

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4056

Appeal PA18-222

The Ottawa Hospital

July 29, 2020

Summary: The Ottawa Hospital (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the laundry and linen services provided to it by a third party service provider. The hospital denied access to the responsive records in part, relying on the mandatory third party exemption in section 17(1), the discretionary advice or recommendations exemption in section 13(1), and the discretionary economic and other interests exemption in section 18(1). The hospital also denied access to one page of the records, relying on the employment or labour relations exclusion in section 65(6). It also claimed that certain pages of the records were not responsive to the request.

On appeal of the decision to this office, the appellant raised the application of the public interest override in section 23. She also claimed that the hospital had not conducted a reasonable search for records. The affected party asserted that the hospital does not have custody or control of the records.

In this order, the adjudicator finds that the hospital has custody or control of the records and that section 65(6) does not apply to exclude the one identified page from the application of the *Act*. She upholds the hospital's decision that certain pages of the records are not responsive to the request. The adjudicator finds that sections 13(1), 17(1) and 18(1) apply to exempt portions of the records. However, she also finds that the public interest override at section 23 applies to override the section 18(1) exemption respecting information in charts comparing the hospital's laundry and linen services to that of other Ontario hospitals. She orders the hospital to disclose the non-exempt information, including the information to which the public interest override applies.

The adjudicator orders the hospital to conduct another search for records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, sections 10(1), 13(1), 17(1)(a) and (c), 18(1)(c) and (e), 23, 24(1), 65(6)3.

OVERVIEW:

[1] The Ottawa Hospital (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following records related to the provision of laundry and linen services:

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 of directors'] 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] The requester stated that the search for responsive records concerning parts 3 and 4 of her request should include the records of a named individual related to planning and support services for the hospital.

[3] The hospital issued an interim decision and fee estimate stating that sections 13(1) (advice or recommendations), 17(1) (third party information) and 18(1) (economic or other interests) of the *Act* may apply to parts of the responsive records.

[4] Following notification to the hospital's laundry and linen services provider (the affected party), the hospital issued a final decision granting access in part to the responsive records. The hospital denied access to some responsive records pursuant to sections 13(1), 17(1) and 18(1) of the *Act*.

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

[6] During mediation, the hospital advised that it is also relying on sections 21(1) (personal privacy) and 65(6) (exclusions) to withhold some responsive records. The hospital also noted that some information is not responsive and, therefore, does not fit within the scope of the request.

[7] The appellant stated that she believes more responsive records exist, which the

hospital denied. As the appellant continues to believe that additional records should exist, the reasonableness of the hospital's search for responsive records is at issue.

[8] The appellant also advised that she is seeking access to all of the withheld records, including the records the hospital claims are not responsive to the request.

[9] As further mediation was not possible, this appeal proceeded to the inquiry stage, and I conducted an inquiry. Representations were exchanged between the hospital, the affected party and the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[10] In its representations,¹ the hospital indicated that it is no longer relying on section 65(6)5 (hospital privileges exclusion); therefore, this particular exclusion is no longer at issue. The hospital also withdrew its reliance on the discretionary exemptions in sections 13(1) and/or 18(1) for pages 3, 4, 9, 14, 15, 18, 109, and 426. The hospital then issued a supplementary decision letter to the appellant disclosing these pages.

[11] The appellant does not seek access to a personal letter at pages 464-465 of the records, which removes these pages and the mandatory personal privacy exemption at section 21(1) from the scope of the appeal. As well, the appellant is not interested in receiving the login-related information for conference calls. Therefore, as this is the only information severed from pages 33, 35 and 36, these three pages are no longer at issue.

[12] Five pages of the records consist of two (duplicated) charts, and they contain the financial information of three hospitals, other than the Ottawa Hospital. These two charts are located at:

- pages 375, 404 and 409, and
- pages 368 and 384.

[13] I sought the representations of the three Ontario hospitals listed on these charts on the discretionary exemptions claimed by the Ottawa Hospital at sections 13(1) and 18(1)(c) and (e). As well, since the appellant raised the application of the public interest override at section 23, I sought representations on that issue. I received representations on behalf of the three hospitals. One hospital directed me to its linen services provider. I then sought and received representations from this linen service

¹ The hospital provided both confidential and non-confidential representations on certain pages of the records. In this order, I will be referring to only the non-confidential representations, although I will consider the hospital's representations in their entirety. Included in the hospital's representations was a chart, titled "Schedule A", listing the exemptions claimed for each page of the records and representations on each page of the records.

provider.

[14] In this order, as a preliminary matter, I find that the hospital has custody or control of the records for the purpose of section 10(1) of the *Act*. I find that the labour relations exclusion at section 65(6)3 does not apply to exclude page 406 from the application of the *Act*, and I uphold the hospital's decision that certain other pages of the records are not responsive to the request.

[15] Regarding the exemptions, I find that sections 13(1), 17(1) and 18(1) apply to some portions of the records identified by the hospital as exempt on those grounds. I order disclosure of the non-exempt information.

[16] I also find that section 23 applies to override the section 18(1) exemption in relation to the two charts comparing the overall cost of the hospital's laundry and linen services to that of three other Ontario hospitals. I order the hospital to disclose this information.

[17] Finally, I find that the hospital's search for responsive records was not reasonable, and I order the hospital to conduct another search for records.

RECORD:

[18] The records remaining at issue in this appeal are emails, purchase orders, minutes, graphs, presentations, reports, and other correspondence related to a contract for the provision of laundry and linen services to the hospital.

ISSUES:

- A. **What is the scope of the request? What records are responsive to the request?**
- B. **Does the mandatory third party information exemption at section 17(1) apply to the records?**
- C. **Does the section 65(6)3 labour relations and employment records exclusion exclude page 406 of the records from the *Act*?**
- D. **Does the discretionary advice or recommendations exemption at section 13(1) apply to the records?**
- E. **Does the discretionary economic and other interests exemption at sections 18(1)(c) or (e) apply to the records?**
- F. **Did the institution exercise its discretion under sections 13(1) and 18(1)? If so, should this office uphold the exercise of discretion?**

G. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13(1), 17(1), and 18(1) exemptions?

H. Did the hospital conduct a reasonable search for records?

DISCUSSION:

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

[19] For the first time during the processing of this appeal, 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 founding 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.

[20] 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.

[21] The affected party now submits, however, that the hospital does not have possession of the records by reason of its operations. The affected party states that the hospital only has possession of the records because a member of the affected party's board is from the hospital. It otherwise agrees with the hospital's decision to sever certain information from the records.

[22] The hospital states that it is a large public hospital that currently contracts with the affected party for hospital laundry and linen services. It states that the records all relate in some capacity to the hospital's commercial relationship with the affected party, which is a separate, arm's length corporation, owned by the hospital in conjunction with a number of other hospitals in Eastern Ontario. The hospital, along with these other hospitals, is a member of the affected party's board of directors, and an employee of the hospital is delegated responsibility by the hospital to sit as an ex-officio member of the affected party's board of directors.

[23] The hospital states that certain records, those that consist of minutes of meetings of the affected party's board of directors and the affected party's financial statements, are in the custody or under the control of the hospital solely by virtue of the hospital's membership on the affected party's board of directors. It states that these records are held by the employee who is delegated responsibility for sitting as an ex officio member of the affected party's board of directors, and they are solely held in relation to that role. It states that it is not taking the position that these records are

outside of its custody or control.

[24] The appellant states that it is clear both from the hospital's representations, as well as the manner in which the hospital has addressed the appellant's request and appeal over the past two years, that there is no issue as to whether the hospital has custody or control over the responsive records: it admits that it does.

[25] In reply, the affected party reiterates its initial representations.

Analysis/Findings

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

[27] 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.²

[28] 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.³ 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).

[29] The courts and this office have applied a broad and liberal approach to the custody or control question.⁴

[30] 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.⁵ 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?⁶
- What use did the creator intend to make of the record?⁷

² Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

³ Order PO-2836.

⁴ *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.

⁵ Orders 120, MO-1251, PO-2306 and PO-2683.

⁶ Order 120.

⁷ Orders 120 and P-239.

