

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4116

Appeal PA18-180

South West Local Health Integration Network

February 25, 2021

Summary: The appellant seeks access to Price Forms relating to an identified health service provider (the affected party) that are in the custody and control of the LHIN. The LHIN denied the appellant access to the records under sections 17(1) (third party commercial information) and 18(1)(a), (c) and (d) (economic and other interests) of the *Act*. The affected party also claimed the application of section 17(1) to the records. In this order, the adjudicator finds that section 17(1) of the *Act* does not apply to the Price Forms. However, the adjudicator finds that the records are exempt from disclosure under section 18(1)(c) and upholds the LHIN's exercise of discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 18(1)(c).

Orders and Investigation Reports Considered: Orders PO-2435 and PO-2453.

OVERVIEW:

[1] The appellant made two separate requests, pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*), to the South West Local Health Integration Network (the LHIN) for access to

... information pertaining to [named health service provider A]:

1) Health Service Provider Schedule 2 – Price Forms 2012-218 Pricing & Compensation Schedule. The individual Price forms for each year 2012-2018.

... information pertaining to [named health service provider B]:

1) Health Service Provider Schedule 2 – Price Forms 2012-2018 Pricing & Compensation Schedule. The individual Price forms for each year 2012-2018.

... information pertaining to [named health service provider A]:

1) The actual volume of services of the Health Services Provider for each of the following services for the full 2017 year:

- a. Personal Support Services
- b. Occupational Therapy
- c. Physiotherapy
- d. Social Work
- e. Speech Language Pathology
- f. Dietetics

... information pertaining to [named health service provider B]:

1) The actual volume of services of the Health Service Provider for each service provided by [named health service provider B] for the years 2012-2017

2) The average price unit for all services delivered by [named health service provider B]. The average Unit price will be an aggregate total representing all services provided by [named health service provider B].

The LHIN responded to the requests and disclosed some records to the appellant. However, the LHIN withheld the Price Forms relating to the two health service providers identified in the appellant's request.

[2] The appellant appealed the LHIN's decision to this office.

[3] The LHIN informed this office that the two named health service providers amalgamated and now provide services under one legal entity and name. In this order, I will refer to the health services provider as the affected party.

[4] During mediation, the LHIN maintained its position to withhold the Price Forms from disclosure. The LHIN claimed the application of the mandatory exemption in section 17(1) (third party information) and the discretionary exemptions at sections 18(1)(a) and (c) (economic and other interests) of the *Act*. The appellant confirmed their interest in pursuing access to the records at issue.

[5] No further mediation was possible and the appeal proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to the appeal began her inquiry by inviting representations from the LHIN and the affected party. Both parties submitted representations. In its representations, the LHIN raised the application of the exemption in section 18(1)(d) to the records. As a result, the application of section 18(1)(d) and the LHIN's late raising of the exemption were added as issues to the inquiry.

[6] The adjudicator then sought and received representations from the appellant in response to the LHIN and the affected party's representations, which were shared in accordance with Practice Direction 7 of the IPC's *Code of Procedure*. The adjudicator then sought and received reply representations from the LHIN and the affected party.

[7] The appeal was then transferred to me to complete the inquiry. In the order that follows, I uphold the LHIN's decision. I find that section 17(1) of the *Act* does not apply to the records. However, I find that the records are exempt from disclosure under section 18(1)(c). I uphold the LHIN's exercise of discretion under section 18(1)(c) and dismiss the appeal. Given this finding, I will not consider the LHIN's application of sections 18(1)(a) or (d) to the records or whether it ought to be permitted to raise section 18(1)(d) during the inquiry.

RECORDS:

[8] The records at issue consist of Price Forms, which are identified as "Document Number 3: Price Forms" in the LHIN's Index of Records.

ISSUES:

- A. Does the mandatory exemption at section 17(1) apply to the records?
- B. Do the discretionary exemptions in sections 18(1)(a), (c) and/or (d) apply to the records?
- C. Should the LHIN's exercise of discretion under section 18(1)(c) be upheld?

DISCUSSION:

Issue A: Does the mandatory exemption at section 17(1) apply to the records?

