ontario and indeed the entire OHIP system.
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> The Hospital for Sick Children is a taxpayer funded institution and furthermore a registered charitable institution, these two factors alone would indicate a need for transparency in responding to my query.

Analysis and findings

Section 18(1)(a): information that belongs to government

[18] In order for the information to qualify for exemption under section 18(1)(a) of the *Act*, the hospital was required to satisfy a three-part test, whereby the information: consists of a trade secret, or financial, commercial, scientific or technical information; "belongs to" the Government of Ontario or the hospital; and has monetary value or potential monetary value.

[19] Past orders have defined "commercial information" as information that relates solely to the buying, selling or exchange of merchandise or services. The term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[8] In this appeal, I am satisfied that the information at issue relates to the buying, selling or exchange of services, namely the provision of hair testing and analysis by the Motherisk laboratory division in exchange for payment by its clients. I find that the information qualifies as commercial information for the purpose of part one of the test for exemption under section 18(1)(a).

[20] The next part of the test for the application of section 18(1)(a) requires establishing whether the information at issue "belongs to" the hospital. As described in past orders:

> … the term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense -- such as copyright, trade mark, patent or industrial design -- or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.[9]

[21] Examples of records that may be recognized as warranting protection from "misappropriation by another party" include supplier lists, price lists, or other types of confidential business information. With each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information.[10]

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[8] Order PO-2010.

[9] Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226, PO-2632 and PO-2990.

[10] *Supra,* footnote 9.

[22] Based on these principles and on my consideration of the information at issue, I reject the hospital's position that figures representing the number of tests performed by the Motherisk laboratory and the number of tests paid for by government agencies "belong to" it. I am not satisfied that the hospital has a proprietary interest in these figures, or that the figures otherwise qualify as intellectual property in any traditional sense, such that the "law would recognize a substantial interest in protecting them" from disclosure to, and use by, other parties.[11] Further, in my view, there is no reasonable basis upon which I could conclude that there has been any "application of skill and effort to *develop* the information," at least in the sense contemplated by section 18(1)(a). The figures merely reflect the volume of testing done and the proportion of the tests paid for by certain sources in a specific year (2011). They do not represent, nor would they reveal, anything about the nature of, or methods underlying, the "highly specialized testing" behind the figures. For these reasons, I find that the information at issue does not satisfy the second requirement for exemption under section 18(1)(a).

[23] All three parts of the test for exemption under section 18(1)(a) must be met. In view of my finding above that the information at issue does not "belong to" the hospital, review of the third part of the test is not absolutely necessary. Nonetheless, for the sake of completeness, I will do so. I note that in order to satisfy part three of the test, it must be established that there is actual or potential value when the information is not otherwise known, or that disclosure of the information would result in some form of monetary gain to others or monetary loss to the person to whom the request for information is made.[12] Though the hospital asserts that the value of the Motherisk laboratory program through development, research, marketing, instruments and staffing is "in the millions" and that the information "could have considerable monetary value to the appellant and others" if disclosed, I have not been provided with sufficient evidence to satisfy me of the relevance of this assertion. In particular, I have not been provided with a reasonable basis upon which to conclude that the figures themselves have an inherent monetary value. I find, therefore, that the information at issue does not meet the third part of the test for exemption under section 18(1)(a).

[24] As the evidence does not establish that parts two and three of the test for exemption are met, I find that section 18(1)(a) does not apply to the responsive information.

Section 18(1)(c): prejudice to economic interests

[25] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a

[11] *Lac Minerals, supra.*
[12] See Orders PO-2014-I and PO-1740.

reasonable expectation of prejudice to these economic interests or competitive position.[13] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[14]

[26] As noted previously, the hospital was required to provide "detailed and convincing" evidence to demonstrate that disclosure of the information "could reasonably be expected to" lead to the harm specified in section 18(1)(c); that is, prejudice the hospital's economic interests or its competitive position.

[27] There is no disputing the submission that health care costs are rising and that this upward trend in costs puts pressure on health care institutions to find efficiencies, as well as alternate means of revenue generation. In this context, I accept that the hair (and meconium) analysis services performed by the Motherisk laboratory division generate revenue for the hospital. However, on my review of the hospital's representations, I conclude that sufficiently detailed and convincing evidence has not been provided to support a finding that the harms alleged by the hospital could reasonably be expected to result from disclosure of the responsive information relating to that testing.

