Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4292

Appeal PA18-00748

Ministry of Health

August 25, 2022

Summary: A community laboratory appealed a decision by the Ministry of Health (the ministry) to disclose information in certain records to a requester under the *Freedom of Information and Protection of Privacy Act* (the *Act*). These records include Ontario Transfer Payment Agreements, letters from the ministry to the community laboratory, a number of reports and some business cases. The community laboratory claims that some information in these records is exempt from disclosure under the mandatory exemption for third party information in section 17(1) of the *Act*. In this order, the adjudicator finds that the information at issue in the records is not exempt from disclosure under section 17(1). He upholds the ministry's decision to disclose this information to the requester.

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

Orders Considered: Order PO-2435.

OVERVIEW:

[1] The appellant is a community laboratory that objects to a decision by the Ministry of Health (the ministry) to disclose to a requester parts of certain records that contain information about that community laboratory. It submits that this information is exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] This appeal came about as a result of an access request under the *Act* made by a lawyer. His request was for access to the following records:

> Notes, correspondence, memoranda, reports, meeting and/or briefing notes, and agreements relating to the community laboratories - for the period of January 1, 2011 until September 1, 2016.
>
> Internal and external notes, communications, records, relating to:
>
> 1. The development, review, and implementation of the Deloitte Lab Services Review – Final Report – dated February 2012;
>
> 2. The development, review, and implementation of the KPMG Lab System Modernization Blueprint and High-Level Work plan dated February 2013;
>
> 4. The development, review and implementation of the Modernization of the Community Laboratory Sector undertaken in 2016; We're simply looking for correspondence (including emails) from/to/amongst the following Public Servants (including amongst themselves) and to/from/amongst the public servants below and the Community Laboratories:
>
> Public Servants: [21 named individuals];
>
> Community Laboratories: [8 named laboratories];
>
> 5(b) The reduction and subsequent implementation of the $50m laboratory sector funding cut articulated in the 2015 Ontario Provincial Budget; and the 2015-2016 Access and Performance Transition Fund for each of the community laboratories.

[3] The requester subsequently clarified his access request in the following manner:

1. The precise timeframe for the correspondence is for the period of January 1, 2011 until September 1, 2016.

2. Clarification 5b), The requester is looking for "Any of the requested documents/files relating at all with the 2015-16 Access and Performance Transition Fund for each of the community laboratories".

[4] In response, the ministry located records that contain information about a number of community laboratories, including the one that is the appellant in this appeal. These records include Ontario Transfer Payment Agreements between the ministry and the community laboratory, letters from the ministry to the community laboratory, a number of reports and some business cases.

[5] In accordance with the notification requirements in section 28 of the *Act*, the ministry then notified that community laboratory and asked for its views as to whether the records that contain information about it are exempt from disclosure under section 17(1) of the *Act*.

[6] In response, the community laboratory advised the ministry that it consented to the ministry disclosing some records in full to the requester. However, it objected to the disclosure of parts of some records and also argued that other records should be withheld in full under section 17(1). After considering the community laboratory's views, the ministry sent a decision letter to both the community laboratory and the requester which stated that it had decided to disclose most of the records to the requester in full but would be withholding some information (number of annual visits and patient volumes) under section 17(1).

[7] The requester did not appeal the ministry's access decision to withhold the number of annual visits and patient volumes in the records under section 17(1). As a result, that information is not at issue in this appeal. However, the community laboratory appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). It claimed that there remains information in the records that the ministry decided to disclose that is exempt from disclosure under section 17(1).

[8] The IPC assigned a mediator to this appeal, who attempted to resolve the issues in dispute between the parties. During mediation, the community laboratory consented to the ministry disclosing additional records and parts of records to the requester. However, it continued to object to the ministry's decision to disclose some information in each of the remaining records to the requester.