[9] The LHIN claims the application of section 17(1) of the *Act* to withhold the Price Forms. The affected party also claims that section 17(1) applies to the records. The mandatory exemption in 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 be so supplied;
- (c) result in undue loss or gain to any person, group committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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

[11] Where an institution refuses access to a record or part of a record, the burden of proof that the record falls within one of the specified exemptions in the *Act* lies upon the institution.³ Third parties who rely on the exemption in section 17(1) also bear the onus of proving that this exemption applies to the record or parts of the record.⁴ In this appeal, the LHIN and the affected party share the burden of proving the records are

¹ *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.).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ Section 42 of the *Act*.

⁴ Order P-203.

exempt from disclosure under section 17(1).

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

1. the records must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the LHIN in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the records must give rise to a reasonable expectation that one of the harms specified in section 17(1) will occur.

Part 1: Type of Information

[13] As noted above, to satisfy part 1 of the section 17(1) test, the LHIN and the affected party must show the records contain information that is a trade secret, or scientific, technical, commercial, financial or labour relations information.

[14] The LHIN and the affected party submit the records contain commercial, financial and labour relations information. These types of information have been described in prior orders as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁵ The fact that a record might have monetary or potential monetary value does not necessarily mean that the record itself contains commercial information.⁶

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁷

Labour relations information means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships.

[15] The LHIN states that it uses the Price Forms at issue to record the core financial and commercial terms for service delivery by the affected party for the LHIN. The LHIN states the information contained in the Price Forms can be used alone and together to

⁵ Order PO-2010.

⁶ Order P-1621.

⁷ Order PO-2010.

determine the actual price to be paid for services. The LHIN states it is contractually obliged to provide a certain volume of services to the affected party or face higher prices for lower volumes. The LHIN states the Price Forms include:

- the geographic location where the affected party provides the services;
- the types of services provided;
- the range of volumes that the LHIN is contractually obligated to provide the affected party;
- the range of volumes where the LHIN is penalized by higher prices where volumes are lower than contracted and volumes where the LHIN will receive the benefit of lower prices where volumes are higher than contracted; and
- the actual prices paid by the LHIN to the affected party.

[16] The affected party submits that the information set out in the Price Forms, such as the actual volume of services it provided to the LHIN and the average unit price for these services constitutes commercial information. The affected party submits this information relates to the buying of healthcare services by the LHIN and the selling of these services by the affected party.

[17] In addition, the affected party submits that the Price Forms contain financial information in the form of fee amounts paid by the LHIN to the affected party for the affected party's provision of home- and community-based healthcare services.

[18] Finally, the affected party claims that the information at issue constitutes labour relations information. Specifically, the affected party claims that the fee amounts paid by the LHIN and the volume of services the affected party provides to the LHIN are directly used, in conjunction with other information, to determine the fees or wages the affected party pays to its employees.

[19] The appellant did not make submissions regarding the type of information contained in the records.

[20] Based on my review of the records, I find that the Price Forms contain commercial and financial information within the meaning of section 17(1) of the *Act*. I agree with the LHIN and the affected party that the locations and types of services provided by the affected party, the volumes and ranges of the services provided, and the prices paid by the LHIN for these services constitute commercial information within the meaning of section 17(1). In addition, the records clearly contain financial information as the Price Forms contain the prices and rates paid or to be paid by the LHIN to the affected party.

[21] However, I do not agree with the affected party that the records contain labour

relations information. Based on my review, the price forms contain basic pricing information relating to the rates and volumes for the services provided by the affected party. While the information may be used, in combination with other information, to extrapolate fee or wage information as the affected party suggests, the information itself does not contain information concerning the employee/employer relationship or conditions of work.

[22] In conclusion, I find that the Price Forms at issue contain commercial and financial information relating to the affected party. Therefore, part 1 of the test under section 17(1) is met.

Part 2: Supplied in Confidence

[23] 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.⁸

[24] Information may qualify as *supplied* if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.⁹

[25] The contents of a contract involving an institution and a third party will not normally qualify as having been *supplied* for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than *supplied* by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.¹⁰ This approach has been explained as having its basis in the purpose of section 17(1), which is to protect the *informational assets* of third parties. In this context and having regard to the plain meaning of the words used in section 17(1), this office has not generally accepted that the terms of a contract constitute information *supplied* by a third party to an institution.

