Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3885

Appeal PA17-166

Lakeridge Health

October 2, 2018

Summary: Lakeridge Health (the hospital) received a two-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a contract for the provision of laundry services to the hospital (the Services Agreement). The hospital decided to grant full access to the Services Agreement and related slide presentation. The third party appealed this decision, claiming the application of the mandatory third party information exemption in section 17(1) to portions of both records. The third party also argued that the hospital does not have custody or control over the slide presentation.

This order finds the slide presentation is a record within the custody or under the control of the hospital. This order also finds that the information at issue in the records is not exempt under section 17(1) and orders the hospital to disclose it to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1) and 17(1).

Orders cited: Order MO-1706.

OVERVIEW:

[1] Lakeridge Health (the hospital) received a two-part request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following information:

> 1. The contract [the Services Agreement], including, but not limited to, all amendments, renewals, revisions, schedules, appendices, letters of agreement and all other documents deemed to form part of the contract, for the provision of laundry services to the hospital. The provider of the laundry services named in the contract and/or in the associated requested records, may be identified as:
>
> - [five named companies]
>
> - an affiliate of [a named company] or [another named company].
>
> 2. All records including, but not limited to, correspondence (internal and external), emails, briefing notes, related in any way to the records described in paragraph 1 of this request.

[2] Following notification to the third party that was the assignee of the Services Agreement, who objected to disclosure, the hospital issued an access decision to the requester and to the third party granting the requester partial access to the responsive Services Agreement and the slide presentation. The hospital denied access to portions of these records citing the mandatory third party information exemption in section 17(1).

[3] The requester appealed the hospital's decision to deny access to portions of the records. Appeal file PA17-118 was opened to address the requester's appeal. The third party, now the appellant, appealed the hospital's decision to disclose certain information. Appeal file PA17-166 was opened to address the third party's appeal.

[4] During mediation of the appeals, the hospital issued a revised decision granting full access to the records. As the hospital had now granted full access to the responsive records, the requester's appeal PA17-118 was closed.

[5] The requester, however, indicated that she was continuing to seek access to the information that the appellant objected to being disclosed.

[6] Also, during mediation, the original party that had entered into the Services Agreement with the hospital (the affected party) took the position that it has an interest in the records at issue and wished to be added as party to the appeal.

[7] The file proceeded to adjudication, where an adjudicator conducts an inquiry. Representations were sought from all of the parties. The hospital (the institution in this appeal) did not provide representations. Representations were exchanged between the appellant, the requester, and the affected party in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] At the appellant's suggestion, I then notified a number of other hospitals that

had also entered into Services Agreements with the affected party that were assigned to the appellant, seeking their representations on the application of section 17(1) to the portions of the Services Agreement at issue in this appeal.

[9] Most of the other hospitals either did not respond or indicated that they had no problem with the information being disclosed. One hospital indicated that it "does not wish to share the information contained in the Services Agreement," but did not provide representations in support of its position. One other hospital (the other hospital) provided representations opposing disclosure, which I will refer to below.

[10] The appellant has also raised the issue as to whether the slide presentation (Record 2) is in the hospital's custody or control. I have added this issue to the appeal.

[11] In this order, I find that the information at issue in the slide presentation (Record 2) is in the custody or control of the hospital. I also find that the information at issue in the records is not exempt under section 17(1) and I order the hospital to disclose it to the requester.

RECORDS:

[12] There are two records at issue in this appeal.

[13] Record 1 is the Services Agreement (the SA) between the hospital and the affected party, which was assigned to the appellant. At issue is information from the following:

At Issue	**Description**
page 2 of the SA	1.1(o) Change of Control 1.1(t) consistent with past practices
page 3 of the SA	1.1(ee) Effective Date
Page 6 of the SA	1.1(jjjj) Transaction Agreement
page 7-8 of the SA	2.2 Exclusivity
page 18 of the SA	6.2(a) Extension after Initial Term 6.3 Subsequent Extensions
page 29 of the SA	7.16 Assignment and Enurement 7.17

page 3 of the Services Schedule	Web-Based Ordering System
pages 5 to 8 of the Services Schedule	Services Schedule, Excessive Loss/Inventory Management A. Lost Linen Carts B. Lost Linens C. Lost Scrub Suits
first 5 pages of KPI (Key Performance Indicators) Schedule	
both pages of the Pricing Schedule	Price Protection
last two columns of Appendix A of the Pricing Schedule	Acute Facility and LTC Facility
Legacy Services Schedule	

[14] Record 2 is a slide presentation. At issue is the following:

Slide Page #	**Title**
3	Ongoing Service Terms
5	3. Key MSA (Master Services Agreement) Changes
37	04 Key MSA Terms Key Performance Indicators: Member Representative Quality Committee
38	04 Key MSA Terms Key Performance Indicators: Summary
39	04 Key MSA Terms Other Key Terms: Exclusivity Provision
40	Key MSA Terms Other Key Terms: Inventory Management and Excessive Loss Mechanism
41	04 Key MSA Terms Other Key Terms: Lost Linen Carts and Lost Scrub Suits

[15] Other than for page 5, the appellant objects to disclosure of the entirety of the pages in Record 2, except the titles of each page. For page 5, the appellant objects to disclosure of portions of this page.