[28] It bears repeating that there are two figures at issue, representing the number of drug or alcohol hair tests conducted by the lab in 2011, and the number of those tests paid for by government agencies. While this information may provide some insight into potential revenue generated by the services, as the hospital submits, I reject the argument that it amounts to, or could reveal, "key marketing insight." I also reject the assertion that disclosure of the figures could in any way reveal the business model of the Motherisk lab. Furthermore, the mere fact that private labs may use this information to market their services to government agencies in competition with Motherisk does not, by itself, attract the protection of section 18(1)(c) of the *Act*. There must be a demonstrated evidentiary connection between disclosure of the information at issue and prejudice to those interests. Simply put, a finding that a link exists between this information and a reasonable expectation of harm with its disclosure cannot be made based on the evidence before me. As I am not persuaded that disclosure of the figures could reasonably be expected to prejudice the hospital's economic interests or its competitive position, I find that section 18(1)(c) does not apply to the information.

[13] Orders P-1190 and MO-2233.
[14] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

Section 18(1)(d): injury to financial interests

[29] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[15]

[30] In this appeal, the hospital submits that disclosure of the figures representing the volume of the Motherisk laboratory division's drug and/or alcohol hair testing in 2011 and the number of those tests paid for by government agencies could reasonably be expected to injure the financial interests of the Government of Ontario or its broader economic interests. The hospital suggests in its submissions that if the information were disclosed, the revenue currently generated for the hospital by Motherisk laboratory services would no longer be available and, hence, could not be reinvested in research. Indeed, the affidavit evidence on section 18(1)(d) goes so far as to suggest that disclosure of the information would imperil the lab's future existence or, at the very least, its profitability. However, there is a lack of detailed and convincing evidence to establish a reasonable expectation of these harms actually resulting from disclosure of the information. In my view, the submissions tendered on these harms are speculative and, as previously identified, evidence amounting to speculation of possible harm is not sufficient.[16]

[31] From a certain perspective, the hospital's arguments under sections 18(1)(c) and 18(1)(d) are not easily reconciled with one another. If one accepts the position (under section 18(1)(c)) that disclosure could lead to private labs successfully assuming market share of the testing currently done by the Motherisk lab because the responsive information somehow equips private labs to develop "more competitive business models" and "offer more preferential terms," it is difficult to see how the "more preferential terms" offered by private labs (indirectly) to the provincial government through social service agencies could reasonably to be expected to be injurious to the financial interests of the Government of Ontario or harm its ability to manage the economy. It seems as though the converse would be true.

[32] Finally, with regard to the submission that disclosure of the responsive information is "not in the public interest" due to the alleged harms to research and provision of services by the Motherisk laboratory division, I note that there is no general requirement that disclosure under the *Act* be in the public interest. Pursuant to section 10(1), every individual has a general right of access to information in the custody or under the control of an institution, unless the information falls within one of the

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[15] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

[16] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

exemptions in sections 12 to 22. The burden of proof that an exemption applies rests with the institution seeking to rely on it to deny access. A requester need not establish that disclosure would be in the public interest unless he or she raises the possible application of section 23 of the *Act*, the public interest override.[17] The appellant did not raise the possible application of section 23 in this appeal; therefore, the onus rested with the hospital to satisfy me that the harm that section 18(1)(d) seeks to prevent could reasonably be expected to result from disclosure. As stated above, I am not satisfied by the evidence that disclosure of the responsive information could reasonably be expected to injure the financial interests of the provincial government or the broader economic interests of Ontarians. I find that section 18(1)(d) does not apply.

[33] Having found that sections 18(1)(a), (c), and (d) of the *Act* do not apply, I do not uphold the hospital's decision to deny access to the responsive information.

ORDER:

I order the hospital to disclose the responsive record to the appellant by **January 20, 2014.**

Original Signed By: December 12, 2013
Daphne Loukidelis
Adjudicator

[17] Section 23 of the *Act* states that: "An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption." For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.