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁸
- Is the activity in question a “core”, “central” or “basic” function of the institution?⁹
- Does the content of the record relate to the institution’s mandate and functions?¹⁰
- 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?¹¹
- If the institution does have possession of the record, is it more than “bare possession”?¹²
- 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?¹³
- Does the institution have a right to possession of the record?¹⁴
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁵
- 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?¹⁶

[31] Considering these factors, I find that the hospital has custody or control of the records, including the minutes of meetings and financial statements.

[32] The records relate to the affected party, which is the laundry and linen services

⁸ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

⁹ Order P-912.

¹⁰ *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.

¹¹ Orders 120 and P-239.

¹² Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹³ Orders 120 and P-239.

¹⁴ Orders 120 and P-239.

¹⁵ Orders 120 and P-239.

¹⁶ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

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 and that the hospital has claimed that portions of the records are exempt under the mandatory section 17(1) exemption or the discretionary exemptions in sections 13(1) and 18(1).

[33] As confirmed by the hospital, the records all relate in some capacity to the hospital's commercial relationship with the affected party.

[34] When the records at issue were created, the hospital was represented on the affected party's board of directors by one of its employees.

[35] I do not agree with the affected party that the hospital's employee 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, as the records relate directly to a hospital matter: the provision of laundry and linen services to it.

[36] 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.

[37] Therefore, considering all of the above, including the parties' representations, I find that the records are in the custody or under the control of the hospital.

Issue A: What is the scope of the request? Are pages 427 to 454 responsive to the request?

[38] 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).

[39] 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.¹⁷

[40] To be considered responsive to the request, records must "reasonably relate" to the request.¹⁸

[41] The appellant disputes the hospital's claim that pages 427 to 454 are not responsive to the request. The hospital merely states that these pages are not responsive to the request.

Analysis/Findings

[42] Based on my review of pages 427 to 454 of the records, I agree with the hospital that these pages are not responsive to the request. The request essentially seeks information related to the hospital's laundry and linen services and to its provider, the affected party. I find that pages 427 to 454 are not responsive to the request, because the information they contain is not about, or reasonably related to, either the affected party or the hospital's laundry and linen services.

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

[43] 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;

¹⁷ Orders P-134 and P-880.

¹⁸ Orders P-880 and PO-2661.

(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.

[44] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹⁹ 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.²⁰

[45] 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 paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[46] The hospital states that the request seeks records concerning the commercial contract between it and the affected party. It submits that much of the information in the records is commercial and financial information, as it describes business operations, costs, and pricing of the affected party.

[47] The hospital states that the request also seeks information provided to the affected party’s board of directors, including financial statements detailing the affected party’s operations, changes in net assets and cash flows, minutes from board meetings, a risk management presentation and information such as the status of the affected party’s inventory, assets, loans, and debts.

[48] The affected party agrees with the hospital’s submissions and states that the

¹⁹ *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.*).
20 Orders PO-1805, PO-2018, PO-2184 and MO-1706.

records contain financial statements and detailed information on its budget, assets, liabilities, business costs, pricing, revenues and profits. It submits that they also contain significant commercial information about its current operations and possible future operational plans regarding the expansion of services.

[49] The above representations speak to the records, generally. Neither the hospital nor the affected party's representations addressed whether part 1 of the test in section 17(1) is met for certain, specific pages of the records. Therefore, the appellant has concerns as to whether part 1 of the test is established for the following pages of the records:

- 2, 13, 37, 38, 66, 70, 149, 151, 217 to 220, 232 to 235, 253 to 255, 269 to 271, 275, 284 to 286, 288, 290 to 295, 299, 300, and 425.

[50] In reply, the affected party states that the classification of the severed documents as "financial statement", "financial audit report" and "year in review document" should be clear to the appellant and that revealing any more information regarding their content would defeat the purpose of the exemption. It submits that financial audit reports, financial statements, documents regarding future commercial plans and pricing practices are commercial and/or financial information.

Analysis/Findings re part 1

[51] The types of information at issue in this appeal as listed in section 17(1) 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.²¹ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²²

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.²³

[52] I agree with the appellant, and I find, that part 1 of the test under section 17(1) has not been met for certain information, as follows:

²¹ Order PO-2010.

²² Order P-1621.

²³ Order PO-2010.

- page 2 of the records. Severed from this page is a name and an email;
- pages 13, 37, 38, 149, 151, 217, 218, 253, 232, 254, 424, and 425, and a portion of page 219. Severed from these pages is general board meeting information; and,
- pages 233, 255 and a portion of page 220. Severed from these pages are board by-law information.

[53] As well, the hospital withdrew its reliance on section 17(1) for pages 269, 271 and 275. These pages contain general information related to the affected party's risk management program. I find that part 1 of the test under section 17(1) has also not been met for these pages.

[54] As no other mandatory exemptions apply to this information and no discretionary exemptions have been claimed for this information, I will order this information disclosed.

[55] However, I find that part 1 of the test has been met for the remaining pages and portions of pages that section 17(1) has been claimed for, because these pages contain commercial and financial information as described above. I will consider whether part 2 of the test is met for this information.

Part 2: supplied in confidence

Supplied

[56] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.²⁴

[57] 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.²⁵

[58] 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

²⁴ Order MO-1706.

²⁵ Orders PO-2020 and PO-2043.

single party.²⁶

[59] 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.²⁷ 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.²⁸

In confidence

[60] 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.²⁹

[61] 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.³⁰

Representations

[62] The hospital states that the affected party supplied information to it in confidence during the course of their relationship as vendor and purchaser. It also

²⁶ 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*).

²⁷ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

²⁸ *Miller Transit*, above at para. 34.

²⁹ Order PO-2020.

³⁰ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

states that it received information because a hospital employee is a member of the affected party's board of directors.

[63] The hospital submits that the immutability exception applies to several of the records at issue relating to the hospital's contract with the affected party. It states that some of the records disclose fixed costs that were not negotiated, but rather unilaterally implemented by the affected party.

[64] The hospital states that the records also reveal detailed specifications and discussions regarding laundry standards and equipment. It refers specifically to the pages of the records that contain the affected party's risk management presentation regarding its pandemic planning.

[65] The hospital states that the records relating to the affected party's board of director meetings contain confidential information about the affected party's finances. It refers specifically to the affected party's financial statements, which it says were disclosed to the affected party's board of directors on a yearly basis for the sole purpose of ensuring that the Board of Directors fulfilled its mandate of corporate management and oversight.

[66] The affected party states that the records contain information supplied in confidence to its board members, which has not been otherwise disclosed or made available to public.

[67] The appellant disputes that the immutability exception applies and submits that it is not reasonable to conclude that the information at issue related to the hospital's contract with the affected party was supplied by the affected party to the hospital. The appellant submits that the information at issue was not supplied to the hospital because:

- i. the hospital is both the institution and a partial owner of the affected party, a commercial affected party;
- ii. the hospital has contracted with the affected party for services; and
- iii. the records relate to the relationship between the hospital and the affected party.

[68] Therefore, the appellant submits that the hospital, as an owner of the affected party, is effectively providing the records at issue in this appeal to itself.

[69] The appellant submits that the creation of a separate legal entity should not be used by the hospital to shield records such as financial statements and board meeting

information from the public. It argues that such information should be publicly available to support the transparency required for the spending of taxpayer dollars.³¹

[70] In reply, the hospital states that the affected party is not a corporation owned by the hospital, nor was it created by the hospital. It states that the hospital was simply one of twelve founding partners and that the affected party's board of directors currently has thirteen members, with representatives from the original founders as well as newer additions.

[71] In reply, the hospital states that the affected party was established in 1974 by several hospitals in the Ottawa area for the purpose of providing centralized, cost-effective linen and related services to its founding hospitals.

[72] It states that the affected party is an independently managed corporation, operating at arms-length from the hospital. It states that the affected party services clients other than the hospitals who sit on its board of directors, including clients in the private sector, primarily in the hospitality industry. It describes the affected party as having a revenue-centered mandate; it is fundamentally in business for itself, and it generates profit from both the healthcare and private sectors.

[73] In reply, the affected party essentially reiterates its initial representations.

[74] In sur-reply, relying on the agreement between the hospital and the affected party, the appellant disputes that the affected party is an independent contractor. The appellant does, however, acknowledge that the affected party currently has both public sector hospital clients and private sector customers.