ISSUES:

A. Is Record 2 "in the custody" or "under the control" of the hospital under section 10(1)?

B. Does the mandatory third party information exemption at section 17(1) apply to the records?

DISCUSSION:

Background:

[16] In this case, the Services Agreement (Record 1) is an agreement entered into between the affected party and the hospital for linen and laundry services.

[17] At the time, the affected party was a not-for-profit linen and laundry service provider owned by 22 member hospitals located in the Greater Toronto Area, including the hospital in this appeal, Lakeridge Health.

[18] The appellant and the affected party submit that the form of the SA, the Master Services Agreement (the MSA), was negotiated between them as part of a larger transaction, the sale transaction, under which the appellant, as part of the transaction, acquired substantially all of the assets of the affected party. A template form of Master Services Agreement was part of the sales transaction.

[19] As part of the sale transaction, the hospital and a number of other hospitals in Ontario entered into Services Agreements with the affected party for linen and laundry services. These Services Agreements were ultimately assigned to the appellant.

[20] A few hospitals, including the hospital in this appeal, attended certain meetings at which the appellant was present to discuss the MSA. The slide presentation, Record 2, was created by the affected party and is entitled "The Sale of [the affected party]". Record 2 was distributed as part of concluding negotiations between the affected party and the appellant that led to the eventual sale transaction.

A. Is Record 2 "in the custody" or "under the control" of the hospital under section 10(1)?

[21] Section 10(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[22] The appellant states that Record 2 contains portions of a slide presentation provided by the affected party to the hospital and is subject to a confidentiality agreement that expressly restricted the use to which the hospital could put the information. It relies on the affected party's submission that the "presentation was distributed as part of concluding negotiations between [the appellant and the affected party] that led to the eventual transaction."

[23] The appellant states that Record 2 was not created by an officer or employee of the hospital and that there is nothing to suggest that the hospital had a statutory power or duty to carry out the activity - that is, concluding negotiations that resulted in the creation of the Record 2.

[24] The appellant further states that the hospital's evaluation of the sale was not a "core", "central" or "basic" function of the hospital; but arose from the hospital's status as a member of the affected party, not its function as a hospital.

[25] The appellant submits that the content of Record 2 does not relate to the hospital's mandate to provide health care services to the public and that there is no evidence of how Record 2 was used by the hospital. It also submits that there is no evidence of the customary practice of the hospital or other hospitals in relation to possession or control of records like Record 2.

[26] The requester not only disputes the authority of the appellant to argue at the appeal stage that the hospital does not have custody or control of Record 2, but also its contention that the language of the confidentiality agreement "...cannot be construed as an admission that [Record 2 is] within the hospital's custody or control." She states that the language of the Confidentiality Agreement should be read as an acknowledgement that, as an institution subject to *FIPPA*, it is possible that the hospital might receive an access request and the language instructs the hospital on its requirement to give notice.

[27] The requester submits that by issuing a decision on Record 2 in response to the *FIPPA* request, the hospital has decided that it was in its custody or control.

Analysis/Findings

[28] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[29] A record will be subject to the *Act* if it is in the custody OR under the control of

an institution; it need not be both.[1]

[30] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[2] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[31] The courts and this office have applied a broad and liberal approach to the custody or control question.[3]

[32] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[4] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [5]
- What use did the creator intend to make of the record?[6]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[7]
- Is the activity in question a "core", "central" or "basic" function of the institution?[8]
- Does the content of the record relate to the institution's mandate and functions?[9]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[10]

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[1] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[2] Order PO-2836.
[3] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.
[4] Orders 120, MO-1251, PO-2306 and PO-2683.
[5] Order 120.
[6] Orders 120 and P-239.
[7] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[8] Order P-912.
[9] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); and Orders 120 and P-239.

- If the institution does have possession of the record, is it more than "bare possession"?[11]

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?[12]

- Does the institution have a right to possession of the record?[13]

- Does the institution have the authority to regulate the record's content, use and disposal?[14]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[15]

[33] Considering these factors, I find that the hospital has custody or control of Record 2, the slide presentation.[16]

[34] Record 2 relates to the proposed linen and laundry services to be provided to the hospital. A copy of this record, less the information at issue in this appeal, has already been provided to the requester. It is undisputed that this record is in the possession of the hospital.

[35] The hospital is specifically mentioned in Record 2. The hospital was a member of the affected party when it was provided with a copy of this record. The record relates to the hospital's own laundry and linen services.

[36] Record 2 was provided to the hospital to give it information about a sale transaction the affected party was considering entering into. This transaction concluded as the required minimum number of hospitals, including the hospital in this appeal, agreed to enter into Services Agreements with the affected party. This Services Agreement was subsequently assigned by the affected party to the appellant.

[37] The confidentiality agreement entered into between the affected party and the hospital specifically states that the hospital is a member of the affected party and that *FIPPA* may require disclosure of information related to the sale transaction.

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[10] Orders 120 and P-239.
[11] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[12] Orders 120 and P-239.
[13] Orders 120 and P-239.
[14] Orders 120 and P-239.
[15] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[16] Given my finding, I do not need to address the requester's argument that it is too late for the appellant to raise this issue.

