Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3518

Appeal PA14-354

The Hospital for Sick Children

July 31, 2015

Summary: The requester seeks access to the purchase orders, invoices and other documents describing the amounts of monies the hospital paid a software development company for its services. The hospital granted the requester full access to the records but the company appealed the hospital's decision claiming that the third party information exemption under section 17(1) applies. This order finds that the information contained in the records was not "supplied" to the hospital for the purposes of section 17(1). Accordingly, the records do not qualify for exemption and the appeal is dismissed.

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: Orders MO-3062, PO-2806 and PO-3347

OVERVIEW:

[1] An individual submitted a request to the Hospital for Sick Children (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for contracts and purchase orders related to a specified software program.

[2] The hospital located responsive records and notified the software development company (the third party) pursuant to the notification provisions in section 28 of the *Act*. After considering the third party's submissions, the hospital decided to grant the

requester access to the responsive records. The third party (now appellant) appealed the hospital's decision to this office and a mediator was assigned to the appeal file.

[3] During mediation, the parties explored settlement but mediation was not possible. The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*.

[4] During the inquiry process, the parties were invited to file written representations in support of their positions. The appellant submitted representations in response but the requester and hospital did not.

[5] In this order, I find that the records do not qualify for exemption under the third party information exemption under section 17(1).

RECORDS:

[6] The records at issue consist of 10 records, listed below:

Record No.	Description of Records
1	Computer generated list of payments to the appellant
2	Purchase order, September 11, 2009
3	Invoice, dated July 23, 2011
4	Fax cover sheet from hospital, dated July 27, 2011
5	Invoice, dated September 10, 2010
6	Invoice, dated August 31, 2010
7	Invoice, dated August 20, 2012
8	Invoice, dated August 20, 2012 (duplicate of Record 7 with different handwritten notes)
9	Hospital Accounts Payable Memo, dated August 26, 2012
10	Purchase order, dated July 26, 2011

DISCUSSION:

[7] The sole issue in this appeal is whether the third party information exemption at sections 17(1)(a) and (c) apply to the records. Sections 17(1)(a) and (c) state:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency

[8] 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]

[9] 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
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> 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

[10] The appellant submits that the records contain commercial, financial and technical information. In its submissions to the hospital, the appellant advised that the information contained in the records describe a "confidential commercial and financial arrangement" between itself and the hospital. In its decision letter, the hospital indicates that the records contain "commercial and/or financial information".

[11] Technical, commercial and financial information have been discussed in prior orders, as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences

[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.

> or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[3]
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> *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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
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> *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.[6]

[12] Having regard to the appellant's submissions, along with the records, I am satisfied that the records contain "technical information", "commercial information" and/or "financial information" within the meaning of those terms as defined by this office. The appellant provides software solutions and technical support to various industries, including the hospital sector. Given that the records breakdown the financial cost for services the appellant provided the hospital, I am satisfied that this information meets the first part of the three-part test for section 17(1).

Part 2: supplied in confidence

Supplied

[13] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[7]

[14] 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.[8]

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

[15] 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 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.[9]

[16] 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 third party to the institution.[10] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[11]

Representations of the parties

[17] In its decision letter to the appellant, the hospital stated:

> In our view, the pricing information is not supplied by you, as it indicates an amount [we] agreed to pay for the products and services listed. In addition, several of the records are purchase orders issued by [us] and thus cannot be considered supplied by [you].

[18] The hospital went on to state that there was no evidence on the face of the records or in the submissions of the appellant to support a finding that the information was supplied in confidence.

[19] The appellant takes the position that the records contain invoice and pricing information it provided to the hospital. In support of its position, the appellant states:

> All information in regards to invoicing and pricing proposals is provided in confidence with no expectation it will be disseminated to third parties having been provided with the full expectation of confidentiality.

[20] The appellant goes on to state that the confidentiality statement it includes in its emails strictly forbids dissimilation of any information transmitted by email. The appellant states that the confidentiality statement states that "[t]his email and any files

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[9] 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*).
[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[11] *Miller Transit*, above at para. 34.

transmitted with it are proprietary and intended solely for the use of the individual or entity to whom they are addressed". The appellant also submits that this confidentiality statement would have accompanied any proposal or invoice it sent by email to the hospital.

[21] The appellant also argues that its software licence agreement provides that "all information [provided in] association with this licence whether that be technical or commercial is strictly confidential and shall not be [disseminated] to any third parties without the specific written consent of [the appellant].

[22] Finally, the appellant notes that one of the invoices at issue was sent from one of the hospital's laboratory departments to its accounts payable department by fax. The appellant advises that the hospital's fax cover page accompanying the invoice states that "[t]his fax may contain confidential and/or privileged information for the sole use of the intended recipient". The appellant submits that the hospital's confidentiality statement demonstrates the hospital's "acceptance" that the invoice contains "Confidential and Privileged Information".

Decision and analysis

[23] In this appeal, the records at issue are purchase orders and other internal documents created or issued by the hospital, and invoices which were issued by the appellant.

Documents created by the hospital (Records 1, 2, 4, 9 and 10)

[24] There is no dispute that the purchase orders, accounts payable memo, fax cover page and list of payments were prepared by the hospital. Accordingly, for these records to meet the "supplied" test in section 17(1), there must be evidence that the "inferred disclosure" or "immutability" exceptions apply.

[25] For the "immutability" exception to apply there must be evidence that the information at issue is the appellant's information that is immutable or is not susceptible to change. The examples provided above include financial statements, underlying fixed costs and product samples or designs. The appellant's representations do not claim that the records contain this type of information and I am satisfied that they do not.