[26] Both the LHIN and the affected party submit the affected party supplied the pricing information at issue. The LHIN states the Price Forms are attached to the Pricing and Compensation Schedule under the Services Agreement between itself and the affected party. Both parties confirm that the affected party supplied the information in response to the LHIN's request for proposals to provide home- and community-based healthcare services. The LHIN submits that the information was not the product of negotiation.

[27] The information subject to the LHIN and affected party's section 17(1) claim consists of pricing information relating to the home- and community-based health

⁸ Order MO-1706.

⁹ Orders PO-2020 and PO-2043.

¹⁰ This approach was approved by the Divisional Court in *Boeing Co., supra* note 1, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII).

services the affected party would provide on behalf of the LHIN. The information includes the geography of the service, the type of services, the range of volumes that may be provided, and the prices paid by the LHIN to the affected party. As indicated by the LHIN, the Price Forms are a part of the Services Agreement between the LHIN and the affected party. While the LHIN and affected party submit that the information contained in the Price Forms was not negotiated, the pricing information forms part of the Services Agreement and therefore became *negotiated* information when the agreement was completed. Therefore, the information at issue is not *supplied* within the meaning of section 17(1) of the *Act*.

[28] I find support for this finding in Order PO-2435, in which the adjudicator rejected the position taken by the Ministry of Health and Long-Term Care that proposals submitted by potential vendors in response to government Requests for Proposals, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. The adjudicator found that the exercise of the government's option in accepting or rejecting a consultant's bid is a "form of negotiation."¹¹

[29] Similarly, in Order PO-2453, the adjudicator addressed the application of the *supplied* component of the part 2 test to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. The record at issue in Order PO-2453 included the successful bidder's pricing for various components of the service to be delivered, as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution and were not *supplied* pursuant to part 2 of the test under section 17(1), the adjudicator stated:

Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

[30] I adopt the approaches discussed above in this analysis. In the circumstances of this appeal, I find that in choosing to accept the affected party's bid, the information in the Price Forms became *negotiated* information. Therefore, I find that the information at issue effectively became the essential terms of a negotiated contract and is not *supplied* within the meaning section 17(1).

[31] There are two exceptions to the general *supplied* rule: the *inferred disclosure*

¹¹ Order PO-2435. Followed in Order MO-353, among many others.

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 affected party to the institution. The *immutability* exception applies to information that is immutable or is not susceptible to change, such as the operating philosophy or a business or a sample of its product.

[32] In its representations, the affected party submits that the disclosure of the pricing information would reveal or permit the drawing of accurate inferences with respect to pricing information it supplied to the LHIN's request for proposals and when renewing its contracts with the LHIN. Specifically, the affected party submits that overhead costs could be revealed if this pricing information is disclosed, such as its budget, operational costs, collective agreement labour and other costs. The affected party submits that these overhead costs underlie its setting of the prices set out in the price forms.

[33] The LHIN submits that, even if the information is not *supplied* within the meaning of section 17(1), the disclosure of the combination of information or any of its parts would reveal or permit the drawing of accurate inferences with respect to other information supplied by the affected party during the request for proposal process. For example, the LHIN submits the disclosure of the records could result in the inferred disclosure of the affected party's market share for which it has the contracted right to receive a certain portion of all volume for a certain geographic area in the LHIN. The LHIN also submits that the information at issue could likely reveal the nature and amount of resources required by the affected party to deliver those services, especially since the Services Agreement defines pricing in Schedule 2 to be an all-inclusive price.

[34] Based on my review of the records, I am not satisfied the LHIN and the affected party provided me with sufficient evidence to demonstrate how this information can, if disclosed, be used to reasonably infer proprietary business information or other pricing arrangements between the affected party and the LHIN. The pricing information at issue contains the geography where the service will be provided, the types of services, the ranges of volumes to be provided, penalized or rewarded and the actual prices paid by the LHIN to the affected party for the specific types of service based on the actual volume of services. Upon review, I am not satisfied the affected party and the LHIN provided me with sufficient information to demonstrate that the disclosure of the pricing information at issue could reasonably be expected to reveal or permit the drawing of accurate inferences with respect to other underlying or overhead costs relating to the affected party. The affected party did not provide me with specific examples or calculations as to how the volume ranges and prices charged per service for a specific volume range could be used to reveal its confidential cost information. In the absence of specific details, I find that the *inferred disclosure* exception to the *supplied* requirement does not apply in this case.