[75] The appellant also questions how the affected party's board of directors' duty to keep information confidential was maintained when the hospital has issued a decision under *FIPPA* in which it has granted access to some of the information in the records.

Analysis/Findings re part 2

[76] Based on my review of all of the evidence, I find that although the hospital was a founding member of the affected party corporation, the situation has changed and the affected party now acts as an independent contractor. From the evidence, it is clear that the affected party is a separate business entity from the hospital and has both private and public sector customers.

[77] A contract between the hospital and the affected party has already been disclosed. The information at issue does not form part of a contract and can be categorized as follows:

³¹ The appellant relies on Orders PO-3885, PO-3886, and PO-3887.

- Pages 5, 19 to 22, 30, 31, 66, 70, 82, 83, 86, 87, 96 to 98, 112, and 113 are email chains.
- Pages 118, 119, 120 to 131, 135 to 137, 140 to 147, 158 to 161, 164 to 171, 197, 225, 226, 239, 240, 263, 264, 325, and 326 are financial statements.
- Pages 199 to 201, 222 to 223, 235 to 236, 260 to 261, 327, and 328 are business reports.
- Pages 203 to 207, and 309 to 312 are year-end review reports.
- Pages 208 to 216, and 313 to 323 are financial graphs.
- Pages 219 to 221, 233, 234, 255 to 257 are minutes of board of directors meetings.
- Pages 270, 284 to 295, 299 and 300 are excerpts from risk management presentations.

[78] Other than most of the emails, the records at issue are internal documents of the affected party. These records represent information related to the affected party's board meetings, financial status and risk management procedures. It is the affected party's internal information that was provided to the hospital during the course of the hospital's commercial relationship with the affected party.

[79] The emails at pages 5, 19 to 22, 30, 31, 66, 70, 82, 83, 86, 87, 96 to 98, 112, and 113 were exchanged between the hospital and the affected party and contain pricing information or technical and costing information.³²

[80] The hospital claims that the pricing increase information in the emails is immutable as it would disclose fixed costs that were not negotiated, but rather unilaterally implemented by the affected party. The appellant disagrees that the pricing information in the records is immutable. She notes that the affected party did not claim that this information is immutable and submits that it is not reasonable to conclude that the information at issue related to the hospital's contract with the affected party was supplied by the affected party to the hospital.

[81] The emails at pages 5, 19 to 22, 66, 70, 82, 83, 86, 87, 96 to 98, 112, and 113 contain the affected party's response to the hospital about proposed price increases, as well as discussing the renewal of certain agreements. These emails are not part of contracts and the proposed price increases are not contained in a contract. The emails

³² All of the emails contain pricing information, except for those at pages 30 and 31, which contain technical and costing information.

at pages 30 to 31 contain information following up on a meeting between the hospital and affected party. This email seeks clarification about certain items discussed at the meeting.

[82] None of the records at issue are contracts, nor do I have any information that they form part of contracts, and so the immutability exception is of no relevance here. Based on my review of all the pages at issue and the parties' representations, I find that they were supplied to the hospital and were supplied in confidence as they were:

- communicated to the hospital on the basis that it was confidential and was to be kept confidential,
- treated consistently by the affected party in a manner that indicates a concern for confidentiality,
- not otherwise disclosed or available from sources to which the public has access, and
- prepared for a purpose that would not entail disclosure.

[83] Therefore, part 2 of the test under section 17(1) has been met for the information I found met part 1 of the test.

Part 3: harms

[84] 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.³³

[85] 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.³⁴ 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*.³⁵

[86] In applying section 17(1) to government contracts, the need for public

³³ *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.

³⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

³⁵ Order PO-2435.

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).³⁶

Representations

[87] The hospital states that the disclosure of the information at issue to the public through this request, solely as a result of the role of a hospital employee as a member of the affected party's board of directors, could have a chilling effect upon the relationship between the hospital and the affected party.

[88] The hospital states that disclosure to a third party of the affected party's processes and procedures can reasonably be expected to be copied by competitors, which will eliminate the affected party's competitive advantage. It states that the linen services industry is very competitive and it believes that the appellant is seeking the records at issue on behalf of a competitor, expressly to permit this competitor to better compete with the affected party. It states that disclosure will provide the affected party's competitors with knowledge of the affected party's profit margins, overhead, and fixed costs.

[89] The hospital states that the affected party has invested considerable resources in developing its corporate structures, employee mix, and service delivery methods, and in setting prices. It submits that disclosure would allow the affected party's competitors to obtain, at no cost to themselves, the affected party's methods and procedures, and to undercut its pricing with the knowledge of its fixed costs, profit margins and overhead.

[90] The affected party states that disclosure of the detailed financial information concerning its operations and pricing and costs of business would result in it being in a disadvantaged position against its competitors. Therefore, it submits disclosure would inevitably result in it suffering undue losses.

[91] The appellant submits that the submissions of the hospital and the affected party do not meet part 3 of the test. She states that, although the hospital and the affected party allege a negative impact on the affected party, the affected party is in the best position to provide evidence of such harms. The appellant submits that the affected party has not done so and that its submissions on the "harms" test are bald statements that are, in essence, nothing more than a restatement of paragraphs 17(a) and (c) of *FIPPA*.

[92] In reply, the affected party states that financial records and sensitive commercial information regarding the current status and future plans of a company contain

³⁶ Order PO-2435.

information that would hurt any business if they were procured by competing businesses. It reiterates that this information could be used by its competitors to undercut the company and cause considerable undue financial loss and would prejudice the affected party's competitive position in the market significantly as a result.

Analysis/Findings re Part 3

[93] I recently issued Order PO-4004. In that order, the parties were another Ottawa hospital, plus the same affected party and requester/appellant. Many of the responsive records were the same as those at issue in this appeal, except that they related to a different time period. For example:

- The minutes in this appeal are from 2016, while in Order PO-4004, the minutes were from 2017.
- The financial statements in this appeal are from 2011 to 2017, while in Order PO-4004, the financial statements were from 2017.
- The year-end review reports in this appeal are for 2014-2015 and 2016-2017. In Order PO-4004, only the 2016-2017 year-end review report was in issue.
- The business reports in this appeal are dated between May 2015 and May 2017. In Order PO-4004, these reports are dated May and September 2017.

[94] In Order PO-4004, I made the following findings regarding the records:

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.

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.

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

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.

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.

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.

[95] I adopt this reasoning from Order PO-4004 in this appeal as it concerns the same record types, namely, minutes, financial statements, year-end review and business reports. I find that part 3 of the test has been met for these records, other than for certain information in the meeting minutes that does not describe changes in the financial status of the affected party, its strategic plan, and contemplated acquisitions or business opportunities. Therefore, with the exception of the information noted

directly above, I find the affected party's financial statements, year-end review and business reports and portions of its minutes are exempt under section 17(1).

[96] The remaining records for which the hospital has claimed section 17(1) are emails, risk management information and financial graphs.

[97] The emails at issue in the records, other than those at pages 5 and 30 to 31, are dated between 2010 and 2012. The emails at page 5 are dated May 2015 and those at pages 30 to 31 are dated September 2017.

[98] The hospital's position is that disclosure of the information at issue in the emails could reasonably be expected to prejudice the affected party's competitive position.

[99] The affected party did not provide specific representations on the emails, only on the records in general.

[100] The emails, other than those at pages 30 to 31, contain general pricing information. The emails at pages 30 to 31 contain questions from the affected party to the hospital. I find that the emails do not contain detailed financial information concerning the affected party's operations, pricing and costs of its business. I find that disclosure of the limited information in these emails could not reasonably be expected to prejudice the affected party's competitive position.

[101] Taking into consideration the contents and the age of the information at issue in the emails, and the hospital's and the affected party's representations, I find that I do not have sufficiently detailed evidence to demonstrate that part 3 of the test under section 17(1) has been met for the emails at pages 5, 19 to 22, 30, 31, 66, 70, 82, 83, 86, 87, 96 to 98, 112, and 113 of the records.

