Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3388

Appeal PA13-241

Ministry of Health and Long-Term Care

August 28, 2014

Summary: The ministry received a request for records regarding the historic funding arrangements it had with a third party. Access to portions of certain approved budgets was denied on the basis on the exemptions in sections 18(1)(c) and (d) (economic and other interests). The third party, who was notified of the request, took the position that the exemption in section 17(1)(a) (third party information) applied, and that portions of the records were not responsive to the request. In this decision, the adjudicator finds that certain withheld information is non-responsive to the request, but that the balance of the withheld information does not qualify for exemption under sections 17(1)(a), 18(1)(c) or 18(1)(d) and should be disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a), 18(1)(c), 18(1)(d) and 24.

OVERVIEW[1]:

[1] Ontario's Action Plan for Health Care was launched in January 2012. The Action Plan is a roadmap for transforming the Ontario health system to improve patient care, provide better value for money, and help manage the rate of growth in health care expenditures. A key pillar of the Action Plan is providing the right care, at the right time, in the right place. In implementing the Action Plan, one focus has been to shift routine

[1] This overview is sourced, in part, from the representations of the Ministry of Health and Long-Term Care.

hospital procedures into specialized not-for-profit community clinics. A policy guideline was released in December 2013[2] to develop interest in the movement of services from hospitals to community-based specialty clinics. The guide provided background on the high level requirements, strategies and principles relating to these clinics. The ministry then issued a Call for Applications (CFA) for community based clinics. The CFA relating to specialty clinics providing low-risk cataract procedures in Ontario was made in February 2014 with an application deadline date of April 22, 2014[3].

THE REQUEST:

[2] The Ministry of Health and Long-Term Care (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to:

> Any records held by [the ministry] pertaining to funding arrangements with [named Eye Institute], [identified Foundation], and [named clinic], concerning the provision of cataract surgeries including, but not limited to, any and all capital costs, operating costs, and fee payments under the Ontario Health Insurance Plan (OHIP) since the inception of the [above-named Eye Institute].
> …

[3] The ministry then sent a third party whose interests may be affected by the disclosure of the responsive records a notice under Section 28 of the *Act*, seeking its position on disclosure. The notice referenced the exemption at section 17 of the *Act* (third party commercial information) and set out a summary of what was required to establish that that exemption applied. In response, the third party advised that while it had "no reasons within section 17 of the *Act*" as to why information pertaining to cataract surgeries should not be disclosed, certain information in Record 10 did not relate to cataract surgeries and was therefore not responsive to the request[4]. The ministry then issued its decision letter. The ministry granted partial access to the responsive records, relying on sections 18(1)(c) and (d) of the *Act* (economic and other interests of Ontario), to deny access to the portions it withheld.

[4] The requester (now the appellant) appealed the ministry's decision to deny access to the withheld information.

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[2] See, A Policy Guide for Creating Community-Based Specialty Clinics, Ministry of Health and Long-term Care, December 2013.
[3] See, Call for Applications to create Non-Profit Community-Based Specialty Clinics as Independent Health Facilities to provide Low-Risk Cataract Procedures in Ontario, Application Guidelines, Ministry of Health and Long-Term Care, February 2014.
[4] The appellant's position does not appear to have been addressed in the ministry's decision letter or at mediation. For the sake of completeness, I have added the responsiveness of the information as an issue in the appeal.

[5] In the course of mediation, the appellant also took the position that there is a public interest in the disclosure of the withheld information. Accordingly, the possible application of the public interest override at section 23 of the *Act* is an issue in the appeal.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the ministry and the third party. Both the ministry and the third party provided representations in response. Notwithstanding its initial position, the third party's representations appeared to raise the possible application of the exemption at section 17(1)(a) of the *Act*. As section 17(1)(a) is a mandatory exemption, I decided to add the possible application of section 17(1)(a) of the *Act* as an issue in the appeal.

[8] I then sent a Notice of Inquiry to the appellant, along with the representations of the ministry and the non-confidential representations of the third party. The appellant provided responding representations. I determined that the appellant's representations raised issues to which the ministry and the third party should be provided an opportunity to reply. Accordingly, I sent a letter inviting reply submissions to the ministry and the third party, accompanied by the appellant's representations. Only the third party provided reply submissions.

