Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-4153

Appeal PA18-00653

Lakeridge Health

June 2, 2021

**Summary:** The appellant sought access to records relating to patient experience survey-related services. The hospital located records responsive to the appellant's request and granted her partial access to them. The hospital applied the mandatory exemption in section 17(1) (third party commercial information) of the *Act* to withhold portions of a Master Services Agreement between a third party service provider and the Ontario Hospital Association (OHA) and a Participation Agreement between the service provider, the OHA and the hospital. The appellant appealed the hospital's decision and claimed that additional responsive records ought to exist. In this order, the adjudicator finds the information at issue is not exempt under section 17(1) and orders the hospital to disclose it to the appellant. The adjudicator upholds the hospital's search for records as reasonable.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 24.

**Orders and Investigation Reports Considered:** Orders MO-1706, MO-3577, PO-2018, PO-2384, PO-3885, PO-3886 and PO-3887.

## OVERVIEW:

[1] The appellant submitted a six-part access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Lakeridge Health (the hospital) for

1. The hospital's contract with an identified organization that provides performance measurement and improvement services to the health care sector (the affected party) and any amendments hereto;

2. All statistical reports and related analyses provided by the affected party to the hospital since April 1, 2016;

3. All policies and procedures related to the sharing of personal health information between the hospital and the affected party in effect since April 1, 2016;

4. All policies and procedures related to patient privacy consent directives in effect at any time since April 1, 2016, irrespective of when they were drafted or whether they are still in effect. This applies both to the hospital and the former Rouge Valley Health System Ajax/Pickering site;

5. The hospital's final plan to establish the patient experience survey program through the affected party; and

6. All Canadian Patient Experiences Survey – Inpatient Care (CPERS-IC) statistical reports and related analyses provided by the Canadian Institute for Health Information to the hospital.

[2] The hospital located records responsive to the request and notified a number of parties whose interests may be affected by the disclosure of the records (the affected parties), pursuant to section 28 of the *Act*. Once the notification process was complete, the hospital issued a decision to the appellant and the affected parties granting the appellant partial access to the responsive records. The hospital claimed the mandatory exemption in section 17(1) (third party commercial information) of the *Act* to withhold some of the records and advised the appellant that certain records do not exist.

[3] The appellant appealed the hospital's decision.

[4] During mediation, the appellant raised the issue of reasonable search, claiming that additional responsive records ought to exist. The appellant also questioned the hospital's reliance on section 17(1) to withhold some of the records.

[5] No further mediation was possible and the file transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. An adjudicator began the inquiry by inviting the hospital, the affected party and the Ontario Hospital Association (the OHA) to submit representations in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. All three parties submitted representations. The adjudicator then sought and received representations from the appellant in response to the Notice of Inquiry and the other parties' representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The adjudicator then sought and received further reply representations from the hospital, the OHA, and the affected party in response to the appellant's representations.

[6] The appeal file was then transferred to me to complete the inquiry. In the discussion that follows, I find the information at issue is not exempt under section 17(1) and order the hospital to disclose it to the appellant. I uphold the hospital's search as reasonable.

## RECORDS:

[7] There are two records at issue: (1) a Master Services Agreement between the affected party and the OHA and (2) a Participation Agreement between the affected party,

the OHA and the hospital. The hospital withheld portions of the two agreements under section 17(1) of the *Act*.

[8] Specifically, the hospital withheld some contact information and terms regarding services, timelines, fees, deliverables and implementation.

## ISSUES:

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

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

## DISCUSSION:

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

[9] The affected party provides performance measurement and improvement services to the health care sector. The OHA conducted a Request for Proposal (RFP) process for survey-related services, including an IT-based hosted solution (known as the Patient Reported Performance Measurement or PRPM Solution). The affected party was the successful bidder. As a member of the OHA, the hospital elected to use the affected party's services to implement and use the PRPM Solution. In connection with the provision of these survey and IT-based services, the affected party entered into a Master Services Agreement with the OHA and a PRPM Solution Participation Agreement (the Participation Agreement) with the OHA and the hospital. These are the two records at issue in this appeal.

