Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3786

Appeal PA16-69

Ministry of Health and Long-Term Care

November 28, 2017

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 parts of these records contain information that is exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the *Act*. It also claimed that the records contain the personal information of its patients and submits that this information is exempt from disclosure under section 21(1) (personal privacy) of the *Act*. In this order, the adjudicator finds that the parts of the records that the ministry decided to disclose to the requester are not exempt under section 17(1) of the *Act*. In addition, he finds that the personal health information of the IHF's patients in the records is not at issue in this appeal and will not be disclosed to the requester. He upholds the ministry's decision to disclose parts of the records to the requester and dismisses the appeal.

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"), 17(1) and 21(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 contain information that is exempt from disclosure under the mandatory exemptions in section 17(1) (third party information) and 21(1) (personal privacy) 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] An 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 a CPSO medical advisor or consultant 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 (if any), and the medical advisor's or consultant'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 sleep medicine. The records that the ministry located relating to this IHF include a letter from the CPSO Registrar to the

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[1] R.S.O. 1990, c. I-3.
[2] www.cpso.on.ca/Member-Information/Independent-Health-Facilities
[3] *Ibid*.

Director of IHFs; a medical consultant's report; an IHF facility review panel report; and an IHF assessment report.

[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 from disclosure under section 17(1). In response, the IHF submitted representations to the ministry in which it claimed that the records contain information that is exempt under section 17(1).

[8] The ministry then sent a decision letter to both the requester and the IHF which stated that it did not agree with the IHF's representations on section 17(1) and had decided to disclose the records to the requester. However, it further stated that it had decided to withhold some personal information under the mandatory exemption in section 21(1) of the *Act* and also the personal health information of patients, which is protected from disclosure by the *Personal Health Information Protection Act*.[4]

[9] The requester did not appeal the ministry's refusal to withhold this information from the records. However, the IHF appealed the ministry's decision to disclose the remainder of the records to the requester and claimed that these parts of the records are exempt from disclosure under section 17(1). 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 some information in the records is 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 whether specific parts of the records contain "personal information," as that term is defined in section 2(1) of the *Act*, the section 17(1) exemption, and the public interest override in section 23 of the *Act*. In response, she received representations from the IHF but not the ministry or the requester.

[11] This appeal was then transferred to me. In this order, I find that the parts of the records that the ministry decided to disclose to the requester are not exempt under section 17(1) of the *Act*, and I uphold the ministry's access decision. In addition, I find that the personal health information of the IHF's patients in the records is not at issue in this appeal and will not be disclosed to the requester.

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[4] S.O. 2004, c. 3, Sched. A.

RECORDS:

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

General description of record	Page numbers	Ministry's decision	Exemption(s) claimed by appellant
Letter from CPSO Registrar to ministry's Director of IHFs	33-1	Disclose in full, except for personal information	s. 17(1)
Medical consultant's report	33-2 to 33-3	Disclose in full, except for personal information and personal health information	s. 17(1) s. 21(1)
IHF facility review panel report	33-4 to 33-5	Disclose in full, except for personal information and personal health information	s. 17(1) s. 21(1)
IHF assessment report	33-6 to 33-36	Disclose in full, except for personal information and personal health information	s. 17(1) s. 21(1)

DISCUSSION:

THIRD PARTY INFORMATION

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

[13] The IHF claims that some of the information in the records at issue is exempt from disclosure under section 17(1) of the *Act*, which 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;
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> (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;
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> (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.

[14] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[15] 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.

[16] With respect to part 1 of the section 17(1) test, the IHF submits that the records reveal scientific, technical and commercial information, and it provides some examples of such information in the records. With respect to part 2 of the test, the IHF submits that because of confidentiality and other requirements in the *Independent Health Facilities Act*[7] and the *Regulated Health Professions Act*,[8] IHFs have a reasonable expectation that information supplied to the ministry as a result of the obligatory

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[5] *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.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[7] See note 1, s. 37.
[8] S.O. 1991, c. 18, s. 36(1).

assessment process is done so in confidence.

[17] Even if I were to accept that the IHF's submissions satisfy parts 1 and 2 of the section 17(1) test, I find, for the reasons that follow, that its submissions fall short of the type of evidence required to show that the harms requirement in part 3 of the section 17(1) test is met.

