Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4004

Appeal PA18-156

Royal Ottawa Health Care Group

October 31, 2019

Summary: The Royal Ottawa Mental Health Centre, a branch of the Royal Ottawa Health Care Group, (the hospital) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* for records relating to the provision of laundry services to the hospital. The hospital denied access to the records in part citing the mandatory third party information exemption in section 17(1) and the discretionary solicitor-client privilege exemption in section 19. The requester appealed that decision to the IPC.

In this order, the adjudicator partially upholds the hospital's decision under both exemptions. As a preliminary matter, the adjudicator finds that the records are in the custody or control of the hospital. The adjudicator also upholds the hospital's decision that two pages of the records are not responsive to the appellant's request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, F.31, as amended, sections 10(1), 17(1)(a) and 19(a).

Orders Considered: Orders MO-3756 and PO-3154.

OVERVIEW:

[1] The Royal Ottawa Mental Health Centre, a branch of the Royal Ottawa Health Care Group, (the hospital or the ROHCG) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following records relating to the provision of laundry services to the hospital:

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 by a named company (the affected party)].

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.

3. All minutes of meetings of the Board of Directors of [the affected party], and any information included in the Board packages and other materials provided to Board Directors from 2014 to the date of the request.

4. All financial statements of [the affected party] from 2014 to the date of this request.

[2] Following notice to the affected party, the hospital issued a decision to the requester granting access in part to the responsive records. The hospital stated that it denied access to some responsive records pursuant to sections 17(1)(a) and (c) (third party information) of the *Act*.

[3] The requester, now appellant, appealed that decision.

[4] During mediation, the hospital provided the appellant with an index of records. The index of records indicated that along with sections 17(1)(a) and (c), the hospital was adding section 19 (solicitor-client privilege) of the *Act* to deny access to some responsive records.

[5] As some of the records concerned the affected party, the mediator contacted it to seek consent to disclose those records to the appellant. The affected party later consented to disclose some additional information.

[6] Subsequently, the hospital disclosed those records for which consent was obtained. The hospital continued to withhold the remaining responsive records pursuant to sections 17(1)(a) and (c) and 19 of the *Act*. The hospital also stated that it was no longer relying on sections 17(1)(a) and (c) to withhold pages 86 to 88 of the records, because it was now withholding those pages as not responsive to the request.

[7] As further mediation was not possible, this appeal proceeded to the adjudication stage, where an adjudicator conducts an inquiry. Representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] In its representations, the hospital advised that it had disclosed the cover email at page 86 of the records. Therefore, this page is no longer at issue in this appeal.

[9] In this order, I partially uphold the hospital's decision to withhold the information

at issue in the records under sections 17(1)(a) and 19(a). I also uphold the hospital's decision that two pages of the records are not responsive to the appellant's request.

RECORDS:

[10] Based on the hospital's index of records, I have constructed the following index of records categorizing the records:

Record number	Description	Page	Exemptions
1	Letter to affected party's board of directors listing documents to review prior to meeting - May 2017	1 (part)	17(1)(a) & (c)
2	Affected party's board meeting agendas - May and September 2017	2 and 75 (part)	17(1)(a) & (c)
3	Minutes of affected party's board meetings - March, May and September 2017	4, 6, & 76 to 78 (part) 5, & 104 to 105 (entire)	17(1)(a) & (c)
4	Financial statements of the affected party - March, April and August 2017	34 to 50, 67 to 69, & 82 to 84 (entire)	17(1)(a) & (c)
5	Affected party's Year in Review 2016-2017	51 to 58	17(1)(a) & (c)
6	Affected party's business reports - May and September 2017	70 to 71, & 80 to 81 (entire)	17(1)(a) & (c)
7	Meeting minutes of a third party - October 2016	87 to 88	Non-responsive
8	Emails to affected party board members - January and October 2017	124 to 125 (entire) 131 (part)	17(1)(a) & (c) for pages 124, 125, and part of 131 19 for part of page 131
9	Memo from law firm to affected party - April 2011	126 to 130	19

10	Schedule D, Price List to the Linen Services Agreement - September 2008	144 to 149	17(1)(a) & (c)

ISSUES:

A. What is the scope of the request? Are pages 87 and 88 of the records responsive to the request?

B. Does the mandatory third party information exemption at sections 17(1)(a) or 17(1)(c) apply to the information at issue in the records?