[10] The hospital disclosed the majority of the information in the records to the appellant. The hospital applied section 17(1) to withhold the following portions of the agreements:

- Master Services Agreement: sections 9,1, 9,7, 9.8 and part of 24.1(a);
- Schedule "B" of the Master Services Agreement in its entirety;
- Sections 2, 3, a portion of 4, 5 to 8, and 12 of Schedule "C" of the Master Services Agreement;
- Schedule "D" of the Master Services Agreement in its entirety;
- Sections 5(a) and 9 of Schedule "E" of the Master Services Agreement; and
- Participation Agreement: part of 3.3; the final paragraph of Schedule "1"; and sections A III, VII, VIII, and IV of Schedule "4";

[11] Generally, the information at issue consists of terms relating to the services to be provided by the affected party, the processes and tools provided, the technical

requirements for the services, fees and pricing, and the affected party's contact information.

[12] The hospital, the affected party and the OHA claim the information at issue is exempt from disclosure under sections 17(1)(a) and (c) of the *Act*. These sections state,

> 17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[13] 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]

[14] For section 17(1) to apply, the parties claiming the application of the exemption, in this case, the hospital and the affected parties, 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.

[15] I note the affected party agreed to release the previously redacted names and email addresses of its representatives at sections 24.1(a) of the Master Services Agreement and part of section 3.3 of the Participation Agreement in its representations. However, the hospital did not disclose this information to the appellant as a result of the affected party's revised position. Therefore, I will consider whether this information is exempt under section 17(1).

---

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

***Part 1: type of information***

[16] The hospital, the OHA and the affected party take the position that the records contain commercial, financial and technical information. These types of information have been explained in prior orders as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[3]
>
> *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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *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.[6]

[17] The hospital submits the information at issue contains technical, commercial or financial information belonging to the affected party. The hospital submits the information is proprietary to the affected party in that it relates to the affected party's surveying tools and methodologies including its online reporting portal.

[18] The affected party claims the records contain its sensitive proprietary information. Specifically, the affected party submits the records contain commercial information as it relates to the buying and selling of survey-related services, such as proprietary methodology, service structure and procedures. The affected party also claims the records contain financial information relating to the payment of money, such as unit pricing. The affected party submits the commercial, financial and technical information constitutes a "recipe" for the proprietary offering it developed for specific customers. The affected submits the information provides a "roadmap" for competitors to replicate its innovations and the contracts lay out its "detailed business plan for service offerings." Finally, the affected party submits the records contain technical information such as technical product details, specific processes and flow charts.

[19] The OHA submits the Master Services Agreement contains commercial and financial information. Specifically, the OHA refers to the pricing information in Schedule "C" of the

---

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

Master Services Agreement.

[20] Based on my review of the records, I agree they contain commercial information relating to the buying and selling of survey-related services. The information at issue includes terms regarding the services the affected party contracted to provide to the OHA and the hospital and the deliverables of the contract. In addition, I find the records contain financial information as some portions of the records, such as Schedule "C", contain details regarding the fees. Finally, I find the records contain technical information relating to the products the affected party will be providing or using, and the specific technical processes and requirements for the online reporting portal.

[21] Therefore, I find the records contain commercial, financial and technical information relating to the affected party and part 1 of the test under section 17(1) is satisfied.

### ***Part 2: Supplied in Confidence***

[22] The requirement that information was *supplied* to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[7]

[23] 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.[8]

[24] The contents of a contract involving an institution and a third party will not normally qualify as *supplied* for the purpose of section 17(1). The provisions of a contract, in general, are considered to be 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.[9] This approach is based on 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.

[25] There are two exceptions to this general rule: 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 the underlying non-negotiated confidential information supplied by the third party to the institution.[10] 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.[11]

*The Parties' Representations*

[26] The hospital takes the position that the affected party and the OHA are better

---

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

suited than the hospital to make submissions on the application of the exemption to the information at issue. The hospital states it did not design or conduct the patient surveys through the process developed by the affected party. However, the hospital submits it is reasonable to conclude that the cost of specific components of the services to be provided and the description of the affected party's survey-related methodology are immutable and other proprietary information relating to the affected party is subject to the inferred disclosure exception.

[27] The hospital refers to Order P-610, in which the IPC upheld the application of section 17(1) to withhold unit prices. The hospital submits the information at issue contains unit prices for the services to be provided by the affected party and this information should be exempt under section 17(1).

[28] The affected party states it prepared and supplied the information at issue in both of the agreements and the information was never subject to negotiation. The affected party also submits the information at issue is confidential and proprietary information and is subject to both the *inferred disclosure* and *immutability* exceptions.

