Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4305

Appeal PA18-00752

Ministry of Health

September 27, 2022

Summary: A community laboratory appealed a decision by the Ministry of Health (the ministry) to disclose a number of records in full and others in part to a requester under the *Freedom of Information and Protection of Privacy Act* (the *Act*). These records include Ontario Laboratories Information System (OLIS) interface enhancement plan reports; letters from the ministry to the community laboratory; a letter from the community laboratory to the ministry; two Ontario Transfer Payment Agreements; various quality improvement plan (QIP) business cases, reports and charts; and year end performance reports. The community laboratory claims that there is information in these records that 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 these records is not exempt from disclosure under section 17(1). He upholds the ministry's decision to disclose these records and parts of records 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 23 records in full and five records in part that contain information about that community laboratory. It submits that there is information in these records that 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.
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> Internal and external notes, communications, records, relating to:
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> 1. The development, review, and implementation of the Deloitte Lab Services Review – Final Report – dated February 2012;
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> 2. The development, review, and implementation of the KPMG Lab System Modernization Blueprint and High-Level Work plan dated February 2013;
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> 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:
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> Public Servants: [21 named individuals];
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> Community Laboratories: [8 named laboratories];
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> 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 Laboratories Information System (OLIS) interface enhancement plan reports; letters from the ministry to the community laboratory; a letter from the community laboratory to the ministry; two Ontario Transfer Payment Agreements; various quality improvement plan (QIP) business cases, reports and charts; year end performance reports, and other records.

[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 to the requester. However, it submitted that the ministry should withhold a number of records because they contain information that is exempt from disclosure under section 17(1). After considering the community laboratory's views, the ministry sent a decision letter to the community laboratory which stated that it was in partial agreement with the community laboratory's submissions.[1] Based on my review of this decision letter and the records themselves, it appears that the ministry decided to disclose 23 records in full and five records in part to the requester but also decided to withhold 10 records in full under section 17(1).

[7] The requester did not appeal the ministry's access decision to withhold 10 records in full and parts of five records under section 17(1). As a result, those records and parts of records are 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 the remaining records and parts of records that the ministry decided to disclose contain information 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. 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 and parts of records that the ministry decided to disclose to the requester. The community laboratory did not submit any representations in response.

[9] This appeal was subsequently transferred to me to complete the inquiry.[2] 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

[1] Dated November 20, 2018. The ministry also sent a separate decision letter to the requester.
[2] 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.

uphold the ministry's decision to disclose 23 records in full and five records in part to the requester.

RECORDS:

[10] The community laboratory objects to the ministry disclosing the following records and parts of records to the requester:

Record number[3]	**General description of record**	**Ministry's decision**	**Exemption claimed by community laboratory**
463	OLIS interface enhancement plan report	Disclose in part	s. 17(1)
770	OLIS interface enhancement plan report	Disclose in part	s. 17(1)
771	OLIS interface enhancement plan report	Disclose in part	s. 17(1)
772	OLIS interface enhancement plan report	Disclose in part	s. 17(1)
773	OLIS interface enhancement plan report	Disclose in part	s. 17(1)
33	Ontario Transfer Payment Agreement between ministry and community laboratory	Disclose in full	s. 17(1)
38	Letters from ministry to community laboratory	Disclose in full	s. 17(1)
43	Ontario Transfer Payment Agreement between ministry and community laboratory	Disclose in full	s. 17(1)
156	Letters from ministry to community laboratory	Disclose in full	s. 17(1)
161	Letter from ministry to community laboratory	Disclose in full	s. 17(1)
166	Letter from ministry to	Disclose in full	s. 17(1)

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

	community laboratory		
794	QIP innovation business case	Disclose in full	s. 17(1)
837	QIP innovation report	Disclose in full	s. 17(1)
838	QIP innovation report	Disclose in full	s. 17(1)
851	Letter from ministry to community laboratory	Disclose in full	s. 17(1)
911	QIP progress report	Disclose in full	s. 17(1)
916	QIP	Disclose in full	s. 17(1)
917	QIP chart	Disclose in full	s. 17(1)
922	Year end performance report	Disclose in full	s. 17(1)
927	Year end performance report	Disclose in full	s. 17(1)
933	QIP progress report	Disclose in full	s. 17(1)
934	QIP chart	Disclose in full	s. 17(1)
939	QIP	Disclose in full	s. 17(1)
940	QIP chart	Disclose in full	s. 17(1)
946	Letter from ministry to community laboratory	Disclose in full	s. 17(1)
947	Letter from community laboratory to ministry	Disclose in full	s. 17(1)
948	Year end performance report	Disclose in full	s. 17(1)
949	Year end performance report	Disclose in full	s. 17(1)

DISCUSSION:

[11] 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]

[12] 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,
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> > (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.

[13] For section 17(1) to apply, the party arguing against disclosure 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;

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.

[14] Given that the ministry has decided to disclose 23 records in full and five records in part, 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.

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[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.