[102] However, as the hospital has also claimed the application of discretionary exemption in sections 18(1)(c) and (e) for the emails at pages 96 to 98 and 112 to 113, I will consider the application of those exemptions to them below.

[103] As no other mandatory exemptions apply and no discretionary exemptions have been claimed, I will order the information at issue in the emails at pages 5, 19 to 22, 30, 31, 66, 70, 82, 83, 86 and 87 disclosed to the appellant.

[104] Concerning the affected party's risk management information at pages 270, 284 to 295, 299 and 300, the hospital indicates that these pages include information about the affected party's pandemic planning, business continuity and information technology risks, contingency planning, and equipment redundancy. Based on my review of these records, I find that this is sensitive commercial information the disclosure of which could reasonably be expected to cause the harms set out in section 17(1)(a) by prejudicing significantly the competitive position of the affected party.

[105] The remaining information at issue is contained in the financial graphs at pages

208 to 216, and 313 to 323. The hospital describes these graphs as containing information about the volume of linen shipped by the affected party, the affected party's revenue, direct and indirect costs, utility usage, interest and depreciation costs, assets and trucking logistics. I find that disclosure of this detailed financial information could reasonably be expected to cause the harms set out in section 17(1)(a) by prejudicing significantly the competitive position of the affected party.

Conclusion re section 17(1)

[106] I have found that all of the information that met part 2 of the test also meets part 3 of the test under section 17(1), except for the emails and portions of the minutes of the affected party's board meetings, as detailed below. Therefore, subject to my review of the application of section 23, I find that section 17(1) applies to exempt the following information:

- The financial statements at pages 118, 119, 120 to 131, 135 to 137, 140 to 147, 158 to 161, 164 to 171, 197, 225, 226, 239, 240, 263, 264, 325, and 326.
- The business reports at pages 199 to 201, 222 to 223, 235 to 236, 260 to 261, 327, and 328.
- The year-end review reports at pages 203 to 207, and 309 to 312.
- The financial graphs at pages 208 to 216, and 313 to 323.
- Portions of the minutes of the affected party's board of director's meetings at pages 219 to 221, 233, 234, and 255 to 257.
- The risk management presentations at pages 270, 284 to 295, 299 and 300.

[107] I have found that section 17(1) does not apply to:

- The email chains at pages 5, 19 to 22, 30, 31, 66, 70, 82, 83, 86, 87, 96 to 98, 112, and 113.
- Portions of the minutes of the affected party's board of director's meetings at pages 219 to 221, 233, 234, and 255 to 257.

[108] I will order these pages disclosed, except for the emails at pages 96 to 98 and 112 to 113. For the emails at pages 96 to 98 and 112 to 113, I will consider whether the discretionary exemptions in sections 18(1)(c) or (e) apply.

Issue C: Does the section 65(6)3 labour relations and employment records exclusion exclude page 406 of the records from the *Act*?

[109] Section 65(6)3 states:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[110] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[111] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.³⁷

[112] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.³⁸

[113] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.³⁹

[114] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁴⁰

[115] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.⁴¹

[116] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its

³⁷ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

³⁸ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

³⁹ Order PO-2157.

⁴⁰ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

⁴¹ Orders P-1560 and PO-2106.

employees.⁴²

[117] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.⁴³

[118] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.⁴⁴

[119] The records collected, prepared maintained or used by the institution are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.⁴⁵

Representations

[120] The hospital states that page 406 is part of a presentation it prepared along with its consultants regarding the streamlining of the hospital's laundry and linen services. It states that this presentation was delivered by hospital staff and the hospital's consultants. It states that page 406 contains plans with respect to the staffing mix responsible for the provision of laundry and linen services to the various hospital sites, and the structure of the hospital's distribution program. The hospital submits that page 406 directly addresses conditions of employment for employees working for the hospital.

[121] The appellant refers to the hospital's submissions under section 13(1) concerning page 406 and states that the hospital describes the context of the creation of page 406 as part of its consultant's review of potential cost savings for the hospital, including with respect to the delivery of laundry and linen services. She states that this review is described by the hospital as a "sustainability review" in which "Many areas have been looked at across [the hospital] and multiple initiatives have been implemented."

[122] The appellant points out that the hospital acknowledges that:

Past decisions of the IPC have distinguished between records relating to broad organizational reviews which touch "occasionally, and in an

⁴² *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁴³ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

⁴⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

⁴⁵ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

extremely general way, on staffing and salary issues”, and which are therefore not excluded under section 65(6), and records which specifically and directly engage the institution’s role as an employer and relationship with its workforce and which are therefore properly excluded under section 65(6).

[123] The appellant submits, therefore, given the context of its creation, as well as the hospital’s own description, page 406 is appropriately characterized as part of a “broad organizational review” which the IPC has found not to be subject to the exclusion in section 65(6)3 of the *Act*.

[124] The hospital did not provide representations in reply to the appellant’s on this issue.

Analysis/Findings

[125] For section 65(6)3 to apply, the hospital must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[126] Page 406 appears to me to be part of an overall review by the hospital concerning its laundry and linen services. This review resulted in a number of reports and presentations that are set out in the records from pages 352 to 423 and 455.

[127] I agree with the hospital, and I find, that parts 1 and 2 of the test have been met as page 406 is part of a presentation prepared by the hospital in relation to meetings, consultations, discussions or communications regarding the hospital’s laundry and linen services.

[128] However, part 3 of the test is not met. Page 406 is part of a general review of the hospital’s laundry and linen services, which appears at pages 352 to 423 and 455. Based on my review of the content of the review including page 406, I find that the record that includes this page does not fall within section 65(6)3 as the meetings, consultations, discussions or communications were not about labour relations or employment-related matters in which the institution has an interest for the purpose of part 3 of the test under section 65(6)3. This is because the review as a whole does not

relate to employment-related matters and the hospital's relationship with its workforce. Rather, it is an overall operational review of the hospital's operations.⁴⁶

[129] Given my conclusion that part 3 of the test has not been met for page 406, I find that it is not excluded from the application of the *Act* by reason of section 65(6)3. I will consider the application of the discretionary exemptions in sections 13(1) and 18(1)(c) and (e) to page 406.

Issue D: Does the discretionary advice or recommendations exemption at section 13(1) apply to the records?

[130] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[131] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁴⁷

[132] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[133] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁴⁸

[134] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

⁴⁶ The IPC has consistently held that the exclusion in section 65(6) of the *Act* are record-specific and fact-specific. Therefore, in order to qualify for an exclusion, the record is examined as a whole. See for example, Orders M-797, P-1575, PO-2531, PO-2632, MO-1217, PO-3456-I.

⁴⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

⁴⁸ See above at paras. 26 and 47.

[135] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁴⁹

[136] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁵⁰

[137] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).⁵¹

[138] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information⁵²
- a supervisor's direction to staff on how to conduct an investigation⁵³
- information prepared for public dissemination.⁵⁴

Representations

[139] The hospital claims that section 13(1) applies to pages 6 to 8, 25, 26, 32, 63 to 65, 99 to 100, 352 to 423, and 455.

[140] The hospital states that, in recent years, like most hospitals in Ontario, it has

⁴⁹ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

⁵⁰ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

⁵¹ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

⁵² Order PO-3315.

⁵³ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

⁵⁴ Order PO-2677.

found itself under increasing and unprecedented financial pressure. The hospital has tasked its own staff and retained a consultant to facilitate discussions concerning cost saving. The mandate of the consultant, supported by the hospital's staff, was to advise the hospital in its pursuit of financial sustainability and to identify areas where there may be opportunities for change, including with respect to the delivery of laundry and linen services, and providing advice with respect to the options available for increasing financial viability.

[141] The hospital states that the pages at issue contain advice or recommendations of employees of the hospital, or of the consultant, regarding the pricing of hospital laundry and linen services.

[142] The hospital states that examples of the types of advice and recommendations can be found on pages 352 to 423. It states that these pages contain slides that set out advice regarding options available to the hospital to reduce costs associated with the provision of laundry and linen services on the basis of the analysis performed by the consultant and the hospital's own staff.

[143] The hospital states that it has withheld these pages as disclosure would allow a third party to draw inferences about the nature of the advice or recommendations provided. It says that these pages contain both advice and recommendations regarding managing the hospital's relationship with the affected party and discussions regarding the ramifications of reducing the volume of linen processed by the affected party.