[18] 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.[9]

[19] The IHF states that sleep medicine is a competitive field and that competitors are financially motivated to ascertain information about the policies and procedures of competing sleep disorder facilities. It further submits that any negative information in the records can be utilized in a manner that is prejudicial to it. It then cites the harm requirement in section 17(1)(a) of the *Act*, which requires an institution to refuse to disclose a record that reveals specified types of information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization." It submits that:

> . . . Disclosure of quality assurance assessments where the CPSO assessor concluded [we] did not meet standards would place [us] in an extremely adverse position vis-à-vis [our] competitor facilities . . . . Publication of such assessments would devastate [our] business as the release of such information could be reasonably be expected to dissuade physicians from referring patients to [us]. Our competitors could use the information so released to malign [our] reputation.

[20] I do not find the IHF's submissions to be convincing. The IHF was subject to an assessment to determine whether it was meeting the "Clinical Practice Parameters and Facility Standards for Sleep Medicine" set by the CPSO. The records at issue, which include a letter, a medical consultant's report, a facility review panel report and an assessment report, relate to and discuss the findings of the assessor that the IHF failed to meet some of these parameters and standards. After severing some personal health information and the personal health information of patients from these records, the ministry decided to disclose the remaining parts to the requester because it concluded that the information in those parts did not satisfy the requirements of section 17(1) of the *Act*.

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

[21] To satisfy the competitive harm requirement of section 17(1)(a), the IHF must not simply show that disclosing the information in these parts of the records could reasonably be expected to prejudice its competitive position. It must show that such disclosure could reasonably be expected to prejudice "significantly" its competitive position.

[22] Although I accept the possibility that an IHF that provides sleep medicine may face competition from other facilities, the IHF has provided me with little evidence about the actual competitive environment in which it operates. It is essentially asking me to presume that it faces some level of competition but has provided me with little supporting evidence, such as the number of competing IHFs providing sleep medicine that are located in the same city or region.

[23] I am also not persuaded by the IHF's argument that disclosing the information in these parts of the records would "devastate" its business because physicians would be dissuaded from referring patients and its competitors "could" use this information to malign their reputation. This amounts to an argument that its competitive position could reasonably be expected to be prejudiced "significantly" if these parts of the records are disclosed. However, in light of the lack of evidence that the IHF has provided about the purported competitive environment in which it operates, I find that these submissions are speculative.

[24] In these circumstances, I find that disclosing the information in these parts of the records to the requester could not reasonably be expected to prejudice significantly the IHF's competitive position, as required by section 17(1)(a). As a result, the IHF has failed to satisfy the harms requirement in part 3 of the section 17(1) test. In short, I uphold the ministry's decision to disclose those parts of the records because they are not exempt under section 17(1) of the *Act*.

[25] Finally, it should be noted that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions,[10] and it serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[11] However, the information in the records that are at issue in this appeal relates to the findings of an assessor that the IHF failed to meet certain parameters and standards for sleep medicine set by the CPSO. In my view, the harms requirements in section 17(1), including section 17(1)(a), were not designed to shield such information, which could impact patient safety, from public scrutiny.

ADDITIONAL ISSUE – PERSONAL INFORMATION/PERSONAL PRIVACY

[26] The Notice of Inquiry that was sent to the IHF during adjudication invited it to

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[10] See notes 5.
[11] See note 6.

submit representations on a number of issues, including whether there was any "personal information" in the records, as that term is defined in section 2(1) of the *Act*. In its representations, the IHF claims that the records contain the personal information of its patients and submits that this information is exempt from disclosure under the personal privacy exemption in section 21(1) of the *Act*. However, the ministry's decision letter to the IHF and the requester stated that it was severing this information from the records, and the requester did not appeal that part of the ministry's decision. As a result, this information is not at issue in this appeal and will not be disclosed to the requester.

[27] At the end of its representations on section 17(1), the IHF also submits that, "[T]he physicians who practise at the clinic could reasonably be expected to suffer harm to their reputational and privacy interests if the disclosure sought is allowed." This appears to be a reference to the personal privacy exemption in section 21(1), not section 17(1).

[28] However, the section 21(1) exemption only applies to "personal information," and the IHF did not provide any evidence in its representations to show why the information relating to any of its physicians should be viewed as being their "personal information," as term is defined in section 2(1) of the *Act*, rather than information that is associated with them in a professional, official or business capacity.[12] In addition, it did not explain why such information might meet the requirements of the section 21(1) exemption. In the absence of such evidence and based on my review of the records, I find that the section 21(1) exemption does not apply to such information.

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 disclose the severed records to the requester by **January 8, 2018** but not before **January 2, 2018**.

Original Signed by: November 28, 2017
Colin Bhattacharjee
Adjudicator

[12] The section of the Notice of Inquiry sent to the IHF that asked whether there was any "personal information" in the records sets out the distinction between information associated with an individual in a personal capacity and information associated with an individual in a professional, official or business capacity.