[35] In addition, I find the parties did not provide me with sufficient evidence to

demonstrate that the information at issue is immutable.

[36] In conclusion, I find that the information at issue was not supplied for the purposes of section 17(1) of the *Act*. Because all three parts of the section 17(1) test must be met in order for the exemption to apply, I find the Price Forms are not exempt under section 17(1) of the *Act*.

Issue B: Do the discretionary exemptions in sections 18(1)(a), (c) and/or (d) apply to the records?

[37] Sections 18(1)(a), (c) and (d) state:

A head may refuse to disclose a record that contains,

(a) 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;

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

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

The purpose of section 18(1) 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 section 17(1) of the *Act*.¹²

Section 18(1)(c)

[38] The purpose of section 18(1)(c) is to protect the ability of institutions to earn 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.¹³

[39] The section 18(1)(c) exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs

¹² See *Public Government for Private People: the Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980).

¹³ Orders P-1190 and MO-2233.

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.¹⁴

[40] For section 18(1)(c) to apply, the institution must provide specific and persuasive evidence about the potential of 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 information at issue and seriousness of the consequences.¹⁵

[41] 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.¹⁶

Representations

[42] The LHIN submits that the disclosure of the price forms could significantly prejudice its economic interests and commercially competitive position. Further, the LHIN submits that the disclosure of the records could frustrate its statutorily-mandated role of delivering publicly funded services directly or indirectly through contracted service providers. The LHIN refers to Order PO-3332, in which the adjudicator considered factors such as the limited size of the market and a past practice of non-disclosure in upholding the institution's application of section 18(1)(c). The LHIN submits that both factors are relevant in this appeal.

[43] The LHIN submits it is reasonable and foreseeable that the disclosure of the Price Forms could result in harm to its economic interests and competitive position. Specifically, the LHIN submits it is concerned about the disclosure of the pricing information to other services providers, in the case that there are any substantial differences between the rates it pays to the affected party and other service providers operating in the LHIN's region or other areas. If the information at issue is disclosed, the LHIN submits it is likely these service providers would leverage their knowledge of the information at issue to the LHIN's disadvantage to secure higher rates. The LHIN emphasises that unreasonable cost demands and increases in pricing have material implications for its operating budget and ability to deliver the publicly-funded services identified in the records in accordance with its statutory mandate.

[44] The LHIN submits that service providers often have Service Agreements in multiple LHINs, each of which is independent and binding with each LHIN and each

¹⁴ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

¹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras 52-54.

¹⁶ See Orders MO-2363 and PO-2758.

service provider. In fact, the LHIN states that the affected party has Service Agreements in eleven other LHINs. As such, if the price forms are disclosed, the LHIN submits it is reasonable to expect that its bargaining position in relation to other service providers and the bargaining position of other LHINs across the province could weaken. Specifically, the LHIN submits that the bargaining position of it and other LHINs could weaken in relation to their pricing strategies and their ability to effectively determine the commercial terms by which the LHINs plan, organize, procure and deliver services, including their ability to secure favourable pricing terms, in the face of limited financial resources. The LHIN also submits there is a strong public interest in non-disclosure to preserve its ability to determine pricing with service providers.

[45] The LHIN submits there is “genuine concern” that the disclosure of the records will have a chilling effect across the sector. The LHIN states that its service providers have strongly objected to the disclosure of the same or similar information. Given the limited size of the market, the LHIN submits that it and other LHINs must promote and protect their relationships with the service providers by maintaining the confidentiality of pricing and other commercially valuable information as evidenced by the confidentiality provision in the Services Agreement. The LHIN submits that if the records are disclosed, it is reasonable to expect that service providers will be reluctant to contract with the LHINs on pricing terms favourable to the LHINs and less willing to assist the LHINs, for example, in absorbing surplus volumes in emergency situations or where other service providers exit the business.

