

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4279

Appeal PA19-00204

Ministry of Health

July 19, 2022

Summary: This appeal relates to an access request received by the Ministry of Health (the ministry) for records related to community laboratories. Following third party notification, the ministry issued a decision granting partial access to responsive records. While the requester did not appeal the ministry's decision, one of the third parties (the appellant) filed an appeal, claiming the application of the third party information exemption at section 17(1) of the *Act*. While the appellant provided consent for the disclosure of some records to the requester, two portions of a briefing document provided by the appellant to the ministry remain at issue (the withheld information). In this order, the adjudicator finds that the withheld information is not exempt from disclosure under section 17(1) of the *Act* and she orders the ministry to disclose it to the requester. Accordingly, she upholds the ministry's access decision and dismisses the appellant's appeal.

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

OVERVIEW:

[1] Prior to a meeting, a community laboratory (the appellant) provided the Ministry of Health and Long-Term Care, now known as the Ministry of Health (the ministry) with a briefing document about the role of community laboratories in the health care system in Ontario.

[2] The ministry received an access request under the *Freedom of Information and*

Protection of Privacy Act (the *Act*) for records relating to:

Notes, correspondence, memoranda, reports, meeting and/or briefing notes, and agreements relating to the community laboratories – for the period January 1, 2011 until September 1, 2016.

[3] The requester further clarified the request as follows:

Internal and external notes, communications, records, relating to:

- The development, review and implementation of the Laboratory Services Expert Panel dated November 2015;
- Details about the development and decisions relating to various community laboratory funding decisions (for the period from January 1 2011 - September 1, 2016), including (but not limited to) any and all internal and external communications with the community laboratories to develop:
 - a. The 2012-2016 Community Laboratories' Access and Performance Fund agreements for each of the community laboratories.

[4] After locating responsive records, the ministry notified a number of third parties of the request pursuant to section 28 of the *Act*. One of the third parties did not consent to the disclosure of some of the information contained in the records but provided its consent to the disclosure of record 21 and part of record 64.

[5] The ministry issued an access decision to the requester and the third parties, granting the requester partial access to the records. The ministry did not disclose any of the records to the requester to allow the third parties to appeal its decision.

[6] The third party who did not provide consent (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). The requester did not appeal the ministry's decision to withhold portions of the responsive records under various exemptions of the *Act*.

[7] During mediation, the appellant did not consent to any additional disclosure and the requester confirmed its interest in pursuing access to all of the information to which the ministry granted them access.¹

[8] Mediation could not resolve the appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the

¹ While the mediator noted that the appellant had provided consent to the disclosure of record 21 and part of record 64, the ministry did not disclose these to the requester.

Act.

[9] The adjudicator originally assigned to this appeal began her inquiry by inviting the appellant to make representations in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. She also reminded the ministry that it could disclose to the requester the information that was not at issue in this appeal. The appellant submitted representations and consented to the disclosure of some records, which are no longer at issue in this appeal. She then invited the ministry and the requester to submit representations in response to the Notice of Inquiry and the appellant's representations. She received representations from the ministry, but not from the requester.

[10] While the previous adjudicator invited reply representations from the appellant, it chose not to submit any further representations. The representations of the parties were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[11] This appeal was then transferred to me to continue with the adjudication of the appeal. I have reviewed all the file materials and representations and sought clarification from the parties on the records remaining at issue. Based on these clarifications, only portions of one record remain at issue.

[12] In this order, I find that the withheld information is not exempt from disclosure under section 17(1) of the *Act* and I order the ministry to disclose record 64 to the requester. Accordingly, I uphold the ministry's access decision and dismiss the appellant's appeal.

RECORDS:

[13] Initially, the records remaining at issue in this appeal were 16, 16 CML, 21, 30 and 64. At the request stage and as noted by the mediator, the appellant consented to the disclosure of record 21 and part of record 64.

[14] In its representations, the appellant consented to the disclosure of records 16 CML, 21 and 30 and these are no longer at issue in this appeal. The appellant also took the position that the ministry should redact the names of its employees from record 16 as the ministry had previously agreed to do so in a similar document for a prior access request.