[29] The affected party submits the *inferred disclosure* exception applies to the contractual terms at issue in both agreements because the disclosure of this information could, if disclosed, allow a sophisticated third party or competitor to infer the nature of the affected party's confidential business plans, operations and the services offered.

[30] In addition, the affected party submits the *immutability* exception applies to the information that "remains relatively unchanged" from the information originally provided by the affected party to the OHA during the bidding process conducted by OHA on behalf of its member hospitals for the provision of survey-related services. The affected party states it understood the RFP process was confidential and that bidders' responses were not to be publicly disclosed or shared with third parties, except as required by law.

[31] The OHA submits that both contracts were supplied to the hospital with the intention that they were to be kept confidential and treated in a manner consistent with a concern for protection from public disclosure. Specifically, the OHA submits the Master Services Agreement and sections 2, 3, 5, 6, 7, and 12 of Schedule "C" were supplied to the hospital. Sections 9.1, 9.7 and 9.8 of the Master Services Agreement refer to the services the affected party is to provide. Section 24.1(a) of the Master Services Agreement contains the address and contact information of the affected party. The information at issue in Schedule "C" relates to fees. The OHA states the hospital did not negotiate the Master Services Agreement on its own nor was the hospital in a position to treat the Master Services Agreement as "mutually generated" within the meaning adopted by the IPC. The OHA says this is especially true with regard to the specific commercial and financial information supplied to the hospital in sections 2, 3, 5, 6, 7, and 12 of Schedule "C."

[32] The OHA also submits the information in sections 2, 3, 5, 6, 7, and 12 of Schedule "C" meets the *inferred disclosure* and *immutability* exceptions to the *supplied* test. The OHA submits that the disclosure of these terms in Schedule "C" would allow the appellant or similar parties to "derive inferences and competitive insights into the nature of [the affected party's] business operations and its survey offerings." In addition, the OHA claims the *immutability* exception applies to these sections of Schedule "C" because this information was not the subject to negotiation with the hospital and therefore falls within

the exception.

[33] The appellant refers to Order PO-3890, in which the adjudicator found that the unit pricing information at issue did not meet the *supplied* requirement for the application of section 17(1). The appellant submits the unit prices in a contract are "inherently negotiated and agreed upon, even if [the affected party's] bid were accepted without change and may reflect the fact that the contract was being renewed."

[34] In its reply representations, the hospital submits that unit prices are not "inherently negotiated" as the appellant claims. Rather, the hospital submits that unit prices may be fixed, reflecting a supplier's costs, in contrast to the total cost of a contract.

[35] The OHA reiterates that both the Master Services Agreement and the Participation Agreement were supplied to the hospital with the intention that they were to be kept confidential and were treated in a manner which was consistent with a concern for the protection from public disclosure.

[36] The affected party maintains that the *inferred disclosure* and *immutability* exceptions apply to the information at issue. The affected party reiterates that the portions of the contracts at issue were not "inherently negotiated." Specifically, the affected party submits the *immutability* exception applies to information that is not susceptible to change, overriding the general rule. The affected party states the information relating to its business operating processes and pricing information is not susceptible to change.

[37] The affected party states that it required all parties "to largely accept or reject the terms of the Contracts as a function of the survey services offered." The affected party submits that most of the terms and specifically the pricing structure were not subject to change because it was contemplated that additional parties, such as the hospital and other participating organizations, would adopt the terms of the Master Services Agreement between the OHA and the affected party. The affected party submits this required a standardized approach that the additional parties (such as the hospital) would opt into. In these circumstances, the affected party submits the participating organizations were not agreeing to a contract, per se, but were choosing to opt into an existing program. The affected party submits this arrangement required it to present a comprehensive program to the OHA, complete with unit pricing based in part on fixed costs associated with the survey. To facilitate this large scale initiative, the affected party states it supplied the OHA with comprehensive business and pricing information, most of the terms of which, specifically pricing, were not susceptible to change.

*Analysis and Findings*

[38] Based on my review of the parties' representations and the records, I find that none of the information at issue in either the Master Services Agreement or the Participation Agreement was supplied to the hospital. The affected party provides the survey-related services to hospitals under a bipartite Master Services Agreement to which the OHA and affected party are parties and a tripartite Participation Agreement to which the OHA, affected party and each hospital that has elected to obtain the services (i.e. the hospital) are parties. The hospital states the OHA managed the procurement of the services and "has a continuing role" in relation to the survey-related services. The hospital and the OHA confirm the hospital was not a party to any negotiations that resulted in the agreements at

issue.