[38] The confidentiality agreement indicates that documents were provided to the hospital for the hospital's use in evaluating the transaction. The sale transaction concerned how laundry and linen services were to be provided to the hospital. I find that laundry and linen provisions, such as providing scrub suits, towels, and bedding to staff and patients, is a basic function of the hospital in allowing it to operate.

[39] Therefore, considering all the factors listed above and the parties' representations, I find that Record 2 is within the custody and under the control of the hospital.

B. Does the mandatory third party information exemption at section 17(1) apply to the records?

[40] 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,
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> > (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.

[41] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[17] 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.[18]

[42] For section 17(1) to apply, the institution and/or the third party must satisfy each

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[17] *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.*).
[18] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[43] The appellant states that it purchased substantially all of the assets of the affected party following a competitive, extensive and lengthy process. It states:

> As part of the sale process, [the appellant] provided a proposal to [the affected party] regarding the commercial terms on which they were prepared to provide laundry and linen management services to the member hospitals of [the affected party], including the hospital, as well as the commercial terms that they were prepared to offer to purchase substantially all of the assets of [the affected party].
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> Upon accepting this proposal, [the affected party] entered into the Services Agreement with the hospital on the commercial terms proposed as part of the sale process. Upon completion of the sale, the Services Agreement was assigned to the [appellant].
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> The sale was a commercial transaction between [the affected party] and [the appellant]. The hospital was not a party to the sale. The price and other commercial terms under which the sale was completed are highly confidential and commercially sensitive. Any information received by the hospital about the sale, including the price and commercial terms, was disclosed to the hospital in confidence by third parties...

Part 1: type of information

[44] The appellant states that as the request is for records relating to a commercial contract, the records contain commercial and/or financial information. It also states that the records contain a description of the process for minimizing loss of linens, linen carts and scrub suits, which is technical information.

[45] The affected party states that the information at issue in the Services Agreement is commercial and financial information, as it describes its business operation, costs, cost recovery models and pricing information.

[46] The requester agrees that the records may contain commercial information but

disputes the appellant's position that the records contain financial and technical information specifically whether the description of the process for minimizing loss of linens, linen carts and scrub suits falls within the definition of technical information.

[47] The other hospital states that the Services Agreement contains commercial and financial information.

Analysis/Findings re part 1

[48] The types of information referred to by the parties are listed in section 17(1) and 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.[19]
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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.[20] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[21]
>
> *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.[22]

[49] Based on my review of the records, I agree that they contain commercial and financial information relating to the buying and selling of laundry services. Therefore, part 1 of the test under section 17(1) has been met.

[50] Although the appellant submits that the records also contain technical information, it has not specifically identified where in the records this information is located. Nor can I ascertain such from my review of the records where technical information, as defined above, is located. Accordingly, I do not find that the information

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[19] Order PO-2010.
[20] Order PO-2010.
[21] Order P-1621.
[22] Order PO-2010.

at issue is technical information.

Part 2: supplied in confidence

Supplied

[51] 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.[23]

[52] 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.[24]

[53] 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.[25]

[54] 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.[26] 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.[27]

[55] Both the appellant and the affected party provided confidential and non-confidential representations on this issue.[28]

[56] The appellant states that during the sale process, it provided information to the affected party regarding the commercial terms on which the appellant was prepared to provide laundry and linen management services to the member hospitals as well as the commercial terms that they were prepared to offer to purchase substantially all of the

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[23] Order MO-1706.
[24] Orders PO-2020 and PO-2043.
[25] 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*).
[26] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[27] *Miller Transit*, above at para. 34.
[28] I will be only referring to the non-confidential representations of the parties in this order, although I have considered all of the parties' representations in their entirety.

assets of the affected party.

[57] The appellant submits that if the commercial terms of the Services Agreement (Record 1) are disclosed, a party with knowledge of the sale process could accurately infer the price and/or commercial terms of the sale because of the interrelationship between the appellant and the affected party. It states that the price and/or commercial terms of the sale were not negotiated with the hospital because the hospital was not a party to the sale (which was a transaction between the appellant and the affected party), though the hospital may have received such information in its capacity as a member of the affected party.

[58] The appellant further submits that the "inferred disclosure" exception applies to any information contained in the Services Agreement that could permit the accurate inference of the price and/or commercial terms of the sale. In addition, it states that the Services Agreement also contains descriptions of its business processes and that this information is immutable and the "immutability exception" applies to this information as well.

[59] Concerning Record 2, the appellant states that this record contains confidential information about the negotiations between the affected party and the appellant regarding commercial matters relating to the transaction, such as the term of the Services Agreement, extension options, pricing, key performance indicators, and exclusivity.

[60] The appellant notes that the Record 2 bears a legend stating "STRICTLY CONFIDENTIAL NOT FOR WIDER DISTRIBUTION", and that the hospital appears to have received this record via the affected party. In the circumstances, the appellant submits that the decisions finding that contracts are not "supplied" to institutions does not apply.