[15] Before making my decision, I sought confirmation from the ministry as to whether it had disclosed the records that are no longer at issue in this appeal. In response, the ministry issued a revised decision and disclosed records 16 CML (in part based on its access decision), 21 and 30, based on the appellant's consent.² These

² I note that despite receiving consent from the appellant to disclose the majority of record 64, the ministry did not disclose these portions to the requester.

records are no longer at issue in this appeal.

[16] Also, in its representations, the appellant took the position that the names of its employees in record 16 should not be disclosed. Accordingly, I sought and received confirmation from the requester that it was not seeking access to this information in record 16. In addition, as the appellant did not submit specific representations on the application of the third party information exemption to record 16, I sought and received confirmation from the appellant that it is not claiming the application of the section 17(1) exemption to record 16 in its entirety. The appellant confirmed that it consents to the disclosure of record 16 with its employees' names redacted. Accordingly, record 16 is also no longer at issue in this appeal and I will direct the ministry to disclose it to the requester with the names of the appellant's employees severed based on the appellant's consent.

[17] I also sought and received confirmation from the appellant that it is not claiming the application of the section 17(1) exemption to record 64 as a whole; it is only claiming this exemption for two portions of record 64 (the withheld information).

[18] Based on the above, the only record remaining at issue in this appeal is record 64. It is a briefing document titled "Realizing Improvements and Net Savings in the Health Care System with Involvement of Community Laboratories", outlining how the involvement of community laboratories can lead to improvements and savings in the health care system. The appellant only claims the third party information exemption in section 17(1) of the *Act* for the following portions of record 64:

- point #1 on page 2, noting the appellant's vision on how health care systems can achieve savings by involving the community laboratory sector (page 2 portion); and
- the first sentence under section 4 on page 6, noting the amount of harmonized sales tax (HST) the appellant is expected to pay annually (page 6 portion);

(collectively the withheld information).

DISCUSSION:

[19] The sole issue in this appeal is whether the mandatory exemption at section 17(1) applies to the withheld information. This section states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[20] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.³ 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.⁴

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

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

Part 1: Information

[22] For the reasons that follow, I find that the withheld information consists of financial information in part and therefore, only the page 6 portion meets part one of the test.

[23] The types of information listed in section 10(1) have been discussed in prior orders. Those types of information with relevance to this appeal are:

³ *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.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁵ The fact that a record might

have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁶

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

Representations of the parties

[24] The appellant submits that the withheld information reveals its commercial and financial information.

[25] With reference to page 2 portion, the appellant submits that this information relates to the appellant's vision on how health care systems can achieve savings by involving the community laboratory sector. It explains that this information is of a highly commercial and strategic business nature.

[26] With reference to the page 6 portion, the appellant submits that, by revealing the amount of HST it is expected to pay annually, this information can be used to determine its operating costs, which is commercial and financial information.

[27] The ministry submits that the page 2 portion is of a general nature and disclosure would not reveal any of the types of information protected under section 17(1). Specifically, it submits that this information does not fit within the definition of those terms, as defined in previous IPC orders.

[28] With reference to the page 6 portion, the ministry concedes that there are previous IPC orders where it was found that the amount of taxes is "financial information."⁸

Analysis and findings – part of the withheld information is financial information

[29] Based on my review of the withheld information, I find that only the page 6 portion consists of financial information and meets part one of the test, while the page

⁵ Order PO-2010

⁶ Order P-1621.

⁷ Order PO-2010.

⁸ The ministry refers to Orders PO-2043 and PO-4122.

2 portion does not meet part one of the test.

[30] I have reviewed the page 2 portion. I agree with the ministry that this information is of a general nature and does not specifically refer to the appellant's commercial operation. Instead, it outlines the appellant's general opinion about the health care system and the involvement of the community laboratory sector in it.

[31] I find that the page 2 portion does not relate to the commercial operation of the appellant because it does not relate to the buying, selling or exchange of merchandise or services *of the appellant*; rather it relates to the appellant's opinion about the community laboratory sector in general. While the appellant's opinion on how health care systems can improve or achieve savings may have some impact on the appellant's business, its opinion does not relate to the commercial operation of the appellant.

