

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3779

Appeal PA16-56

Ministry of Health and Long-Term Care

October 26, 2017

Summary: An independent health facility appealed a decision by the Ministry of Health and Long-Term Care to disclose parts of an assessment report and other records to a newspaper reporter under the *Freedom of Information and Protection of Privacy Act*. It claimed that these records are exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the *Act*. In this order, the adjudicator upholds the ministry's decision to partly disclose these records to the requester but also orders it to sever some additional personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information") and 17(1).

OVERVIEW:

[1] The appellant is an independent health facility (IHF) that objects to a decision by the Ministry of Health and Long-Term Care (the ministry) to disclose parts of an assessment report and other records to a newspaper reporter. It submits that these records are 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] By way of background, the *Independent Health Facilities Act*¹ provides for the establishment of IHFs in Ontario. IHFs perform procedures funded by the Ontario Health Insurance Plan that are normally performed in hospitals. According to the website of the College of Physicians and Surgeons of Ontario (CPSO),² IHFs include: (1) diagnostic facilities that provide services such as radiology, ultrasound, pulmonary function studies and sleep medicine, and (2) ambulatory care facilities that provide surgical, therapeutic and diagnostic procedures.

[3] The ministry's Director of IHFs (the Director) is responsible for licensing IHFs and also contracts with the CPSO to conduct assessments of IHFs. On an annual basis, the Director selects IHFs to be assessed by the CPSO. The assessment of each IHF is based on its adherence to CPSO guidelines called "Clinic Practice Parameters and Facility Standards." In the absence of specific guidelines, the CPSO assesses the IHF's adherence to the current generally accepted standards of practice.

[4] As assessment team makes an on-site visit to an IHF to conduct an assessment. After the visit, the assessment team prepares a report outlining all findings and submits it to the CPSO. This report specifies whether the facility is meeting the "Clinical Practice Parameters and Facility Standards" or current standards of practice. If an IHF is breaching current standards, the report will indicate how the IHF can improve to meet the standards for that specialty. The CPSO forwards the assessment report to the IHF to allow it to develop a written plan of action to address any breaches that were identified. The IHF has 14 days to respond.

[5] In some circumstances, the assessment report is sent to a facility review panel established by the CPSO. The role of the panel is to provide advice to the Director on whether the IHF's response to the assessor's recommendations has placed it in compliance with the relevant standards. It appears that the assessment report and any facility review panel findings are also sent to the CPSO's medical advisor for review. Finally, the CPSO Registrar sends a letter to the Director that includes relevant records, such as the assessment report, the facility review panel's findings, and the medical advisor's findings.³

[6] This appeal came about as a result of an access request under the *Act* made by a newspaper reporter who requested "all quality assurance assessments submitted to [the ministry] by the [CPSO] for [IHFs] that were found to have 'not met standards.'" In response, the ministry located responsive records relating to numerous IHFs, including the appellant, which is an IHF that provides pulmonary function testing. The records that the ministry located relating to this IHF include a letter from the CPSO Registrar to the Director of IHFs; a medical advisor's report; an IHF facility review panel report; and an IHF assessment report.

¹ R.S.O. 1990, c. I-3.

² www.cpso.on.ca/Member-Information/Independent-Health-Facilities

³ *Ibid.*

[7] The ministry notified the IHF under section 28(1)(a) of the *Act* that these records might contain information referred to in the section 17(1) exemption that would affect its interests if disclosed. It further stated that if the IHF objected to the ministry disclosing these records to the requester, it should submit representations explaining why the information in the records is exempt under section 17(1). The IHF did not submit any representations to the ministry.

[8] The ministry then sent a decision letter to both the requester and the IHF which stated that it had decided to disclose the records in full, except for some personal information, which it was withholding under the mandatory exemption in section 21(1) (personal privacy) of the *Act*. The requester did not appeal the ministry's refusal to withhold the personal information in the records. However, the IHF appealed the ministry's decision to disclose the remainder of the records to the requester.

[9] This appeal was assigned to a mediator, who attempted to resolve the issues in dispute between the parties. During mediation, the IHF reiterated its claim that the records are exempt from disclosure under section 17(1) of the *Act*. In addition, the requester raised the public interest override in section 23 of the *Act*.