[144] The hospital states that advice or recommendations regarding opportunities for cost savings with respect to its linen supply can be specifically found at pages 6 to 8, 25, 26, 32, 63 to 65, 99 to 100, and 455.

[145] The appellant states that even if the records contain advice or recommendations, the mandatory exceptions to section 13(1) in sections 13(2)(a), (b), and/or (f) should apply. These sections read:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(b) a statistical survey;

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

[146] Based on the severances made to the records, the appellant infers that some of the records are from the report provided by the consultant to the hospital.

Analysis/Findings

[147] The hospital also provided confidential representations on many of the records at issue under section 13(1). I agree with the hospital that the emails at pages 6 to 8, 25, 26, and 32 contain advice or recommendations within the meaning of section 13(1). Disclosure of these records would reveal the advice or recommendations of hospital staff within the meaning of the section 13(1) exemption.

[148] Therefore, subject to my review of the hospital's exercise of discretion and the application of the public interest override in section 23, I find the emails at pages 6 to 8, 25, 26, and 32 are exempt under section 13(1).

[149] Pages 63 to 65 are a form for which the hospital has claimed sections 13(1), along with 18(1)(c) and (e). The identical form is found at pages 71 to 74. The only difference between the two forms is that the form at pages 71 to 74 has two very short handwritten notes written on it. The hospital provided essentially the same representations for both forms, however, the hospital did not claim the application of section 13(1) to the form at pages 71 to 74.

[150] The hospital's representations on the application of section 13(1) to pages 63 to 65 only indicate that the form comprising this record contains advice or recommendations regarding opportunities for cost savings with respect to its linen supply. Based on my review of the form found at pages 63 to 65, and considering the hospital's brief representations on this form, I cannot ascertain any cost-savings recommendations, or even any advice, in this form.

[151] Based on my review of the form at pages 63 to 65, and considering that section 13(1) was not claimed for the same form at pages 71 to 74 of the records, there is not sufficient evidence upon which I could conclude that section 13(1) applies to pages 63 to 65 of the records, and I find that it does not.

[152] Pages 99 to 100 is a form with an attachment containing linen pricing information. The hospital did not provide representations as to what advice or recommendations may be revealed by disclosure of this information. Nor can I ascertain such from my review of this record. I find that section 13(1) does not apply. I will consider whether sections 18(1)(c) or (e) apply to these pages, below.

[153] Pages 352 to 423 are part of presentations developed by the consultant, in conjunction with hospital staff, containing advice or recommendations to the hospital related to the hospital's financial sustainability. I find that section 13(1) applies to these pages. However, although they contain advice or recommendations within the meaning of section 13(1), I find that these pages are not exempt under that exemption because they fit within the mandatory exception to section 13(1) in section 13(2)(f). This section reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

[154] Section 13(2)(f) is not restricted to reports or studies concerning institutions as a whole, but may also apply to reports or studies concerning one or more discrete program areas within an institution.⁵⁵

[155] Pages 352 to 423 are part of the larger study undertaken by the hospital with its consultant on the financial efficiency of the hospital. In the circumstances, I find that these pages are not exempt under section 13(1) by reason of section 13(2)(f). I will consider, below, whether sections 18(1)(c) or (e) apply to this information.

[156] The hospital has not indicated that page 455 is part of the consultant's review; however, it did provide the same confidential representations for this page as it did for pages 352 to 423. Based on my review of page 455, I find that this page is related to the consultant's review. I find that, although page 455 contains advice or recommendations, the information it contains also fits within the exception in section 13(2)(f). I will also consider, below, whether sections 18(1)(c) or (e) apply to page 455.

[157] In conclusion, subject to my review of the hospital's exercise of discretion, pages 6 to 8, 25, 26, and 32 are exempt under section 13(1). I will consider, below, whether pages 63 to 65, 99, 100, 352 to 423, and 455 are exempt by reason of sections 18(1)(c) or (e).

Issue E: Does the discretionary economic and other interests exemption at sections 18(1)(c) or (e) apply to the records?

[158] Section 18(1) states in part:

A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

⁵⁵ Orders M-941 and P-658.

[159] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.⁵⁶

[160] For section 18(1)(c) to apply, the institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁵⁷

[161] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁵⁸

[162] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.⁵⁹

[163] In its initial representations, the hospital has referred specifically to the application of sections 18(1)(c) and (e) to certain portions of the records at pages 67 to 69, 71 to 74, 88 to 100, 111, 352 to 423, and 455 of the records. In Schedule "A" to its initial representations, the hospital has indicated that sections 18(1)(c) and (e) also apply to other portions of these records at pages 81, 84, 85, 112, and 113.

[164] Therefore, of the information remaining at issue, the hospital has claimed the application of sections 18(1)(c) and (e) to:

- pages 63 to 65, 67 to 69, 71 to 74, 81, 84, 85, 88 to 100, 111 to 113, 352 to 423, and 455.

Section 18(1)(c): prejudice to economic interests

[165] The purpose of section 18(1)(c) is to protect the ability of institutions to earn

⁵⁶ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.

⁵⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁵⁸ Order MO-2363.

⁵⁹ See Orders MO-2363 and PO-2758.

money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁶⁰

[166] This exemption is arguably broader than section 18(1)(a)⁶¹ in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.⁶²

Representations

[167] The hospital states that it withheld under section 18(1)(c) the portions of the records that contain details of the costs, benefits and drawbacks of contracted linen services at the hospital, together with options to improve the same. It points out that certain pages of the records, pages 63 to 65,⁶³ 67 to 69, 71 to 74, 81, 84, 85, 88 to 100, and 111 to 113, address the pricing of linen services provided to the hospital by the affected party.

[168] The hospital states that pages 352 to 423 and 455 identify potential cost savings opportunities with respect to general hospital laundry and linen usage, and contain detailed information regarding the hospital's budget and operating expenses in this respect.

[169] The hospital submits that disclosure of the information at issue would result in poorer outcomes for the hospital in negotiations and would prejudice the hospital's economic position, as a result of:

- impairing its ability to negotiate effectively with its contracted partners in the future by giving them insight into the hospital's strategic priorities and pressure points for negotiation; and,

⁶⁰ Orders P-1190 and MO-2233.

⁶¹ Section 18(1)(a) reads:

A head may refuse to disclose a record that contains,
trade secrets or financial, commercial, scientific or technical information that
belongs to the Government of Ontario or an institution and has monetary value or
potential monetary value.

⁶² Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

⁶³ Although the hospital did not specifically mention pricing in relation to pages 63 to 65, as set out above under section 13(1), this form is identical to the form at pages 67 to 69.

- prejudicing the hospital's ability to secure savings on linen services by weakening its bargaining position in negotiations.

[170] The appellant states that the hospital has merely repeated the wording of the exemption. The appellant submits that I should consider the relationship between the hospital as an owner of the affected party, as compared to that of the hospital and a completely independent third-party vendor. She points out that the hospital effectively sits on "both sides of the negotiating table" with respect to its contract for laundry and linen services with the affected party.

[171] In reply, as noted above, the hospital rejects the appellant's position that the affected party is not an independently managed corporation operating at arm's length from the hospital.

Analysis/Findings

[172] Although pages 63 to 65, 67 to 69, 71 to 74, 81, 84, 85, 88 to 100, and 111 address the pricing of laundry and linen services provided to the hospital by the affected party, I find that the hospital has not provided detailed evidence about the potential for harm as required by section 18(1)(c), nor is the harm inferable from the records themselves and/or the surrounding circumstances

[173] Based on my review of pages 63 to 65, 67 to 69, 71 to 74, 81, 84, 85, 88 to 100, and 111, I find that I do not have sufficient evidence to determine that disclosure of the pricing information in these pages could reasonably be expected to prejudice the economic interests or competitive position of the hospital. The hospital and the affected party have been in a long-standing relationship for the provision of laundry and linen services to the hospital. A hospital employee has a seat on the affected party's board of directors. The hospital does not compete with other hospitals for the provision of laundry and linen services from the affected party.