RECORDS REMAINING AT ISSUE:

[9] The records remaining at issue consist of the following four records, described as follows in the ministry's index of records:

> Schedule 2 Approved Budget January 2006 to December 2011
> (Record 7)
>
> Schedule 2 Approved Budget for January 2006 to December 2010
> (Record 8)
>
> Schedule 2 Approved Budget January 2011 to December 31, 2011
> (Record 9)
>
> Schedule 2 Approved Budget January 1, 2012 to December 31, 2012
> (Record 10)

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[10] The affected party submits that the records contain information related to a number of surgical procedures that are not responsive to the request.

[11] The ministry submits:

> The request sought any and all records held by the ministry concerning public funding associated with cataract surgeries that had been received by the specified private health clinic since the clinic's inception in [a specified date]. The request provided sufficient detail to enable the ministry to identify the responsive records in accordance with section 24 of the *Act*.
>
> …
>
> Record 10 contains non-responsive information. In particular, the last 3 items under the "Primary Insured Services" column do not "concern the provision of cataract surgeries". The ministry submits that any information in Record 10 that relates to these 3 items is non-responsive, and therefore beyond the scope of this appeal. The ministry respectfully submits that the non-responsive information should be removed from the record …

[12] The appellant did not provide representations on this issue.

[13] 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).

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[5]

[15] To be considered responsive to the request, records must "reasonably relate" to the request.[6]

[16] As set out above, the request is for access to information pertaining to funding arrangements concerning the provision of cataract surgeries. In my view, therefore, only information pertaining to funding arrangements concerning the provision of cataract surgeries is responsive to the request. Accordingly, the information relating to the three other items listed in Record 10, and certain other funding figures in Record 10 (which incorporate the funding amounts for these three items) is not at issue in the appeal and will not be the subject of any order for disclosure. I have highlighted this non-responsive information on a copy of Record 10 of the records that I have provided to the ministry along with a copy of this order.

Issue B: Does the mandatory exemption in section 17(1)(a) apply to the information at issue?

[17] Notwithstanding its initial position, that there were "no reasons within section 17 of the *Act*" as to why responsive information should not be disclosed, the third party's preliminary representations appeared to raise the possible application of the exemption at 17(1)(a) of the *Act*, in the following way:

> It is our view that disclosure of information included in the records in question … would significantly prejudice the competitive position of [the third party] relative to other respondents to government Requests for Proposal (RFP).
>
> …
>
> This information is particularly sensitive at this time as it is anticipated that an RFP will be issued by the [ministry] in the fall of 2013.

[18] In reply, the third party submitted that:

> Given the imminent release of the new "call for applications," we continue to seek an exemption for disclosure of the records in question as we fully

[5] Orders P-134 and P-880.
[6] Orders P-880 and PO-2661.

> expect this information to be in the public domain as part of the application process and anticipate that the funding received by [the third party] will be in line with the standardized funding to be spelled out in the new process.

[19] Section 17(1)(a) reads:

> 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,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization

[20] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[7] 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.[8]

[21] For section 17(1)(a) to apply, 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

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) of 17(1) will occur.

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[7] *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.).
[8] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: Type of Information

[22] Based on my review of the records, I am satisfied that the schedules at issue contain commercial and financial information for the purposes of the first part of the test for exemption under section 17(1) of the *Act*.

[23] The meaning and scope of these two types of information have been discussed in past orders of this office, as follows:

> *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 (Order PO-2010). The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information (P-1621).
>
> *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 (Order PO-2010).

[24] I adopt these definitions for the purposes of this appeal.

[25] The information at issue is contained in schedules that, as discussed in more detail below, are related to funding arrangements between the appellant and the ministry for the provision of specified health services. The schedules represent Approved Budgets associated with the provision of those health services for a specific period. That said, there remain two other parts of the section 17(1) test, whether the information was supplied in confidence and whether the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) of 17(1) will occur. I set out the tests and my determinations below.

Part 2: Supplied in Confidence

[26] In order to satisfy part 2 of the test under section 17(1), the third party must provide evidence to satisfy me that information was "supplied" to the ministry in confidence, either implicitly or explicitly.

[27] 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.[9]

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[9] Order MO-1706.