C. Does the discretionary solicitor-client privilege exemption at section 19(a) apply to pages 126 to 131 of the records?

D. Did the hospital exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Preliminary Issue – Does the hospital have custody or control of the records?

[11] In its representations, the affected party disputes that the hospital has custody or control of the records. It indicates that it provides hospital laundry and linen services to over 70 facilities throughout Ontario and Quebec. The affected party states that since its initial foundation in 1971, representatives of hospitals have been appointed as members of its board of directors. Accordingly, a representative from the hospital is an acting board member of the affected party.

[12] The affected party submits that the records, although in the hospital's possession, are not in the possession of the hospital for the reason of the hospital's operations. The affected party states that the records were supplied in confidence to the members of the affected party's board, which includes a representative from the hospital. It otherwise agrees with the hospital's decision to sever certain information from the records.

[13] The hospital indicates that all of the records at issue were supplied to it as they were provided to its Vice-President and Chief Financial Officer (the VP) as a board member for the affected party.

Analysis/Findings

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

[15] 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]

[16] 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).

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

[18] 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]

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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.

- 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]

- 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]

[19] Considering these factors, I find that the hospital has custody or control of the records.

[20] The records relate to the affected party, which is the linen and laundry services provider for the hospital. Portions of the records at issue, and other similar records, have already been provided to the appellant by the hospital. It is undisputed by both the hospital and the affected party that the records are in the possession of the hospital.

[21] The hospital has claimed that certain information in the records is subject to the mandatory section 17(1) exemption or the discretionary section 19 exemption.

[22] At no time during the request stage, or during the mediation or the adjudication stage of the appeal, did the hospital submit that it does not have custody or control of the records. In particular, the IPC's Mediator's Report did not identify it as an issue in this appeal to be adjudicated upon by me.

[23] One of the records in particular, Schedule D, is an attachment to the agreement

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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.

entered into between the affected party and the hospital. When the records at issue were created, the hospital was represented on the affected party's board of directors by its VP.

[24] I do not agree with the affected party that the hospital's VP only received copies of the records as a member of the affected party's board of directors. I find that at all times the hospital had custody or control of the records.

[25] The mediator's report indicates that during mediation, the mediator had discussions with the appellant, the affected party and the hospital. The hospital provided the appellant with an index of records. The index of records indicated that, along with sections 17(1)(a) and (c), the hospital was adding section 19 of the *Act* to deny access to some responsive records.

[26] As some of the records concerned the affected party, the mediator contacted the affected party seeking its consent to disclose its records to the appellant. The affected party then consented to disclose additional information.

[27] The mediator's report did not include the issue of custody or control of the records. The cover letter to the mediator's report invited the hospital to advise the mediator of any errors in her report. The hospital did not raise the issue of custody or control of the records at that point, nor did it raise it in its representations as an issue to be determined by me.

[28] The affected party was provided with a copy of the records at the request stage and was asked to provide the hospital with its position on disclosure. In response, the affected party objected to disclosure of certain pages of the records but did not argue that the records were not in the hospital's custody or control.

[29] The records relate to the hospital's own laundry and linen services provider. Providing scrub suits, towels, and bedding to staff and patients is a basic function of the hospital's operations, and I find that the records at issue therefore relate to a basic function of the hospital. The records were provided voluntarily to the hospital and there is no indication thereon that the hospital was limited in its use of the records.

[30] Therefore, considering all of the above, including the parties' representations, I find that the records are within the custody of and under the control of the hospital. Given this finding, I do not need to address the appellant's argument that it is too late for the affected party to raise this issue.

Issue A: What is the scope of the request? Are pages 87 and 88 of the records responsive to the request?

[31] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[32] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[16]

[33] To be considered responsive to the request, records must "reasonably relate" to the request.[17]

[34] The hospital states that pages 87 and 88 are minutes of a board meeting and are not responsive to the request because they pertain to documents supplied by a company not named in the request. This company does not provide laundry services. It states that these pages were erroneously identified as responsive.

[35] The appellant asks that I make an independent determination as to these two pages.

Analysis/Findings

[36] I find that the appellant's request provided sufficient detail to identify the records responsive to the request. This request sought records about a named company that provided the hospital with linen services.