[61] The affected party states that one of the conditions to the completion of the sale of its assets to the appellant was the preparation of a template form of a Master Services Agreement containing specified pricing and cost recovery. It states that this template was negotiated between it and the appellant and that while a few hospitals attended certain meetings at which the appellant was present to discuss the MSA, the MSA was not negotiated by any hospital. It further states that after the transaction closed it assigned all of the Services Agreements to the appellant.

[62] The affected party states that the terms of the Services Agreement were supplied to the hospital and that if any particular member of the affected party did not agree to the template form of the MSA, they were not entitled to receive the benefits of the transaction.

[63] The affected party submits that the template terms are immutable as the terms were negotiated between it and the appellant and not negotiated by the hospital. As

well it submits that the Services Agreement is subject to the inferred disclosure exception as disclosure would permit outside parties to infer financial and commercial information of the sale transaction beyond the Services Agreement.

[64] With respect to Record 2, the affected party states that this record predates the Services Agreement and is solely information that reflected the commercial terms of an asset sale being negotiated between it and the appellant and was supplied to the hospital. It states that this record does not contain information about the hospitals. It states the information in this record:

> …appears to reflect certain information involving commercial, financial terms negotiated between [the affected party and the appellant], as well as certain internal operational and management process information that related solely to [the affected party]. The slide deck reflects a snap-shot in time of [this] extensive and long term negotiation…

[65] The other hospital states that its own Services Agreement was supplied to it in its capacity as a member of the affected party.

[66] The requester submits that the records were not "supplied." She states that as the members of the affected party included the hospital, the affected party's representatives in the negotiation of the Services Agreement would have been representing the interests of the hospital members and acting on their behalf.

[67] The requester submits that the fact that the hospital may not have attended all the meetings at which the MSA was being discussed does not negate in any way a finding that the Services Agreement was negotiated by the hospital and not supplied. She states:

> Organizations frequently do not directly negotiate contracts with third parties - their legal counsel do so on their behalf. Ultimately though, counsel's client has to agree to the terms of the contract negotiated by counsel. It can hardly be said that because the client was not at the negotiating table with counsel that the agreed-upon terms were not negotiated. As did [the affected party] in providing the hospital with the [Record 2], so too does counsel provide their client with information about the "offer on the table" which the client may accept or reject.
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> Furthermore, from a contracting perspective, it does not appear to make any commercial sense that the hospital members of [the affected party] had no say or provided no input into the commercial terms of the MSA, given that they would be the ultimate recipients of the services and paying the costs once the sale closed and the [Services Agreements] were assigned to [the appellant]. The … member owners of [the affected party] had to approve the sale, including the template form of the MSA.

> The … hospitals that did agree to the template form of the MSA, illustrates that the hospital, as [an affected party] member that did agree to the MSA, accepted the terms negotiated by [the affected party] on behalf of its members. Thus, the [Services Agreement] was negotiated, not supplied.

[68] The requester provided publicly available information that reflects information about the affected party member hospitals' agreement or non-agreement to the terms of the MSA. The requester states that while the sale process was an asset sale, those assets included the Services Agreements entered into between the affected party and its hospital members.

[69] The requester submits that the mere fact that some of the severed information in the Services Agreement describes the appellant's business processes (which may change over time) does not bring it within the "immutability" exception. It states that the fact that the business processes were included in the MSA demonstrates that they were acceptable for the needs of [the affected party] and its hospital members, including the hospital.

[70] The requester states that there exists publicly available information that provides detail from which the price of the sale could be directly calculated and therefore, the "inferred disclosure" of the sale price from disclosure of the records would be from information that is already in the public domain. She also submits that there is not nearly enough information in the records to draw any inferences about any other aspects of the price and/or commercial terms of the sale.

[71] The requester submits that the appellant and the affected party have failed to describe the financial relationship between the terms of the Services Agreement for the provision of laundry and linen services, and the terms of an asset sale of the affected party, a not-for-profit corporation.

[72] Concerning Record 2, the requester relies on the same submissions that she provided for the Services Agreement. She also points out that Record 2 was provided to the hospital in its capacity as a member of the affected party to evaluate the sale transaction, a transaction that was being negotiated by the Board of Directors, on behalf of its members.

[73] In reply, the appellant states that the affected party did not negotiate on behalf of the hospital or other hospitals and that such a finding would be a significant error because it ignores the separate legal personality of the affected party and/or mistakenly confuses an agency relationship with the relationship between a corporation and its members/shareholders.

[74] The appellant submits that the absence of the hospital and other hospitals from the negotiations of the form of the MSA distinguishes this case. The appellant relies on

previous IPC decisions finding that unit pricing prepared by a supplier and presented to an institution was "supplied", not "negotiated", to demonstrate that the requester overreaches in its arguments. It states that none of the hospitals played a role in the process by which the MSA was developed and that the process was conducted by the affected party.

[75] The appellant submits that the information was not subject to negotiation and the sale price for the assets of the affected party is not in the public domain.

[76] The affected party did not provide reply representations.

[77] In sur-reply, the requester states that she is not seeking access to the sale price. She states that the MSA was a valued asset of the affected party and after the sale, the Services Agreements would be assigned from the affected party to the appellant and that hospital members had to agree to enter into the MSA component of the sale in order to receive a percentage of the monies received from the sale itself.