[174] As well, I cannot ascertain from my review of the pages at issue how disclosure of the pricing information at issue could reasonably be expected to reveal strategic priorities and pressure points for negotiation or could reasonably be expected to weaken its bargaining position. The pages at issue reveal prices paid by the hospital to the affected party for laundry and linen services for services in the past. I do not have sufficient evidence to find that these pages contain information that reveals the affected party's current pricing strategy.

[175] Therefore, I cannot ascertain how disclosure of pages 67 to 69, 71 to 74, 81, 84, 85, 88 to 100, and 111 could reasonably be expected to prejudice the economic interests or the competitive position of the hospital and I find that the section 18(1)(c) exemption does not apply to these pages. I will consider, below, whether section 18(1)(e) applies to them.

[176] For pages 112 and 113 the hospital has only provided section 17(1)

representations. Its representations for these pages read:

These emails contain correspondence between hospital staff and [the affected party] regarding price increases. As outlined in the hospital's primary submissions, the pricing information constitutes immutable fixed costs which were supplied in confidence to the hospital. The disclosure of such information can reasonably be expected to prejudice [the affected party's] competitive position within the marketplace.

[177] Pages 112 to 113 are brief emails exchanged between the affected party and the hospital and are pricing related. For the same reasons set out above for the other pages that contain pricing information, I find that section 18(1)(c) does not apply to exempt these pages. I will also consider whether section 18(1)(e) applies to them.

[178] Pages 352 to 423 and 455 are part of an overall operational review of the hospital's operations. The pages at issue contain a detailed review of the hospital's laundry and linen services. The hospital provided essentially the same argument about disclosure as it did for the other pages at issue under section 18(1), namely, that disclosure will affect its relationship with the affected party.

[179] I agree with the hospital that disclosure of the pages at issue from this laundry and linen services operational review could reasonably be expected to prejudice the competitive position of the hospital. I am satisfied that disclosure could reasonably be expected to impair the hospital's ability to negotiate effectively with the affected party in the future by giving the affected party insight into the hospital's strategic priorities and pressure points for negotiation.

[180] Therefore, I find that pages 352 to 423 and 455 are subject to section 18(1)(c). For the sake of completeness, I will also consider whether these pages are also subject to section 18(1)(e).

Section 18(1)(e): positions, plans, procedures, criteria or instructions

[181] In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.⁶⁴

[182] Section 18(1)(e) applies to financial, commercial, labour, international or similar negotiations, and not to the development of policy with a view to introducing new legislation.⁶⁵

[183] The terms “positions, plans, procedures, criteria or instructions” suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.⁶⁶

[184] This office has adopted the dictionary definition of “plan” as a “formulated and especially detailed method by which a thing is to be done; a design or scheme.”⁶⁷

[185] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations but rather simply reflects mandatory steps to follow.⁶⁸

Representations

[186] The hospital states that the information at issue contains positions and plans to be applied or which may be applied to future negotiations as the hospital pursues sustainability through changes to its support services, including linen services. It states that such negotiations are ongoing, as the hospital is continually seeking to streamline operations and to proactively manage linen usage.

[187] The hospital submits that the information at issue would provide the affected party or other linen service providers with insight into the hospital’s priorities and strategy with respect to future negotiations, which would permit these providers to:

- exploit vulnerabilities and pressure points for the hospital in negotiations, and
- anticipate the strategies which the hospital would adopt during negotiations and substantially impair the hospital’s ability to negotiate with these third parties.

[188] The hospital also states that disclosure would be severely detrimental to the hospital’s ability to negotiate effectively, which can reasonably be expected to lead to significantly poorer outcomes for the hospital in those negotiations.

⁶⁴ Order PO-2064.

⁶⁵ Orders PO-2064 and PO-2536.

⁶⁶ Orders PO-2034 and PO-2598.

⁶⁷ Orders P-348 and PO-2536.

⁶⁸ Order PO-2034.

[189] The hospital explains that the pages at issue contain positions and instructions to be applied to the hospital's renegotiation of services provided by the affected party to the hospital. Further, the hospital submits that disclosure of its plans and positions for negotiations may result in these plans and positions being put at risk, as details may not be finalized and necessary approvals may not be obtained. It submits that its chances of success in negotiations are improved when the hospital does not face the threat of disclosure.

[190] The appellant disputes that the information at issue suggests a pre-determined course of action with respect to any future negotiations of its contract with the affected party.

[191] The appellant submits that a close examination of the dates of pages 67 to 69, 71 to 74 and 96 to 98 (where it is possible to ascertain these dates from the portions of the records disclosed), indicates that the negotiations between the hospital and the affected party on several matters had previously been concluded.

[192] The hospital did not provide reply representations on sections 18(1)(c) and (e).

Analysis/Findings

[193] The hospital's position is that disclosure would reveal procedures and criteria applicable in negotiations.

[194] Pages 63 to 65, 67 to 69, 71 to 74, 81, 84 to 85, 88 to 89, 90 to 95, 99 to 100, and 111 to 113, all relate to linen pricing information that has been in place at the hospital.

[195] The hospital states that disclosure of these pages would reveal strategies and approaches to negotiations, which would compromise the relationship between it and the affected party.

[196] Based on my review of these pages, I find that they reflect the pricing already determined by the hospital and in place between the parties. I find that these pages do not contain information about positions, plans, procedures, criteria or instructions intended to be applied to negotiations being carried on currently, or to be carried on in the future. Therefore, I find that section 18(1)(e) does not apply to these pages. As no other discretionary exemptions have been claimed for these pages, and no mandatory exemptions apply, I will order pages 63 to 65, 67 to 69, 71 to 74, 81, 84 to 85, 88 to 89, 90 to 95, 99 to 100, and 111 to 113 disclosed.

[197] Pages 352 to 423 and 455, the linen services operational review, relate to the streamlining and management of linen services. I agree with the hospital that these pages contain positions and plans to be applied or which may be applied to future negotiations regarding its linen services.

[198] I agree with the hospital that disclosure of pages 352 to 423 and 455 would provide the affected party or other linen service providers with insight into the hospital's priorities and strategy with respect to future negotiations.

[199] Therefore, I find that section 18(1)(e) applies to pages 352 to 423, and 455, as these pages contain positions, plans, procedures, criteria or instructions to be applied to negotiations to be carried on by the hospital for linen services.

Conclusion re sections 18(1)(c) and (e)

[200] I have found that sections 18(1)(c) and (e) apply to pages 352 to 423 and 455, which contain the hospital's linen services operational review. Subject to my review of the hospital's exercise of discretion and the application of the public interest override at section 23, this information is exempt under sections 18(1)(c) and (e).

[201] I have found that neither sections 18(1)(c) nor (e) applies to the records at pages 63 to 65, 67 to 69, 71 to 74, 81, 84 to 85, 88 to 89, 90 to 95, 99 to 100, and 111 to 113, which contain pricing related information that is already in effect. As no other discretionary exemptions have been claimed for this information, and no mandatory exemptions apply, I will order this information disclosed.

Issue F: Did the institution exercise its discretion under sections 13(1) and 18(1)? If so, should this office uphold the exercise of discretion?

[202] The sections 13(1) and 18(1) exemptions are discretionary, and permit 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.

[203] 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.

[204] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶⁹ This office may not, however,

⁶⁹ Order MO-1573.

substitute its own discretion for that of the institution.⁷⁰

[205] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁷¹

- 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

[206] The hospital states that it considered the appellant's interest in receiving the records, and the public interest in transparency, but also the need for confidentiality. It states that, wherever possible, it severed and disclosed portions of the records to the

⁷⁰ Section 54(2).

⁷¹ Orders P-344 and MO-1573.

appellant while protecting the minimum information necessary to protect the interest in question.

[207] The hospital states that it determined that the public interest in its ability to receive advice and develop and implement plans to operate in a financially sustainable manner supported withholding the portions of the records at issue.

[208] The appellant submits that the hospital's submissions do not delineate the factors it took into consideration when withholding access to records pursuant to the exemptions in sections 13(1) and 18(1).

[209] The appellant states that in the hospital's statements in other parts of its representations, it assumed and considered that the requester is a competitor of the affected party. She submits that this demonstrates that the hospital took into account an irrelevant consideration in exercising its discretion.

