



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2740**

## **Appeal PA07-244**

### **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 access to the following information:

...copies of licences and (if applicable) transfers of same licences held by [named individual and/or second named individual] in respect of a facility operating under the name of [named medical facility] as well as any other available and related information held by the Ministry.

The Ministry located 20 records responsive to the request and notified any third parties who might have an interest in the disclosure of the responsive records. One of the third parties objected to the disclosure of any of the records in their entirety. Despite the third party's objection, the Ministry granted the original requester partial access to the responsive records with severances made under sections 21(1) (personal privacy), 17(1)(c) (third party information) and 18(1)(c) and (d) (economic and other interests) of the *Act*. The Ministry also provided the requester with an index of records describing the 20 responsive records.

The third party who objected to disclosure (now the appellant), appealed the Ministry's decision to disclose any of the responsive records.

During the course of mediation, the original requester narrowed the scope of the appeal to include only one record (Record 19) and explained that he was not appealing the severances made to the record by the Ministry. The requester confirmed that he is seeking access to only the portions of Record 19 that the Ministry is prepared to disclose.

The appellant takes the position that despite the fact that the Ministry is prepared to grant partial access to Record 19, the record should be withheld, in its entirety, pursuant to sections 21 and 17(1)(a) and (c) of the *Act*.

Mediation could not resolve the issues on appeal and the file was forwarded to the adjudication stage of the appeal process for an inquiry. I decided to seek representations from the appellant, initially. The appellant provided representations in response. Based on my review of the appellant's representations, I found that it was not necessary for me to seek representations from the Ministry or the original requester.

## **RECORDS:**

There is one 11-page record at issue in this appeal. In the index of records that was prepared by the Ministry and provided to the appellant this record is identified as Record 19 and is described as a "transfer application".

## DISCUSSION:

### PERSONAL INFORMATION

In order to determine whether section 21(1) of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) of the *Act*. In particular, paragraphs (a), (b), (c), (d) and (h) of the definition state:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to *financial transactions* in which the individual has been involved,
- (d) the *address, telephone number*, fingerprints or blood type of the individual,
- (h) the individual’s *name* where it appears with other personal information relating to the individual or where the disclosure of the *name* would reveal other personal information about the individual; [Emphasis added]

However, to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

In addition, the Ontario legislature recently amended the *Act* to exclude certain information from the definition of personal information. In particular, sections 2(3) and 2(4) state:

- (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professions or official capacity.

- (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

These amendments came into effect on April 1, 2007, and apply only to appeals involving requests that were received by institutions on or after that date. The original requester filed his request with the City on February 13, 2007. The request was narrowed and clarified on March 9, 2007. Consequently, I find that sections 2(3) and 2(4) do not apply in the circumstances of this appeal and I will not address these provisions any further in this order.

The appellant submits that Record 19 contains information that qualifies as his personal information, including information relating to a financial transaction that he entered into (paragraph (b)), his address and telephone number, both home and business (paragraph (d)), and his name where it appears with other personal information relating to him and his business or profession where the disclosure of his name would reveal other personal information about him (paragraph (h)).

The appellant submits that the information is "about" him as an individual and not merely as an individual in a business capacity because it reveals information of a personal nature about him; specifically, a purchase transaction that he entered into.

### **Analysis and findings**

Several orders of this office have considered whether information pertaining to certain types of business operations constitutes personal information (Order PO-2295, PO-1986, P-364, M-454). These orders have come to different conclusions regarding the issue depending on the circumstances of each case. In Order M-454, Senior Adjudicator John Higgins summarized the issue as follows:

Many previous orders have held that information about businesses, including partnerships and sole proprietorships, does not qualify as personal information. For example, in Order 16, former Commissioner Sidney B. Linden made the following comments in this regard:

The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated association or corporation, it could and would have used the appropriate language to make this clear.

Former Commissioner Linden went on to state in Order 113 that:

It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to

an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

In Order PO-2225, former Assistant Commissioner Tom Mitchinson further enunciated the approach taken by this office in determining the personal information/business information distinction:

Based on the principles expressed in these [previously discussed] orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

...

The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

I agree with this approach and will apply it in the circumstances of this appeal.

Having considered the representations of the appellant as well as having carefully reviewed the record at issue, I find that the majority of the information contained in Record 19 constitutes information about the appellant in a business capacity rather than a personal one. The record relates to the potential transfer of a licence for operation of a medical facility from one operator to another. This type of information, in my view, clearly relates to a business activity and appears is a business context.