[78] The requester submits that there would be an ongoing relationship between the hospitals and the appellant with respect to the linen and laundry services that the hospitals would receive post-sale. She also submits that it is not possible that the affected party went to the table without having a clear understanding of the terms of the MSA that would be satisfactory to the hospitals and conversely would not have agreed to a MSA containing terms that it knew would not receive the requisite hospital member approval.

[79] Furthermore, she states that previous orders of the IPC have made it clear that approval and acceptance of an agreement (i.e. in this case by the hospital) leads to a finding that the Services Agreement was "negotiated" and not "supplied". She states:

> …the fact that the hospital had the option of agreeing to the sale, including the terms of the MSA to be assigned, leads to the conclusion that the Sale Agreement was negotiated. This is because the information at issue in this appeal contained in the Sales Agreement relates to the appellant, regardless of the fact that this may not have been a negotiation typical in the IPC decisions involving RFPs.[29] If this were not the case, any third party wishing to contract with the government could create a separate legal entity "as the face of the negotiations" and then claim that the resultant contract was supplied by the independent legal entity that executed the contract with the government institution, thus circumventing the access provisions of *FIPPA*.

[80] In sur-sur-reply, the appellant states that although the members of the affected party had the power to approve the overall sale transaction, the discussions regarding

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[29] Request for Proposals.

the form of the MSA were between the appellant and the affected party.

[81] The appellant submits that both the revenue and operating costs can be inferred from disclosure of the records.

Analysis/Findings re supplied

Record 1 - the Services Agreement

[82] Based on my review of the parties' representations and the information at issue in the Services Agreement, I find that this information was not supplied to the hospital. The Services Agreement is a contract entered into between the hospital and the affected party, which was later assigned by the affected party to the appellant.

[83] The information at issue in the Services Agreement consists of the following:

At Issue	**Description**
page 2 of the SA	1.1(o) Change of Control 1.1(t) consistent with past practices
page 3 of the SA	1.1(ee) Effective Date
Page 6 of the SA	1.1(jjjj) Transaction Agreement
page 7-8 of the SA	2.2 Exclusivity
page 18 of the SA	6.2(a) Extension after Initial Term 6.3 Subsequent Extensions
page 29 of the SA	7.16 Assignment and Enurement 7.17
page 3 of the Services Schedule	Web-Based Ordering System
pages 5 to 8 of the Services Schedule	Services Schedule, Excessive Loss/Inventory Management A. Lost Linen Carts B. Lost Linens C. Lost Scrub Suits

first 5 pages of KPI (Key Performance Indicators) Schedule	
both pages of the Pricing Schedule	Price Protection
last two columns of Appendix A of the Pricing Schedule	Acute Facility and LTC Facility
Legacy Services Schedule	

[84] As stated by the appellant, the affected party had the power to own and sell assets and negotiate and enter into contracts with other parties, subject to any applicable requirements that required member approval of significant transactions by the affected party. The hospital was a member of the affected party. The sale of assets by the affected party to the appellant was a significant transaction which the hospital, as a member of the affected party, would have had to approve. As stated by the appellant:

> …although the member [hospital]s of [the affected party] had the power to approve the overall sale transaction in their capacity as members, the discussions regarding the form of [the] Services Agreements were between the appellant and [the affected party].
>
> …the sale price was a term of a separate agreement between [the appellant and the affected party] but disclosed to the hospitals in confidence so they could approve the overall sale transaction in their capacity as members of [the affected party].

[85] Nevertheless, even if the hospital was not involved in approval of the asset sale between the affected party and the appellant, the contract at issue in this appeal is the Services Agreement entered into between the affected party and the hospital, not an agreement between the affected party and the appellant for the sale of the affected party's assets. The entering into a Services Agreement by a minimum number of hospitals may have been a condition of the asset sale, but as pointed out by the requester, not all of the hospital members of the affected party were required to or did enter into a Services Agreement for their hospital with the affected party in order for the sale transaction to be completed.

[86] The MSA template is not at issue in this appeal. Only certain portions of the actual Services Agreement entered into between the affected party and the hospital are at issue. Although the template MSA may have been identical in many respects to the actual Services Agreement entered into by the hospital, this does not mean that this

agreement was supplied.

[87] The Services Agreements were not identical between hospitals as noted by the appellant. The appellant indicated in its representations that, besides the Services Agreements for this hospital and the other two hospitals that I was adjudicating at the same time, a number of other hospitals had entered into a Services Agreement with the affected party and that these other hospitals "…should be notified and consulted prior to any decision in this appeal."

[88] Before notifying these other hospitals, I asked the appellant the following question:

> What is the difference between the three … Services Agreements at issue in these appeals[30] and the agreements with other hospitals that are not parties to these appeals?

[89] The appellant replied as follows:

> We are advised that all [the] Services Agreements with the [#] hospitals/health care facilities …were identical except for the information about each facility (name, address, type of facility, etc.) and two schedules:
>
> • Supplier's Delivery/Ordering Process Schedule - Existing schedules for delivery/pick-up of linens and laundry were maintained but were necessarily different as between hospitals, hence this schedule was different.
>
> • Legacy Services Schedule - This schedule described "Legacy Services" at each hospital (i.e., certain services provided to the hospital using in-house resources or third party suppliers other than Booth). These "Legacy Services" necessarily differed between hospitals, hence this schedule was different.

