

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3785

Appeal PA16-58

Trillium Health Partners

November 27, 2017

Summary: Trillium Health Partners (THP) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the dashboard metrics created to monitor the quality of the third party appellant's process of decontaminating THP's previously used medical devices. THP denied access to the responsive records in part, relying on the mandatory third party information exemption in section 17(1). This order finds that the remaining information is exempt by reason of 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)(a).

Orders Considered: Order PO-1811.

OVERVIEW:

[1] Trillium Health Partners (THP) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to:

1. In electronic format, dashboard metrics used by Trillium Health Partners in order to monitor the quality of [a named company] from May 2014 to September 10, 2015.

2. A list of Trillium staff member names and job titles who correspond with [the named company] on a regular basis in relation to [the named company's] operational performance.

[2] In accordance with section 28(1) of the *Act*, THP notified the named company that might be affected by the disclosure of records responsive to the first part of the request, to seek its views. After considering the named company's representations, THP issued a decision to the requester granting partial access to the records and citing the mandatory third party information exemption in section 17(1) to withhold certain portions.

[3] In the decision to the requester, THP responded to the second part of the request and included a list of job titles of THP's staff members that correspond with the named company on a regular basis in relation to their operational performance. Therefore, the second part of the request was no longer at issue.

[4] The named company (the appellant) appealed THP's decision to disclose the information in the records responsive to the first part of the request that THP had determined was not subject to section 17(1). The requester did not file a separate appeal appealing the information that THP decided to withhold under section 17(1).

[5] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. I sought the representations of the third party appellant initially.

[6] I sent the appellant's representations, less the confidential portions, to THP and the requester, and sought their representations. Only THP provided representations, which I shared with the appellant and received its reply representations in response.

[7] In this order, I find that the information at issue in the records is exempt under section 17(1)(a).

RECORDS:

[8] The appellant was THP's contract medical device reprocessing¹ service provider.

[9] At issue are 27 performance dashboards, which were created to track the number of times reprocessed medical devices were contaminated or otherwise unfit for use.

[10] The information at issue in the records is a mathematical analysis of incident

¹ THP states that medical device reprocessing is a process of decontaminating previously used medical devices (for example, surgical instruments such as scissors, forceps, and scalpels), cleaning and sterilizing these instruments for future use.

reports and volume data related to these devices.

[11] At issue is the information in the records that THP has decided to disclose from the records.²

DISCUSSION:

Does the mandatory third party exemption at sections 17(1)(a), (b) and (c) apply to the records?

[12] Section 17(1) states in part:

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

[13] 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

[14] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

² THP decided to disclose all of the information in the records except for labour relations information about the appellant’s employees. THP decided to withhold this labour relations information and the requester did not appeal this decision, therefore, the labour relations information in the records is not at issue in this appeal.

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.

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.

Part 1: type of information

[15] The appellant submits that the records contain commercial and technical information and were produced pursuant to a commercial contract and in furtherance of the commercial transaction of services between it and THP.⁵

[16] THP did not provide representations on the types of information it has decided to disclose.

Analysis/Findings

[17] The types of information referred to by the appellant are listed in section 17(1) 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 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.⁶

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.⁷ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁸

[18] Based on my review of the records, I agree that they contain commercial and

⁵ The appellant provided both confidential and non-confidential representations. THP provided only non-confidential representations. As noted above, the requester did not provide representations.

⁶ Order PO-2010.

⁷ Order PO-2010.

⁸ Order P-1621.

technical information concerning the selling of the appellant's services and a technical analysis of the performance of these services.

[19] Therefore, part 1 of the test under section 17(1) has been met.

Part 2: supplied in confidence

Supplied

[20] The appellant states that it supplied the volume data to populate the records and that the records are linked to and build upon information supplied by it.

[21] THP states that the data in the dashboards was contributed by either it, the appellant acting on behalf of THP, or the appellant acting on its own behalf.