[10] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. The adjudicator assigned to this appeal sent a Notice of Inquiry to the IHF, the ministry and the requester. She invited them to submit representations on the section 17(1) exemption and the public interest override in section 23 of the *Act*. However, none of the parties chose to submit representations.

[11] The adjudicator also noted that the records that the ministry decided to disclose appear to contain additional personal information. She notified the requester, who confirmed that he is not seeking access to such information.

[12] This appeal was transferred to me to render a decision. In this order, I find that the records at issue are not exempt under section 17(1) of the *Act*. I uphold the ministry's decision to partly disclose these records to the requester but order it to sever some additional personal information.

RECORDS:

[13] The records at issue in this appeal are summarized in the following chart:

General description of record	Page numbers	Ministry's decision	Exemption claimed by appellant
Letter from the CPSO registrar to the Director of IHFs	4-1	Disclose in full, except for personal information	s. 17(1)

Medical advisor's report	4-2 to 4-3	Disclose in full, except for personal information	s. 17(1)
IHF facility review panel report	4-4	Disclose in full, except for personal information	s. 17(1)
IHF assessment report	4-5 to 4-24	Disclose in full, except for personal information	s. 17(1)

DISCUSSION:

THIRD PARTY INFORMATION

Does the mandatory exemption at section 17(1) apply to the records?

[14] The IHF claims that the records at issue are exempt from disclosure under section 17(1) of the *Act*. However, with the exception of the brief appeal letter that it submitted to this office, it did not provide any representations on whether this exemption applies to the records. Nevertheless, because section 17(1) is a mandatory exemption, I will consider whether it applies to the records.

[15] 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, 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;

(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.

[16] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁴ 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.⁵

[17] For section 17(1) to apply, the party resisting 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; 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.

[18] In its appeal letter, the IHF states:

The CPSO inspection of the IHF was conducted on Feb. 21, 2014. There were some deficiencies found and they did not meet standard. The IHF and the Quality Advisor then corrected all the deficiencies outlined in the assessment and submitted to the CPSO and these were acceptable to the CPSO. A subsequent inspection was performed and the subsequent inspection reiterated that the deficiencies were all properly corrected.

Therefore, release of this information will not serve any purpose when the deficiencies were already corrected and do not remain at issue at all. Patient care at the IHF is excellent and meets all standards.

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.

Please see the post assessment action plan attached to the decision letter.

[19] The IHF's appeal letter does not specifically address any part of the three-part test that the party resisting disclosure must satisfy to demonstrate that the section 17(1) exemption applies to the records at issue.

[20] With respect to part 3 of the test, the party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁶

[21] In its appeal letter, the thrust of the IHF's arguments is that disclosing the records would serve no purpose because the deficiencies identified in the assessment report have been corrected. In my view, this argument falls far short of the type of evidence required to show that the harms listed in paragraph (a), (b), (c) and/or (d) of section 17(1) could reasonably be expected to occur if the records are disclosed to the requester. For example, the IHF has not provided sufficient evidence to show that disclosure of the records could reasonably be expected to prejudice significantly its competitive position [section 17(1)(a)] or result in undue loss to it [section 17(1)(c)].

[22] In short, I find that the records are not exempt under section 17(1) and I uphold the ministry's decision to partly disclose them to the requester. There is some additional personal information on page 4-7 of the records that was not severed by the ministry. In particular, this page contains the employment history of three of the IHF's employees, which falls within paragraph (b) of the definition of "personal information" in section 2(1) of the *Act*. Given that the requester has indicated that he is not seeking access to any personal information, I will order the ministry to sever this information from the records.

ORDER:

1. I uphold the ministry's decision to partly disclose the records to the requester. The appeal is dismissed.
2. I order the ministry to sever the additional personal information that I have identified on page 4-7 before disclosing the records to the requester. I am providing the ministry with a copy of this page and have highlighted in green the additional personal information that must be severed.

⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

3. I order the ministry to disclose the severed records to the requester by **December 1, 2017** but not before **November 27, 2017**.

Original Signed by: _____

Colin Bhattacharjee

Adjudicator

October 26, 2017 _____