[46] The LHIN also submits that this situation is distinguishable from other cases where the IPC has found that there would be an economic benefit from disclosure as the bidding process would become more competitive, such as Order MO-2363. The LHIN submits that this result will not likely result from the disclosure of the price forms at issue due to the unique procurement model set by the Ministry of Health and Long-Term Care, the limited size of the service provider marketplace and the dependency the LHINs have on certain service providers for certain services in certain geographic areas where there are no viable alternatives.

[47] The appellant submits that the LHIN incorrectly views itself as a competitor in the open market. The appellant submits that the LHIN is a public sector organization that has contracted a service provider to provide a service, in a closed environment, as a result of the requirement for the same from the province on the direction of the Province. The appellant claims the LHIN and Province are not designed to generate profit and if service providers’ prices are reduced to provide services, that would benefit the LHIN and the general public.

[48] The appellant refers to the Contract Management Guidelines for LHINs¹⁷, which identifies three circumstances in which a LHIN may use a competitive procurement

¹⁷ Online available at: <http://helathcareathome.ca/serviceproviders/en/Documents/Contract-Management-Guidelines-Update-May-2017.pdf>

process for purchasing client services. In addition, the appellant states that section 5 of the Contract Management Guidelines state that all contracts must be within the LHINs' approved level of funding and all service providers must complete a prequalification process. Therefore, the appellant claims that pricing is not the only variable in the competitive procurement process, if it occurs. The appellant submits that Contractor Performance and LHIN-approved funding levels from the Ministry of Health and Long-Term Care "are significantly more deterministic and impactful." Given the closed procurement process, including prequalification and Price Review negotiations, the appellant submits there is not sufficient evidence to support a finding of harms pertaining to the disclosure of the records at issue.

[49] The appellant submits the LHIN did not provide sufficiently detailed evidence to demonstrate that the harms in section 18(1)(c) can reasonably be expected to result from the disclosure of the records.

[50] In its reply representations, the LHIN refers to its original submissions and reiterates its position that the disclosure of the records could reasonably be expected to result in the harms contemplated by section 18(1)(c). The LHIN disagrees with the appellant's submissions. The LHIN submits that the appellant ignored the possibility that its own direct competitors could use the information at issue to their advantage when purchasing the same or similar services from the same service providers. The LHIN submits that it is concerned about the chilling effect disclosure could have across the sector which could impact the reliability and certainty of the supply chain and the LHIN's ability to deliver services to patients in a cost effective manner.

[51] The LHIN acknowledges that it is not competing to generate profit with other entities that purchase and deliver the same or similar services from service providers. However, the LHIN affirms it may face increased competition from other entities purchasing the same or similar services from health providers if these competitors gain insight into the LHIN's pricing structure. The LHIN also submits that the appellant's assertion that service providers could provide services to the LHIN at a lower cost to the LHIN is flawed. The LHIN submits the appellant has not established that service providers will lower costs after disclosure. In fact, the LHIN submits that service providers could just as easily raise the cost of services and employ a coordinated approach across the sector to obtain more favourable rates when contracting with LHINs.

Analysis and Findings

[52] As noted above, the purpose of section 18(1)(c) is to protect the ability of institutions such as the LHIN to earn money in the marketplace, recognizing that they may have economic interests and compete for business with other public or private sector entities. To establish that section 18(1)(c) applies, the LHIN must provide sufficient evidence to demonstrate that disclosure of the information at issue could reasonably be expected to prejudice these economic interests or its competitive

position.

[53] Previous orders of this office acknowledge it is in the public interest that the Ontario government, its agencies, and institutions negotiate favourable commercial and contractual arrangements.¹⁸ However, accepting the existence of such a public interest does not alter the fact that an institution must provide me with evidence to establish that a claimed exemption applies to withhold government-held information that is otherwise subject to a right of access under the *Act*.