Analysis/Findings

[210] I find that the hospital exercised its discretion in a proper manner with respect to the information I have found subject to sections 13(1) and 18(1)(c) and (e).

[211] I note that the appellant is concerned that the hospital may have taken into account an improper consideration, namely, that the appellant represents a competitor of the affected party and is seeking the information at issue in this appeal to gain a competitive advantage over the affected party.

[212] However, as stated above, proper considerations that an institution may take into account include:

- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

[213] I find that the hospital took into account relevant factors and did not take into account irrelevant factors in withholding the information at issue that consists of:

- internal advice or recommendations in the case of the emails at issue for which section 13(1) was claimed, and
- information affecting the hospital's economic interest in its operational review for which sections 18(1)(c) and (e) were claimed.

[214] Therefore, I am satisfied that the hospital exercised its discretion properly and I will uphold it. I will now consider the application of the public interest override in section 23 to the information that I have found exempt under sections 13(1), 17(1) and 18(1)(c) and (e).

Issue G: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13(1), 17(1), and 18(1) exemptions?

[215] I found above that section 17(1) applies to exempt the following information at issue:

- pages 118 to 131, 135 to 137, 140 to 147, 158 to 161, 164 to 171, 197, 199 to 201, 203 to 216, 219 to 223, 225, 226, 233 to 236, 239, 240, 255 to 257, 260 to 261, 263, 264, 270, 284 to 295, 299, 300, 309 to 323, 325 to 328.

[216] I also found that section 13(1) applies to pages 6 to 8, 25, 26, and 32 of the records.

[217] Finally, I found that sections 18(1)(c) and (e) apply to pages 352 to 423 and 455 of the records. Amongst these pages are two charts at pages 368, 375, 384, 404, and 409 that contain the Ottawa Hospital's and three other hospitals' information.

[218] In considering the application of section 23 to these two charts, I have considered the representations of the third party provider that provided substantive representations as to the application of sections 13(1), 17(1), and 18(1). I maintain my finding as to the application of section 18(1) to these two charts. I find, however, that sections 13(1) and 17(1) do not apply to these pages, based on my review of these pages and the general nature of the provider's representations.

Representations

[219] The appellant has raised the application of the public interest override in section 23 of the *Act* with respect to the information that I have found subject to sections 13(1), 17(1), and 18(1).

[220] The appellant submits that section 23 applies because Ontario taxpayers should know how their tax dollars are spent by government-funded organizations. She submits that the records represent expenditures by a hospital in an indirect manner by the flow-through of money from the government to a private sector entity, the affected party.⁷²

[221] In reply, the hospital states that:

The hospital takes the position that this appeal is not fundamentally about "informing and enlightening" the public with respect to the manner in which scarce healthcare dollars are spent, as asserted by the appellant. The interest at stake in this appeal is the commercial interest of a

⁷² The appellant also provided confidential representations on this issue, which are not set out here.

competitor in obtaining information relating to the pricing practices of a private organization, so as to better compete with that organization. This is not in any way a matter of compelling public interest. Section 23 of *FIPPA* has no application to this case.

[222] As noted above, five pages of the records, consisting of two charts, contain the financial information of three hospitals plus that of the Ottawa Hospital. These five pages are located at:

- pages 375, 404 and 409, which contain identical information, and
- pages 368 and 384, which contain identical information.

[223] I sought the representations of the three other hospitals on these charts regarding the discretionary exemptions claimed by the Ottawa Hospital at sections 13(1) and 18(1)(c) and (e). As well, I sought their representations on the application of the public interest override at section 23.

[224] One hospital did not object to the release of its information, but it did suggest that I seek the representations of its laundry and linen services provider, which I did.

[225] I also sought representations from this hospital's provider on the application of sections 13(1), 17(1), 18(1)⁷³ and 23. This provider provided representations indicating that the charts contain its pricing information for laundry and linen services, including fees charged by it to the hospital. It submits that disclosure of its hospital customer's information in these charts could reasonably be expected to:

- Compromise its negotiating position with new and existing customers;
- Provide its competition with an unfair advantage in the market for hospital laundry and linen services; and,
- Harm the economic interests and competitive positions of its member hospitals.

[226] Another hospital responded by saying that it:

...supports the position of The Ottawa Hospital and upholds the exemptions in the broader context...

[It] is not in a position to make representations regarding the public interest override at section 23.

⁷³ I considered this party's representations in my determinations under these exemptions when making a determination about the pages at issue that contained this party's information.

[227] The third hospital stated that its figures in the charts did not match what was in its service agreement. It stated that the data in the charts might have come from a third party. I sent a Notice of Inquiry to this third party, but did not receive representations in response.

Analysis/Findings

[228] Section 23 states:

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.

[229] 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.

[230] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.⁷⁴

Compelling public interest

[231] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the Act's central purpose of shedding light on the operations of government.⁷⁵ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.⁷⁶

[232] A public interest does not exist where the interests being advanced are essentially private in nature.⁷⁷ Where a private interest in disclosure raises issues of

⁷⁴ Order P-244.

⁷⁵ Orders P-984 and PO-2607.

⁷⁶ Orders P-984 and PO-2556.

⁷⁷ Orders P-12, P-347 and P-1439.

more general application, a public interest may be found to exist.⁷⁸

[233] A public interest is not automatically established where the requester is a member of the media.⁷⁹

[234] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.⁸⁰

[235] Any public interest in *non*-disclosure that may exist also must be considered.⁸¹ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.⁸²

[236] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation⁸³
- the integrity of the criminal justice system has been called into question⁸⁴
- public safety issues relating to the operation of nuclear facilities have been raised⁸⁵
- disclosure would shed light on the safe operation of petrochemical facilities⁸⁶ or the province’s ability to prepare for a nuclear emergency⁸⁷
- the records contain information about contributions to municipal election campaigns⁸⁸

[237] A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations⁸⁹

⁷⁸ Order MO-1564.

⁷⁹ Orders M-773 and M-1074.

⁸⁰ Order P-984.

⁸¹ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

⁸² Orders PO-2072-F, PO-2098-R and PO-3197.

⁸³ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

⁸⁴ Order PO-1779.

⁸⁵ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

⁸⁶ Order P-1175.

⁸⁷ Order P-901.

⁸⁸ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations⁹⁰
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding⁹¹
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter⁹²
- the records do not respond to the applicable public interest raised by appellant⁹³

Purpose of the exemption

[238] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[239] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.⁹⁴

Section 17(1)

[240] Section 17(1) applies to exempt the following information:

- The financial statements at pages 118, 119, 120 to 131, 135 to 137, 140 to 147, 158 to 161, 164 to 171, 197, 225, 226, 239, 240, 263, 264, 325, and 326.
- The business reports at pages 199 to 201, 222 to 223, 235 to 236, 260 to 261, 327, and 328.
- The year-end review reports at pages 203 to 207, and 309 to 312.
- The financial graphs at pages 208 to 216, and 313 to 323.
- Portions of the minutes of the affected party's board of director's meetings at pages 219 to 221, 233, 234, and 255 to 257.

⁸⁹ Orders P-123/124, P-391 and M-539.

⁹⁰ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁹¹ Orders M-249 and M-317.

⁹² Order P-613.

⁹³ Orders MO-1994 and PO-2607.

⁹⁴ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

- The risk management presentations at pages 270, 284 to 295, 299 and 300.

[241] I disagree with the appellant that the records for which I have upheld section 17(1), (namely, financial statements and graphs, meeting minutes, risk management information and business and year-end review reports) address the public interest considerations raised by the appellant. Those public interest considerations relate to how taxpayer funds are being spent.

[242] The records relate to the internal financial operations of the affected party. Although the hospital may have been involved originally in the formation of the affected party, the evidence is clear that the affected party is now a private entity. A compelling public interest has been found not to exist where the records do not respond to the applicable public interest raised by the appellant.⁹⁵ Therefore, I find that the information that I have ordered withheld under section 17(1) is not subject to the public interest override in section 23.

Section 13(1)

[243] The appellant has indicated that the public interest override in section 23 should apply to the information I have found subject to the discretionary exemption in section 13(1), which are the emails at pages 6 to 8, 25, 26, and 32.