[Emphasis added by me]

[90] However, the fact that the terms of the Services Agreements do not significantly vary from hospital to hospital does not mean that each Services Agreement is not negotiated. As indicated in Order MO-1706:

> [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied"

[30] PA17-166, PA17-275, and PA17-403.

> 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.[31]

[91] I find that the hospital, as a member of the affected party and also in its own right as the defined customer in the Services Agreement between it and the affected party, would have had to agree to the terms of this agreement.

[92] As indicated by the appellant, the Services Agreement entered into by the hospital was not an identical agreement to the Services Agreements entered into by the other hospitals. Moreover, and as noted above, the hospital had the choice of whether or not to enter into the Services Agreement.

[93] I have considered whether the "inferred disclosure" and "immutability" exceptions apply to the information at issue in the Services Agreement in this appeal.

[94] 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.

[95] The appellant submits that the "inferred disclosure" exception applies to any information contained in the Services Agreement that could permit the accurate inference of the price and/or commercial terms of the sale transaction between the appellant and the affected party.

[96] In particular, it states:

> To formulate the successful proposal, the appellant developed financial models based on the anticipated volumes of laundry and linen services provided by [the affected party]. At a high level, the anticipated financial return on the purchase of [the affected party's] assets can be derived by forecasting the revenue over the term of the Services Agreement, which can be obtained by multiplying the unit price per kilogram of laundered material (which can be found on unit pricing schedules to the Services Agreement and is consistent across all [#] largely identical Services Agreements, thus being representative of the vast majority of the customer base) multiplied by the estimated annual volume of [the affected party] (a figure which has been publicly disclosed …). Once a revenue profile is established, an industry average earnings before interest, taxes, depreciation and amortization ("EBITDA") margin range can be applied, with EBITDA being a proxy for the cash flow an investor

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[31] This approach was upheld in *Boeing v. Ontario (Ministry of Economic Development and Trade)* Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

> can expect to obtain from an investment. Alternatively, a competitor can use its own EBITDA margin as a proxy for [the appellant's]. Even if an industry average EBITDA margin range or other proxy margin range is not available, one could simply apply the relevant metric from the public comparable company [name], which is required to publicly disclose its financial information on [the System for Electronic Document Analysis and Retrieval]. This cash flow forecast, when combined with an estimated purchase price for [the affected party's] assets, which can be approximated by taking publicly disclosed acquisition multiples known within the industry and applied to the forecasted EBITDA, can be used to derive the anticipated return on the investment.

[97] I have reviewed this explanation and the Services Agreement, and considered that other Services Agreements may have identical information about the unit price per kilogram. I do not agree that the affected party's[32] revenue or anticipated return on investment can be ascertained from disclosure of the Services Agreement.

[98] I find that the revenue generated from the Services Agreement is indefinite and uncertain. The Services Agreement provides for revenue to be generated not only from the affected party charging the hospital for services by the kilogram for a number of different items, but also by the affected party charging the hospital by the piece for a number of items. As well, certain items do not have a definite price in the pricing schedule but indicate that the price is to be determined.

[99] As well, concerning the return on investment in particular, the annual volume of linen and laundry services to be provided referred to in the appellant's explanation is not a fixed and current price but is an estimated figure for 2016.

[100] I do not accept that the information in the Services Agreement could be used to calculate the appellant's revenue resulting from the sale transaction and that, therefore, the inferred disclosure should apply. The appellant's explanation of its calculations to determine the price or commercial terms of the sales transaction or the return on its investment is based on a number of approximations and assumptions.

[101] As well, I find that given the wide range of products and services listed in the Services Agreement, I cannot determine how the operating costs of the appellant (which was assigned the Services Agreement by the affected party) could be ascertained from disclosure of the Services Agreement.

[102] I also find that the immutability exception does not apply to the information at issue in the Services Agreement. As noted above, the immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation.

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[32] When the MSA was assigned, this became the appellant's revenue.

[103] The appellant states that the Services Agreement contains descriptions of its business processes and that this information is immutable. The appellant has not identified which business process it is referring to, nor can I ascertain such information from my review of the information at issue in the Services Agreement. Similarly, I cannot ascertain how the information at issue in the Services Agreement could reasonably be expected to reveal the sale price of the affected party's assets to the appellant. This sale price is not contained in either record at issue in this appeal.

[104] In conclusion, I find that the Services Agreement was not supplied to the hospital by either the affected party or the appellant. Accordingly, part 2 of the test under section 17(1) has not been met for the Services Agreement.

[105] As all three parts of the test under section 17(1) must be met, this exemption does not apply. As no other mandatory exemptions apply to this record, I will order the Services Agreement disclosed.

Record 2 – the slide presentation

[106] As noted above, at issue in this record is the following information:

Slide Page #	**Title**
3	Ongoing Service Terms
5	3. Key MSA (Master Services Agreement) Changes[33]
37	04 Key MSA Terms Key Performance Indicators: Member Representative Quality Committee
38	04 Key MSA Terms Key Performance Indicators: Summary
39	04 Key MSA Terms Other Key Terms: Exclusivity Provision
40	Key MSA Terms Other Key Terms: Inventory Management and Excessive Loss Mechanism
41	04 Key MSA Terms Other Key Terms: Lost Linen Carts and Lost Scrub Suits

[107] Record 2 forms part of a slide deck presentation distributed as part of concluding negotiations between the affected party and the appellant that led to the eventual sale transaction.