[9] This appeal was not resolved during mediation and was moved to adjudication, where an adjudicator may conduct an inquiry to review an institution's access decision. The adjudicator initially assigned to this appeal sent a Notice of Inquiry to the community laboratory and invited it to submit representations to her that explain why it believes the section 17(1) exemption applies to the information in the records that the ministry decided to disclose to the requester. In response, the community laboratory did not provide representations on section 17(1) but simply stated:

> [O]ur correspondences (e.g. notes, memos, reports, agreements etc.) with the MOH during Jan 01, 2011 to Sept 01, 2016 were open and transparent with a focus on access and quality of community laboratory services to our patients.
>
> Further to your request for any representations, we do not [have] any additional documents or evidence.

[10] This appeal was subsequently transferred to me to complete the inquiry.[1] In this order, I find that the community laboratory has failed to establish that the information in the records at issue is exempt from disclosure under section 17(1) of the *Act*. I uphold the ministry's decision to disclose this information to the requester.

RECORDS:

[11] The community laboratory objects to the ministry disclosing parts of the following 35 records to the requester:[2]

Record number[3]	**General description of record**	**Ministry's decision**	**Exemption claimed by appellant**
35	Ontario Transfer Payment Agreement between ministry and community laboratory	Disclose in full	s. 17(1) for parts of record
40	Letters from ministry to community laboratory	Disclose in full	s. 17(1) for parts of record
45	Ontario Transfer Payment Agreement between ministry and community laboratory	Disclose in full	s. 17(1) for parts of record

[1] After reviewing the file material, including the records, I determined that I did not need to seek representations from any of the other parties before rendering a decision.

[2] The Notice of Inquiry sent to the community laboratory by the adjudicator initially assigned to this appeal included the following six records in the group remaining as issue: records 460, 501, 602, 611, 706, 913 and 943. However, the community laboratory had previously consented to the ministry disclosing these records in full to the requester. As a result, these records are no longer at issue in this appeal, and I have not included them in this chart. In addition, even though record 471 was not listed as remaining at issue in the Notice of Inquiry, the community laboratory previously stated that it continues to object to the ministry disclosing parts of it to the requester, so I have included it in the above chart.

[3] The ministry subsequently reorganized and renumbered some of the records but I will be using the original record numbers in this order.

144	Letter from ministry to community laboratory	Disclose in full	s. 17(1) for parts of record
151	Letter from ministry to community laboratory	Disclose in full	s. 17(1) for parts of record
158	Letter from ministry to community laboratory	Disclose in full	s. 17(1) for parts of record
163	Letter from ministry to community laboratory	Disclose in full	s. 17(1) for parts of record
168	Letter from ministry to community laboratory	Disclose in full	s. 17(1) for parts of record
347	Baseline performance report	Disclose in full	s. 17(1) for parts of record
356	Year end performance report	Disclose in full	s. 17(1) for parts of record
391	Patient survey	Disclose in full	s. 17(1) for parts of record
423	Year end performance report	Disclose in full	s. 17(1) for parts of record
452	Year end performance report	Disclose in full	s. 17(1) for parts of record
471	Net new hours of operation report	Disclose in full	s. 17(1) for parts of record
478	Net new hours of operation report	Disclose in full	s. 17(1) for parts of record

625	Year end performance report	Disclose in part (number of annual visits and patient volumes redacted)	s. 17(1) for parts of record
626	Year end performance report	Disclose in full	s. 17(1) for parts of record
636	Access and specimen collection report	Disclose in part (number of annual visits and patient volumes redacted)	s. 17(1) for parts of record
637	Year end performance report	Disclose in part (number of annual visits and patient volumes redacted)	s. 17(1) for parts of record
645	Year end performance report	Disclose in part (number of annual visits and patient volumes redacted)	s. 17(1) for parts of record
646	Net new hours of operation report	Disclose in full	s. 17(1) for parts of record
730	Patient wait times method implementation cost report	Disclose in full	s. 17(1) for parts of record
818	Business case	Disclose in full	s. 17(1) for parts of record
819	Business case	Disclose in full	s. 17(1) for parts of record
820	Business case	Disclose in full	s. 17(1) for parts of record

