Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER PO-2210

## Appeal PA-020385-1

## Ministry of Health and Long-Term Care

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## NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> I am looking for two IHS Assessment reports that were completed by the College of Physicians and Surgeons of Ontario (Independent Health Facilities) on November 21, 2000 and May 8, 2002 for [a named IHF] located at [a specific address].

The Ministry identified two responsive records. It then notified the named IHF and an individual whose interests could be affected by disclosure. After considering submissions from the IHF, the Ministry advised the requester that the reports would be disclosed in part, subject to certain severances under section 21 of the *Act* (invasion of privacy) for portions that contain the educational or employment history of identifiable individuals. The requester did not appeal this decision.

However, the IHF (now the appellant) appealed the Ministry's decision to disclose the remaining portions of the two reports. The appellant contends that these portions qualify for exemption under section 17(1) of the *Act* (third party commercial information).

Mediation did not resolve the appeal, so it was transferred to the adjudication stage. I initially sent a Notice of Inquiry to the appellant and the Ministry outlining the facts and issues in the appeal and seeking representations. Both parties submitted representations. I then sent a copy of the Notice to the requester, along with the Ministry's representations and the non-confidential portions of the appellant's representations. The requester also provided representations, the non-confidential portions of which were in turn shared with the appellant. The appellant submitted additional representation in reply.

## RECORDS:

The records at issue consist of two Assessment Reports prepared for the Independent Health Facilities Program dated December 20, 2000 and May 15, 2002.

## DISCUSSION:

### THIRD PARTY INFORMATION

The Ministry decided to disclose the two reports (other than portions that qualify for exemption under section 21) on the basis that they do not qualify for exemption under section 17(1) of the *Act*. Accordingly, the appellant, as the only party resisting disclosure, bears the onus of establishing the requirements of the section 17(1) exemption.

For the reports to qualify for exemption under sections 17(1) the appellant must satisfy each part of the following three-part test:

1. the reports 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 Ministry 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 sections 17(1)(a), (b) or (c) will occur.

[Orders 36, P-373, M-29 and M-37]

**Part 3: Harms**

I have decided to deal with part 3 of the section 17(1) test first.

For part 3 to apply, the appellant must demonstrate that disclosing the reports "could reasonably be expected to" lead to the specified result. To meet this test, the appellant must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The harms identified in sections 17(1)(a), (b) and (c) are:

(a) significant prejudice to the competitive position or significant interference 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 Ministry where it is in the public interest that similar information continue to be so supplied;

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

Some of the appellant's submissions regarding the harms component of section 17(1) relate to a requester in a different appeal involving the same records, and have no relevance to the harms arguments here.

The appellant's remaining representations on harms consist of the following arguments:

> Further to this, [the appellant's] competitors would have access to [the appellant's] trade secrets, technical as well as commercial information should [the] Reports be disclosed. They would then be able to reap the advantage of [the appellant's] efforts and diligence. [The appellant's] competitors would also be able to use the information in the Reports to unfairly tarnish [the appellant's]

> reputation. This would result in an undue gain being bestowed upon [the appellant's] competitors.
>
> Finally, as indicated above, the purpose of the Reports is to improve the quality of service offered in health care facilities. If service providers feel that the inspections of the facilities and the reports generated thereby would harm them in any way, they will be far less cooperative with the inspectors. This will reduce the effectiveness of the inspections and the reports which would in turn prevent the parties from working together to improve services which would in turn harm the general public.

The Ministry takes a different view. In reaching its decision to provide the requester with access, the Ministry states:

> The presentation of [the appellant] is not to disclose any part of the reports because [the appellant] believes the reports contain confidential technical and commercial information and potentially prejudicial concerns about the facility; however, I do not feel that [the appellant] has provided sufficient evidence of either this position or of the harm to its business that could result from disclosure. …

The requester also disagrees with the appellant. In responding to the appellant's arguments on the harms component of section 17(1), the requester submits:

> … We requested the assessment to protect the general public. It is very disheartening to see that a corporation that is in the business of providing health care would not want to cooperate with inspectors even if the reports were not deemed confidential. How can these reports truly harm the appellant? We all learn from our mistakes … but if this can be prevented in the future have we not all gained something from this?

In its final set of representations, the appellant replies as follows:

> [The appellant] endeavours to provide an exceptional quality of care and appreciates the feedback it receives from inspectors who have examined [the appellant's] facilities, however, like any business in a highly competitive field, [the appellant] must take the necessary steps to ensure that its trade secrets and proprietary information remains confidential. As outlined in our previous representations, the disclosure of [the appellant's] confidential information would allow its competitors to take advantage of [the appellant's] research and development and to tarnish [the appellant's] reputation by misrepresenting the information in the assessment reports. To suggest that the disclosure of the report will serve only to help others "learn from [the appellant's] mistakes" and not cause any loss or hard to [the appellant] is, in our opinion, naïve.

Having carefully reviewed the contents of the two reports, I do not accept the appellant's position. In my view, the arguments put forward by the appellant are speculative at best, particularly when considered in light of the actual content of the reports themselves. The two reports are essentially operational reviews of the appellant's facilities. They assess the adequacy of staffing levels and expertise; various policies and procedures put in place by the facility; and the facility's care and quality management programs. The reports discuss medical examinations observed and products produced by the IHF during the course of the investigation, and include brief descriptions of equipment used at the IHF. Although the reports contain some technical details, this information is primarily generic in nature. Based on the evidence provided by the appellant and the contents of the reports themselves, it is simply not reasonable to conclude that disclosing them would "allow a competitor to take advantage of the appellant's research and development" or to "tarnish the appellant's reputation". In my view, these are exaggerated concerns that are not adequately supported by argument or evidence.

As to the suggestion that disclosing the reports would cause the appellant and other IHFs to be less cooperative in the future, I am not persuaded that this position has credibility. The inspection process for IHFs is established by the Ministry through the Independent Health Facilities Program and utilizes the services of the College of Physicians and Surgeons of Ontario. It is aimed, at least in part, at meeting public expectations of quality health care and I am not convinced based on the statements made by the appellant (and particularly in light of the position taken by the Ministry in this appeal) that the level of cooperation extended by members of the medical profession who are licensed to operate these facilities would in any way be impacted by a decision to provide a member of the public with access to the reports under the *Act*.

For all of these reasons, I find that the appellant has not provided the kind of detailed and convincing evidence necessary to establish any of the harms outlined in sections 17(1), and therefore part three of the test has not been satisfied. Because all three parts of the test must be established in order for a record to qualify for exemption, I find that the two reports do not qualify for exemption under section 17(1) of the *Act* and should be disclosed to the requester.

## ORDER:

1. I uphold the Ministry's decision and order it to disclose the two reports (with the exception of the portions exempted by the Ministry under section 21) to the requester by **January 12, 2004** but not before **January 6, 2004**.

2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the requester, upon request.

Original Signed By: December 2, 2003
Tom Mitchinson
Assistant Commissioner