[37] Pages 87 to 88 concern another company not mentioned in the request. I agree with the hospital, and I find that these two pages are not responsive to the appellant's request.

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[16] Orders P-134 and P-880.
[17] Orders P-880 and PO-2661.

Issue B: Does the mandatory third party information exemption at sections 17(1)(a) or 17(1)(c) apply to the information at issue in the records?

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

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[39] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[18] 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.[19]

[40] 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

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

Part 1: type of information

[41] The hospital indicated in its representations that the information for which it has claimed sections 17(1)(a) and (c) is:

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

- Audited Financial Statement (pages 34 to 50);
- Year In Review document (pages 51 to 58);
- Financial Statements (pages 67 to 69 and 82 to 85);
- Business Report (pages 70, 80 to 81 and 104 to 105);
- Email correspondence regarding memorandum of law (pages 124 to 125 and 131); and,
- Schedule D - Price List to the Linen Services Agreement (pages 144 to 149).

[42] The hospital supplied an index of records that also lists the following additional pages or portions of pages as being at issue under sections 17(1)(a) and (c):

- Board meeting documents – pages 1 to 2 and 4 to 6;
- Financial Statements - pages 75 to 78.

[43] As section 17(1) is a mandatory exemption, I will consider whether this exemption applies to all of the information listed as being at issue in the hospital's index of records, above, not only the records specifically indicated in its representations. I note that the affected party agrees with all the severances made to the records by the hospital.

[44] The hospital states that the withheld information is commercial and financial in nature as it relates to the buying and selling of services involving the hospital and the affected party.

[45] It states that the financial information consists of information relating to pricing practices, profit and loss data, overhead and operating cost, assets, profit-making strategies, upcoming bids, business development and growth, business strategies and cost saving initiatives.

[46] The affected party reiterates the hospital's representations on part 1 of the test under section 17(1).

[47] The appellant questions how all of the information contained in the records described as "Board Meeting documents", "Year in Review Document", "Email Correspondence" and "Privileged Correspondence" can be characterized as the "informational assets" of the affected party or be the type of information that the exemption in section 17(1) is designed to protect.

Analysis/Findings re part 1

[48] The types of information in section 17(1) listed by the hospital and the affected

party have been discussed in prior orders:

> *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] I am satisfied that all of the information at issue concerns the affected party's financial status or its commercial interests in buying assets or selling its services and that it comes within the definition of commercial and financial information set out above.

[50] Therefore, I find that part 1 of the test has been met for the information at issue in the records.

Part 2: supplied in confidence

Supplied

[51] The requirement that the information have been "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

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[20] Order PO-2010.
[21] Order P-1621.
[22] Order PO-2010.
[23] Order MO-1706.
[24] Orders PO-2020 and PO-2043.

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]

In confidence

[55] 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.[28]

[56] 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.[29]

Representations

[57] The hospital states that the withheld documents were supplied to it in confidence

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[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] Order PO-2020.
[29] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

as they were provided to its Vice-President and Chief Financial Officer as a board member for the affected party. It states that these documents were shared with the ROHCG exclusively because of the VP's role as a member of the Board of Directors.

[58] The hospital also states that Schedule D to the Linen Services Agreement (Schedule D) should be considered as being supplied to it as this schedule consists of a Price List. It states that Schedule D is a non-negotiated document, which would be immutable and should, therefore, be considered as having been supplied to the hospital.

[59] The hospital submits that when the affected party supplied the information, it would have expected such information to be kept confidential given the nature of the documentation, the information contained in it and the purpose for which it was disclosed to the VP. It states:

> As part of the Board of Director's Code of Conduct [the Code of Conduct], included at pages 89 to 91 of the disclosed documents, all Directors stand in a fiduciary relationship with [the affected party] and must respect the confidentiality of information of [the affected party]. This would include information and documents received about [the affected party] for Board of Directors meetings, financial … and commercial information and documentation.
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> When these documents were supplied to the ROHCG it was for the purpose of providing the information to [the VP], a member of the Board of Directors; disclosed solely to [him] within the ROHCG; not available to the public otherwise; and prepared and supplied for the Board of Directors meetings.

[60] The affected party states that the information at issue in the records was supplied in confidence to the members of the affected party's board, which includes a representative from the hospital.