[108] This record predates the Services Agreement. It is not a contract. This record

[33] Only portions of page 5 of Record 2 are at issue.

contains information about the proposed Master Services Agreement and the procedure for the sale transaction.

[109] This record reflects a snap-shot in time of the negotiation for the sale transaction. I agree with the affected party and the appellant that this record was supplied to the hospital.

[110] As the information at issue in Record 2 was supplied to the hospital, I will now consider whether it was supplied in confidence.

In confidence

[111] 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.[34]

[112] 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.[35]

[113] Both the appellant and the affected party point out that each page of Record 2 at issue contains the words:

> STRICTLY CONFIDENTIAL NOT FOR WIDER DISTRIBUTION[36]

[114] The appellant further states that

> As part of the sale process, [it] also provided commercial and financial information in confidence to [the affected party] regarding the price and other commercial terms on which they would acquire substantially all of

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[34] Order PO-2020.
[35] 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.
[36] Original wording is in capital letters.

> the assets of [the affected party]. As is customary in competitive bidding processes, they expected that such information would be kept confidential and not shared with any other party, except [the affected party's] professional advisers and members, and then only in confidence. In particular, they expected that under no circumstances would such information be shared with other bidders competing for the purchase of [the affected party's] assets.

[115] The affected party states that the information at issue in Record 2 is solely information that reflected the commercial terms in the process of being negotiated between it and the appellant, not information about the hospitals. It states that it was information at that point in time about third parties who were in the process of negotiating the terms of an asset sale between themselves.

[116] It states that the hospital received the information in its capacity as a member of the affected party and that all the hospitals that had received a copy of Record 2 had signed a separate confidentiality agreement, which made it clear that all information was to be kept strictly confidential, not only from outside persons but included strict limitations on who within each hospital may see the information.

[117] The requester states that the confidentiality agreement recognizes that Record 2 could be subject to a request under *FIPPA*. She acknowledges that if the information at issue was "supplied" to the hospital by the appellant and the affected party, these two parties held a reasonable expectation of confidentiality. However, as demonstrated by language in the confidentiality agreement she submits that this expectation was subject to the provisions of *FIPPA* and the process and findings of the adjudicator in this appeal.

[118] I agree with the affected party and the appellant that Record 2 was supplied in confidence to the hospital. Each page of this record is marked confidential, and the hospital and the affected party entered into a confidentiality agreement that would have covered this record.

[119] I find that Record 2 was:

- communicated to the hospital on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the affected 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

[120] Therefore, I find that Record 2 was supplied in confidence and part 2 of the test

has been met for Record 2.

Part 3: harms re: Record 2

[121] The party resisting disclosure 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.[37]

[122] The failure of a party resisting disclosure to provide such 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.*[38]

[123] 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 sufficient evidence to support the harms outlined in section 17(1).[39]

[124] The appellant states that Record 2 discloses confidential information about the negotiations between the affected party and the appellant regarding commercial matters relating to the transaction, such as the term of the MSA, extension options, pricing, Key Performance Indicators, and exclusivity.

[125] The appellant provided this chart detailing the information at issue in Record 2:[40]

Page	**Title**	**Basis for Exemption**
3	Ongoing Service Terms	Discloses information about negotiation of the commercial terms, which would allow "inferred disclosure" of other confidential information.
5	3. Key MSA Changes	Discloses information about negotiation of the commercial terms, which would allow "inferred disclosure" of other confidential information.

[37] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[38] Order PO-2435.
[39] Order PO-2435.
[40] At issue is the entirety of the pages, except for page 5, where only portions of that page are at issue.

37	04 Key MSA Terms Key Performance Indicators: Member Representative Quality Committee	The information belongs to the affected party but describes aspects of the confidential negotiation process.
38	04 Key MSA Terms Key Performance Indicators: Summary	Discloses information about negotiation of the commercial terms, which would allow "inferred disclosure" of other confidential information.
39	04 Key MSA Terms Other Key Terms: Exclusivity Provision	Discloses information about negotiation of the commercial terms, which would allow "inferred disclosure" of other confidential information.
40	04 Key MSA Terms Other Key Terms: Inventory Management and Excessive Loss Mechanism	Discloses information about negotiation of the commercial terms, which would allow "inferred disclosure" of other confidential information. Describes immutable business processes used by the appellant.
41	04 Key MSA Terms Other Key Terms: Lost Linen Carts & Lost Scrub Suits	Discloses information about negotiation of the commercial terms, which would allow "inferred disclosure" of other confidential information. Describes immutable business processes used by the appellant.

[126] The affected party states that Record 2 contains information relating to the results of a negotiation, at a point in time, between it and the appellant and does not reflect information of or about the hospital. It submits that disclosure would permit outside parties to infer the details of the transaction beyond the Services Agreement and would harm its commercial and other relationships and possibly harm its other former members.