[32] Moreover, I am unable to see how the purpose of section 17(1), which is to protect confidential "informational assets" of businesses that provide information to government institutions, would be achieved by exempting this information from disclosure. Nor am I able to see how a competitor could exploit such information in the marketplace. Accordingly, I find that the page 2 portion does not contain information that qualifies as commercial, as that term is contemplated in section 17(1) of the *Act*, and that the page 2 portion does not meet the first part of the three-part test

[33] Having concluded that the first part of the section 17(1) test has not been met for the page 2 portion, it is not necessary for me to consider the remaining parts of the test for this information and I therefore find that section 17(1) does not apply to it. I will order the ministry to disclose the page 2 portion to the requester.

[34] With reference to the page 6 portion, I agree with the appellant that the amount of HST expected to be paid by the appellant is financial information. Accordingly, I find that the page 6 portion meets the first part of the three-part test and I will continue my analysis of the application of the section 17(1) exemption to the page 6 portion only.

Part 2: Supplied in confidence

[35] For the reasons below, I find that the page 6 portion was supplied in confidence and therefore, part two has been met.

[36] 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.⁹

[37] 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

⁹ Order MO-1706.

inferences with respect to information supplied by a third party.¹⁰

[38] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹¹

[39] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.¹²

Representations of the parties

[40] The appellant submits that record 64 was supplied to the ministry in the context of the ministry’s review of current health sector savings and that laboratories hold an expectation of confidence when they provide required information to the ministry. Given the nature of the financial information provided to the ministry, the appellant submits that the expectation of confidentiality was reasonable in the circumstances.

[41] It further submits that the competitive nature of the funding process under the *Laboratory and Specimen Collection Centre Licensing Act* (the LSCCLA)¹³ only works because the laboratories expect their information will remain confidential. It explains that the public disclosure of the information of any laboratory would undermine the “healthy competition” in the sector for ministry funding and potentially result in less innovative solutions at higher costs to the public related to laboratory services – a result that would not have been intended by the ministry or the purposes of the LSCCLA.

¹⁰ Orders PO-2020 and PO-2043.

¹¹ Order PO-2020.

¹² Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

¹³ (R.S.O. 1990, c. L.1). The appellant explains that it is in the business of providing community laboratory services to Ontarians and thus is subject to the provisions of the LSCCLA, which provides a complete scheme for the licensing and regulation of laboratories and specimen collection centres in the province of Ontario. It also explains that these services are funded by the government according to the fee schedule set out in the publicly available *Schedule of Benefits for Laboratory Services* (at https://www.health.gov.on.ca/en/pro/programs/ohip/sob/lab/lab_mn2020.pdf).

[42] The ministry concedes that the withheld information was supplied in confidence on the basis that it was not otherwise disclosed or available from sources to which the public has access and it was prepared for a purpose that would not entail disclosure.¹⁴

Analysis and findings – the financial information was supplied in confidence

[43] I begin by noting that record 64 is a briefing document provided to the ministry prior to a meeting, and not specifically in the context of the funding process referred to by the appellant.

[44] However, I find that the appellant supplied the page 6 portion in confidence to the ministry. I agree with the parties that given the context under which this information was provided to the ministry, it was reasonable for the appellant to have an expectation of confidentiality at the time record 64 was provided to the ministry. Also, it was not otherwise disclosed or available from sources to which the public has access and it was prepared for a purpose that would not entail disclosure.

[45] Accordingly, part 2 of the three-part test has been met for the page 6 portion.

Part 3: Harms

[46] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.¹⁵

[47] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁶ The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁷

Representations of the parties

[48] With reference to sections 17(1)(a) and (c), the appellant submits that the disclosure of the page 6 portion could reasonably be expected to prejudice significantly its competitive position as against other laboratories seeking funding from the ministry,

¹⁴ Orders PO-2043, PO-2371 and PO-2497; *Canadian Medical Protective Association v. Loukidelis*, cited above.

¹⁵ *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹⁷ Order PO-2435.

as well as result in undue loss to the appellant and undue gain to these other laboratories. Specifically, it submits that the financial information contained in the page 6 portion would in effect provide the appellant's competitors with information on its operating costs and enable them to reverse engineer its operating costs by virtue of knowing the amount of HST it is expected to pay.