[39] I acknowledge the OHA and the affected party are the only parties to the Master Services Agreement and the hospital did not take part in the negotiations that resulted in the Master Services Agreement. The hospital, the OHA and the affected party are the parties to the Participation Agreement. While I accept the hospital was not a party to the negotiation process that led to the Master Services Agreement, it is a party to the Participation Agreement, which explicitly requires the hospital to abide by the terms and conditions of the Master Services Agreement. In other words, the hospital was required to accept the terms of the Master Services Agreement when it entered the Participation Agreement.

[40] Upon review of the records, it appears the hospital was not required to enter into the Participation Agreement. Further, none of the parties suggest the hospital was required to enter into the Participation Agreement in their representations. Therefore, the hospital had a choice of whether or not to enter into the Participation Agreement and, in turn, accept the terms of the Master Services Agreement. Given these circumstances, I find the agreements cannot be considered to have been supplied to the hospital. By entering the Participation Agreement, the hospital agreed to accept and abide by the terms of the Master Services Agreement, thereby incorporating the terms of the Masters Services Agreement into the Participation Agreement. Therefore, even though the Master Services Agreement was not between the hospital and the affected party, the hospital accepted and incorporated its terms into the Participation Agreement when it entered the Participation Agreement with the OHA and the affected party.

[41] I refer the parties to Order MO-1706 which established that

> … the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1).[12] The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even when they were proposed by the third party and agreed to with little discussion.[13]

The IPC has adopted the analysis in Order MO-1706 in a number of decisions of this office.[14] In Orders PO-3885, PO-3886 and PO-3887, the adjudicator found that the linen and laundry services agreements between a service provider and each of the hospitals were not supplied. In those cases, the third party appellant argued the nearly identical services agreements were supplied because they were based on a template derived from a Master Services Agreement to which the hospitals were not a party. The third party appellant argued the services agreements were, therefore, supplied and not negotiated. The adjudicator followed Order MO-1706 and found the fact that the service agreements before her did not vary significantly from hospital to hospital did not mean that each agreement was not negotiated. Rather, the adjudicator found that "the hospital, as a

---

[12] Section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*is the municipal equivalent to section 17(1) of the provincial *Act*.
[13] This approach was upheld in *Boeing v. Ontario (Ministry of Economic Development and trade*) Tor. Docs. 75/04 and 82/04; motion for leave to appeal dismissed, Doc. M32858 (C.A.).
[14] See, for example, Orders MO-3375, PO-4031, and PO-2346 among many others.

member of the affected party and also in its own right as the defined customer in the Services Agreement between it and the affected party, would have had to agree to the terms of this agreement."[15]

[42] I agree with this reasoning and adopt it for the purposes of this analysis. Similar to the hospitals in Orders PO-3885, PO-3886 and PO-3887, Lakeridge Health, either in its own right or as a member of the OHA, made a choice to agree to the terms of the Participation Agreement. A condition of the Participation Agreement was to accept and incorporate the terms of the Master Services Agreement as a "participant." Accordingly, prior to entering the Participation Agreement, the hospital had to consider the terms of the Master Services Agreement and decide whether to accept those terms as a requirement of entering the Participation Agreement. Given these circumstances, I find the Master Services Agreement and the Participation Agreement were not *supplied* within the meaning of section 17(1) of the *Act*.

[43] The affected party and the OHA claim the application of the *inferred disclosure* and *immutability* exceptions to the *supplied* requirement in section 17(1). Specifically, the OHA submits that sections 9.1, 9.7 and 9.8 of the Masters Services Agreement and sections 2, 3, 5, 6, 7, and 12 of Schedule "C" contain information that would, if disclosed, allow the appellant or similar parties to "derive inferences and competitive insights into the nature of [the affected party's] business operations and its survey offerings." In addition, the OHA submits the *immutability* exception applies to these sections of Schedule "C" because this information was not subject to negotiation.