[22] THP states that the information was provided and included in the dashboard either 1) through the creation and analysis of incident reports completed by THP staff directly, or 2) through incident reports created by THP and analyzed by the appellant's staff in conjunction with THP, while performing work on THP's behalf. In the second instance, it states that the appellant was performing work on THP's behalf and shared with THP information about its performance of work including incidents, all of which was done pursuant to the legal agreement between THP and the appellant.

[23] In reply, the appellant states that the "dashboard metrics" are the records and initially, THP was responsible for compiling the records. The appellant states that it took over this responsibility in early 2015 and that the records were maintained until the appellant's relationship with THP terminated in December 2015.

[24] The appellant submits that THP's description of the facts ignores or minimizes its contribution to the information contained in the records. It states that the volume data that was critical to producing the averages and percentages reflected in the records was independently "supplied" by it and provided to THP. It states that this volume data was neither "mutually generated" nor "negotiated", but "supplied" outright. It states:

Yet, THP's description erroneously suggests that the only information that was "provided and included in the dashboard" was information relating to the incident reports. The raw data arising out of the incident reports are only one aspect of the information contained in the records; the incident reports are mathematically contextualized into averages and percentages by the volume data supplied by [the appellant] to THP.

[25] The appellant submits that its volume data is embedded and integrated into the portion of the records in dispute. It further submits that it is an error to suggest that at any time during their relationship, the appellant completed work "on behalf of" THP. Specifically, it states that it is an error to suggest that the appellant provided information that was incorporated into the records on THP's behalf. It states:

Any action undertaken by [the appellant] in relation to its MDR services to THP was in fulfillment of [its] own obligations under the Services Agreement. As explicitly stated in [section] 3 of the Services Agreement, [the appellant's] relationship to THP was to be exclusively governed by the terms and conditions of the Services Agreement. There is no provision in the Services Agreement that in any way states that obligations fulfilled by [the appellant] are "on behalf of" THP. Indeed, such a provision would be highly unusual in a commercial contract between an independent contractor and the recipient of the independent contractor's services.

[26] The appellant submits that the facts in Order PO-2675 relied upon by THP are distinguishable as the source of the Complaint Information in the records in that appeal was an additional third party, namely a student or another institution, that supplied the information in the portion of the records in dispute.

[27] The appellant submits that, as this appeal only involves THP as the institution and appellant as the third-party, it is indisputable that it is the source of the volume data incorporated into the records.

[28] The appellant submits that the reasoning in Orders PO-3479 and PO-1811 ought to be followed instead. It states:

As stated in Order PO-3479, "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". The holding in Order PO-1811 further clarified the kind of information that could inferentially reveal third-party informational assets.

In Order PO-1811, the affected third-party had submitted certain samples to the Ministry of Agriculture, Food & Rural Affairs ("Ministry"). The Ministry created records from the information found within the samples. In finding that these records were "supplied" by the third-party, the Information and Privacy Commissioner stated as follows:

In the circumstances, I am satisfied that all of Record 1, and Records 2c, 2h, 2o and 2r either contain or would reveal information supplied by the affected person to the Ministry. I accept that much of this information was actually derived from samples provided by the affected person. In the circumstances, however, I find that by voluntarily providing samples to the Ministry for testing, the affected person was, in effect, supplying information which could be directly derived from the samples. In essence, the test result information was embedded in the samples, and the affected person voluntarily provided that

information by providing the samples, and requesting that the Ministry extract this information and report it back to the affected person.

The circumstances of this appeal can be likened to Order PO-1811. [The appellant] submitted volume data to THP. THP then derived information that was eventually incorporated into the records. Like the sample information in Order PO-1811, the volume data is embedded in the records.

Analysis/Findings re: supplied

[29] 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

[30] 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

[31] The records are performance dashboards that track the performance of the appellant statistically. Part of the information used to create the dashboards statistical analyses originates from the appellant. In fact, several portions of the records even contain a notation that THP is “awaiting [the appellant’s] data”, resulting in a certain analysis not being completed for that portion of the record.

