Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4413

Appeal PA21-00261

Halton Healthcare Services

June 29, 2023

Summary: Halton Healthcare Services (HHS) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for any agreements between HHS and a named company, and other related records. The company appealed HHS's decision granting the requestor access to the responsive records. In this order, the adjudicator finds that the information withheld under section 17(1) is not exempt, and orders it disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, as amended, section 17.

Order Considered: Order PO-4049.

OVERVIEW:

[1] Halton Halton Healthcare Services (HHS) received a request under the Freedom of Information and Protection of Privacy Act (the Act). Following discussion between the requester and HHS, the scope of the request was narrowed to any agreements between HHS and a named company, as well as other related records from a specified time period.

[2] HHS identified a company specified in the request as a third party whose interests might be affected by disclosure of the requested records. HHS notified the third party of its intention to grant full access to the responsive records, providing an opportunity for the third party to make representations. The third party made

representations asking that HHS deny access to the responsive records pursuant to the mandatory third party information exemption under section 17(1) of the *Act*.

[3] HHS issued a decision to the requester refusing access to the records citing section 17(1) of the *Act*. The requester appealed HHS's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] That appeal (PA20-00680) was resolved through mediation when HHS revised its decision and decided to grant the requester full access to the responsive records. HHS notified the third party of its revised decision.

[5] The third party, now the appellant, appealed HHS's revised decision to the IPC.

[6] During mediation, the appellant agreed to the disclosure of a portion of the records at issue, with some information withheld under section 17(1) of the *Act*. The requester continued to seek access to the remainder of the records at issue, specifically the Joint Venture Agreement between HHS and the appellant and a payment record.

[7] As a mediated resolution was not achieved, the appeal was moved to the adjudication stage.

[8] The adjudicator originally assigned to this appeal decided to conduct an inquiry. She sought and received representations from the appellant and the HHS, both of whom raised confidentiality concerns with regards to sharing. The adjudicator accepted that both sets of representations met criteria under *Practice Direction Number 7* of the IPC's *Code of Procedure.* As a result, she shared the appellant and HHS's non-confidential representations with the requester. The requester was invited to submit representations but did not do so.

[9] The file was then assigned to me to continue the adjudication of the appeal.[1]

[10] For the reasons that follow, I find that the records withheld under section 17(1) do not meet all three parts of the section 17(1) test. Accordingly, I find that they are not exempt.

RECORDS:

[11] In its representations, the appellant explains that the records at issue relate to a joint venture between it and HHS. The appellant specifies that it handles various aspects of the joint venture including the administration, accounting, and billing.

[12] The information at issue is a portion of a Joint Venture Agreement (3 pages) and

[1] I have reviewed the parties' representations and concluded that I do not need further representations before rendering a decision.

a payment record (6 pages).

[13] The first page of the Joint Venture Agreement (the agreement) was disclosed to the requester. The second page is entitled "Proposal" and according to HHS, it sets out the allocation thresholds for the joint venture revenues between HHS and the appellant and the basis for that allocation. The third page HHS describes as the amendment to the original agreement between HHS and the appellant, which incorporates the proposal into the agreement.

DISCUSSION:

[14] The sole issue in this appeal is whether the section 17(1) mandatory exemption for third party information applies to the records at issue. The appellant argues that both the agreement and the payment meet all the three parts of the test, while HHS argues that only the payment record does.

[15] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[2] where specific harms can reasonably be expected to result from its disclosure.[3]

[16] 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.

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

[17] 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.

[18] For the reasons below, I find that the agreement meets part one but not part two of the test, and that the payment record meets parts one and two, but not part three. Accordingly, I find that neither the agreement or the payment record are exempt under section 17(1) of the *Act*.

Part 1 of the section 17(1) test: type of information

Representations, analysis and finding

[19] The appellant submits that the records at issue qualify as trade secrets, commercial information and/or financial information, while HHS submits that they contain commercial and financial information. For the reasons below, I agree with HHS and find that the records at issue contain commercial and financial information.

Trade secret

[20] The IPC has described trade secrets protected under section 17(1) as follows:

> Trade secret includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
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> a) is, or may be used in a trade or business;
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> b) is not generally known in that trade or business;
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> c) has economic value from not being generally known; and
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> d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]

[21] The appellant submits that the agreement details the fee-split formulations

[4] Order PO-2010.

between it and HHS, and fits within the definition of trade secret. The appellant states that the fee-split formulations are used in the joint venture, for the purposes of determining the revenues attributable to each party.[5] According to the appellant, the fee- split formulations are not generally known within its industry as their disclosure would undermine HHS and the appellant's economic interests. The appellant argues that there is economic value to keeping the fee-split formulations confidential, adding that it has made a consolidated effort to maintain the secrecy of the fee-split arrangement for the past 26 years. In particular, it notes that the confidentiality of the formulation allows for it, HHS and the joint venture to maintain an income stream it would not otherwise have.

