Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3625

Appeal PA15-578

West Nipissing General Hospital

June 29, 2016

Summary: West Nipissing General Hospital received a request under the *Act* for records relating to a sleep lab. The hospital identified a copy of a contract between it and a third party as responsive to the request and decided to disclose the contract. The third party appealed the hospital's decision, arguing the exemption for third party information in section 17(1) of the *Act* applied. The exemption for third party information does not apply, because the information in the contract was not "supplied" by the third party to the hospital for the purposes of section 17(1). The hospital's decision to disclose the contract is upheld.

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

OVERVIEW:

[1] West Nippissing General Hospital (the hospital) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) as follows:

> Currently there is a Sleep Lab in your Facility. I would like to know who manages your Sleep Lab, what is the group number for the Sleep Lab and if there is a contract, a copy of the contract or/and when it expires.

[2] The hospital identified a contract for a sleep lab to the hospital as responsive to the request. As section 28 of the *Act* requires, the hospital notified the other party to the contract with the hospital (the "third party") of the request and invited its views on

disclosing the contract. After considering the third party's representations, the hospital issued a decision granting access to the record. The third party (now the appellant) appealed the hospital's decision to disclose the contract to this office.

[3] During mediation, the requester clarified that despite the wording of the original request he would not be satisfied with just receiving the expiry date for the contract, but that he wanted the contract itself. The requester's position was communicated to the appellant during mediation.

[4] The appellant continued to object to the disclosure of the record, citing the mandatory exemption for third party commercial information at section 17(1) of the *Act*.

[5] As a mediated resolution could not be reached, the appeal moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the appellant and the hospital. I received submissions from both parties in response.

[6] While the Notice of Inquiry identified the contract as the record in issue in the inquiry, the appellant's submission focussed on the original wording of the requester's access request. The appellant submitted that as the request sought "a copy of the contract or/and when it expires," just providing the expiry date of the contract, rather than the entire contract, would satisfy the request. It argued disclosing only the expiry date was the more appropriate response to the request because that was the least intrusive and least detrimental to the appellant.

[7] After reviewing the appellant's submissions, I reiterated to the appellant that the contract was the record in issue, and invited the appellant to provide further submissions addressing whether section 17(1) applied to the record. The appellant did not provide further submissions. As a result, I decided that it was not necessary to seek submissions from the requester. Instead I proceeded to consider whether section 17(1) applied to the record based on the submissions of the appellant and the hospital.

[8] In this order I find that section 17(1) does not apply to the record and uphold the hospital's decision to disclose it to the requester.

RECORD:

[9] The record in issue is a contract between the hospital and the appellant relating to the provision of sleep lab services.

DISCUSSION:

[10] The sole issue is whether the mandatory exemption at section 17(1) of the *Act* for third party information applies to the contract.

[11] Section 17(1) 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; or
> >
> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[12] 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]

[13] For section 17(1) to apply, the appellant, as the party resisting disclosure, 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

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[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

[14] Prior orders have described "commercial information" as relating 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]

[15] I find that the entire contract pertains to a commercial arrangement between the appellant and the hospital for the provision of sleep lab services. I find, therefore, that the contract comprises commercial information.

Part 2: supplied in confidence

[16] The requirement that the information was "supplied" to the institution reflects the purpose of section 17(1) to protect the informational assets of third parties.[4]

[17] 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.[5]

[18] 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.[6]

[19] There are two exceptions to this general rule, known 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.[7] 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

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[3] Order PO-2010.
[4] Order MO-1706.
[5] Orders PO-2020 and PO-2043.
[6] 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*).
[7] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

samples or designs.[8]

Submissions of the parties

[20] As discussed above, the appellant's submissions to the inquiry did not address the section 17(1) requirements. The appellant has therefore not provided evidence to establish that section 17(1) applies to the contract.

[21] The hospital took the position that section 17(1) did not apply to the contract and that the appellant had not satisfied it that the requirements of section 17(1) were met. In its submission the hospital stated that it did not take a position on whether section 17(1) applied to the contract.

[22] The hospital's submission discusses the possibility that some portions of the contract might fall within the inferred disclosure exception, and that therefore those portions of the contract may have been supplied in confidence. However, the hospital's position is equivocal on this point.

[23] Section 17(1) is a mandatory exemption, so if I consider from my review of the record and the evidence before me that section 17(1) applies to the record, it must be withheld.

[24] As noted above, the appellant's representations do not address section 17(1). In reaching my conclusions, I have reviewed the information at issue, section 17(1) of the *Act*, court decisions and previous orders of this office, and the hospital's submissions.

[25] I am satisfied that section 17(1) does not apply to the contract. As discussed above, the general rule is that contracts are not supplied for the purposes of section 17(1), but are negotiated between the parties. The only evidence that the general rule does not apply here are the equivocal observations in the hospital's submissions about the possible application of the "inferred disclosure" exception. From my review of the record, I consider there is insufficient evidence to conclude that this exception or the "immutability" exception applies to any information in the contract.

[26] Accordingly, the general rule remains and the contract does not qualify as supplied for the purpose of section 17(1). The appellant has therefore failed to meet the requirements of Part 2 of the section 17(1) test.

[27] As I have found that the information at issue was not supplied to the hospital, I do not need to consider Part 3 of the test, namely whether its disclosure could reasonably be expected to result in any of the harms set out in section 17(1).

[28] I conclude that the contract is not exempt from disclosure pursuant to section

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[8] *Miller Transit*, above at para. 34.

17(1) of the *Act* and I order it to be disclosed.

ORDER:

1. I uphold the hospital's decision to disclose the contract.

2. I order the hospital to disclose the contract to the requester by sending him a copy by **August 5, 2016** but not before **July 29, 2016**.

3. In order to verify compliance with provision 2, I reserve the right to require the hospital to provide me with a copy of the contract which is disclosed to the requester.

Original Signed by: June 29, 2016

Hamish Flanagan
Adjudicator