Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3887

Appeal PA17-403

Campbellford Memorial Hospital

October 2, 2018

Summary: Campbellford Memorial Hospital (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. The third party appealed this decision, claiming the application of the mandatory third party information exemption in section 17(1) to portions of this record.

This order finds that the information at issue in the record 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, section 17(1).

Orders cited: Order MO-1706.

OVERVIEW:

[1] Campbellford Memorial Hospital (the hospital) received a two-part request for general records under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), as follows:

> 1. The contract, 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 [named company] or [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 a third party, which 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 partial access to the responsive records. Access was denied to some portions of the responsive records pursuant to sections 17(1)(a) and (c) of the *Act*. The hospital also stated that certain emails did not form part of a specified Services Agreement and were therefore not responsive to the request and will not be released.

[3] The hospital issued another decision to the requester and the third party stating that one additional record was located that is responsive to part 2 of the request. The hospital stated that it was granting full access to this newly located record, an email dated September 27, 2016. The hospital also stated that it would release this record pending an appeal by the third party.

[4] Subsequently, the hospital issued a revised decision to the requester and the third party granting full access to the Services Agreement.

[5] The requester appealed the hospital's decision. Appeal PA17-37 was opened to deal with the requester's concerns. Following the hospital's revised decision granting full access to the responsive records, appeal PA17-37 closed. The third party, now the appellant, appealed the hospital's decisions and this file PA17-403 was opened to deal with their concerns.

[6] During mediation of appeal file PA17-403, the requester indicated that she was seeking the portions of the Services Agreement that the appellant objected to being disclosed.

[7] 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 record at issue and wished to be added as a party to the appeal.

[8] Accordingly, appeal file PA17-403 proceeded to adjudication, where an adjudicator conducts an inquiry. Representations were sought from the hospital, the

appellant, the requester and the affected party. 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*.

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

[10] 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.

[11] In this order, I find that the information at issue in the Services Agreement is not exempt under section 17(1) and I order the hospital to disclose it to the requester.

RECORD:

[12] At issue are the following portions of the Services Agreement (the SA)[1] between the hospital and the affected party:

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

[1] The SA was assigned to the appellant by the affected party.

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	

DISCUSSION:

Background:

[13] The only issue in this appeal is whether the information at issue in the Services Agreement is exempt from disclosure under section 17(1). The Services Agreement is an agreement entered into between the affected party and the hospital for linen and laundry services. The affected party assigned the Services Agreement to the appellant.

[14] The affected party was formerly 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, Campbellford Memorial Hospital.

[15] The appellant and the affected party submit that the form of the SA, the Master Services Agreement, 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, the Master Services Agreement (the MSA), was part of the sale transaction.

[16] 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.

Does the mandatory third party exemption at section 17 apply to the record?

[17] Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
> >
> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[18] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[20] 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].
>
> 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

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

[22] 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.

[23] The requester agrees that the record may contain commercial information but disputes the appellant's position that the record contains 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.

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

Analysis/Findings re part 1

[25] 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.[4]
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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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]
>
> *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.[7]

[26] Based on my review of the record, 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.

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

Part 2: supplied in confidence

Supplied

[28] The requirement that the information was "supplied" to the institution reflects

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

the purpose in section 17(1) of protecting the informational assets of third parties.[8]

[29] 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.[9]

[30] 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.[10]

[31] 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.[11] 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.[12]

[32] Both the appellant and the affected party provided confidential and non-confidential representations on this issue.[13]

[33] 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 assets of the affected party.

[34] The appellant submits that if the commercial terms of the Services Agreement 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

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[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] 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*).
[11] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[12] *Miller Transit*, above at para. 34.
[13] 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.

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.

[35] 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.

[36] 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.

[37] 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.

[38] 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.

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

[40] The requester submits that the record was 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.

[41] 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. …Counsel provide their client with information about the "offer on the table" which the client may accept or reject.
>
> 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.
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> 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.

[42] 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.

[43] 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.

[44] 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 record would be from information that is already in the public domain. She also submits that there is not nearly enough information in the record to draw any inferences about any other aspects of the price and/or commercial terms of the sale.

[45] 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.

[46] 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.

[47] 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.

[48] 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.

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

[50] 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.

[51] 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.

[52] 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.[14] If this were not the case, any third party wishing to contract with the government could create a

[14] Request for Proposals.

> 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*.

[53] 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 the form of the MSA were between the appellant and the affected party.

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

Analysis/Findings re supplied

[55] 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.

[56] 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	

[57] 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].

[58] 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.

[59] 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.

[60] 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."

[61] 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[15] and the agreements with other hospitals that are not parties to these appeals?

[62] 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]

[63] However, the fact that the terms of the Services Agreements do not significantly

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

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" 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.[16]

[64] 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.

[65] 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.

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

[67] 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.

[68] 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.

[69] 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 [number of Services Agreements]

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[16] 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.).

> 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 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.

[70] 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[17] revenue can be ascertained from disclosure of the Services Agreement.

[71] 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.

[72] 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.

[73] 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.

[74] 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

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

(which was assigned the Services Agreement by the affected party) could be ascertained from disclosure of the Services Agreement.

[75] 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.

[76] 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 the record at issue in this appeal.

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

[78] 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.

ORDER:

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

Original Signed by: October 2, 2018

Diane Smith
Adjudicator