[49] The ministry submits that the appellant's response to the third party notice did not establish a reasonable expectation of the harm described in section 17(1). It makes no comment on the appellant's representations provided during this inquiry, as they were not provided to the ministry prior to its initial access decision. It defers to the IPC's assessment of the evidence in the appellant's representations.

Analysis and findings – disclosure of the financial information could not reasonably be expected to result the section 17(1) harms

[50] In the circumstances of this appeal, I find that there is insufficient evidence before me of any harms outlined in section 17(1) of the *Act* that could reasonably be expected to result from disclosure of the page 6 portion. I also find that the harms contemplated in section 17(1) cannot be inferred directly from page 6 portion, or established by the appellant's representations, or the circumstances surrounding the creation of the record 64.

[51] As I noted above, the purpose of the section 17(1) exemption is to protect the confidential "informational assets" of businesses that provide information to government institutions. In my view, the harms contemplated under sections 17(1)(a) and (c) must be considered in this light. I am not persuaded that disclosure of the page 6 portion could reasonably be expected to result in the harms envisioned by the appellant.

[52] The appellant submits that the HST amount that it is expected to pay would allow its competitors to determine its operating costs. However, the appellant has not explained how a competitor would be able to do so, nor has it explained how easy or the extent to which it could do so for any given fiscal year. Moreover, the page 6 portion relates to the amount of HST the appellant is expected to pay as of 2010 and as estimated in 2011, which is presumably not the exact amount of HST that it has paid or will pay in any given fiscal year since 2010. In addition, this amount may no longer be accurate if there have been changes to how the HST is calculated or what it applies to, and it is likely to change from year-to-year.

[53] In the circumstances of this appeal, I find that disclosing the amount of HST the appellant is expected to pay could not reasonably be expected to result in undue gain to the appellant's competitors by allowing them to calculate the appellant's operating costs, nor do I find that such disclosure of this HST amount could reasonably be expected to result in the harms outlined in section 17(1) of the *Act*.

[54] Even if competitors could determine its operating costs by the amount of HST it is expected to pay, the appellant has not demonstrated how knowing the appellant's operating costs could reasonably be expected to significantly prejudice the appellant's competitive position against other laboratories seeking funding from the ministry, or could result in undue loss to the appellant and undue gain to other laboratories. Without the benefit of more detailed evidence from the appellant, I can only surmise that the appellant is a privately held corporation and that the public may not readily know its operating costs. The appellant has not provided me with sufficient evidence to demonstrate that the harms listed in section 17(1) of the *Act* could reasonably be expected to occur from being able to determine its operating costs from the amount of HST it is expected to pay. I find that simply indicating that disclosure of the amount of HST it is expected to pay would allow its competitors to determine its operating costs is insufficient evidence to establish the harms outlined in section 17(1) of the *Act*.

[55] Accordingly, I find that disclosure of the page 6 portion could not reasonably be expected to result in the harms outlined in section 17(1) of the *Act*. I also find that I am unable to infer the harms contemplated by sections 17(1) from the page 6 portion. And I find the appellant's representations do not establish any of the harms in section 17(1) nor do the circumstances surrounding the creation of the record 64 establish the harms.

[56] As not all three parts of the test have been met for the page 6 portion, in addition to the page 2 portion, as noted above, I find that the withheld information is not exempt under section 17(1) of the *Act*. Therefore, I uphold the ministry's decision and dismiss the appellant's appeal. The withheld information should be disclosed to the requester. As the appellant has only claimed the application of section 17(1) to these two portions of record 64 and the ministry's decision was to disclose record 64, I will order the ministry to disclose record 64 to the requester, in accordance with its access decision.

ORDER:

1. I uphold the ministry's decision and dismiss the appellant's appeal.
2. I order the ministry to disclose record 64 to the requester in accordance with its access decision, by **August 24, 2022**, but not before **August 19, 2022**.
3. As the appellant has consented to the disclosure of record 16 with the names of its employees severed, the ministry is directed to disclose this record without the names of employees based on the appellant's consent and in accordance with its access decision.
4. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the requester in accordance with provision 2 of this order.

Original Signed by: _____
Valerie Silva
Adjudicator

July 19, 2022 _____