[26] However, the appellant's representations appear to suggest that the "inferred disclosure" exception could apply. The appellant submits that all of the records at issue, including the records created by the hospital, reveal information about its prices and pricing structure it provided the hospital.

[27] Having regard to the records and the contractual context in which they exist, I find that the records created by the hospital contain information about the mutually-

agreed upon price the hospital agreed to pay for the appellant's services. Accordingly, I find that these records cannot be said to have been "supplied" by the appellant to the hospital. In making my decision, I note that previous decisions from this office have consistently found that purchase orders prepared and issued by government institutions to a service provider do not meet the "supplied" test in section 17(1).[12]

[28] Furthermore, I am satisfied that disclosure of the amounts of monies the hospital paid the appellant for its services would not reveal non-negotiated confidential information. Accordingly, I find that the "inferred disclosure" exception could not apply to this information.

[29] As a result, I find that the records at issue created by the hospital were not "supplied" to the hospital for the purposes of section 17(1).

Invoices (Records 3, 5, 6, 7, and 8)

[30] The appellant takes the position that the invoices contain confidential pricing information it supplied directly to the hospital. There is no dispute that the appellant created the invoices in question and provided them to the hospital. However, this fact does not end the discussion of whether the invoices meet the supplied test in section 17(1) given that the invoices were issued in accordance to a contractual arrangement between the parties.

[31] In my view, the circumstances in this appeal are similar to those in Order PO-2806 in which Adjudicator Daphne Loukidelis found that the annual payments the Ontario Power Generation made to a company which could be "readily traced back" to the negotiated arrangement could not meet the "supplied" test in section 17(1).[13]

[32] The contractual arrangement between the parties is that the appellant provides services to the hospital for payment of an agreed upon price. The invoices at issue in this appeal were created by the appellant to effect payment in accordance with the negotiated agreement between the parties. I agree and adopt the reasoning in Order PO-2806 and find that the price information described in the invoices can be traced back to the negotiated agreement between the parties. Though the appellant submits that the terms of the agreement are confidential, I am not satisfied that the appellant has adduced sufficient evidence to support its position. The appellant's evidence is that the confidentiality statements included in its external emails and software licence agreement explicitly provide that all information relating to its provision of services to the hospital is to be kept confidential. The appellant also submits that the hospital's inclusion of a general confidentiality statement on its fax cover page establishes that the hospital accepted that all information relating to their contractual arrangement, including the price it agreed to pay the appellant, was to be kept confidential.

[12] Orders PO-3347 and MO-3062.
[13] See also Orders MO-2115 and MO-2715.

[33] In my view, the confidentiality provisions relied upon by the appellant are too remote from what is at issue in this appeal – whether information describing the price the hospital paid the appellant for its services meets the "supplied" test for the purposes of section 17(1). The appellant argues that the confidentiality provisions which protect the transmission of the technical aspects of its services translate into a broad confidentiality provision covering any and all information which relates to its business. Not only is the appellant's position not established by the evidence, it is not reasonable taking into consideration that the payments the appellant received from the hospital involve the expenditure of public funds. Furthermore, the hospital's payments to the appellant were made pursuant to a contractual arrangement between the parties and the approach of this office, which has been consistently upheld by the courts, is that information regarding the amount of monies a government institution has contractually agreed to pay for a service should be available to the public.[14]

[34] Adjudicator Catherine Corban 's comments in Order MO-3175 summarize the desire of the courts to grant access to the details of government contracts:

> … it is well established that the agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied" even when "negotiation" amounts to acceptance of the terms proposed by the third party [See Orders PO-2384, PO-2497 (upheld in CMPA) and PO-3157]. In Order MO-1706, Adjudicator Bernard Morrow stated:
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> > …[T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects the terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.
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> Also … the Divisional Court has affirmed this office's approach with respect to the application of section 10(1) to negotiated agreements and

[14] See Orders PO-2018, and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 (Div. Ct.) (*Grant Forest Products Inc.*) and PO-2497, upheld *in Canadian Medical Protective Association v. Loukidelis*, [2008] O.J. No. 3475 (Div. Ct) (*CMPA*). See also *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (Can LII) and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario* et al., 2013 ONSC 7139 (CanLII) (*Miller Transit*) and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392 (CanLII) (*Aecon Construction*).

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> specifically confirmed in *Miller Transit* and *Aecon Construction* that the approach is consistent with the intent of the legislation, which recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds.

[35] Having regard to the above, I find that disclosure of the invoices would not reveal non-negotiable confidential information. Accordingly, the "inferred disclosure" exception cannot apply and the invoices cannot be said to have been "supplied" by the appellant to the hospital for the purposes of section 17(1).

Summary

[36] In summary, I find that the records were not "supplied" to the hospital for the purposes of section 17(1) and do not meet the second part of the three-part test for the third party information exemption under section 17(1). As all three parts of the section 17(1) test must be met, it is not necessary for me to also review the confidentiality requirement of the second part or the harms contemplated in the third part.

[37] I find that section 17(1) does not apply to the records and dismiss the appeal.

ORDER:

1. I uphold the hospitals' decision to disclose the records.

2. I order the hospital to disclose the records to the requester by **September 8, 2015** but **not** before August 31, 2015.

3. In order to verify compliance with order provision 2, I reserve the right to require a copy of the records disclosed by the hospital to the requester to be provided to me.

Original Signed By: July 31, 2015
Jennifer James
Adjudicator