[127] The requester states that there is not enough information in this record that could result in harms and that, even if disclosure could lead to accurate inferences about the sale price, the sale price does not equal the appellant's return on investment (the "ROI") for the asset sale.

[128] The requester further states that the ROI does not indicate anything about the profitability of the sale, which is based on further projections, information which is found no where in the record. Nor, she submits, would disclosure of the record result in the ability to determine or infer anything about other key issues needed to determine returns including timing of additional capital injections, the year of exit and the exit multiple/valuation.

[129] The requester states that as the affected party has very limited, if any, current operations, disclosure could not reasonably be expected to result in any harms to it.

[130] In reply, the appellant states that there is no suggestion that this record is incorporated by reference into the Services Agreement and that it discloses information that has nothing to do with the Services Agreement. The appellant provides the following examples:

- page 3 discloses information about the affected party's then-current model for inventory losses;
- page 38 discloses information about the affected party's on-time delivery performance during the previous three years; and
- page 40 discloses information about soiled-to-client cost recovery charges within the appellant's operations for its other customers.

[131] The appellant further submits that Record 2 also appears to disclose information about the history of the negotiations between it and the affected party, thereby revealing information about concessions that the appellant was prepared to make during negotiations. It states that page 5, for example, discloses information about "changes" to the MSA.

[132] In reply, the requester states if there is information in Record 2 that accurately describes portions of the Services Agreement and the IPC finds that the Services Agreement should be disclosed, Record 2 should also be ordered to be disclosed to her.

[133] In further reply, the appellant states that disclosure of Record 2 could result in disclosure of its revenue and the sale price.

[134] The affected party did not provide reply representations.

Analysis/Findings re part 3 for Record 2

[135] As stated above, Record 2 forms part of the affected party's slide deck presentation about the MSA distributed to its hospital members as part of concluding negotiations between it and the appellant that led to the eventual sale transaction.

[136] This record predates the Services Agreement. It is not a contract. This record contains information about key terms of the proposed MSA and reflects a concluding snap-shot of the form of the MSA for the sale transaction and includes key changes from the previous agreements the hospitals had with the affected party for linen and laundry services.

[137] As noted above, the appellant provided specific additional information about the following three pages:

- page 3 discloses information about the affected party's then-current model for inventory losses;

- page 38 discloses information about the affected party's on-time delivery performance during the previous three years; and

- page 40 discloses information about soiled-to-client cost recovery charges within the appellant's operations for its other customers.

[138] Although the appellant has provided specific representations on certain information in these three pages, it has not indicated how disclosure could reasonably be expected to result in the harms set out in section 17(1).

[139] Pages 3 and 38 concern information about the affected party. I have no evidence that the affected party, as a linen and laundry services provider, is still in operation. Therefore, I cannot agree that part 3 of the test under section 17(1) has been met for pages 3 and 38.

[140] I have carefully reviewed page 40. I find that it does not contain actual charges charged by the appellant for its other customers.

[141] The appellant has also identified that Record 2 contains contract terms, renewal rights and service levels and is concerned that competitors can use the information in Record 2 to adjust their bids on future business contracts to undercut the appellant. It also submits that hospitals offering such contracts can use their knowledge of the business terms as a starting point for negotiations with the appellant, unduly constraining its negotiating position in future negotiations for linen and laundry contracts.

[142] The information at issue in Record 2 is primarily a brief summary of some of the information I have ordered disclosed in Record 1, as well as key changes from the previous Services Agreements that the hospitals had for linen and laundry services. Record 1 is dated September 2016 and Record 2 predates this record.

[143] I found above that disclosure of the information at issue in Record 1 could not reasonably expected to reveal the revenue and operating costs of the appellant or the sale price. I maintain this finding for similar information appearing in Record 2.

[144] Although the appellant submits that Record 2, "[d]iscloses information about negotiation of the commercial terms, which would allow inferred disclosure of other confidential information [and describes] immutable business processes used by the appellant", the appellant has not specified what confidential information or immutable business processes could be revealed by disclosure of Record 2.

[145] I find that the information in this record is not sufficient to be reasonably expected to result in the harms claimed by the appellant if it is disclosed.

[146] The affected party's representations on part 3 of the test for Record 2 indicate that disclosure would harm its commercial and other relationships and possibly harm its

former members. I find that the affected party also has not provided sufficient evidence under part 3 of the test for Record 2 to establish that the harms could reasonably be expected to occur. Its representations are about merely possible or speculative potential harms.

[147] I also find, based on my review of Record 2, and the appellant's representations, that the appellant has not provided the requisite evidence under part 3 of the test for Record 2.

[148] I find that the appellant's representations also are about merely possible or speculative potential harms. In particular, I do not agree with the appellant that disclosure of Record 2 could reasonably be expected to interfere significantly with its contractual or other negotiations.

[149] I find that part 3 of the test under section 17(1) has not been met for Record 2 and this record is not exempt under this exemption. As no other mandatory exemptions apply to this record, I will order it disclosed.

ORDER:

I order the hospital to disclose the information at issue in the records to the requester by **November 7, 2018** but not before **November 2, 2018.**

Original Signed by: October 2, 2018

Diane Smith
Adjudicator