Analysis and findings

[15] 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 and parts of 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.

[16] 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 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.

[17] In particular, I have reviewed the records at issue, which include OLIS interface enhancement plan reports; letters from the ministry to the community laboratory; a letter from the community laboratory to the ministry; two Ontario Transfer Payment Agreements; various QIP business cases, reports and charts; and year end performance reports.

[18] The record of proceedings 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.[6] In this letter, the community laboratory identified a number of records that it claims contain information that is exempt from disclosure under section 17(1).

[19] After receiving the Notice of Inquiry that was issued to it 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. 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 summarize the community laboratory's general arguments and will not be revealing the letter's detailed contents in this public order.

[20] 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

[6] Dated October 3, 2018.

of evidence required to show that the harms requirement in part 3 of the section 17(1) test is met. As a result, I uphold the ministry's decision to disclose 23 records in full and five records in part to the requester.

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

[21] 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.

[22] 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 33 and 43 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 in the schedules, such as the specific dollar amounts that it was entitled to receive from the ministry, is exempt from disclosure under section 17(1).

[23] 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.[7]

[24] 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.[8]

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.[9]

[25] In its submissions on section 17(1) that are found in its letter to the ministry, the

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[7] 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*).
[8] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[9] *Miller Transit*, cited above at para. 34.

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.

[26] I have examined these two agreements and I am satisfied that their contents, 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).

[27] 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 33 and 43 that it submits should be withheld. I find, therefore, that this information is not exempt from disclosure under section 17(1).

Part 3 of test - harms

[28] Part 3 of the section 17(1) test 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) or (d) of section 17(1) will occur.

[29] 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.*[10]

[30] The party resisting disclosure must show that the risk of harm is real and not just a possibility.[11] 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.[12]

[31] In its submissions on section 17(1) in its letter to the ministry, the community

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[10] Orders MO-2363 and PO-2435.
[11] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.
[12] *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.

laboratory appears to be relying primarily on the competitive harm requirement in section 17(1)(a) and the undue gain/loss requirements in section 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.

[32] I do not find the community laboratory's submissions to be sufficiently detailed and persuasive for three reasons.

[33] First, the community laboratory submits that the OLIS interface enhancement plan reports relate to a competitive bid/submission process and disclosing them would result in a specific gain for its competitors because it would provide them with its entire application template. In addition, it claims that disclosing a QIP innovation business case and QIP innovation reports would significantly prejudice its competitive position and result in an undue gain for its competitors because of the potential for commercialization. It also claims that other records, such as the various QIP reports and charts and year end performance reports, contain technical and commercial information that is unique to its business operations, and that disclosing this information would significantly prejudice its competitive position.

[34] In my view, the community laboratory's submissions do not explain in sufficient detail how its competitors could use the information in the records 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).

[35] For example, what could the community laboratory's competitors do with its application template in the OLIS interface enhancement plan reports or the information in a QIP innovation business case and QIP innovation reports? In particular, how could they specifically use this information in a manner that could reasonably be expected to prejudice significantly the community laboratory's competitive position or result in an undue loss for the community laboratory or an undue gain for themselves? The community laboratory's submissions in its letter to the ministry do not shed adequate light on these questions.

[36] Second, the community laboratory submits that disclosing the specific dollar amounts that it received from the ministry, which are found in the Ontario Transfer Payment Agreements and other records, would prejudice its competitive position. However, the IPC has previously 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.[13] In the circumstances of the appeal before me, I similarly find that the fact that the community laboratory 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 its competitors.

[37] Third, it is not sufficient for the community laboratory to merely show that disclosing the records at issue could reasonably be expected to prejudice its competitive position or result in a loss for itself or a gain for its competitors. To satisfy the requirements of sections 17(1)(a) and (c), it must establish that disclosure could reasonably be expected to prejudice "significantly" its competitive position or result in an "undue" loss for itself and an "undue" gain for its competitors.

[38] Although the community laboratory submits, for example, that disclosing the records at issue would "significantly" prejudice its competitive position and result in an "undue" gain for its competitors, it does not explain in sufficient detail how it is reasonable to expect that such prejudice would reach the threshold of being significant, nor does not explain how it is reasonable to expect that any loss for itself or gain for its competitors would be undue.

[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 reasonable basis for me to find that the second harm set out in section 17(a) or the harms in sections 17(1)(b) or (d) could 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).

ORDER:

1. I uphold the ministry's decision to disclose the following 23 records in full to the requester: records 33, 38, 43, 156, 161, 166, 794, 837, 838, 851, 911, 916, 917, 922, 927, 933, 934, 939, 940, 946, 947, 948 and 949.

2. I uphold the ministry's decision to disclose the following five records in part to the requester: records 463, 770, 771, 772 and 773.

[13] Order PO-2435.

3. I order the ministry to disclose these records to the requester by **November 2, 2022** but no earlier than **October 28, 2022**.

Original Signed By: September 27, 2022

Colin Bhattacharjee
Adjudicator