[61] The appellant disputes that the information at issue was supplied in confidence. She states that because the hospital's index of records only lists the type of document, she cannot even discern the nature of the information that the ROCGH severed from a majority of the records.

[62] The appellant was able to provide more specific information on Schedule D - Price List to the Linen Services Agreement at pages 144 to 149 of the records. She submits that this information does not satisfy the "supplied" component of sections 17(1)(a) and (c) as it is part of a contract.

[63] The appellant further submits that the confidentiality provisions of the Code of Conduct do not apply to the facts of this appeal and are irrelevant to an assessment of the "in confidence" component of the three-part section 17(1) test for exemption. She

quotes from section 5 of the Code of Conduct as follows:

> **Confidentiality**
>
> 5.1 **Directors and committee members** owe a duty of confidentiality to the Corporation [name of affected party] to respect the confidentiality of information about the Corporation whether that information is received in a meeting of the Board or of a committee or is otherwise provide to or obtained by the Director or committee member. **Directors and committee members** shall not disclose or use for their own purpose confidential information concerning the business and affairs of the Corporation unless otherwise authorized by the Board.
>
> …
>
> 5.3 A **Director** is in breach of his or her duties with respect to confidentiality when information is used or disclosed for purposes other than those of the Corporation. [Emphasis added by appellant]

[64] The appellant states that the confidentiality provisions of the Code of Conduct apply only to directors in their position as directors of the affected party and, in certain cases, members of a committee of the affected party's board of directors. She submits that these provisions do not purport to, nor can they, apply to anyone who is not a director or committee of the affected party. She states that they cannot apply to the individual who is the "head" or his/her delegate for the purposes of making decisions in response to an access request under *FIPPA*.

[65] The appellant also states that if the ROHCG bases the affected party's reasonable expectation of confidentiality on the provisions of the Code of Conduct, it necessarily follows that the VP has breached the Code of Conduct given that the ROHCG has previously disclosed a number of records in response to the appellant's access request. She states:

> Clearly, this is an absurd suggestion which demonstrates why the confidentiality provisions of the Code of Conduct do not apply to the facts of this appeal and are irrelevant to an assessment of the "in confidence" component of the three-part section 17(1) test for exemption.
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> Furthermore, the submissions of [the affected party] on this point appear to contradict what has occurred to date in this appeal. Paragraph 6 of [the affected party's] submissions provides in part:
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> > As the records were in possession of [the hospital] solely as a result of the hospital's representative's position as a board member of [the affected party] **it was clearly understood by the**

> **parties [(the affected party) and the ROHCG] that the records were confidential.** [Emphasis added by the appellant]

[66] The appellant submits that regardless of what the parties "understood", the ROHCG recognized that it had an obligation to, and did, disclose some of these records pursuant to the appellant's access request.

[67] The hospital did not provide reply representations.

[68] In reply, the affected party states that the records are only in the possession of the hospital due to the fact that a representative from the hospital is a member of the affected party's Board of Directors. The affected party also states that the records were not created by the hospital. The affected party states that Schedule D contains a pricing list of its services and was an immutable appendix to its agreement with the hospital.

[69] In sur-reply, the appellant states that the records relate to the hospital's operations on two levels: i) the costs incurred by and the contractual terms pursuant to which the hospital obtains linen and laundry services; and ii) the hospital's interest and investment in the affected party that provides these services.

[70] The appellant submits that no third parties external to government institutions provide information to such institutions for the purpose of disclosing them. Rather, the point is that third parties doing business with government are aware that government institutions are subject to *FIPPA*. In addition, given the hospital's commercial interest in the affected party, the affected party cannot be considered to be a typical third-party service provider.

[71] The appellant submits that Order PO-1791, issued in 2000, relied on by the affected party to support its argument that information such as unit pricing has been found to be "supplied" to an institution and not "negotiated" is "old law". She states that this order does not represent the current approach taken by the IPC in which it has found that unit pricing information found in a contract (not a proposal) is negotiated.[30]

[72] The appellant submits that if pricing information, such as that in Schedule D, is found in a contract between an institution and a third party, the general rule (i.e., that the information was "negotiated", rather than "supplied") applies.

Analysis/Findings re part 2

[73] I will begin with Record 10, Schedule D (the Price List), which forms part of the agreement between the affected party and the hospital. I agree with the appellant that the current approach of this office has been to find that pricing information is not

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[30] The appellant refers to Order PO-3499, issued in 2015.

immutable, but subject to negotiation.