821	Business case	Disclose in full	s. 17(1) for parts of record
868	Access and performance project	Disclose in full	s. 17(1) for parts of record
869	Quality improvement plan innovation report	Disclose in full	s. 17(1) for parts of record
871	Quality improvement plan innovation report	Disclose in full	s. 17(1) for parts of record
889	Letter from ministry to community laboratory	Disclose in full	s. 17(1) for parts of record
924	Year end performance report	Disclose in part (number of annual visits and patient volumes redacted)	s. 17(1) for parts of record
929	Year end performance report	Disclose in part (number of annual visits and patient volumes redacted)	s. 17(1) for parts of record
936	Quality improvement plan progress report	Disclose in full	s. 17(1) for parts of record
951	Year end performance report	Disclose in part (number of annual visits and patient volumes redacted)	s. 17(1) for parts of record

957	Year end performance report	Disclose in part (number of annual visits and patient volumes redacted)	s. 17(1) for parts of record

DISCUSSION:

[12] The sole issue in this appeal is whether the mandatory exemption at section 17(1) of the *Act* applies to any information in the above records. The community laboratory claims that there is information in these records that is exempt from disclosure under section 17(1). The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[4] where specific harms can reasonably be expected to result from its disclosure.[5]

[13] 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, if 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.

[14] For section 17(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

---

[4] *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.*).
[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

1. the record 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 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.

[15] Given that the ministry has decided to disclose most of the information in the records at issue, the onus is on the community laboratory to establish that the information that it submits should be withheld meets the requirements of the section 17(1) exemption.

Analysis and findings

[16] As noted in the overview section of this order, a Notice of Inquiry was sent to the community laboratory at the outset of adjudication and it was invited to submit representations that explain why it believes the section 17(1) exemption applies to the information in the records that the ministry decided to disclose to the requester. In response, the community laboratory did not provide representations on section 17(1), nor did it point to any evidence that the adjudicator could rely upon.

[17] Because the onus is on the community laboratory to establish that the information that it submits should be withheld meets the requirements of the section 17(1) exemption, its failure to submit legal arguments and evidence to me in response to the Notice of Inquiry undermines its appeal. However, because section 17(1) is a mandatory exemption, I have decided to scrutinize other documents in the record of proceedings before me in considering whether this exemption applies to the information in the records that the community laboratory submits should be withheld from the requester.

[18] In particular, I have reviewed the records themselves, including the information that the community laboratory claims is exempt from disclosure under section 17(1). During mediation, the community laboratory sent a letter to both the ministry and the IPC mediator in which it consented to the ministry disclosing additional records in full to the requester but objected to the ministry disclosing specific information in parts of other records.[6] This letter included a marked-up copy of the records at issue in which the information that the community laboratory submits is exempt from disclosure under section 17(1) is redacted in black.

[19] This redacted information includes various funding amounts (amounts requested by the community laboratory, amounts provided by the ministry, maximum funding

[6] Dated March 22, 2019

amounts, etc.), license numbers and addresses for the community laboratory's centres, estimated and actual costs for various items, some statistics relating to monthly and daily laboratory test requisitions, specific payments made by the community laboratory, the estimated price for a property, etc.

[20] The record of proceedings before me also includes the community laboratory's submissions on section 17(1) that are found in a response letter that it sent to the ministry after being notified of the access request.[7] The ministry did not agree with these submissions with respect to most of the information in the records and decided to disclose this information to the requester.

[21] In this letter, the community laboratory characterizes its contents as "confidential" and states that it does not agree to it being disclosed without prior written consent. In response to the Notice of Inquiry that was issued to the community laboratory at the outset of adjudication, the community laboratory did not indicate whether it would like me to consider this letter in reaching my decision or whether it consented to sharing its contents with the requester in order to give him an opportunity to respond to its submissions and evidence.