[22] Based on my review of the records and the appellant's representations, I find that the agreement does not contain trade secrets. The appellant has not provided sufficient detail to establish that the agreement meets the definition of trade secret, and that it contains information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism. The appellant describes the information in question as fee-split formulations or a fee-split arrangement, however, it does not explain *how* this information qualifies as trade secrets.

Commercial and financial information

[23] The IPC has described commercial and financial information protected under section 17(1) as follows:

> Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[6] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[7]
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> Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

[24] The appellant and HHS submit that the agreement qualifies as commercial information and the payment records as financial information. I agree.

[25] As the appellant and HHS explain in their representations, the agreement sets out the details of the revenue split between them in the operation of their joint venture,

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[5] Appellant's affidavit.
[6] Order PO-2010.
[7] Order P-1621.
[8] Order PO-2010.

and relates to the provision of services by their business. I therefore find that the agreement meets the definition of commercial information, as it relates to the buying, selling or exchange of services, in the context of the parties' joint venture.

[26] The parties explain that the payment record details the monthly payments received by HHS from the appellant over a 13-and-a-half-year period. I agree with the parties and find that the payment record meets the definition of financial information, as it contains specific data, and relates to the distribution of the joint venture's revenues between the parties.

[27] Accordingly, I conclude that the information at issue either qualifies as commercial or financial information.

Part 2: supplied in confidence

[28] As explained below, I find that the payment record was supplied in confidence and that the agreement was not supplied to HHS for the purposes of section 17(1).

Supplied

[29] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[9]

[30] 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.[10]

Representations

[31] As noted above, the agreement includes two parts, a proposal and an amendment. HHS submits that it prepared the proposal following negotiations with the appellant on the allocations of revenues, and that the proposal formed the basis of the amendment. HHS submits that the agreement was therefore not supplied to it by the appellant, but rather that it was the result of negotiation and was mutually generated by the parties.

[32] HHS explains that the payment record details the monthly payments it received from the joint venture. It further explains that this record was generated by its finance department from the general ledger, based on reporting and payments received from the appellant. According to HHS, the detailed reporting provided by the appellant supports the revenue split and payments made to it under the amendment. HHS submits that disclosure of the payment record would reveal or permit the drawing of

[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.

accurate inferences with respect to the reporting provided by the appellant related to the total revenues and profitability of the joint venture.

[33] As I understand the appellant's representations, it makes similar arguments with respect to the payment record. The appellant does not make specific representations addressing whether the information in the agreement was supplied to HHS.

Analysis and finding:

[34] 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.[11]

[35] I accept HHS's representations with respect to the agreement. In particular, I accept that the agreement resulted from negotiations between HHS and the appellant and that the information that is at issue was mutually generated. I have also reviewed the agreement and find that the proposal and amendment contain terms proposed and agreed to with respect to the fee split formulations between the parties in the context of their joint venture.

[36] In light of the foregoing, I find that the general rule for contracts applies in this case. There are two exceptions to this general rule:

1. "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.[12]

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.[13]

[37] However, it is not evident on the face of the records that either applies. Furthermore, in the absence of representations on the application of these exceptions in the circumstances, I find that they do not apply. As I have found that the agreement does not meet part two of the test, it is not necessary for me to consider part three. Accordingly, I order its disclosure to the requester.

[38] I also accept HHS's representations with respect to the payment record. Both

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[11] 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*).
[12] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[13] *Miller Transit*, cited above at para. 34.

parties note that the data contained in the payment record was provided to HHS by the appellant. The appellant specifies that this data was generated by its president, a Chartered Professional Accountant who is also the accountant and administrator for the joint venture (the accountant). While HHS's finance department created the payment record, I am satisfied that this record is based on information provided by the appellant, and that its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the appellant. I will therefore consider whether the information in the payment record was supplied to HHS in confidence.

In confidence

[39] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[14]

Representations

[40] The appellant submits that the information in the payment record was generated by the accountant. In her affidavit, the accountant states that she has an obligation not to release the financial information of another person or entity without express written consent. She affirms that neither the appellant nor the joint venture gave her permission to share the information in the payment record. The accountant further states that this information was created for accounting and administrative purposes only and never intended to be made publicly available.

[41] In addition, the accountant explains in her affidavit that this information has been kept completely confidential for 26 years, which speaks to the parties' intention that it remain confidential.

[42] In its representations, HHS submits that the information was provided to it by the appellant, with a reasonable expectation of confidentiality. It notes that the appellant and joint venture are private companies that are not subject to the public disclosure of their financial information. It is HHS' position that while the expectation may not have been made explicit, the appellant, the joint venture and HHS have all treated the information as confidential since the beginning of their relationship.

Analysis and finding:

[43] I accept the parties' representations and am satisfied that the appellant had a reasonable expectation of confidentiality when supplying the information in the payment record to HHS. In making this finding, I have considered the duty of confidentiality of the accountant supplying the information to HHS on behalf of the joint venture, that the information was prepared for accounting and administrative purposes

[14] Order PO-2020.

and not for disclosure, and that the confidentiality of the information was maintained for many years.

