Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3810-I

Appeal PA16-9

Ministry of Health and Long-Term Care

January 24, 2018

Summary: An independent health facility appealed a decision by the Ministry of Health and Long-Term Care to disclose parts of an assessment report to a newspaper reporter under the *Freedom of Information and Protection of Privacy Act*. It claimed that several pages of the assessment report contain information that is exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the *Act*, and that there is inaccurate information in this record that should not be disclosed because it is not responsive to the access request. In this interim order, the adjudicator upholds the ministry's decision to partly disclose these pages of the record to the requester but orders it to withhold the names of some of the IHF's employees, pending the receipt of further information. In addition, he finds that the information in the record that the IHF claims is inaccurate is responsive to the access request.

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 to a newspaper reporter. It submits that several pages of this record contain information that is 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*). In addition, it claims that there is inaccurate information in this record that should not be disclosed because it is not responsive to the access request.

[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 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 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 diagnostic testing, such as radiography, ultrasound and mammography. The ministry located two sets of records relating to this IHF. Each set includes a letter from the CPSO Registrar to the Director of IHFs; a medical advisor's report; and an IHF assessment report.

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[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 from disclosure 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 to the requester. However, it further stated that it had decided to withhold some personal information under the mandatory exemption in section 21(1) (personal privacy) 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. 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 the section 17(1) exemption and the public interest override in section 23 of the *Act*.

[11] The adjudicator received representations from the IHF, but not from the ministry or the requester. In its representations, the IHF states that it only objects to the ministry disclosing the information on pages 7-25 to 7-29 of the IHF assessment report, and that the ministry could disclose the remainder of the records to the requester. As a result, the adjudicator contacted the ministry, which then disclosed those records to the requester.

[12] In addition, the IHF claimed that there is inaccurate information in the record that should not be disclosed because it is not responsive to the access request. As a result, whether this information is responsive to the access request has been added as an issue to be resolved in this appeal.

[13] This appeal was then transferred to me. In this order, I find that the information in the pages of the record at issue is not exempt under section 17(1) of the *Act*. I uphold the ministry's decision to partly disclose these pages to the requester but order it to withhold the names of some of the IHF's employees, pending the receipt of further

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

information. In addition, I find that the information in this record that the IHF claims is inaccurate is responsive to the access request.

RECORD:

[14] The record at issue in this appeal is summarized in the following chart:

General description of record	Page numbers	Ministry's decision	Exemption claimed by appellant
IHF assessment report	7-25 to 7-29	Disclose in full, except for personal information and personal health information	s. 17(1)

ISSUES:

A. Does the mandatory exemption at section 17(1) apply to the record?

B. Are parts of the record not responsive to the access request?

DISCUSSION:

THIRD PARTY INFORMATION

A. Does the mandatory exemption at section 17(1) apply to the record?

[15] The IHF claims that some information in the record 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;
>
> (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
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> (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.[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]

[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 representations, the IHF objects to the ministry disclosing the information on pages 7-25 to 7-29 of the assessment report. It submits that these pages reveal scientific and technical information that was supplied in confidence and, if disclosed, would significantly prejudice its competitive position [section 17(1)(a)] and may result in undue loss to itself and possible gain to another competitor [section 17(1)(c)].

[19] Even if I were to accept that the parts of the record at issue identified by the IHF reveal scientific and technical information that was supplied in confidence (parts 1 and 2 of the section 17(1) test), I find, for the reasons that follow, that the IHF's 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.

[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

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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.

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.[7]

[21] The IHF is relying on the harms in sections 17(1)(a) and (c) of the *Act*. These provisions require 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 . . . of a person, group of persons, or organization" [section 17(1)(a)] or "result in undue loss or gain to any person, group, committee or financial institution or agency" [section 17(1)(c)]. Given that the ministry has decided to disclose the record, the onus is on the IHF, which is the party resisting disclosure, to show that the specific information in the record is exempt under these provisions.

[22] The IHF claims that the assessors made statements in their report that were based on a misunderstanding about the scientific and technical information that they reviewed. It then cites some examples of the assessors' comments on pages 7-25 and 7-26 of the assessment report and expresses particular concern that the assessors refer to a "probable misdiagnosis" of a patient. It submits that this was not a misdiagnosis and no items were missed as feared by the assessors. It claims that all of the medical tests referred to by the assessors were reviewed and found to be 100 per cent accurate.