[22] I have decided to review and consider the community laboratory's submissions on section 17(1) found in this letter. However, in the absence of consent from the community laboratory to share or disclose this letter, I will only refer to its general arguments and will not be revealing the detailed contents of the letter in this public order.

[23] For the reasons that follow, I find that even if I were to accept that there is information in the records at issue that meets parts 1 and 2 of the section 17(1) test, the community laboratory's submissions in its letter to the ministry fall short of the type of evidence required to show that the harms requirement in part 3 of the section 17(1) test is met.

Parts 1 and 2 – type of information and supplied in confidence

[24] Parts 1 and 2 of the test for the application of section 17(1) require that the community laboratory establish that the records reveal a trade secret or scientific, technical, commercial, financial or labour relations information that was supplied in confidence.

[25] Before assessing whether the community laboratory has met part 3 of the section 17(1) test, I have decided to briefly examine whether two specific records meet the requirements of part 2 of this test. Records 35 and 45 are contracts between the community laboratory and the ministry. These contracts are known as Ontario Transfer Payment Agreements and include several schedules. The community laboratory submits that some information, such as maximum funding amounts, in these agreements is

[7] Dated October 29, 2018.

exempt from disclosure under section 17(1).

[26] To satisfy part 2 of the section 17(1) test, the party resisting disclosure must show that the information in the records has been "supplied" to the institution in confidence, either implicitly or explicitly. Previous IPC orders have found that the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[8]

[27] There are two exceptions to this general rule:

1. The "inferred disclosure" exception. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.[9]

2. The "immutability" exception. This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[10]

[28] In its submissions on section 17(1) that are found in its letter to the ministry, the community laboratory does not address whether the information in the two Ontario Transfer Payment Agreements were "supplied" for the purpose of part 2 of the section 17(1) test, nor does it address whether the specific information that it submits should be withheld under section 17(1) falls within the "inferred disclosure" or "immutability" exceptions.

[29] I have examined these records and the information at issue and am satisfied that these two agreements, including the schedules, were the product of a mutual negotiation process between the community laboratory and the ministry. It cannot, therefore, be said, that the community laboratory "supplied" the information in the agreements to the ministry. There is no evidence that would lead me to conclude that the "inferred disclosure" or "immutability" exceptions apply to the information that the community laboratory submits should be withheld under section 17(1).

[30] In these circumstances, I find that the community laboratory has failed to satisfy part 2 of the section 17(1) test with respect to the information in records 35 and 45 that it submits should be withheld. I find, therefore, that this information is not exempt

---

[8] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[9] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[10] *Miller Transit*, cited above at para. 34.

from disclosure under section 17(1).

Part 3 - harms

[31] I will now assess whether the community laboratory has met part 3 of the section 17(1) test for the information in the remaining records at issue. Part 3 requires that the community laboratory establish that the prospect of disclosure of the information in the records gives 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.

[32] The party resisting disclosure of the information in a record cannot simply assert that the harms under section 17(1) are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act.*[11]

[33] The party resisting disclosure must show that the risk of harm is real and not just a possibility.[12] However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[13]

[34] As noted above, I have decided to review and consider the community laboratory's submissions on section 17(1) found in its letter to the ministry. However, in the absence of consent from the community laboratory to share or disclose this letter, I will only refer to its general arguments and will not be revealing the detailed contents of the letter in this public order.

[35] The information in the records that the community laboratory submits should be redacted from the records includes various funding amounts (amounts requested by the community laboratory, amounts provided by the ministry, maximum funding amounts, etc.), license numbers and addresses for the community laboratory's centres, estimated and actual costs for various items, some statistics relating to monthly and daily laboratory test requisitions, specific payments made by the community laboratory, the estimated price for a property, etc.