[44] The affected party claims the information at issue falls within the *inferred disclosure* exception because this type of information can "easily allow a sophisticated third party, such as a competitor, to infer the nature of the affected party's confidential business plans, operations and service offerings." The affected party submits the *immutability* exception applies to the information at issue because it remains relatively unchanged from the information originally provided by the affected party to the OHA. In addition, the affected party states that it required all parties to largely accept or reject the terms of the contracts as a function of the survey services offered. The affected party states that most of the terms in the agreements, such as the pricing structure in the Master Services Agreement, was not subject to change.

[45] Based on my review of the records and the parties' representations, I am not satisfied the OHA and the affected party provided me with sufficient evidence to demonstrate how the information at issue can, if disclosed, be used to reasonably infer proprietary business information relating to the affected party. The affected party did not provide detailed submissions on how the disclosure of the specific terms or portions of the schedules at issue could allow competitors to infer the nature of its confidential business plans, operations and service offerings. In its representations, the affected party merely asserts that the type of information at issue can "easily allow a sophisticated third party, such as a competitor, to infer the nature of [the affected party's] confidential business plans, operations and service offerings from such information." The affected provided an affidavit sworn by its Director, Consumer Services to support its position, but the affidavit did not provide any more specificity regarding the underlying confidential information that

[15] Order PO-3885, para. 91.

could be inferred if the information at issue was disclosed.

[46] I find support for my finding in Order MO-3577, in which the adjudicator considered the *inferred disclosure* exception to a project agreement and found,

> I am satisfied that the information the affected party says can be inferred is not **underlying confidential supplied information distinct from the contractual information**. It is information that is contained in, and revealed by, the contract itself. In other words, the information that the affected party says can be inferred, is inferred from the contract that the affected party negotiated. It reveals what the affected party agreed to. To the extent that what the parties agreed to reveals strategies and assumptions made by the affected party, this information still falls within the scope of information agreed to by the affected party. [Emphasis added]

I will follow this finding for the purposes of my analysis. Based on my review of the records, I find the parties did not provide me with sufficient evidence to demonstrate how the information at issue would, if disclosed, reveal underlying confidential supplied information distinct from the contractual arrangement. The information at issue consists of information relating to the technical requirements, fees, services offered and deliverables to be provided by the affected party to the hospital and the OHA. The affected party takes the position that the disclosure of this information could allow competitors to infer the nature of its confidential business plans, operations and service offerings. I accept the records contain information relating to the business plans, operations and service offerings in relation to the OHA and the participants (i.e. the hospital). However, the affected party did not provide sufficient evidence to demonstrate how these plans, operations and offerings relating to the OHA and the participants would reveal the affected party's own underlying confidential business operations or its internal pricing structure.

[47] I also refer to Order PO-2018, in which the adjudicator stated,

> Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of arrangements the parties agreed to accept, this information is not in itself considered a type of "informational asset" which qualifies for exemption under section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party.

As stated above, the affected party merely asserts the information at issue will allow its competitors to make accurate inferences regarding its business operations and plans and service offerings. However, based on my review, the contracts reveal the operations and plans agreed to by the OHA, the affected party and the hospital. The affected party did not provide any particulars regarding how the specific information at issue, such as the survey-related services it will provide the hospital and the OHA and the fees it will be charging for these services, would, if disclosed, reveal the affected party's information relating to underlying confidential business operations and plans or financial structure.

[48] Specifically, I find the information at issue in the Master Services Agreement does not contain such detailed information that would, if disclosed, allow accurate inferences into the nature of the affected party's business plans or operations. The information at

issue in Section 9 relates to the services the affected party intends to provide the OHA and the hospital and I find they do not contain information that would reveal any underlying confidential information relating to the affected party itself. Furthermore, the information at issue in section 24.1(a) of the Master Services Agreement is the affected party's mailing address, which is publicly available on the affected party's website.

[49] Section 3.3 of the Participation Agreement contains the mailing addresses of the affected party and the OHA, which are publicly available. The information at issue in Schedules "1" and "4" of the Participation Agreement relate to the services to be provided by the affected party as part of its survey-related services. Based on my review, I find the affected party and the OHA did not provide me with sufficient evidence to demonstrate how the disclosure of the information subject to their section 17(1) claim could allow other parties and competitors to derive inferences and competitive insights into the affected party's business operations and service offerings. The information at issue in Schedule "4" relates to the arrangement between the hospital, the OHA and the affected party. It does not appear to reveal any underlying confidential information relating to the affected party's business operations and plans. The information at issue in Schedule "1" provides a general summary of the components of the services to be provided by the affected party to the hospital and OHA. I find the affected party did not provide me with any specific information regarding the underlying confidential information that could be revealed by the disclosure of this information.