[23] The IHF then submits that disclosing the incorrect information in the assessment report could reasonably be expected to lead to the harms set out in sections 17(1)(a) and (c). It states:

> If incorrect information that refers to a possible misdiagnosis is released, it is certain to cause harm to [our facility]. Physicians will not want to refer their patients to a facility that is alleged to possibly misdiagnose patients and patients will not want to have their medical tests done at such a clinic. It should be noted that every test undertaken at [our facility] requires a referral from a treating physician. Therefore, it is essential to the financial well-being of [our facility] that referring doctors continue to refer their patients to [our facility].
>
> Similarly patients, although referred to a clinic, may choose to have their tests done at a competing facility. If patients are concerned with the quality of the work done at [our facility], they will certainly have their tests done at other competing facilities. This will result in unjustified pecuniary harms being suffered by [our facility].

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

[24] The IHF also claims that because pages 7-25 to 7-29 of the assessment report contain incorrect and misleading information, these pages should not be disclosed until any alleged inaccuracies have been corrected. It states that when it received a copy of the assessment report in 2014, it wrote to the CPSO to advise it of the errors in the report but has not yet received a response.

[25] I do not find these submissions to be convincing as they relate to the harms in sections 17(1)(a) and (c) of the *Act*. In my view, it is certainly possible that in some fact circumstances, disclosing incorrect information could reasonably be expected to prejudice significantly a third party's competitive position or result in an undue loss for itself or an undue gain for its competitors. However, it is not sufficient for the party resisting disclosure to simply claim that the information in the record is incorrect or inaccurate. It must provide some supporting evidence to support its assertion.

[26] As noted above, the IHF expresses particular concern that the assessment report refers to a "probable misdiagnosis" of a patient, which appears on page 7-25 of the assessment report. It submits that this particular case was not a misdiagnosis and no items were missed as feared by the assessors. It claims that all of the medical tests referred to by the assessors were reviewed and found to be 100 per cent accurate.

[27] However, beyond these bare assertions, it has not provided me with any supporting evidence or even a clear explanation as to why some information in the assessment report is incorrect. For example, the IHF indicates that it wrote to the CPSO to advise it of the alleged errors in the assessment report, but it did not provide me with a copy of this correspondence. Furthermore, I note that the section of the assessment report which precedes the assessors' reference to a "probable misdiagnosis" (page 7-25) indicates that a physician at the IHF responsible for quality control agreed with the assessors' finding that a diagnostic error had occurred.

[28] In light of the lack of supporting evidence that the IHF has provided about the allegedly incorrect information in the record, I find that its submissions are speculative and do not meet the evidentiary threshold required to show that the harms set out in sections 17(1)(a) and (c) of the *Act* could reasonably be expected to occur if the information on pages 7-25 to 7-29 of the assessment report is disclosed. In particular, I find that the IHF has not met the burden of showing that disclosing the information in these pages of the record could reasonably be expected to prejudice significantly its competitive position, as required by section 17(1)(a), or result in an undue loss for itself or an undue gain for its competitors, as required by section 17(1)(c).

[29] 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,[8] and it serves to limit disclosure of confidential

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[8] See note 5.

information of third parties that could be exploited by a competitor in the marketplace.[9] However, the information in the pages of the record that are at issue in this appeal relates to the assessors' findings that the IHF did not meet some parameters and standards set by the CPSO. In my view, the harms requirements in section 17(1) were not designed to shield such information, which could impact patient safety, from public scrutiny.

RESPONSIVENESS OF INFORMATION

B. Are parts of the record not responsive to the access request?

[30] The IHF submits that the ministry is obliged to retain information that is correct and accurate and that the inaccurate information in the record should not be disclosed to the requester because it is not responsive to his access request under the *Act*.

[31] To be considered responsive to an access request, records must "reasonably relate" to that request.[10] This appeal came about as a result of an access request for "all quality assurance assessments submitted to [the ministry] by the [CPSO] for [IHFs] that were found to have 'not met standards.'" The IHF that is the appellant here was subject to an assessment to determine whether it was meeting the "Clinical Practice Parameters and Facility Standards" set by the CPSO. The information on pages 7-25 to 7-29 of the assessment report contains the assessors' findings with respect to the IHF's delivery of diagnostic services to patients and includes a reference to a "probable misdiagnosis" of a patient.