[28] 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.[10]

[29] In order to satisfy the "in confidence" component of part 2, the appellant must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[11]

[30] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the appellant prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[12]

Part 3: harms

[31] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[13]

[32] 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 the surrounding circumstances. However, parties should not assume that the

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[10] Orders PO-2020 and PO-2043.
[11] Order PO-2020.
[12] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No 3475 (Div. Ct.).
[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[14]

[33] In applying section 17(1) to government contracts, 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).[15]

Analysis and Finding

[34] In my view, the third party has failed to provide me with sufficient evidence to satisfy parts 2 and 3 of the section 17(1)(a) test. The third party provided no evidence to support a finding find that the information at issue was supplied by the third party with an expectation of confidentiality that is based on reasonable and objective grounds. Furthermore, the allegation of harm is made in a general way and essentially is linked to the CFA process, which has already taken place. In my view, the third party has failed to provide sufficiently "detailed and convincing evidence" to establish a reasonable expectation of harm under section 17(1)(a) of the *Act*. Accordingly, I find that the third party has failed to satisfy the remaining parts of the section 17(1)(a) test. As all three parts of the test must be satisfied for information to qualify for exemption under section 17(1)(a), I find that the section 17(1)(a) exemption does not apply.

[35] In conclusion, I find that the information at issue does not qualify for exemption under section 17(1)(a) of the *Act*.

Issue C: Do the discretionary exemptions at sections 18(1)(c) and 18(1)(d) apply to the records?

[36] Sections 18(1)(c) and 18(1)(d) read:

> A head may refuse to disclose a record that contains,
>
> (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.

[14] Order PO-2435.
[15] Order PO-2435.

[37] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *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) (the Williams Commission Report) 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.

[38] For sections 18(1)(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[16]

[39] 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.[17]

[40] 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 reasonable expectation of prejudice to these economic interests or competitive positions.[18]

[41] 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.[19]

[42] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the

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[16] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.
[17] Orders MO-1947 and MO-2363.
[18] Orders P-1190 and MO-2233.
[19] 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.

surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[20].

[43] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[21]

[44] The ministry submits that the disclosure of information at issue, namely, the portions of the records reflecting cataract surgery funding arrangements with the specified clinic since the clinic's inception, could reasonably be expected to prejudice the ministry's economic interests.

[45] The ministry submits:

> … private clinics funded under earlier agreements with the ministry, including the private health care clinic specified in this request, were able to negotiate with the ministry to determine how much public funding they would receive to cover their direct costs, which, would have included any operating and capital costs associated with cataract surgeries. As a result, those clinics likely received more funding for direct costs than what the QBP [Quality-Based Procedures] anticipates funding CFA [Call for Application] applicants. Of additional importance is the fact that the specified private health care clinic in the information request is a teaching institute, which affects the amount of public funding provided for direct costs of that facility.
>
> Economic prejudice could reasonably occur because disclosure will lead potential applicants to seek greater public funding for direct costs than will be stipulated in the CFA based on QBP. The information regarding public funding of the specified clinic will be used as a minimum, rather than a maximum funding request, in response to the CFA for community-based clinics that will be issued in the near future.
>
> Given that the public funding of multiple community-based clinics has the potential to be inherently costly, these clinics may represent a significant budgetary expense for the ministry, depending on the magnitude of the public funding budget.
>
> One reason behind the shift of routine hospital procedures such as cataract surgeries into specialized community clinics is to help the ministry

[20] Order MO-2363.
[21] See Orders MO-2363 and PO-2758.

> reach its objectives of providing quality health care efficiently and at a lower cost. However, disclosing the requested information could reasonably lead to inflated budget proposals at the upcoming CFA, which would lead to increased spending from the public purse, thereby undermining the ministry's objective.

[46] The ministry provides more detailed submissions on the application of each of sections 18(1)(c) and (d).

[47] With respect to section 18(1)(c), the ministry submits that:

> The ministry directly funds independent health facilities, and therefore has a legitimate economic interest in reducing the scope and cost of public funding provided to applicants responding to the upcoming CFA.
>
> The ministry submits that if information regarding past funding received by the specified clinic, for cataract surgeries, is disclosed prior to the CFA, it will undermine any future public application process commenced in respect of community-based specialty clinics; potential applicants for these clinics will consider the public funding received by the specified clinic as a minimum value. Applicants will therefore have an incentive to challenge the CFA's stipulated direct funding amounts and propose higher funding budgets than they would have otherwise if they did not have access to this significant piece of information. Applicants will also have an incentive to inflate their indirect funding costs to make up the difference between the QBP direct funding proposal and the funding for direct costs received by the specified clinic.
>
> Without information about the funding received by the specified clinic, applicants will only have information regarding the set price for direct costs contained in the ministry's CFA. However, if the applicants know the specified private clinic received more funding than what is proposed in the CFA, it is reasonable to expect that they will likely challenge that proposal and request a budget that mirrors or comes very close to that higher cost. The ministry submits that the application process should not be influenced or undermined by any external factors, such as the funding budget allocated to another private clinic. The Ministry also submits that it is unreasonable to assume that potential applicants would not be influenced by this information.
>
> Disclosing the public funding received by the specified health service provider prior to the CFA would prejudice the ministry's economic interests if the amount listed on the record is read as the standard funding costs associated with community-based specialty clinics.

