Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4118

Appeal PA18-282

Ministry of Long-Term Care

March 4, 2021

Summary: This is a third party appeal of an access decision made by the former Ministry of Health and Long-Term Care to disclose, in part, surveys completed by long-term care homes relating to payments made to them by pharmacy service providers. The appellant claims that the records are exempt from disclosure under the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy). In this order, the adjudicator finds that the records do not contain personal information and, therefore, the personal privacy exemption in section 21(1) does not apply. She also finds that the appellant has not provided sufficient evidence that the three-part test in section 17(1) is met and, therefore, the records are not exempt under section 17(1). The ministry is ordered to disclose the records, in part, to the requester.

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

Cases Considered: *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 (CanLII).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the former Ministry of Health and Long-Term Care (the ministry). The access request, made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) was for copies of all past, present and future correspondence between the

ministry and licenced long-term care (LTC) homes relating to the reporting of payments to LTC homes from their pharmacy service provider(s) and co-payments charged to Ontario Drug Benefit recipients in LTC homes, including without limitation any relevant reports prepared through Survey Monkey.

[2] The ministry identified numerous responsive records. Before making its decision on access to the records, the ministry notified approximately 600 long-term care homes (third parties) to obtain their views on disclosure of the records. Some of the third parties provided the ministry with submissions on whether or not the records should be disclosed.

[3] After considering the representations from the third parties, the ministry issued its final decision. The ministry decided that the records could be disclosed in part, but that portions of the records should be withheld, claiming the application of the mandatory exemption in sections 17(1)(a), (b) and/or (c) (third party information) and the discretionary exemption in sections 18(1)(a) and/or (c) (economic and other interests) of the *Act*.

[4] Three of the third parties appealed the ministry's decision to this office, and three appeal files were opened. In this appeal, a third party (now the appellant) appealed the ministry's decision to disclose records related to its three long-term care homes.

[5] During the mediation of the appeal, the appellant confirmed that it did not consent to copies of the surveys for its long-term care homes being disclosed. It objected to the answers to the survey questions being disclosed, claiming the application of the mandatory exemption in section 17(1). The appellant also objected to the names of employees and email addresses being disclosed under the mandatory exemption in section 21(1) (personal privacy).

[6] The requester confirmed with the mediator that she was seeking access only to the survey results, and that she was not seeking access to emails or other documents. As a result, the email addresses of staff members is no longer at issue, and will not be disclosed to the requester. In addition, the requester confirmed that she sought access only to the portions of the records that the ministry agreed to disclose, and that she was not appealing the ministry's decision to withhold the remaining information.

[7] The appeal was then transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*.

[8] The adjudicator assigned to this appeal commenced her inquiry by seeking representations from the ministry and the appellant. Both the ministry and the appellant provided representations. Portions of both sets of representations were withheld, as they meet this office's confidentiality criteria. The appeal was then transferred to me to continue the inquiry. I provided the requester with the opportunity to provide representations, but none were received.

[9] For the reasons that follow, I find that the records do not contain personal information and, therefore, the personal privacy exemption in section 21(1) does not apply. I also find that the appellant has not provided sufficient evidence the meet the three-part test in section 17(1) and, therefore, the records are not exempt under section 17(1). I order the ministry to disclose the records to the requester, subject to certain severances detailed in order provision 1.

RECORDS:

[10] The records at issue are three eight-page completed surveys.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption in section 17(1) apply to the records?

DISCUSSION:

[11] The ministry provided background information about the records at issue, which consist of three surveys that were completed by the appellant as a long-term care home. These surveys were completed in response to a request under section 88(2) of the *Long-Term Care Homes Act, 2007*. The ministry required the completed surveys in order to gain a better understanding of the prevalence of monetary payments and payments-in-kind that some long-term care homes received or were receiving from their pharmacy service providers. Even long-term care homes that did not receive payments or payments-in-kind from their pharmacy service provider were required to complete and submit the survey.

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[12] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> > (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,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
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> (g) the views or opinions of another individual about the individual, and
>
> (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;

[13] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[1]

[14] Section 2(3) also relates to the definition of personal information, which states:

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

[15] 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.[2] To qualify as personal information, it must be reasonable to expect that an

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

individual may be identified if the information is disclosed.[3]

[16] The appellant submits that the records contain personal information as defined in paragraphs (a) and (b) of the definition of personal information in section 2(1) of the *Act*. In particular, the appellant argues that the names of the staff members qualifies as their personal information.

[17] The ministry submits that the records do not contain personal information as defined in section 2(1). It further submits that the only identifying information in the records consists of business identity information, namely the name, title and contact information of certain LTC employees in their business capacity. The ministry goes on to argue that section 2(3) of the *Act* clearly excludes business information from the definition of personal information and, therefore, the personal privacy exemption in section 21(1) does not apply.

[18] On my review of the records, I find that they include information about three identifiable individuals. This information consists of the individuals' names, their job titles with the appellant, their work email addresses[4] and their work telephone numbers. I find that none of this information qualifies as their "personal information" as defined in section 2(1) of the *Act*. In addition, section 2(3) of the *Act* clearly applies to this information, which states that personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. I find that the information contained in the records relates to these individuals in their professional capacity and, therefore does not qualify as their "personal information." As a result, the personal privacy exemption in section 21(1) cannot apply.