[244] I find that these emails do not address the public interest considerations raised by the appellant, as set out above. These internal hospital emails concern a number of options about the linen services being provided by the affected party without definitive information about a course of action being undertaken by the hospital. The emails do not directly address the public interest consideration raised by the appellant regarding the responsible expenditure of public monies and operational efficiencies of the hospital.

Section 18(1)

[245] I have found that the discretionary exemptions in sections 18(1)(c) and (e) apply to the operational review at pages 352 to 423 and 455.

[246] I agree with the appellant that certain information in these pages, the information that details the amount of money spent by the hospital on laundry and linen services as compared to other hospitals, which is found at pages 368, 375, 384, 404, and 409, address the public interest considerations raised by the appellant.

[247] These considerations relate to "informing and enlightening" the public with respect to the manner in which scarce healthcare dollars are spent by the hospital. I

⁹⁵ Orders MO-1994 and PO-2607.

find that in the circumstances of this appeal, taking into account the longstanding and intertwined relationship of the hospital with its linen services provider, the affected party, and the amount of money the hospital is spending on its linen services, there exists a compelling public interest in disclosure.

[248] The charts analyze the Ottawa Hospital's laundry and linen services spending as compared to its operating expenses and the net cost to the hospital per patient per day. It compares this information to that of three other Ontario hospitals.

[249] The two charts show a comparison of the hospital's spending on laundry and linen services with that spent by certain other Ontario hospitals. I find that there is a public interest in disclosure of this information, which reveals the amounts these hospitals spend on laundry and linen services.

[250] I find that disclosure would shed light on the Ottawa Hospital's operations, and that there is a compelling public interest in disclosure of the Ottawa Hospital's information as compared to other hospitals in Ontario. I also find that this compelling public interest clearly outweighs the purpose of the applicable sections 18(1)(c) and (e) exemptions.

[251] In this appeal, I find that the public interest in the Ottawa Hospital's significant expenditure on laundry and linen services, as well as this expenditure as it compares to other Ontario hospitals, clearly outweigh the purpose of sections 18(1)(c) and (e) exemptions, which is to protect certain economic interests of institutions.

[252] Accordingly, I find that the public interest override in section 23 applies to override the sections 18(1)(c) and (e) exemptions for the two charts at pages 368, 375, 384, 404, and 409 of the records as disclosure will show the Ottawa Hospital's spending on laundry and linen services as compared to other Ontario hospitals.

Conclusion

[253] In conclusion, regarding the information that I have found exempt under sections 13(1), 17(1) and 18(1), the only information to which I have found that the public interest override applies is that which would otherwise be subject to sections 18(1)(c) and (e), namely, the two charts found at pages 368, 375, 384, 404, and 409 of the records.

Given my finding that section 23 of the *Act* applies to override their exemption under sections 18(1)(c) and (e), I will order these pages disclosed to the appellant.

Issue H: Did the hospital conduct a reasonable search for records?

[254] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.⁹⁶ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[255] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁹⁷ To be responsive, a record must be "reasonably related" to the request.⁹⁸

[256] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁹⁹

[257] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹⁰⁰

[258] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹⁰¹

[259] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.¹⁰²

Representations

[260] The hospital states that its information and privacy office received and processed the request and notified the individuals and offices that were likely to have possession of the requested records. It states that it worked with those individuals to identify staff who would be well positioned to conduct a search. After these individuals searched for records, the information and privacy office reviewed all responsive records for possible exemptions and exclusions for redaction and identified any duplicate records.

⁹⁶ Orders P-85, P-221 and PO-1954-I.

⁹⁷ Orders P-624 and PO-2559.

⁹⁸ Order PO-2554.

⁹⁹ Orders M-909, PO-2469 and PO-2592.

¹⁰⁰ Order MO-2185.

¹⁰¹ Order MO-2246.

¹⁰² Order MO-2213.

[261] In response to the hospital's description of its search efforts, the appellant provided a chart setting out the language in eight of the records, which she submits suggest the existence of additional responsive records. These items refer to attachments that were not included in the records package she received from the hospital.

[262] The appellant states that the first part of her request sought records related to the provision of laundry and linen services, yet apart from the linen service agreement, the majority of the records that the hospital has identified as being responsive to the first part of the request deal only with the provision of hyperbaric linen services.

[263] The appellant submits that based on the plain language broad scope of the linen service agreement entered into between the affected party and the hospital, it is extremely difficult to understand how there could be such a paucity of information related to the non-hyperbaric linen services provided by the affected party to the hospital.

[264] In reply, the hospital states that the vast majority of the records identified by the appellant as not being located by it were included within the records disclosed to the appellant.

[265] The hospital disputes that it produced a "paucity of information" relating to the non-hyperbaric services and submits that the appellant has failed to adduce any evidence or basis for that allegation. It maintains that it has produced all relevant records.

Analysis/Findings

[266] The appellant sought access to the following information:

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.

[267] I agree with the appellant that the hospital has not conducted a reasonable

search with respect to specific information that has not yet been located, identified and/or disclosed¹⁰³ to the appellant, as follows:

- Records related to the pricing of the provision of services for all products other than non-hyperbaric services (e.g. for a regular hospital bed).
- One additional record related to the financial statements at pages 132 to 147 of the records.¹⁰⁴
- One additional record related to the two PowerPoint presentations referenced within the email at page 28 of the records.¹⁰⁵
- The pricing agreement between the hospital and the affected party that precedes the one dated March 26, 2011.
- The column titled "Annual Volume" Schedule "A" to the linen service agreement between the affected party and the hospital, which is blank.
- Records responsive to part 1 of the request addressing the pricing for the provision of services and products by the affected party for hyperbaric services.¹⁰⁶

[268] I find that the appellant has provided a reasonable basis for concluding that such additional records exist. Accordingly, I find that the hospital has not conducted a reasonable search and will order the hospital to conduct another search for the listed records, taking into account the wording of the appellant's request.

ORDER:

1. I order the hospital to conduct another search for the records listed above that have not yet been located, identified or disclosed, taking into account the wording of the appellant's request. The hospital is to provide the appellant with an access decision letter concerning these records, treating the date of this order as the date of the request for the purposes of the procedural requirements of its access decision.

¹⁰³ Subject to any applicable exemptions under the *Act*.

¹⁰⁴ The hospital indicated in its representations that it will issue a decision in respect of this record, but has not done so.

¹⁰⁵ The hospital indicated in its representations that it will issue a decision in respect of this record, but has not done so.

¹⁰⁶ Other than the linen service agreement already disclosed to the appellant.

2. I find that pages 427 to 454 are not responsive to the appellant's request and uphold the hospital's decision to deny access to these pages on that basis.
3. I uphold the hospital's decision to deny access to the following pages of the records that are exempt under sections 13(1), 17(1) or 18(1)(c) and (e), as the case may be:
 - Pages 6 to 8, 25, 26, 32, 118, 119, 120 to 131, 135 to 137, 140 to 147, 158 to 161, 164 to 171, 197, 199 to 201, 203 to 216, 222, 223, 225, 226, 235, 236, 239, 240, 260, 261, 263, 264, 270, 284 to 295, 299, 300, 309 to 312 to 323, 325, 326 to 328, 352 to 357, 359 to 367, 369, 372 to 374, 377 to 383, 385, 387 to 392, 394 to 400, 402 to 403, 406 to 408, 410 to 423, and 455; and,
 - Portions of pages 219 to 221, 233, 234, and 255 to 257. With a separate cover letter dated July 31, 2020, I will courier the hospital a highlighted copy of the information in pages 219 to 221, 233, 234, and 255 to 257 that is not to be disclosed from these pages of the records. The hospital is to disclose the non-highlighted information in pages 219 to 221, 233, 234, and 255 to 257 to the appellant **by September 9, 2020 but not before August 31, 2020.**
4. I order the hospital to disclose the remaining non-exempt information at issue, including pages 368, 375, 384, 404, and 409 to which the public interest override applies, to the appellant **by September 9, 2020 but not before August 31, 2020.**
5. The timeline noted in order provision numbers 1, 3, and 4 may be extended if the hospital is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such extension requests.

Original Signed by: _____

Diane Smith
Adjudicator

July 29, 2020 _____