[50] Similarly, Schedules "B", "D" and "E" relate to the commitments and services to be provided by the affected party as part of its survey-related services. Based on my review, I find the OHA and the affected party did not provide sufficient information to demonstrate that the disclosure of the information at issue in these schedules could reasonably be expected to reveal or permit the drawing of accurate inferences with respect to the affected party's business operations, plans or service offerings. I find the information at issue in Schedules "B", "D" and "E" relates to the arrangements between the OHA, the hospital and the affected party rather than the affected party's own business operations and structure.

[51] Schedule "C" of the Master Services Agreement relates to the fees under the agreements. The OHA submits the *inferred disclosure* exception to the *supplied* test in section 17(1) applies to this information. The OHA submits that these specific terms could be "analyzed" to allow the appellant or similar parties to derive inferences and competitive insights into the nature of the affected party's business operations and survey offerings. I reviewed the information subject to section 17(1) in Schedule "C." I find the OHA and the affected party did not provide sufficient information to demonstrate how this information could be analyzed to reveal underlying non-negotiated confidential information relating to the affected party and it is not evident from a review of the information itself how anyone could do so.

[52] Therefore, in the absence of detailed evidence demonstrating the inferences that can be drawn regarding the information at issue, I find the *inferred disclosure* exception to the general rule that information in contacts is not *supplied* in section 17(1) does not apply.

[53] In addition, I find the *immutability* exception to the exemption does not apply to the

information at issue. The OHA argues the information at issue is immutable because the hospital was directly supplied with the information and the information was not susceptible to negotiation with the hospital. The affected party makes similar arguments as the OHA, claiming that the information "remains relatively unchanged" from the information it provided to the OHA during the bidding process. Furthermore, the affected party states that the participating hospitals (such as Lakeridge Health) were required to largely accept or reject the terms of the contracts and accept the entire survey-related program offered by the affected party. In this way, the affected party submits the majority of the terms at issue, such as the pricing information, in the contracts were not susceptible to change.

[54] As stated above, 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.[16] I have reviewed the information at issue and find I have not been provided with sufficient information to demonstrate that it is immutable. The OHA and the affected party take the position that the information at issue is immutable because it had already been negotiated and confirmed before the hospital entered the Participation Agreement and accepted the terms of the Master Services Agreement. However, as discussed above, the hospital agreed to the terms of the Participation Agreement and Master Services Agreement. It does not follow that the terms of the contract themselves are immutable simply because they were accepted in large part by the hospital.

[55] I find support for this finding in Order PO-2384, where the adjudicator stated,

> [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

The affected party did not refer to specific terms and provide evidence to demonstrate how these terms are immutable. The affected party only referred to "most of the terms" and specifically pricing in its representations. The OHA referred to the terms in Schedule "C" regarding the fees for the services agreed upon, but did not demonstrate how these terms contain certain fixed costs or other costs that are not negotiable. In the absence of

[16] *Miller Transit*, *supra* note 9 at para. 34.

specific evidence demonstrating what information at issue is immutable, I find that this exception does not apply.

[56] In conclusion, I find that the information at issue in both the Master Services Agreement and the Participation Agreement 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 information at issue is not exempt under section 17(1) of the *Act* and there is no need for me to consider whether part three of the test is satisfied.

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

[57] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 24 of the *Act*.[17] If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the hospital's decision. If I am not satisfied, I may order the hospital to conduct further searches.

[58] 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 it made a reasonable effort to identify and locate responsive records.[18] To be responsive, a record must be *reasonably related* to the request.[19]

[59] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends reasonable effort to locate records which are reasonably related to the request.[20] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.[21]

[60] 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.[22] 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.[23]

[61] The hospital submits it conducted a reasonable search for the records responsive to parts 2, 5 and 6 of the request. These portions of the appellant's request read as follows:

> 2. All statistical reports and related analyses provided by the affected party to the hospital since April 1, 2016;
>
> 5. The hospital's final plan to establish the patient experience survey program through the affected party; and

[17] Orders P-85, P-221 and PO-1954-I.
[18] Orders P-624 and PO-2559.
[19] Order PO-2554.
[20] Orders M-909, PO-2469 and PO-2592.
[21] Order MO-2185.
[22] Order MO-2246.
[23] Order MO-2213.