[32] Relying on Order PO-1811, I agree with the appellant that its information is embedded in the dashboards’ analyses. This information cannot be separated from that provided by THP and it is an integral part of the information at issue in the records.

[33] As the information at issue in the records is a compilation of information from both THP and the appellant and the appellant’s information cannot be separated from that of THP, I find that the information at issue was supplied by the appellant.

In confidence

[34] The appellant states that it elected to disclose the quality assurance data that underlies the records to THP by relying on the robust confidentiality provisions of the Service Agreement. It states that pursuant to the Services Agreement, Confidential Information is defined to include “all analyses, compilations, studies and other information prepared by or on behalf of a Party which contain or otherwise reflect or are derived from such information designated or deemed to be confidential”.

⁹ Order MO-1706.

¹⁰ Orders PO-2020 and PO-2043.

[35] The appellant states that it disclosed the data underlying the records to THP with the explicit understanding that any records produced by such data would remain confidential and the sole property of the appellant.

[36] THP states that the dashboards' purpose was expressly confidential and intended to measure the appellant's performance. It states that it is reasonable to conclude that any supplied information in a dashboard was supplied by the appellant to THP for a purpose that would not entail disclosure.

Analysis/Findings re: in confidence

[37] 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.¹¹

[38] 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.¹²

[39] I find that the information at issue in the records was supplied by the appellant in confidence to THP. I make this finding based on my review of the records and the representations of THP and the appellant, along with taking into account the terms of the agreement between the hospital and the appellant, as set out above, including the following term:

... the information concerning the business or affairs of the Service Provider [the appellant] and/or its partners disclosed to the Hospital [THP] in connection with this Agreement shall constitute Confidential Information of the Service Provider ...

¹¹ Order PO-2020.

¹² 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.

Any information supplied, or to which access is or was at any time (whether before or after the date of this Agreement) granted, by or on behalf of the Service Provider to, or for the benefit of, the [THP] in any proposal, audit, report or offer, or in any documents in support or furtherance thereof or otherwise in support or in furtherance of this Agreement, shall be deemed to constitute the Service Provider's Confidential Information regardless of the form or format of such information and regardless of the means or methods of communication

[40] I find that the information at issue was communicated to THP on the basis that it was confidential and that it was to be kept confidential, treated consistently by the appellant in a manner that indicates a concern for confidentiality, not otherwise disclosed or available from sources to which the public has access and prepared for a purpose that would not entail disclosure.

[41] Therefore, as the information at issue in the records was supplied in confidence, part 2 of the test under section 17(1) has been met.

Part 3: harms

[42] 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

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

[44] 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

[45] The appellant relies on sections 17(1)(a), (b) and (c), as set out above. Most of its representations on part 3 are confidential. THP did not provide representations on part 3 of the test to the specific information at issue in the records

¹³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁴ Order PO-2435.

¹⁵ Order PO-2435.

Section 17(1)(a): prejudice to competitive position

[46] Based on my review of the appellant's detailed representations and the information at issue in the records, I am convinced that disclosure of this information could reasonably be expected to result in the harms set out in section 17(1)(a).

[47] I agree with the confidential representations of the appellant on section 17(1)(a) that it is more than reasonable to expect that disclosure of the information at issue in the records would not only prejudice the appellant's competitive position in the MDR market (and unjustly so), but would significantly interfere with its future negotiations for other MDR contracts.

[48] As such, disclosure of the information at issue in the records could reasonably be expected to significantly prejudice the competitive position of the appellant, as well as interfere significantly with its future negotiations.

[49] Therefore, I find that part 3 of the test has been met for the information at issue in the records.

[50] As I have found that section 17(1)(a) applies, there is no need for me to consider whether sections 17(1)(b) or (c) also apply.

[51] The requester has not appealed the remaining information in the records that THP has determined is exempt by reason of section 17(1), accordingly, all of the information in the records is exempt under section 17(1).

ORDER:

I find that the information in the records is exempt by reason of section 17(1).

Original Signed by: _____

Diane Smith
Adjudicator

November 27, 2017