[74] As set out in the Notice of Inquiry sent to the parties, and as quoted above, the immutability exception has been found to apply to information not subject to negotiation.

[75] 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.

[76] I find that Schedule D, Record 10, as part of the agreement between the hospital and the affected party, was not supplied to the hospital. Therefore, part 2 of the test has not been met for this record. As no other mandatory exemptions apply and no discretionary exemptions have been claimed for Record 10, I will order this record disclosed.

[77] I find that the remaining records for which section 17(1) has been claimed, namely, Records 1 to 8, were supplied in confidence to the hospital by the affected party. As set out in the index of records above, these records are internal documents of the affected party, representing information about it related to its board meetings or financial status.

[78] I find that Records 1 to 8 were:

- communicated to the hospital on the basis that they were confidential and were 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, and
- prepared for a purpose that would not entail disclosure.

[79] Therefore, I find that part 2 of the test has been met for Records 1 to 8.

Part 3: harms

[80] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that

disclosure will in fact result in such harm.[31]

[81] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[32] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or 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.*[33]

[82] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1).[34]

Representations

[83] The hospital states that:

- The Board of Director meeting documents contain confidential business information discussing financial assets and losses, price lists and the business dealings of the affected party which would provide undue gain for the appellant and the release of this information would most likely impede the competitive position of the affected party amongst its competitors.

- The audited financial statement, the financial statements, the Business Reports and the Year in Review would reveal the annual net revenues of the affected party and would thereby allow a competitor to assess the financial condition and profitability of the affected party. These documents would also reveal the internal structure and financial activities of the affected party. Should a competitor gain access to this type of information, the affected party's competitive edge would be compromised.

- Moreover, disclosing the audited financial statements, Year in Review and Business Reports would be contrary to the purpose of the *Act*, in that it would be providing information to the appellant that it would not otherwise be entitled to, had [the VP] not been a member of the Board of Directors.

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[31] *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.
[32] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.
[33] Order PO-2435.
[34] Order PO-2435.

[84] The affected party states that it can be reasonably expected that the disclosure of this sensitive information would be detrimental to its business, resulting in undue loss and damaging the company's competitive position in the market. It describes the records as containing detailed financial information concerning the operations of the company, its pricing and costs of business. If this information were known by its competitors, the affected party submits that its ability to be competitive in the market would be significantly hindered and the company would be in a disadvantaged position against its competitors.

[85] The appellant submits that the submissions of the ROCGH and the affected party do not establish a risk of harm that is "well beyond the merely possible or speculative." She points out that the ROHCG has already disclosed all of the affected party's financial audit reports, more than half of its Year in Review documents, and portions of its financial statements.

[86] Furthermore, the appellant submits that financial statements and other information such as that described by the ROHCG as being in the Year in Review records are the type of information that public companies must make public.

[87] In reply, the affected party repeats that the information at issue could be used by its competitors to undercut the company, cause considerable undue financial loss and prejudice the affected party's competitive position in the market significantly as a result.

Analysis/Findings re part 3

[88] Neither the affected party nor the hospital provided detailed representations on each record at issue regarding part 3. I find that the hospital's and the affected party's representations only contain general evidence to demonstrate the harms set out in sections 17(1)(a) and (c). I find that for certain records the harms under sections 17(1)(a) or (c) are not established based on their content and the submissions provided. I will consider each record separately to determine if part 3 of the test has been met.

[89] Record 1 is a one-page letter to the affected party's directors listing documents for their review. Some of the listed document names have been disclosed, but others have not. I cannot ascertain how, nor am I satisfied that, disclosure of the names of certain documents in this letter could reasonably be expected to result in the harms set out in sections 17(1)(a) or (c).

[90] Record 2 consists of portions of two one-page agendas of the affected party's board meetings. Again only certain items in the agendas have been disclosed. I also cannot ascertain, nor does the evidence otherwise connect me to how disclosure of the undisclosed agenda items could reasonably be expected to result in the harms set out in sections 17(1)(a) or (c).