> 6. All Canadian Patient Experiences Survey – Inpatient Care (CPERS-IC) statistical reports and related analyses provided by the Canadian Institute for Health Information to the hospital.

[62] As background, the hospital states the affected party advised that it does not prepare any reports based on the survey data or aggregated results for the hospital's use. Rather, the affected party's online reporting portal allows participants to choose the parameters that are important to them to view patient experience results. Therefore, with regard to part 2 of the request, the hospital confirms the affected party does not provide any statistical reports or related analysis to the hospital as part of its services.

[63] With regard to part 6 of the request, the hospital states the affected party advised that it submits data to the Canadian Institution for Health Information (CIHI) on the hospital's behalf in connection with CIHI's CPERS-IC. The hospital is not directly involved in the transmission of data. The affected party states that CIHI provides the hospital with a basic query tool, similar to the survey-reporting portal provided by the affected party, but has not published a facility level report to date in CPERS. The affected party advised that CIHI's query tool was made available to the hospital months after the date of the request. However, the query tool allows the hospital to generate reports itself; it does not mean that CIHI provides reports on the hospital's CPERS-IC data to the hospital.

[64] The hospital states it engaged six areas of the hospital (Privacy, Patient Experience, Procurement, Decision Support, People and Senior Management Team Administration) in its search for records responsive to the request. The hospital states it also asked the affected party to confirm its understanding of report creation through its services. The hospital submits it provided "exhaustive evidence" to demonstrate that the reports responsive to parts 2 and 6 of the request do not exist.

[65] The hospital states it sought and received responsive records from the Procurement and Patient Experience Departments upon receipt of the request. The hospital then requested statistical reports provided by NRC or CIHI from the Manager of Decision Support Unit. The Decision Support Unit advised the hospital that "we can pull extracts from their web portal."

[66] The hospital then requested clarification from the appellant regarding the meaning of "final plan" in part 5 of her request. The appellant responded as follows:

> The term "final plan" gives sufficient notice to the institution with respect to the information being sought that it can make internal inquiries. It would be absurd to require requestors to provide a thesaurus to identify the name of the document being sought or a description of the form that it would take, such that the institution could defeat the intention of the Act merely by having its staff create different names for its plans.

The appellant's response was provided to the Director of Patient Experience. The hospital states the Director of Patient Experience conducted a search, but did not locate any responsive records.

[67] During mediation, the hospital conducted an additional search for records. The hospital states its Director of Patient Experience, Vice President of People Department, and

the Senior Management Team conferred on the meaning of "final plan" and confirmed search terms and timelines. However, it was unable to identify any records responsive to part 5 of the request. The hospital states the Manager of Decision Support confirmed that neither NRCC nor CIHI provided the hospital reports responsive to parts 2 and 6 of the request. The hospital submits it processed the appellant's request diligently, in good faith, and in compliance with the *Act*.

[68] In her representations, the appellant made a number of submissions regarding the proper interpretation and true meaning of the word *provided* in her request. The appellant takes the position that the hospital unilaterally narrowed the scope of her request to include only records that the affected party directly provided to the hospital. The appellant submits the hospital was *provided* with reports by the affected party in the form of exported reports from the online portal the affected party runs.

[69] The appellant submits there should also be additional records responsive to part 3 of her request, which reads: "All policies and procedures related to the sharing of personal health information between the hospital and the affected party in effect since April 1, 2016." The appellant states she only received a few paragraphs imbedded in health records policies with respect to the withdrawal of consent to receive patient satisfaction surveys. The appellant submits there should be at least a memorandum regarding sharing personal health information with a non-health custodian and some written justification for doing so. In addition, the appellant submits there should be a written understanding between the hospital and affected party regarding the types of data being shared and how it will be used.

[70] The appellant takes issue with the manner in which the hospital dealt with part 5 of her request for a "final plan." The appellant claims the hospital did not provide any assistance in reformulating or clarifying her request. The appellant refers to the *Excellent Care for All Act, 2010*, which requires all hospitals to carry out patient satisfaction surveys and imposes a number of new requirements. The appellant submits it would have been necessary for the hospital to create a business or other type of plan to effectively comply with the new legislation.