Following former Assistant Commissioner Mitchinson's reasoning in PO-2225, having come to the conclusion that the information itself appears in a business context, I must now consider whether there is something about the information at issue that, if disclosed, would reveal something that is inherently personal about the appellant. In my view, with the exception of a small portion of information, there is nothing present in the information at issue in Record 19 that, were it disclosed, would reveal something of a personal nature about the appellant. Again, Record 19 relates to the appellant's potential acquisition of a licenced medical facility that he intends to operate, which, in my view is properly characterized as a business transaction. With the exception of the appellant's home address and telephone number which appears on page 3 (twice), page 5 (home telephone number only), and in Appendix B, and the appellant's citizenship, which appears in Appendix B, I do not find that any of the information at issue in Record 19 contains or would reveal anything inherently personal in nature about him.

Accordingly, I conclude that, with the exception of the appellant's home address, home telephone number and citizenship, all of the information that is contained in this record is "about" the appellant in a business capacity rather than personal one. Consequently, this

information does not qualify as “personal information” as that term is defined in section 2(1) of the *Act*.

The personal privacy exemption in section 21(1) applies only to “personal information.” Accordingly, the only information that I will review to determine whether it is exempt under section 21(1) is the appellant’s home address, telephone number and citizenship.

## **PERSONAL PRIVACY**

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21(1).

In the circumstances, it appears that the only exception that could apply is paragraph (f) which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except.

if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

If section 21(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21(1). In the circumstances of this appeal, section 21(4) does not apply.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the “public interest override” at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In the circumstances of this appeal, section 21(3) does not apply.

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The appellant submits that the factors weighing against disclosure in paragraphs (a) and (h) of section 21(2) apply. He also submits that the factors weighing in favour of disclosure in paragraphs (b) and (c) do *not* apply. Specifically the appellant submits:

Disclosure of [Record 19] would be an unjustified invasion of personal privacy because:

- the disclosure would not be desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny [section 21(2)(a)];
- access to the personal information would not promote public health and safety[section 21(2)(b)];
- access to the personal information would not promote informed choice in the purchase of goods and services[section 21(2)(c)];
- The personal information has been supplied by [appellant] in confidence [section 21(2)(h)].

### **Analysis and findings**

As noted above, the only information contained in Record 19 that can be found to be exempt under section 21(1) is the appellant's home address, telephone number and citizenship information because that is the only information that I find qualifies as personal information within the meaning of the *Act*.

In Order PO-2265, former Assistant Commissioner Mitchinson summarized his conclusions from his analysis of the factors listed in section 21(2):

I have determined that there are no factors under section 21(2) that favour disclosing the tenant names and unit number of apartments whose residents are subject to applications before the Tribunal. Because section 21 is a mandatory exemption, in the absence of any factors favouring disclosure I must conclude that the requirements of the exception in section 21(1)(f) are not present, and that disclosing the tenant names and unit numbers would constitute an unjustified invasion of the privacy of tenants residing in these units. Therefore, the tenant names and unit numbers contained on the various application forms qualify for exemption and, subject to my discussion of section 23 below, must not be disclosed.

In my view, Assistant Commissioner's comments in Order PO-2265 are relevant in the circumstances of this appeal. Reviewing the list of factors in section 21(2), I find that none of the factors favouring disclosure appear to be relevant in the circumstances of the current appeal. In the absence of any factors favouring disclosure, there is no basis for concluding that disclosure of the personal information in Record 19 would not constitute an unjustified invasion of personal privacy, as required for the exception in section 21(1)(f) to apply. Therefore, I find that the personal information in Record 19 (the appellant's home address, home telephone number and

citizenship) is exempt from disclosure under section 21(1) of the *Act* and I will order that it not be disclosed to the requester.

### THIRD PARTY INFORMATION

The appellant claims that the mandatory exemption in sections 17(1)(a) and (c) apply to the information in Record 19. Those provisions state:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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

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



### **Part 1: type of information**

The types of information listed in section 17(1) have been discussed in prior orders. The one that appears might be relevant in the circumstances of this appeal is “commercial information,” which has been defined as follows:

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

The Ministry has described Record 19 in its index of records as a “transfer application” and on my review it is an application for consent to transfer a licence under the *Independent Health Facilities Act [IHFA]*, between two parties. In my view, although the terms of the exchange are not specifically outlined in the record and it contains no financial or other details, it clearly contains information that relates to the buying, selling or exchange of a licenced medical facility. As a result, I find that the information in Record 19 qualifies as “commercial information” within the meaning of that term.

Accordingly, part 1 of the section 17(1) test has been met.

### **Part 2: supplied in confidence**

In order to satisfy part 2 of the test, the appellant must establish that it “supplied” the information to the Ministry “in confidence”, either implicitly or explicitly.