[91] Record 3 contains minutes of three of the affected party's board meetings. Again only portions of these minutes have been withheld. I am satisfied that disclosure of certain information in this record could reasonably be expected to significantly prejudice the competitive position of the affected party under section 17(1)(a). In particular, I find that the portions of Record 3 that contain detailed information about changes in the financial status of the affected party, its strategic plan, and contemplated acquisitions or business opportunities, are exempt by reason of section 17(1)(a). However, I find that the remaining information at issue in this record, as meeting minutes, does not contain sufficient detail to reasonably be expected to result in the harms set out in sections 17(1)(a) or (c), were it to be disclosed.

[92] Record 4 consists of three sets of financial statements. The first set is marked as "Draft." I agree with the reasoning of Adjudicator Lan An in Order MO-3756 that with respect to financial statements, it is reasonable to expect that the affected party would suffer harm from their disclosure because the statements provide detailed information about the affected party's financial viability. As Adjudicator An stated in Order MO-3756:

> The financial statements contain its revenue and expenditures statements, balance sheets, statements of operations and changes in fund balances, statement of cash flows, schedules of revenues and expenses and independent auditor's reports. I agree with the third party appellant that its financial statements are its informational assets. I note that it disclosed these records to the region to satisfy its contractual obligations under the agreements. I also note that they are not appended to nor do they form a part of [the] agreements. In my view, it is reasonable to expect that its competitors would gain an advantage over the third party appellant if these records were disclosed. The third party appellant's competitors would be able to make accurate inferences regarding its financial position, which normally would be kept confidential.

[93] Therefore, I find the financial statements of the affected party at Record 4 are exempt under section 17(1)(a) as disclosure could reasonably be expected to significantly prejudice the competitive position of the affected party.

[94] Record 5 is the affected party's Year in Review document for 2016/2017. This record contains detailed financial information about the affected party, as well as details about its business plans. I agree with the affected party that disclosure could reasonably be expected to significantly prejudice its competitive position.

[95] Record 6 is the affected party's business reports for May and September 2017. The entire September 2017 business report has been withheld in full, whereas the entire first page and two portions of the second page of the May 2017 business report has been withheld. This record also contains detailed financial information about the affected party, as well as details about its business plans. I agree with the affected party that disclosure of the information at issue in this record could reasonably be

expected to significantly prejudice its competitive position.

[96] Accordingly, I find that it is reasonable to expect that the affected party's competitors would gain an advantage over the affected party if Records 4 to 6 were disclosed.

[97] Record 8 consists of two email chains. The January 2017 email chain at pages 124 and 125 of the records is from the affected party to its board members and merely refers to the attached Record 9, the 2011 legal memorandum. I find that disclosure of the limited and general information in this email chain could not reasonably be expected to cause the harms set out in sections 17(1)(a) or (c), and I find that it is not exempt on that basis.

[98] I have also considered the hospital's application of section 17(2) to pages 124 and 125. It raised the application of this exemption for the first time at the adjudication stage of this appeal in its representations. Section 17(2) reads:

> A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

[99] The hospital states that the email at pages 124 to 125 relates to taxes. I find that this email does not reveal information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax, as section 17(2) requires. Therefore, given my finding that none of the limited information at pages 124 and 125 of the records reveals information that fits under section 17(2), I find that this mandatory exemption does not apply.

[100] The second email chain in Record 8 is from October 2017 and appears at page 131 of the records. Sections 17(1)(a) and (c) has been claimed for one severance in this email. Section 19(a) has been claimed for the other severance.

[101] From her representations, it is apparent that the appellant is aware of the information in the severance made under section 17(1). I find that disclosure of the one sentence at issue in this email chain could not reasonably be expected to cause the harms set out in sections 17(1)(a) or (c). This severance does not reveal information that is not already known publicly.

Conclusion re part 3

[102] I have found that sections 17(1)(a) or (c) do not apply to the information at issue in Records 1, 2, and 8 and portions of Record 3. As no other mandatory exemptions apply and no discretionary exemptions have been claimed for this information, I will order it disclosed.

[103] I have found that section 17(1)(a) applies to the information at issue in Records

4 to 6 and part of the information at issue in Record 3. During adjudication, the appellant raised the application of the public interest override in section 23. This section reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[104] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[105] The appellant submits that there is a compelling public interest in disclosure of the records because the public should know how their tax dollars are spent. She states that the records represent expenditures by a hospital in an indirect manner by the flow-through of such money from the government to a private sector entity, the affected party.