Issue B: Does the mandatory exemption in section 17(1) apply to the records?

[19] As previously stated, the ministry withheld some information in the records, claiming the mandatory exemption in section 17(1) and the discretionary exemption in section 18. These withheld portions at not at issue in this appeal. The appellant claims that sections 17(1)(a) through (d) apply to the remaining information at issue. These sections 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,

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[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[4] As previously stated, the email addresses are no longer at issue in this appeal and will not be disclosed.

> (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
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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.

[20] 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]

[21] 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

[22] The types of information listed in section 17(1) have been discussed in prior orders. The types of information that may be relevant in this appeal include the following:

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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.

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[7]
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> *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.[8] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[9]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[10]

[23] The appellant's representations do not address part one of the three-part test.

[24] The ministry submits that the information at issue is of a general nature that cannot satisfy the elements of the "trade secret" definition, as it does not consist of a "formula, pattern, compilation, programme, method, technique or process or information contained or embodied in a product, device or mechanism," or any other related information. In addition, the ministry submits that the information at issue does not qualify as commercial or financial information, given its general nature.

[25] I have reviewed the records at issue and I agree with the ministry that there is no information in them that would qualify as either a "trade secret" or "financial" information for the purposes of the first part of the three-part test in section 17(1). Conversely, I find that the records contain information that would qualify as

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[7] Order PO-2010.
[8] Order PO-2010.
[9] Order P-1621.
[10] Order PO-2010.

"commercial information," as these records relate to the buying and selling of pharmacy services. As a result, the first part of the three-part test has been met.

Part 2: supplied in confidence

[26] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[11]

[27] 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.[12]

[28] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[13]

[29] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure. [14]

[30] The appellant's representations do not address part two of the three-part test.

[31] The ministry submits that it does not contest that some or all of the information at issue was supplied to it in confidence, either implicitly or explicitly, by the appellant.

[32] In the absence of evidence from the appellant, which is the party resisting disclosure, I find that it has not established that it had a reasonable expectation of

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[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] Order PO-2020.
[14] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

confidentiality, either implicitly or explicitly when it supplied the records to the ministry. Further, on my review of the records themselves, despite the ministry's position, it is not clear that the records were "supplied in confidence" by the appellant to the ministry. As a result, I am unable to make a finding on whether part two of the three-part test has been met. However, even if I were to find that the records were supplied in confidence to the ministry by the appellant, I find, below, that the appellant has not established a reasonably held expectation of the harms in section 17(1).

Part 3: harms

[33] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[15]

[34] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[16] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[17]

[35] The appellant submits that the disclosure of the records will "break the good faith" of the pharmacy to the appellant's organization. In particular, the appellant argues that it does not consent to the disclosure of the following information:

- the responses to questions one through five of the Pharmacy Report Templates, which contain third party information;
- the response to question nine of the Pharmacy Report Templates, which contains the service agreement between the contracted pharmacy and the long-term care homes; and
- the response to question 11 of the Pharmacy Report Templates, which contains the name of the appellant's organization and the pharmacy.

[36] The ministry submits that it notified the appellant of the access request and

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[15] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.

[16] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.

[17] Order PO-2435.

received representations from the appellant, and that these representations were not sufficient to establish a reasonable expectation of harm.

[37] The Supreme Court of Canada has held that wherever the "could reasonably be expected to" language is used in access to information statutes, evidence well beyond or considerably above a mere possibility of harm must be provided to meet the standard of proof.[18] Accordingly, in this appeal, the appellant must provide evidence that demonstrates a risk of harm that is well beyond the merely possible or speculative to satisfy part 3 of the section 17(1) test.

[38] The failure of the appellant to satisfy the standard of proof will not defeat the claim for exemption if the harms claimed can be inferred from the surrounding circumstances. However, the IPC has repeatedly affirmed that parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[19]

[39] The summary of the appellant's representations, above, is the totality of the evidence it provided in support of its position.

[40] The appellant does not explain in any detail how disclosure of the records at issue could reasonably be expected to cause any of the harms enumerated in section 17(1). I find that the appellant has not described how the information in the records could reasonably be expected to result in any alleged harm or how specific information from the records could be used to bring about the alleged harm.

[41] In sum, I am not persuaded by the appellant's speculative and unsupported assertions that disclosure of the records at issue could reasonably be expected to cause it section 17(1) harms. I am also not satisfied on my review of the records that any of the section 17(1) harms can be inferred from the surrounding circumstances or established by the information at issue, noting that the ministry withheld some of the information, claiming the application of section 17(1).

[42] For the foregoing reasons, I uphold the ministry's decision and dismiss the appeal.

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[18] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 (CanLII) paras. 197 and 199.
[19] Order PO-2435.

ORDER:

1. I order the ministry to disclose the records to the requester by **April 12, 2021** but not before **April 6, 2021**. The ministry is to sever the information it originally decided to withhold, as well as the email addresses in the records.

2. I reserve the right to require the ministry to provide this office with a copy of the record it discloses to the requester.

3. The timelines noted in order provisions 1 and 2 may be extended if the ministry is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by: March 4, 2021
Cathy Hamilton
Adjudicator