[54] In this appeal, I find the LHIN provided sufficient evidence to persuade me that section 18(1)(c) applies to withhold the records from disclosure. I find that the LHIN provided detailed evidence to demonstrate that the market it operates in is limited and there is a reasonable expectation other service providers could leverage their knowledge of the price form information at issue to the LHIN's disadvantage to secure higher rates for their services. The records contain the prices paid by the LHIN to a service provider, the volume ranges of services, and the different amounts paid in penalty or received as a bonus in relation to the volume of services provided. Given the type of information captured in these price forms and upon review of the LHIN's representations, I am satisfied that the disclosure of the records could reasonably be expected to result in harm to the LHIN's economic interests and competitive position.

[55] I accept the appellant's claim that the LHIN is a not-for-profit organization. However, I find it is in the public interest that the LHIN obtains the best rates with service providers such as the affected party. I do not agree with the appellant that the disclosure of the information at issue could reasonably result in LHIN receiving lower rates from service providers in response to requests for proposals. Rather, I find the LHIN has provided sufficient evidence to demonstrate there is a reasonable expectation other service providers could use the price form information at issue to negotiate higher rates for themselves in future negotiations. I also accept the LHIN's argument that there are material consequences to its ability to deliver its services to the public if it is required to pay service providers higher rates. I find the LHIN provided me with sufficiently detailed and persuasive evidence to demonstrate it is reasonable to expect this harm could result from the disclosure of the information at issue.

[56] In conclusion, subject to my review of the LHIN's exercise of discretion below, I find that the price forms are exempt by reason of section 18(1)(c). Given this finding, I will not consider whether the records are exempt under sections 18(1)(a) or (d) of the *Act*. Further, I will not consider the LHIN's late raising of the section 18(1)(d) exemption to the records.

¹⁸ See Orders MO-2363 and PO-2578.

Issue C: Should the LHIN's exercise of discretion under section 18(1)(c) be upheld?

[57] After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 18(1) exemption is discretionary, which means that the LHIN could have chosen to disclose the records despite the fact that it could withhold it. The LHIN was required to exercise its discretion under this exemption.

[58] On appeal, the Commissioner or her delegated decision-maker (the adjudicator) may determine whether the LHIN failed to exercise its discretion. In addition, the Commissioner may find that the LHIN erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the LHIN for an exercise of discretion based on proper considerations.¹⁹ However, according to section 54(2) of the *Act*, I may not substitute my own discretion with that of the LHIN.

[59] In exercising its discretion under section 18(1)(c), the LHIN submits it took the following factors into consideration:

- The fundamental principles of the *Act* in applying the discretionary exemption in a limited and specific way;
- Whether the appellant had a sympathetic or compelling need for the information; in this case, the LHIN decided that disclosure would likely be a greater benefit to the appellant's private interests and those of the affected party and the LHIN's competitors;
- The financial and economic interests the exemption in section 18(1)(c) seeks to protect and the importance of being able to effectively manage service delivery costs in light of a limited operating budget;
- The currency of the information, the nature of the information and the extent to which it is significant and sensitive to both the LHIN and the affected party;
- The historical practice of non-disclosure of this type of information;
- The need for transparency to the public balanced with the need to manage service delivery costs; and
- The effect disclosure could have across the sector and the impact it could have on patient care.

¹⁹ Order MO-1573.

[60] The LHIN submits it did not exercise its discretion in bad faith or for an improper purpose. The LHIN also submits it took into account all relevant factors and did not take into account any irrelevant factors.

[61] The appellant submits that the records should be disclosed in full. The appellant submits that the LHIN has consistently acted in the best interest of the affected party instead of the public good and the principles of the *Act*.

[62] I have reviewed the parties' representations and the records I have found to be exempt under section 18(1)(c). I am satisfied that the LHIN considered relevant factors in exercising its discretion, including the principles of the *Act*, whether the appellant had a sympathetic or compelling need for information, the importance of transparency, and the historic practice of the information with respect to similar information. I am satisfied that the LHIN exercised its discretion properly and in good faith and I will not interfere with it on appeal. Accordingly, I uphold the LHIN's claim for exemption under section 18(1)(c) of the *Act*.

ORDER:

I uphold the LHIN's decision and dismiss the appeal.

Original Signed by: _____
Justine Wai
Adjudicator

February 25, 2021 _____