[106] I have considered the appellant's confidential and non-confidential representations on the application of section 23. I find that the information I have found exempt under section 17(1)(a) does not address the applicable public interest raised by the appellant. This information concerns the financial and business plans of the affected party and does not demonstrate hospital expenditures as suggested by the appellant. A compelling public interest has been found not to exist where the records do not respond to the applicable public interest raised by the requester.[35]

[107] As well, Record 10, the price list attached to the agreement between the hospital and the affected party, provides the information sought by the appellant about the expenditure of public funds. I am satisfied that the disclosure of the price list is adequate to address any public interest considerations. A compelling public interest has also been found not to exist where a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[36]

[108] Therefore, I find that there is no sufficiently compelling public interest in disclosure to support the application of section 23 to override the application of the section 17(1)(a) exemption to Records 4 to 6 and part of the information at issue in Record 3. This information is, therefore, exempt under section 17(1)(a).

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[35] Orders MO-1994 and PO-2607.
[36] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

Issue C: Does the discretionary solicitor-client privilege exemption at section 19(a) apply to pages 126 to 131 of the records?

[109] Section 19(a), which is claimed by the hospital in this appeal, states in part as follows:

> A head may refuse to disclose a record,
>
> > that is subject to solicitor-client privilege;

[110] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Representations

[111] The hospital states that pages 126 to 131 of the records are subject to common law solicitor-client communication privilege under section 19(a) of the *Act*, because they were prepared by legal counsel for the benefit of the affected party. It points out, in particular, that the memorandum of law at pages 126 to 130 of Record 9 is marked "Privileged and Confidential".

[112] The hospital submits that by supplying the memorandum of law to the board of directors, the affected party did not waive privilege as the board of directors would at the very least have a common interest with the affected party.

[113] The affected party agrees with the hospital and states that these documents were prepared by its lawyers for the purposes of providing legal advice in relation to the company's corporate status, registration and tax related duties. It states that these documents were only disclosed to its board members in confidence, including to the representative of the hospital, and were not disclosed otherwise.

[114] The appellant submits that in order for the exemption in section 19(a) to apply, the pages at issue must either contain or be communications related to legal advice, as opposed to a discussion of business-related matters which are not subject to the solicitor-client privilege.

Analysis/Findings

[115] Solicitor-client communication privilege, provided for in section 19(a) protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal

advice.[37] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[38] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[39]

[116] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[40]

[117] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[41] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[42]

[118] Pages 126 to 130 of the records, comprising Record 9, consist of a memorandum dated April 2011 from the affected party's lawyer to the affected party. This memorandum contains legal advice being provided to the affected party by its solicitor.

[119] Page 131 is part of Record 8 and contains two sentences from an October 2017 email between a board member of the affected party and the VP that have been withheld. One of the two sentences contains communications about the seeking of legal advice by the affected party. The other sentence does not contain legal advice and I find that it does not qualify for exemption under section 19(a).

[120] Both the hospital and the affected party state that the hospital has a common interest with the affected party in the information for which the hospital has claimed the application of section 19(a). Therefore, their position is that privilege has not been waived by the act of the affected party providing the information to the hospital.

[121] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[43]

[122] An implied waiver of solicitor-client privilege may also occur where fairness

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[37] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[38] Orders PO-2441, MO-2166 and MO-1925.
[39] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[40] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[41] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[42] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[43] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[44]

[123] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[45] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[46]

[124] In Order PO-3154, Adjudicator Steven Faughnan reviewed the jurisprudence, including orders of this office, pertaining to a determination of whether the common interest exception to waiver of privilege existed in the context of the commercial matter under consideration in that appeal. At paragraph 179 of that decision, he articulated the following test:

> …the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
>
> > (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under section 19(a) of the *Act*, and
> >
> > (b) the parties who share that information must have a "common interest", but not necessarily identical interest.

[125] It is clear from my review of the legal memorandum at Record 9 that the hospital and the affected party have a common interest in this record. This record is a legal memorandum addressed to the affected party about the affected party's corporate status, registration and tax related duties. Record 9 is, therefore, subject to common law solicitor-client communication privilege in section 19(a) and this privilege has not been waived.

[126] This memorandum relates to the affected party's status and interaction with public hospitals, which includes the ROHCG. The ROHCG holds a seat on the affected party's board of director's through its VP. I find that the hospital and the affected party have a common interest in the information contained in Record 9, which includes information about the affected party's present and future relations with public hospitals, including the ROHCG.