[32] In my view, these parts of the assessment report reasonably relate to the access request because they include findings that the IHF did not meet some parameters and standards set by the CPSO. The fact that the IHF claims that at least one of these findings is incorrect or inaccurate does not mean that this information is not responsive to the access request. In short, I find that those parts of the assessment report are responsive to the access request.

ADDITIONAL ISSUE – PERSONAL INFORMATION/PERSONAL PRIVACY

[33] The personal privacy exemption in section 21(1) of the *Act* is mandatory and I am required to consider whether it applies to any information in the record, even if it has not been claimed by any of the parties. Section 21(1) only applies to "personal information." The term "personal information" is defined in section 2(1) as "recorded information about an identifiable individual" and includes the types of information listed in paragraphs (a) to (h) of that definition.

[34] However, under section 2(3) of the *Act*, personal information does not include

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[9] See note 6.
[10] Orders P-880 and PO-2661.

the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. Similarly, IPC orders have found that 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.[11] However, 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.[12]

[35] A series of orders have found that information that involves an examination of an employee's performance, or an investigation into their conduct, qualifies as that individual's "personal information," as that term is defined in section 2(1), because it reveals something of a personal nature about the individual.[13] However, whether such information qualifies as an individual's "personal information" and, if so, whether it is exempt under the mandatory personal privacy exemption in section 21(1), is fact specific and must be assessed on a case-by-case basis.

[36] As noted above, the ministry decided to disclose the records to the requester, including pages 7-25 to 7-29 of the assessment report. These pages include the assessors' findings that the IHF did not meet some parameters and standards set by the CPSO and make allegations about the competence of certain named employees. However, because the ministry did not submit any representations to the IPC during this inquiry, it is not clear to me whether it decided to disclose this information to the requester because it did not consider it to be the "personal information" of the IHF's employees, which means that it cannot qualify for exemption under section 21(1), or for some other reason.

[37] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[14] I would emphasize that I have not decided whether the information relating to the IHF's employees is those individuals' "personal information" or whether it is exempt under section 21(1). Nevertheless, I have considered whether it is possible to de-identify the information relating to these individuals by severing their names, which would mean that the remaining information could not qualify as their "personal information," as that term is defined in section 2(1), and could therefore be disclosed.[15]

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[11] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[12] Orders P-1409, R-980015, PO-2225 and MO-2344.
[13] See, for example, Orders MO-3449-I, MO-2477, PO-3117, PO-2570, PO-2516, PO-2271 and P-1180.
[14] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[15] Section 10(2) of the *Act* requires an institution to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. In Order P-230, the adjudicator found that in applying subsection 10(2) to the information at issue in an appeal, it is

[38] According to a staff listing on page 7-6 of the assessment report, which has already been disclosed, the IHF has more than 20 radiologists and at least 12 technical staff. I find that if the names of the employees whose competence is called into question is severed, it would not be reasonable to expect that they may be identified if the remaining information is disclosed, because there is a sufficiently large pool of radiologists and technical staff at the facility.

[39] As a result, I have decided to resolve this issue in the following manner. My decision here will be an interim order, and I will order the ministry to sever the names of the employees whose conduct was called into question before disclosing the parts of record to the requester that are not exempt under section 17(1) of the *Act*. In order provision 4 below, I will give the requester an opportunity to notify me within 45 days whether he is seeking access to the names of those employees.

[40] If the requester does not wish to seek access to these names, no final order will be issued. However, if he confirms that he is seeking access to the names of these employees, I will make reasonable efforts to provide these individuals with a Notice of Inquiry and give them an opportunity to submit representations to me on the issues in this appeal, including whether the record contains their personal information.

ORDER:

1. I uphold the ministry's decision to partly disclose pages 7-25 to 7-29 of the record to the requester, except for the names of those IHF employees whose conduct was called into question.

2. I am providing the ministry with a copy of the record and have highlighted the names of these IHF employees in green. To be clear, before disclosing the record to the requester, the ministry should withhold both the personal information and the personal health information that it previously severed under its original access decision. In addition, it should withhold the names of the IHF employees that I have highlighted in green.

3. I order the ministry to disclose the severed record to the requester by **March 1, 2018** from date of order but not before **February 26, 2018**.

4. The requester should notify me by **March 13, 2018** whether he is seeking access to names of the IHF's employees whose conduct was called into question.

Original Signed by:	January 24, 2018
Colin Bhattacharjee	

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necessary to determine whether severing personal identifiers will remove the remaining information from the scope of the definition of "personal information" under subsection 2(1).

Adjudicator