Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3754

Appeal PA16-204

Trillium Health Partners

July 27, 2017

Summary: At issue in this appeal is a request for access to information in a Services Agreement between Trillium Health Partners and the appellant. Trillium Health Partners decided to grant access to all the information in the agreement. The appellant appealed the access decision asserting that certain information in the agreement qualified for exemption under section 17(1) (third party information) of the *Act*. The Adjudicator upholds Trillium Health Partners' decision and orders that the entirety of the Services Agreement be disclosed to the requester.

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

Orders Considered: Orders PO-2018, PO-2384, PO-2435, PO-2453 and PO-3311,

Cases Considered: *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111 and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139.

OVERVIEW:

[1] Trillium Health Partners (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to a copy of an identified current contract and associated Request for Proposal information for Non-Emergency Patient Transfers. The request listed a number of requested records including "[T]he current executed agreement/contract for Non-Emergency Patient

Transfer".

[2] The appellant explains in its representations that non-urgent patient transfer (patient transfer) businesses are responsible for transporting patients between health care facilities. It states that this is a critical part of the delivery of health care in Ontario, involving infants, patients requiring dialysis or radiation treatment, palliative, bariatric, disabled and frail passengers[1].

[3] After notifying the appellant, and receiving its position on disclosure, the hospital issued its access decision granting the requester full access to the responsive Services Agreement. The appellant appealed the hospital's decision asserting that section 17(1) applied to some of the information that the hospital had decided to disclose.

[4] At the close of mediation, only access to the withheld information on pages 38, 39, 41, 42, 43, 44 and 51 of the responsive Services Agreement remained at issue in the appeal.

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

[6] I sent a Notice of Inquiry to the appellant and the hospital setting out the facts and issues in the appeal. Both the appellant and the hospital provided responding representations. The appellant asked that all of its representations be withheld due to confidentiality concerns[2].

[7] I determined that it was not necessary to seek representations from the requester.

[8] In this order, I uphold the hospital's decision and order that the withheld information in the Services Agreement be disclosed to the requester.

RECORD:

[9] Remaining at issue in this appeal is withheld information on pages 38, 39, 41, 42, 43, 44 and 51 of a document entitled "Services Agreement".

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[1] The appellant requested that none of its representations be shared with the requester in the course of adjudication. In making my determinations in this order I have considered all of the appellant's representations, although I have summarized many of them in order to address the appellant's confidentiality concerns.

[2] See footnote 1, above.

DISCUSSION:

Do the mandatory exemptions at sections 17(1)(a) and/or (c) apply to the withheld information in the Services Agreement?

[10] Sections 17(1)(a) and (c) of the *Act* 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 …

[11] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

[12] For section 17(1) to apply, 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 commercial or financial 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) and/or (c) of section 17(1) will occur.

Part 1: type of information

[13] The types of information listed in section 17(1) have been discussed in prior orders:

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[3] *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.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[5]
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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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]
>
> *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.[8]

The appellant's submissions

[14] The appellant submits that this appeal arises from its position that certain Pricing Components in the Services Agreement qualify for exemption under sections 17(1)(a) and/or (c) of the *Act*.

[15] It states that it has "serious concerns that the patient transfer business in Ontario has become inappropriately and dangerously commodified" and that:

> Our concerns are exacerbated by requests such as the Request - in which a competitor will use our unique and confidential information to manipulate its own pricing components when bidding on another opportunity - and do so at a level sufficient to "game" the system, and overcome any advantage that [the appellant] may have in quality and service standards and reasonable pricing. We say this with the knowledge

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[5] Order PO-2010.
[6] Order PO-2010.
[7] Order P-1621.
[8] Order PO-2010.

> that our competitors are the requesters in various recent requests to Ontario hospitals for patient transfer contracts and proposals, and we are currently involved in defending against the release of our confidential information.

[16] The appellant explains that like many businesses, the patient transfer business is one in which various resources are assembled and deployed in a manner that is both efficient and strategic. It submits that such services involve a variety of variables, some of which can be controlled by the service provider, and many of which cannot be so controlled.