[44] As I have found that the payment record was supplied in confidence, I will consider whether its disclosure could reasonably be expected to lead to the harms detailed in section 17(1).

Part 3: harms

[45] HHS and the appellant submit that disclosure of the payment record could reasonably be expected to lead to the harms outlined in sections 17(1)(a) or (c), which are set out above.

[46] For the reasons that follow, I find that the payment record does not meet part three of the section 17(1) test.

Could reasonably be expected to

[47] Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They 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.*[15]

[48] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[16] However, they do 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.[17]

Sections 17(1)(a) and (c): prejudice to competitive position / undue loss or gain

[49] Sections 17(1)(a) and (c) seek to protect information that could be exploited in the marketplace.[18]

Representations

[50] The appellant submits that if both the agreement and payment record were

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[15] Orders MO-2363 and PO-2435.
[16] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[17] *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.
[18] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

disclosed, its most valuable and confidential information could be obtained from the records with a few simple calculations. The appellant further submits that all of its trade secrets and confidential information used to secure its foothold within a competitive marketplace would be lost.

[51] The appellant submits that disclosure of the payment record could cause it considerable harm by allowing a competitor to obtain information not otherwise provided in the document itself. The appellant explains that a series of simple calculations would allow a competitor to obtain information that could be used to undermine its competitive position, including its profits and number of patients.

[52] Similarly, HHS submits that the disclosure of the payment record, when taken together with the information in the agreement, would permit a competitor to fully understand the joint venture's profitability and undermine its competitive position in the market.

[53] Referring to the appellant's representations, HHS submits that the fixed monthly reimbursement rate set by the Ministry of Health and the revenue sharing allocations that are set out in the agreement, when taken together with the payment record, allow for a determination of the joint venture's gross profitability and the number of patients it services. HHS submits that this is competitive information that is not in the public domain and not otherwise available. It concludes that disclosure would provide the requestor an unfair advantage in future negotiations to the detriment of the appellant and joint venture.[19]

Analysis and finding:

[54] As noted above, the onus is on HHS and the appellant, as the parties resisting disclosure, to provide detailed evidence about the risk of harm in the event of disclosure. I have reviewed the parties' representations and supporting documents, and find that they fall short of the level of detail required to establish that part three of the section 17(1) test has been met.

[55] The appellant and HHS claim that disclosure of the payment record could be used to undermine the appellant's competitive position, and that disclosure of the payment record along with the agreement would allow competitors to determine the appellant's profitability and number of patients served.

[56] However, the appellant and HHS do not explain *how* disclosure of the information in the payment record could be exploited in the marketplace. The appellant also does not elaborate on the simple calculations it refers to in its representations, nor does it explain how the information one could obtain from these calculations could be used to undermine its competitive position. Based on my review of the payment record, I also cannot infer that its disclosure could reasonably be expected to lead to the harms

[19] HHS cites Order PO-4049 at paragraph 67.

contemplated in sections 17(1)(a) and (c).

[57] In part one (above), I did not accept that the information at issue contains trade secrets. I therefore do not accept the appellant's argument that all of its trade secrets used to secure its foothold within a competitive marketplace would be lost in the event of disclosure.

[58] HHS submits that that disclosure would provide the requestor an unfair advantage in future negotiations. It cites Order PO-4049, which considered whether records related to the provision of home oxygen services were exempt under section 17(1). The records at issue consisted of portions of a business case, a corporate resources presentation, a contract, a letter of intent, emails and draft agreements. The adjudicator determined that disclosure of the records remaining at issue under part three could reasonably expected to result in the harms described in section 17(1)(a). She found that they:

> could be used by a competitor in future negotiations, which could reasonably be expected to place a competitor at a significant advantage in terms of its competitive position, to the detriment of the affected party's competitive position.[20]

[59] The adjudicator made her finding based on the specific representations before her (including confidential representations), and a varied set of records that she found could reasonably lead to harms in the event that they were all disclosed. At issue under part three of this appeal is a single record documenting payments further to a contract between HHS and the appellant. Considering that the information at issue in Order PO-4049 differs in both breadth and substance, I am not persuaded that a comparison is helpful or apt in the present case.

[60] In order to qualify for exemption under section 17(1), all three parts of the test must be met. As I have found that the second part of the test has not been met with respect to the agreement, and that the third part of the test has not been met with respect to the payment record, I order HHS to disclose both records to the requester.

ORDER:

1. I order HHS to disclose the information at issue to the requester by **August 4, 2023** but not before **July 29, 2023**.

2. In order to verify compliance with order provision 1, I reserve the right to require HHS to provide me with a copy of its access decision as well as any records disclosed with it.

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[20] Order PO-4049 at paragraph 67.

Original Signed By: June 29, 2023

Hannah Wizman-Cartier
Adjudicator