

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3522-R

Appeal PA13-379

Lakeridge Health

August 17, 2015

Summary: This is a reconsideration of Order PO-3489 where the adjudicator found that certain records were not exempt under the mandatory third party information exemption in section 17(1). In this order, the adjudicator allows the reconsideration request and finds that some of the information should be withheld under section 17(1).

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

Order Considered: Order PO-3479.

BACKGROUND:

[1] After conducting a Request for Proposal (RFP) through a group procurement process, a number of hospitals, which included the Lakeridge Hospital (the hospital), contracted with an organization to provide it with prepared intravenous solutions of two chemotherapy drugs. In 2013, it was reported that due to a diluted chemotherapy medication error, more than 1,200 patients at five hospitals including Lakeridge hospital, received doses of two chemotherapy drugs that were weaker than doctors had prescribed over the course of about a year. This controversy received significant media coverage.

[2] The hospital received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to this competitive procurement

process for pre-mixed IV solutions and for contracts with suppliers of compounding ingredients. The appellant narrowed the request to include the following:

- The scores each of the three bidders received
- All other notes, emails, letters or other documentation related to the competitive procurement process – including correspondence between the named company and the hospital, the named company and the three bidders and the hospital
- Records showing the amount of supplies ordered from the compounding companies, what products/materials were compounded together in the hospital, why the compounding was done and the size of batches of compounded products made with these supplies.

[3] The hospital gave notice under section 28 of the *Act* to several organizations whose interests may be affected by disclosure of the records (affected parties). Subsequently, the ministry issued a decision granting the appellant with partial access to the records. The hospital withheld information under the mandatory third party information exemption in section 17(1) and also identified portions of the records that were not responsive to the request.

[4] The appellant appealed the hospital's decision to this office and raised the issue of the possible application of the public interest override in section 23 of the *Act*.

[5] After the inquiry into the appeal, I issued Order PO-3489 where I ordered the hospital to do the following:

I order the hospital to disclose all of Record 1 and portions of Records 2 and 3 that I have found not to be exempt under section 17(1) to the appellant by providing her with a copy of the records by June 17, 2015 but not before June 12, 2015.

[6] On June 15, 2015, I received a request for reconsideration from one of the affected parties, referred to as Affected party 3 in Order PO-3489. The affected party submits that some of the information I ordered disclosed had previously been found to be exempt in related Order PO-3479 and as such, Order PO-3489 contained an error. It argued that this error is a ground for reconsideration pursuant to section 18.01(c) of the IPC's *Code of Procedure*.

[7] I subsequently granted an interim stay of order provision 1 of Order PO-3489 solely as it relates to page 4 of Record 3 pending my determination of the reconsideration.

[8] In this order, I reconsider my finding in Order PO-3489 as it relates to page 4 of Record 3 and find that some of the information pertaining to Affected party 3 is exempt under section 17(1).

RECORD:

[9] The record at issue consists of page 4 of Record 3 (WS10863 Scoring).

ISSUES:

- A. Are there grounds under section 18.01 of the *Code of Procedure* to reconsider Order PO-3489?
- B. Is page 4 of Record 3 exempt under section 17(1) of the *Act*?

DISCUSSION:

Issue A: Are there grounds under section 18.01 of the *Code of Procedure* to reconsider Order PO-3489?

[10] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[11] As set out in paragraph (c) to section 18.01, this office may reconsider an order where it is established that there is a fundamental defect in the adjudication process.

[12] Affected party 3 submits that following receipt of Order PO-3489, it contacted the hospital to request a copy of the records would affect its interests whose disclosure has been ordered. Upon receipt of these records, Affected party 3 realized that its

answer to question #30.5.1.3.2 was ordered disclosed in its entirety. Affected party 3 submits that portions of its same answer to that question were withheld in an earlier related Order PO-3479. The same information was also the subject of a reconsideration request by Affected party 3 with respect to Order PO-3483. Affected party 3 submits that there is an error in Order PO-3489 because of this inconsistency.

[13] Based on my review of Order PO-3479 and the information I ordered disclosed in Order PO-3489, I find that I have been inconsistent in my treatment of section 17(1) with respect to the “delivery information” for Affected party 3. Accordingly, I find that there is an error in Order PO-3489 within the meaning of section 18.01(c) of the *Code of Procedure*. Accordingly, I will reconsider my decision in that order with respect to the application of section 17(1) to the information on page 4 of Record 3.