> Disclosure would bias future applicants toward expecting substantially higher budgets by creating a belief that this funding level is the norm, and perhaps even a minimum value. Applicants who know about the public funding received by the specified clinic in advance of the CFA may challenge the proposed prices on the basis that they do not reflect what the specified clinic received between 2005 and 2011. Applicants may also propose alternate funding budgets that are higher than they might have been otherwise.
>
> In this sense, disclosure of the specified private clinic's fiscal information will likely interfere with the integrity of the application process.
>
> Consequently, the cost of community-based specialty clinics may become artificially inflated, thereby resulting in higher costs for the ministry, since the ministry provides the public funding for these institutions. This could reasonably be expected to have a prejudicial financial impact on the ministry since its costs will be higher than they would have been if the information had not been disclosed.
>
> The ministry therefore submits that disclosing information regarding past public funding of cataract surgeries performed at the specified clinic prior to the CFA could reasonably be expected to prejudice the ministry's economic interests by inflating the budget proposals submitted in response to the CPA, thereby increasing the costs to the ministry.

[48] With respect to section 18(1)(d), the ministry submits:

> One reason behind the shift of routine hospital procedures such as cataract surgeries into specialty community clinics is to reduce costs for the Government as a whole to help it reach its objective to reduce the Province's deficit.
>
> To the extent that the disclosure of the information may reasonably be expected to lead to higher public funding costs for the ministry, the ministry submits that the disclosure would have a similarly negative impact on the Governments financial interests as well. Any untoward or unanticipated increase in the ministry's financial investment in these community-based clinics necessarily has a corollary effect on the Government of Ontario's budget and on its ability to manage the economy of Ontario. In that regard, higher funding costs for the ministry are detrimental to the Government's financial interests because it hampers its ability to control costs.
>
> The ministry submits that maintaining confidentiality of the information

> withheld from the responsive records is a tool available to the ministry to ensure the Government avoids the potential for unnecessarily increased funding costs associated with community based clinics that reply to the CFA. The premature disclosure of this information would make it difficult for the Government to control those costs by avoiding the possibility of future applicants challenging the set funding for direct costs, inflating their funding proposals for indirect costs, and using the information disclosed to from the floor, rather than the ceiling, of their budget proposals.

[49] The ministry's submissions focus on the harms caused by the premature release of the withheld responsive information before the CFA process. Under its arguments in support of the application of section 18(1)(c), it specifically indicates on a number of occasions that disclosure of information prior to the CFA, could result in the identified harms. Essentially, the ministry submits that releasing this information could reasonably be expected to allow bidders to set their bid prices under the CFA in a manner that was disadvantageous to the ministry on the basis of their knowledge of previous arrangements accepted by it. Its arguments in support of section 18(1)(d) are similar to its submissions on the section 18(1)(c) harms.

[50] Based on the information that is set out in the background above, it would appear that the CFA process has already occurred. Accordingly, releasing the information now would not, in my view, realistically impact that process, nor, in my view, would it result in the harms under sections 18(1)(c) or (d).

[51] In my view, the ministry has failed to lead sufficiently detailed and convincing evidence to establish a reasonable expectation of harm under sections 18(1)(c) and/or 18(1)(d) of the *Act*. Accordingly, I find that those exemptions do not apply.

[52] As a result of my determinations above, it is not necessary for me to address the potential application of section 23 of the *Act*, or to consider the ministry's exercise of discretion under sections 18(1)(c) or (d).

ORDER:

1. I find that portions of record 10 are not responsive to the request. For greater certainty, the ministry is not to disclose to the appellant the non-responsive information that I have highlighted on a copy of record 10 that I have provided to the ministry along with a copy of this order.

2. I order the ministry to disclose the remaining withheld responsive information in the records at issue to the appellant by **October 3, 2014** but not before **September 29, 2014**.

3. In order to verify compliance with provision 2 of this Order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant.

Original Signed By: August 28, 2014
Steven Faughnan
Adjudicator