[127] Page 131 of Record 8 is an email between the vice-president of the ROHCG and

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[44] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[45] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[46] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

the vice-president of another hospital as members of the board of the affected party. The sentence for which I have found section 19(a) applies contains information about the seeking of legal advice and is solely about the affected party. This sentence does not contain information related to the hospital, which is a public hospital. I cannot ascertain a common interest in this one sentence at page 131 between the hospital and the affected party. Therefore, I find that the common interest principle does not apply. Without a common interest, the privilege in this one sentence at page 131 of Record 8 has been waived as it has been disclosed by the affected party to the hospital.

[128] In conclusion, I have found that the information at issue in the email at page 131 of the records is not subject to section 19(a). As no mandatory exemption applies and no other discretionary exemptions have been claimed for this information, I will order it disclosed.

[129] I have found that the legal memorandum at Record 9 is subject to solicitor-client communication privilege in section 19(a) and that this privilege has not been waived. I will now consider whether the hospital exercised its discretion in a proper manner in withholding this record under section 19(a).

Issue D: Did the hospital exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[130] The section 19 exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[131] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[132] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[47] This office may not, however, substitute its own discretion for that of the institution.[48]

[133] Relevant considerations may include those listed below. However, not all those

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[47] Order MO-1573.
[48] Section 54(2).

listed will necessarily be relevant, and additional unlisted considerations may be relevant:[49]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[134] The hospital states that in exercising its discretion under section 19, it considered that:

- since the request for information was made by a lawyer and it could not identify the requester, it could assume that the information was being requested by a competitor;

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[49] Orders P-344 and MO-1573.

- the appellant is not seeking its personal information, but rather the contractual and financial information of the affected party;

- disclosure of the memorandum of law that was prepared for the affected party would not increase public confidence in the operation of the ROHCG as it was not the one receiving legal advice;

- the legal advice was being prepared solely for the benefit of the affected party; and,

- the information was not being requested for a sympathetic reason.

[135] The appellant states that the hospital took into account an irrelevant consideration in assuming that merely because the request was made by a lawyer, the information was being requested by a competitor.

[136] The appellant submits that the assumed identity of the requester should not be considered to be a relevant or a proper consideration, given that the purposes of the *Act* include the principle that information should be available to the public and that disclosure pursuant to an access request is "disclosure to the world."

[137] The appellant further submits that disclosure of the legal memorandum would increase public confidence in the operation of the ROHCG because it would likely demonstrate how the hospital spends scarce taxpayer dollars designed for healthcare purposes, thus demonstrating its accountability and transparency as provincial government ministries and other hospitals that receive public funding must.

Analysis/Findings

[138] I have found that Record 9, the legal memorandum, is subject to solicitor-client communication privilege in section 19(a).

[139] I find that in denying access to the record, the hospital exercised its discretion under section 19 in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations.

[140] I find that the hospital took into account the purpose of the section 19 exemption, to protect communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.

[141] The legal memorandum concerns the affected party's corporate status, registration and tax related duties. Contrary to the appellant's assertion, as described above, it does not contain information that demonstrates how the hospital spends taxpayer healthcare dollars.

[142] I disagree with the appellant that the hospital's consideration that the requester

may be a competitor of the affected party reflects that it took into account an irrelevant consideration. As noted in the list of facts set out above, the relationship between a requester and any affected parties may be a relevant consideration.

[143] Accordingly, I am upholding the hospital's exercise of discretion under section 19 and find that the legal memorandum at pages 126 to 130 of the records (Record 9) is exempt under that section. Because I have found that Record 9 is exempt under section 19(a), there is no need for me to also consider whether it is exempt under section 17(2), as the hospital claimed for the first time in its representations.

ORDER:

1. I order the hospital to disclose Records 1, 2, 8, and 10 and the non-exempt portions of Record 3 to the appellant by **December 6, 2019** but not before **December 3, 2019**. For ease of reference, I have provided the hospital with a copy of Record 3 with this order highlighting the information that should not be disclosed from this record.

2. I uphold the hospital's decision to deny access to the remaining information at issue in the records.

Original signed by
Diane Smith
Adjudicator

October 31, 2019