[71] With regard to part 6 of her request, the appellant submits the hospital unilaterally narrowed its search to facility-level CPERS reports. The appellant confirms she seeks access to all CPERS statistical reports and related analysis. The appellant states CIHI "often provides detailed and well-narrated reports to the public." As such, "it stands to reason that it would have provided reports and analysis to participating hospitals, including Lakeridge."

[72] In its reply representations, the hospital states it initially understood the appellant to be seeking reports provided by the affected party only. However, it understands the appellant seeks access to reports downloaded or otherwise obtained by the hospital from the affected party's online portal. The hospital confirms it searched for reports created by the affected party and reports the hospital created by means of the portal. After receiving the appellant's submissions, the hospital states it sought assistance from the affected party and its staff working in the areas most likely to have the records or relevant information. The hospital confirms the affected party never provided any reports to the hospital. In addition, the hospital has not exported or created reports from the portal.

[73] With regard to the "final plan", the hospital states it did not locate records responsive to that part of the request. The hospital states it was not required to create such a plan because the survey-related services were procured by the OHA for use by all of its member.

[74] Based on my review of the parties' representations, I am satisfied the hospital made a reasonable effort to locate records responsive to the appellant's request in fulfilment of their obligations under the *Act*. I am satisfied experienced individuals knowledgeable in the subject matter of the request expended a reasonable effort to locate the records responsive to the appellant's request. I find the hospital searched for records in a variety of departments and did not interpret the appellant's request too narrowly. I am satisfied the hospital attempted to clarify the request with the appellant regarding the meaning of the term "final plan" and, in the absence of helpful clarification, conducted a search in an attempt to respond to her request.

[75] Contrary to the appellant's claims, I do not find the hospital applied an overly narrow interpretation of the term "provided" in her request. A plain interpretation of parts 2 and 6 required the hospital to search for statistical reports and related analysis provided to the hospital by the affected party and the CIHI. I do not agree with the appellant that information generated by the online survey portal provided by the affected party could be interpreted as having been *provided* by the affected party to the hospital. I am satisfied staff knowledgeable in the subject matter of parts 2 and 6 of the request, namely the Manager of Decision Support, expended a reasonable effort to locate records responsive to the appellant's request.

[76] As noted above, the *Act* does not require an institution to prove with absolute certainty that additional records do not exist. Additionally, the hospital is not required to go to extraordinary lengths to search for responsive records. Upon review of the hospital's representations, I am satisfied an employee knowledgeable in the subject matter of the request expended a reasonable effort to locate records responsive to the appellant's request.

[77] Further, I am not satisfied there is a reasonable basis for the appellant's belief that additional responsive records should exist. The appellant makes it clear she believes certain records *ought* to exist, such as a "final plan" to establish a patient experience survey program. The appellant also submits that because the CIHI often provides reports to the public, it should provide reports and analysis to public hospitals.

[78] I have considered the appellant's submissions. I find that most of her arguments consist of opinion and do not provide a reasonable basis for her belief that additional responsive records ought to exist. Nor do the appellant's arguments demonstrate that the hospital did not conduct a reasonable search for responsive records. Based on my review of the parties' representations, I am satisfied the hospital conducted a reasonable search for responsive records in fulfillment of its obligations under the *Act*.

[79] Finally, I note the appellant claims the hospital acted in bad faith in responding to and processing her request. The appellant submits there is "substantial circumstantial evidence of bad faith." The appellant makes a number of allegations and provides personal observations regarding the individual who processed her request and their interpretation of her request. Based on my review, the vast majority of the appellant's claims amount to

little more than her personal opinions regarding that individual, whether additional records ought to exist, and the application of section 17(1) of the Act. Furthermore, I find circumstantial evidence to be insufficient to prove the existence of bad faith on the part of the hospital. Based on my review, I am not satisfied the appellant has established the hospital acted in bad faith in interpreting and processing her request. Similarly, I am not satisfied the hospital acted in bad faith during the inquiry. Therefore, I will not consider this issue further in this decision.

[80] In conclusion, I uphold the hospital's search as reasonable.

## ORDER:

1. I order the hospital to disclose the records in full to the appellant by **July 9, 2021** but not before **July 5, 2021**.

2. I uphold the hospital's search as reasonable.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the hospital to provide me with copies of the records that are disclosed to the appellant.

Original signed by: June 2, 2021

Justine Wai
Adjudicator