[36] In its submissions on section 17(1) found in the letter that it sent to the ministry, the community laboratory appears to be relying primarily on the competitive harm requirement in section 17(1)(a) and the undue gain/loss requirements in section

---

[11] Orders MO-2363 and PO-2435.
[12] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

17(1)(c). To meet the competitive harm requirement in section 17(1)(a), the community laboratory must show that disclosing the information in the records at issue could reasonably be expected to prejudice significantly its competitive position. To satisfy the requirements of section 17(1)(c), it must show that disclosure could reasonably be expected to result in an undue loss for itself or an undue gain for its competitors.

[37] I do not find the community laboratory's submissions to be sufficiently detailed and persuasive for two reasons. First, although the community laboratory suggests that disclosing the information at issue would provide an advantage to its competitors, they do not explain in sufficient detail how its competitors could use such information in a manner that could reasonably be expected to prejudice significantly its competitive position, as required by section 17(1)(a), or result in an undue loss for itself or an undue gain for these competitors, as required by section 17(1)(c).

[38] Second, the IPC has found that the fact that a third party working for the government may be subject to a more competitive bidding process for future contracts if the amount it charges for services rendered is disclosed, does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.[14] Consequently, even though the community laboratory suggests that disclosing, for example, the specific funding that it received from the ministry could be advantageous to its competitors, I find that the fact that it may be subject to a more competitive application process for obtaining ministry funding could not reasonably be expected, in and of itself, to significantly prejudice its competitive position or result in an undue loss for itself or an undue gain for these competitors.

[39] In my view, the community laboratory's submissions are insufficiently detailed and persuasive to establish that disclosing the information in the records at issue could reasonably be expected to lead to the harms set out in sections 17(1)(a) or (c). In addition, there is no evidence before me to establish that the second harm set out in section 17(a) or the harms in sections 17(1)(b) or (d) could reasonably be expected to occur if the information in the records at issue is disclosed to the requester.

[40] I find, therefore, that the community laboratory has failed to meet the harms requirement in part 3 of the section 17(1) test. Given that the community laboratory must satisfy each part of the section 17(1) three-part test to establish that the exemption applies, I find that its failure to meet part 3 means that the information at issue in the records is not exempt from disclosure under section 17(1). I uphold the ministry's decision to disclose this information to the requester.

[41] Finally, I note that the response letter that the community laboratory sent to the ministry after being notified of the access request stated that it did not object to the ministry disclosing the following records to the requester: records 8, 14, 21, 28, 96,

[14] Order PO-2435.

331, 435, 445, 767, 870, 872, 873, 874, 875, 876, 877, 878, 879, 880, 882, 883, 884, 885, 886, 887, 888 and 906. The mediator's report sent to the parties stated that the ministry had not yet disclosed these records to the requester.

[42] When this appeal moved to adjudication, an IPC adjudication review officer followed up with staff in the ministry's access, privacy and corporate information office to determine whether it had disclosed these records to the requester but the ministry did not provide a response. Consequently, I will be ordering the ministry, if it has not already done so, to disclose to the requester any records to which the community laboratory had previously consented to being disclosed.

ORDER:

1. I uphold the ministry's decision to disclose the following records to the requester in full: records 35, 40, 45, 144, 151, 158, 163, 168, 347, 356, 391, 423, 452, 471, 478, 626, 646, 730, 818, 819, 820, 821, 868, 869, 871, 889 and 936.

2. I uphold the ministry's decision to disclose the following records to the requester in part: records 625, 636, 637, 645, 924, 929, 951 and 957.

3. I order the ministry to disclose the records identified in order provisions 1 and 2 by **September 29, 2022** but no earlier than **September 23, 2022**. To be clear, before disclosing the records identified in order provision 2, it must redact the number of annual visits and patient volumes, because its decision to redact this information was not appealed by the requester.

4. I order the ministry, if it has not already done so, to disclose to the requester any records to which the community laboratory had previously consented to being disclosed, including: records 8, 14, 21, 28, 96, 331, 435, 445, 767, 870, 872, 873, 874, 875, 876, 877, 878, 879, 880, 882, 883, 884, 885, 886, 887, 888 and 906.

Original Signed by: August 25, 2022

Colin Bhattacharjee
Adjudicator