[17] It explains that a patient transfer business' pricing model must account for and balance the variables of fuel prices, wait times, cancellations, after-hours services, distance travelled, and in-vehicle supports (e.g., oxygen) and that there is no standard approach. It submits:

> These variables form a matrix that is at the core of our operations, and are the basis for our Pricing Components. If our competitor's pricing components were available to us, we could readily construct the core of their business model; so too if our pricing components were available to our competitors. If a pricing model was known to a competitor, it would be easy to undercut that pricing model in a given procurement process and do so in a way that preserves the overall model with sufficient adjustment to undercut the competitor …

[18] The appellant submits that it consents to the release of the base rate, yearly increase and the percentage of hospital business, (each of which it had previously sought to be withheld) as this "provides a baseline for determining the contract value, and provides fair disclosure of the cost of our services, without compromising our confidential information." It submits:

> To be clear, we have no issue with the release of generalized pricing information, such as the estimated value of this contract or, as noted above, the base rate, yearly increase and the percentage of hospital business. Such information would provide fair disclosure to the public of the cost of our services and would not present the significant harms [the appellant alleges in its representations]. Our concern is solely with the Pricing Components and the significant and undue harm they will cause us.

[19] The appellant submits that the combination of Pricing Components amounts to a trade secret. It explains:

> … The Pricing Components are the product of careful internal analysis and the weighing of risks. It reflects [the appellant's] method of accounting for

> the variables of patient transfer services activities. [The appellant's] Pricing Components are not generally known by its competitors, and have economic value from not being generally known. Moreover, it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
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> …
>
> The Pricing Components are a description of our approach to the delivery of the services. In our business, they are proprietary in the same way that a recipe is proprietary. …

[20] The appellant submits that the Pricing Components are also "commercial" information, as they relate to the buying and selling of services, and the structure of the appellant's business model. In addition, the appellant submits that the Pricing Components are also "financial" information, as they reveal the appellant's pricing practices and thereby relate to profit and the recovery of overhead and operating costs.

[21] The hospital submits that the Services Agreement contains "commercial" and "financial" information but do not contain information that qualifies as a "trade secret".

Analysis and finding

[22] I agree that the Services Agreement, as a contract, contains both commercial and financial information. The record contains commercial information because it relates to the buying and selling of Non-Emergency Patient Transfer Services. It contains financial information since the contract contains pricing information. However, I am not satisfied that the information that the appellant says amounts to a trade secret, meets the definition of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism", or otherwise meets the definition of a "trade secret" as contemplated by section 17(1).

[23] Because I have concluded that the information remaining at issue in the Services Agreement qualifies as both "commercial" and "financial" information, I find that the requirements of Part 1 of the section 17(1) test have been met.

Part 2: supplied in confidence

Supplied

[24] 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.[9]

[25] 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]

[26] 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.[11]

[27] 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.[12]

[28] In *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.* (*Miller Transit*)[13], the Ontario Divisional Court explained the "inferred disclosure" exception in the following way at paragraph 33 of the decision:

> The inferred disclosure exception arises where information actually supplied does not appear on the face of a contract but may be inferred from its disclosure. The onus is on the party to show "convincing evidence that disclosure of the information …would permit an accurate inference to be made of underlying non-negotiated confidential information supplied by the affected party…": see *Order MO-1706, Peel District School Board*, [2003] O.I.P.C. No. 238, at paras. 52-53

[29] At paragraph 43 the court wrote:

> … It applies where contractual information gives rise to an inference, not that the very same information may be found in materials provided by a third party, but that other, confidential, information belonging to the third party may be gleaned by reference to contractual information. That is not the situation here: Miller Transit argues that contractual terms and information mirror documents provided by it to York Region.

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[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] 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 (*Miller Transit*).
[12] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[13] 2013 ONSC 7139.

[30] At paragraph 59 of Order PO-3311, Adjudicator Daphne Loukidelis elaborated upon the "inferred disclosure" exception in the following way:

> …. the "inferred disclosure" exception is one of two exceptions, along with "immutability," that may bring information otherwise found not to have been "supplied" back within the scope of part 2 of section 17(1). The "inferred disclosure" exception applies where contractual information gives rise to an inference, not that the very same information may be found in materials provided by a third party, but that other *non-negotiated* and confidential information belonging to the third party may be gleaned by reference to contractual information.[14]

[31] 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.[15]

[32] In Order PO-2384, I explained the "immutability" exception in the following way:

> … [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

The representations

[33] The appellant argues that because of the nature of the RFP process giving rise to the Services Agreement, the information at issue was not negotiated and that the "inferred disclosure" and "immutability" exceptions arise in the circumstances of this

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[14] Adjudicator Loukidelis cited *Miller Transit, supra* in support.
[15] *Miller Transit*, above at para. 34.

appeal. The appellant states:

> In some procurement processes, a purchaser may be free to accept or reject a proposal, as it wishes. However, in the case of the RFP giving rise to this contract, that was not the case. The hospital issued a binding RFP, which included an irrevocability clause. That binding RFP created a contractual relationship under which the hospital was bound to award the contract to the highest scoring bidder pursuant to the evaluation methodology set out in the procurement documents (with pricing evaluated by objective formula), or to not award the contract at all. Moreover, the hospital was not able to make material changes to its requirements, or to allow bidders to make material changes to their bids, after the deadline for submission of bids. In effect, no negotiation was legally permitted.
>
> In a binding RFP, if the hospital chose a bidder other than the highest-scoring bidder, then the hospital would be in breach of its common law procurement obligations (i.e., the doctrine of "Contract A"), as articulated in *R v. Ron Engineering and Construction (Eastern) Ltd.* (1981) 1 S.C.R. 111, as supplemented by subsequent case law and the obligations imposed on it by the Broader Public Sector Procurement Directive. The hospital has no alternative.
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> In addition, and pursuant to the same Supreme Court of Canada case law, (i) the hospital has no right to negotiate the core elements of a bidder's bid, including its pricing, in a binding RFP; (ii) a hospital cannot require a bidder to modify its approach to pricing in order to be awarded a contract in a binding RFP; and (iii) a hospital cannot reward a bidder for improving its pricing in a binding RFP. In each case, such action would breach the hospital's fairness obligations under case law. It would also constitute a breach of the Broader Public Sector Procurement Directive.
>
> Put simply, hospitals that issue binding RFP processes that contain an irrevocability clause are not negotiating with bidders because the nature of such processes requires that information that was supplied by [the appellant] (and other bidders) was not subject to change.
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> To prepare the form of contract, the hospital transposed our Pricing Components into the relevant sections or schedules to a form of contract. Our Pricing Components were incorporated as is, and without any capacity for negotiation by the hospital or by [the appellant] (given that this was a binding process). This was an automatic process, and not a negotiated one.

[34] Relying on the discussion in the Notice of Inquiry it received, the hospital

submits that:

> … the contents of a contract involving an institution and a third party do not normally qualify as having been "supplied" for the purpose of section 17(1).
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> …
>
> As such, it is the position of [the hospital] that the information contained in the records was mutually generated and not supplied …

Analysis and finding

[35] 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 the third party. As stated in *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), which provided the foundation of *FIPPA*:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. (p. 315) [emphasis added]

[36] In *The Queen (Ont.) v. Ron Engineering* (*Ron Engineering*),[16] the Supreme Court of Canada differentiated between two types of contracts that arose from the tender under review in that case. The Court referred to them as contract A and B in its decision. It explained:

> … Contract A (being the contract arising forthwith upon the submission of the tender) comes into being forthwith and without further formality upon the submission of the tender.

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[16] [1981] 1 S.C.R. 111.

…

…. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

…

… For a mutual contract such as contract B to arise, there must of course be a meeting of the minds, a shared animus contrahendi, but when the contract in question is the product of other contractual arrangements, different considerations apply. However, as already stated, we never reach that problem here as the rights of the parties fall to be decided according to the tender arrangements, contract A. …

[37] Another way of describing the two stages in *Ron Engineering* would be Contract A (tendering) and Contract B (performance).

[38] In this appeal, I am not dealing with a request for a copy of the appellant's tender, rather I am dealing with a request for the finalized agreement. According to *Ron Engineeering* the Services Agreement at issue in this proceeding would be a Contract B. This office has consistently treated the terms of a contract as mutually generated, rather than "supplied" by a third party, even where the contract is preceded by little or no negotiation.

[39] In Order PO-2018 Assistant Commissioner Sherry Liang was faced with an argument that revealing withheld contractual information would reveal information supplied during an RFP process. Although the order was written some time ago, the themes resonate through subsequent orders of this office. She wrote:

MBS [Management Board Secretariat] also submits that if it is determined that the above information was not "supplied" by the affected party, it nevertheless ought not to be disclosed because it would "reveal" information supplied in confidence to MBS. The clauses at issue in the final agreement substantially reveal information supplied by the affected party in confidence during the RFP process.

…

In general, the affected party submits that it does not object to disclosure of the provisions of the final agreement that were mandated by the government and of which other bidders would reasonably be expected to be aware. It is concerned only with those provisions of the agreement

where it made a competitive decision or where it negotiated terms that reveal its competitive strategy.