Issue B: Is page 4 of Record 3 exempt under section 17(1) of the *Act*?

[14] Affected party 3 submits that the information that I ordered disclosed would result in the harm set out in section 17(1) which states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, 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;

[15] 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

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.

[16] 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
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.

[17] In Order PO-3479, I found that Affected party 3's delivery information that was contained in the records was exempt under section 17(1)(a) of the *Act*.

Part 1: type of information

[18] Affected party 3 identified specific information on page 4 of Record 3 which it says will harm its interests if disclosed. The information on these pages consists of delivery information given in response to questions about its proposal. I find this information to be commercial information for the purposes of section 17(1). This term has been defined by the office in past orders as:

.... 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

[19] Affected party 3's responses relate to the provision of its products to the hospital. This is commercial information for the purposes of section 17(1) and part 1 of the test has, therefore, been met.

³ Order PO-2010.

⁴ Order P-1621.

Part 2: supplied in confidence

Supplied

[20] 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.⁵

[21] 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.⁶

In confidence

[22] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[23] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.⁸

[24] In Order PO-3489, I described Record 3 as a table containing a summary of the affected parties’ RFP submissions. I found that the withheld information was supplied by the affected parties to the hospital during the RFP process. I further found that the affected parties supplied the information to the hospital with a reasonably held expectation that the information would be treated confidentially.

⁵ Order MO-1706.

⁶ Orders PO-2020 and PO-2043.

⁷ Order PO-2020.

⁸ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[25] I find no reason to reconsider this part of my section 17(1) analysis. The information withheld on page 4 of Record 3 consists of Affected party 3's responses to questions about the supply of its products to the hospital. I find that this information was supplied by Affected party 3 and that it would be reasonable for Affected party 3 to have both an implicit and explicit expectation of confidentiality in the supply of this information.

[26] I find that part 2 under section 17(1) of the test has been established.

Part 3: harms

[27] In Orders PO-3479 and PO-3489, I considered Affected party 3's representations on the possible harm that would result from disclosure of the records containing its information. I found the following at paragraph 82 of Order PO-3479:

However, based on my review of Affected Party 3's representations and the records relating to it, I am satisfied that Affected Party 3 has provided me with sufficiently "detailed and convincing" evidence to demonstrate a reasonable expectation that the harm in section 17(1)(a) could result from the disclosure of some of its information. Affected Party 3 provided submissions regarding the reasonable possibility of all of the harms in section 17(1) upon disclosure of its proposed rebates, discounts and other value-added benefits as well as other commercial information relating to its methodology and strategies.

[28] In its reconsideration request, Affected party 3 stated the following:

We repeat and rely on the representations and evidence provided to you previously in the within appeal and in the appeals involving the other aforementioned hospitals to support this reconsideration request. Your Order has recognized that [Affected party 3] provided the necessary detailed and convincing evidence to show how disclosure of its proprietary information, including the Delivery Information would harm the corporation. We have kept in mind the purposes of the *Act* in disclosing as much information as possible that is not exempt. We believe that what we are requesting to be withheld is in the spirit and consistent with your Orders.

[29] Lastly, I noted in Order PO-3479 that the information that I found to be exempt which originated with Affected party 3 was of such a quality that my finding did not apply to the commercial information provided by Affected party 2 in response to the same question for the RFP. I find this to be the same for the information at issue on page 4 of Record 3 in the present appeal.

[30] Having reviewed Affected party 3's response on page 4 of Record 3 and the information I withheld from the records in Order PO-3479, I find that the information is the same. I further find that Affected party 3's representations were the same in both appeals and I find it to be sufficiently detailed and convincing to establish the harm in section 17(1)(a). Accordingly, I reconsider my decision in Order PO-3489 and find that the delivery information identified by Affected party 3 in its reconsideration request is exempt under section 17(1)(a).

ORDER:

1. I find that the delivery information on page 4 of Record 3 is exempt under section 17(1) and should not be disclosed to the appellant.
2. I order the hospital to disclose the remaining information on page 4 of Record 3 to the appellant by providing her with a copy of page 4 of Record 3 by **September 22, 2015** but not before **September 15, 2015**. To be clear, I have provided the hospital with a highlighted copy of page 4 of Record 3 identifying the information that should not be disclosed to the appellant.

Original signed by: _____
Stephanie Haly
Adjudicator

August 17, 2015 _____