#### ***Supplied***

The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

*In confidence*

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The appellant submits that pursuant to section 37 of the *IHFA*, information obtained in the administration of the *IHFA* is confidential and not to be disclosed. That section states:

- (1) In this section, “confidential information” means information obtained by a person employed in the administration of this Act or making an assessment or inspection under this Act in the course of the person’s employment, assessment or inspection and that relates to a patient or former patient of a health facility.
- (2) No person shall communicate confidential information to any person except in accordance with subsection (4).
- (3) Subsection (2) applies to any person whether or not the person is or was employed in the administration of this Act or is or was an inspector or assessor under this Act.
- (4) A person employed in the administration of this Act, an assessor or inspector under this Act or any person who obtains confidential information pursuant to this subsection may communicate confidential information,
  - (a) in connection with the administration or enforcement of any Act or any proceedings under any Act;

- (b) in connection with matters relating to professional disciplinary proceedings, to a statutory body governing a health profession;
- (c) to the person's counsel; or
- (d) with the consent of the patient or former patient to whom the information relates.

The appellant submits that the information contained in Record 19 is information supplied to the Ministry in the administration of the *IHFA*. The appellant further submits that because of section 37 of the *IHFA* he supplied the information contained in Record 19 with the expectation that it was being supplied in confidence.

Having reviewed the information contained in Record 19 and the representations submitted by the appellant, I am prepared to accept that based on section 37 of the *IHFA*, the appellant had reason to believe that he was supplying the information contained in the application form to the Ministry in confidence. I am satisfied that this expectation was reasonable in the circumstances.

Accordingly, I find that the information contained in Record 19 was supplied in confidence within the meaning of part 2 of the section 17(1) test.

### **Part 3: harms**

To meet this part of the test, the institution and/or the third party 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 failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The appellant submits that the mandatory exemption at section 17(1) applies to exempt Record 19 from disclosure. He submits that disclosure of the record could reasonably be expected to significantly prejudice his competitive position vis-à-vis operators of other diagnostic facilities. He submits that by alerting his competitors of his interest in obtaining the licence to the facility at issue in the record, his competitors would increase their own efforts to acquire diagnostic facilities. The appellant also submits that if Record 19 were disclosed, he would subsequently be obliged to disclose it to a competitor in an ongoing civil action. Based on these representations, it appears that the appellant submits that section 17(1)(a) and/or (c) apply in the circumstances of this appeal.

The specific information contained in Record 19 includes the name and address of the licenced medical facility subject to the transfer, the name and contact information of the facility operator (and company) who is prepared to transfer his licence, the name and address of the proposed operator to whom the licence is to be transferred (the appellant), as well as the appellant's qualifications and specialities, his legal status, and the expected effective date for the change in the beneficial ownership of the facility. Record 19, however, does not contain any financial or bidding information that details the terms upon which the transfer was agreed upon by the two parties.

Having considered the appellant's representations carefully and having carefully reviewed Record 19, I am not persuaded that the disclosure of the information that remains at issue could reasonably be expected to prejudice significantly the competitive position of the appellant or to interfere significantly with any future contractual or other negotiations the appellant may be involved in (section 17(1)(a)). I am also not persuaded that disclosure could reasonably be expected to result in undue loss to the appellant or undue gain to his competitors (section 17(1)(c)).

In my view, the evidence and argument put forward by the appellant is broad, generalized, and speculative in nature and is not supported by my review of the content of the record which, as noted above, contains no specific details about the terms upon which the potential transfer was agreed. Moreover, without further explanation or evidence, I am not persuaded that disclosure under the *Act* would impact an ongoing civil action (where disclosure is subject to an entirely different scheme), in a manner that could reasonably be expected to give rise to any of the harms contemplated in section 17(1).

Accordingly, I have not been provided with the requisite detailed and convincing evidence required to support the harms component (part 3) of the section 17(1) test. As all three parts of the test must be satisfied for the exemption to apply, I find that the mandatory exemption in section 17(1) does not apply to exempt the portions of Record 19 that are at issue in this appeal, from disclosure.

## **ORDER:**

1. I order the Ministry to disclose Record 19 to the requester, with the exception of:
  - the severances made by the Ministry; and
  - the appellant's home address, telephone number and citizenship information.

For greater clarity I have provided the Ministry with a copy of Record 19 where the highlighted portions identify the information that should *not* be disclosed.

2. The portions of Record 19 that I have ordered disclosed in Provision 1 should be disclosed to the requester by **January 12, 2009** but not before **January 7, 2009**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the requester pursuant to Provisions 1 and 2.

Original signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

December 5, 2008 \_\_\_\_\_