[40] In her analysis on whether this impacted the "supplied" test, she wrote:

> As indicated above, this element of the three-part test under section 17(1) has been the subject of a number of prior orders, most of which have concluded that contracts between government and private businesses do not reveal or contain information "supplied" by the private businesses. These findings reflect the common understanding of a contract as the expression of an agreement between two parties. Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of arrangements the parties agreed to accept, this information is not in itself considered a type of "informational asset" which qualifies for exemption under section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party.
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> Consistent with this general approach, certain cases have recognized that the absence of negotiations does not in itself lead to a conclusion that the information in the contract was "supplied" within the meaning of section 17(1). …
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> …
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> MBS expresses a concern that even if the information in Articles 8.5(d), 12.1(a) and (c) is found not to have been "supplied" by the affected party, the disclosure of these terms would result in revealing information supplied confidentially to MBS during the RFP process. MBS submits that a comparison of the terms of the pro-forma agreement against the terms of the final agreement would allow the requester to determine substantially all of the information in the affected party's proposal.
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> In my view, this concern is not a basis for exempting the information at issue from disclosure. If it were, then I would see no reason to distinguish the information in the specific articles in dispute, from the rest of the contract which has been disclosed to the requester. As a general proposition, this interpretation of section 17(1) would result in the exemption from disclosure of the terms of any number of contracts awarded through a similar process to that used in this case. Such a result would clearly not be in keeping with the intent of the *Act*. …

[41] Several decisions of the Divisional Court have affirmed this office's approach to

section 17(1).[17] In particular, these decisions confirm that one of the central purposes of freedom of information legislation is to make institutions more accountable to the public[18]. In *Miller Transit*, the court upheld Adjudicator Donald Hale's decision ordering the disclosure of portions of bus services contracts between York Region and two companies on the basis that the third party information exemption did not apply. In doing so, at paragraph 44 of the decision, the Court observed that:

> The IPC adjudicator's decision was also 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: see *Vaughan (City) v. Ontario (Information and Privacy Commission)*, 2011 ONSC 7082 (CanLII), 2011 ONSC 7082, 109 O.R. (3d) 149 (Div. Ct.), at para. 49.

[42] In Order PO-2435, Commissioner Brian Beamish rejected the position taken in that appeal by the Ministry of Health and Long-Term Care that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Commissioner Beamish observed that the exercise of the government's option in accepting or rejecting a consultant's bid is a "form of negotiation." He wrote:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health Agency], to claim that the per diem amount was simply submitted and was not subject to negotiation.

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[17] See for example, *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.) at para. 18; *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 at paras. 46 and 56; *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario,* 2012 ONSC 3496 at para. 10; *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 at para. 27 and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario* 2015 ONSC 1392 at para 13.

[18] This office has also published a paper in September 2015 on the issue entitled Open Contracting: Proactive Disclosure of Procurement Records.

[43] Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part 2 of the test to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other items, the record at issue in Order PO-2453 contained the successful bidder's pricing for various components of the service to be delivered, as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were not "supplied" pursuant to part 2 of the test under section 17(1) of *FIPPA*, Adjudicator Corban stated:

> Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

[44] I adopt the approach outlined in the authorities above in the case before me. In the circumstances of this appeal, I find that in choosing to accept the affected party's bid, the information, including pricing information contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Hospital has agreed to it. The terms of the bid quotation submitted by the appellant effectively became the essential terms of a negotiated contract. In that regard, either the Service Agreement's terms were negotiated through the process of offer and acceptance or accepting the Pricing Components in the bid which were then incorporated into the contract was a form of negotiation.

[45] I further find that the appellant has not established the application of the "inferred disclosure" or "immutability" exceptions.

[46] As set out above, the inferred disclosure exception arises where information actually supplied does not appear on the face of a contract but may be inferred from its disclosure. At issue in this appeal is information that appears on the face of the Services Agreement. Hence the "inferred disclosure" exception does not apply. I am also not satisfied that the immutability exception applies. The appellant's representations are peppered with the word "may" and the appellant fails to go through the extra step to explain how disclosing the withheld information would reveal the appellant's actual underlying non-negotiable information.

[47] Accordingly, I find that the appellant has failed to provide me with sufficient evidence to establish that the undisclosed information in the Services Agreement was supplied for the purposes of Part 2 of the three-part section 17 test.

[48] Accordingly, it is not necessary for me to address the "in confidence" portion of the Part 2 test.

[49] As all three parts of the test under section 17(1) must be met in order for the exemption to apply, I find that section 17(1) has no application to the Services Agreement. As a result, it is unnecessary to consider Part 3 of the test.

ORDER:

1. I uphold the hospital's decision and dismiss the appeal.

2. I order the hospital to disclose the withheld information at issue in the appeal to the requester by providing the requester with an unredacted copy of pages 38, 39, 41, 42, 43, 44 and 51 of the Services Agreement by **September 1, 2017** but not before **August 27, 2017**.

3. In order to verify compliance with Order provision 2, I reserve the right to require the hospital to provide me with a copy of the pages of the Services Agreement as disclosed to the requester.

Original Signed by: July 27, 2017

Steven Faughnan
Adjudicator