Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4169

Appeals PA18-00601 and PA19-00022

South East LHIN

July 27, 2021

Summary: The SE LHIN received requests pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records describing the volume and cost of each home health care service provider engaged by the SE LHIN for specified periods of time. The SE LHIN issued a single decision denying access in full to the responsive records pursuant to the mandatory third party exemption at section 17(1) of the *Act*. The appellant appealed this decision to the IPC.

During the mediation of the appeal, the SE LHIN issued a supplementary decision in which it added the discretionary exemption for economic and other interests at section 18(1) of the *Act.* Also during the mediation, the appellant stated that the adjudicator should not consider SE LHIN's raising of section 18(1) because it was claimed late in the process and he asserted that there is a public interest in disclosure of the information.

In this order, the adjudicator decides to consider the section 18(1) claims and upholds the SE LHIN's decision on the basis of section 18(1). The adjudicator is unable to conclude that there is a compelling public interest in disclosure of the information and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, sections 18(1)(a) and 23; *Code of Procedure,* section 11.01.

Orders Considered: Orders PO-1832, PO-3540-F, MO-1573, PO-4056.

Cases Considered: Ontario Medical Association v. Ontario (Information and Privacy Commissioner), 2017 ONSC 4090, upheld on judicial review, Ontario Medical Association v. Ontario (Information and Privacy Commissioner), 2018 ONCA 673, leave to appeal to the Supreme Court of Canada refused, Ontario Medical Association, et al. v. Information and Privacy Commissioner of Ontario, et al., 2019 CanLII 29760.

OVERVIEW:

[1] There are several Local Health Integration Networks (LHINs) in Ontario. LHINs are Ontario government agencies that provide a variety of health care services in specified geographic regions. In 2017, LHINs assumed responsibility for health and homecare services previously provided by Community Care Access Centres (CCACs). After the transition, LHINs became responsible for the agreements between CCACs and health and homecare service providers set out in the "General Conditions for Community Care Access Centre Services Agreement" (the "CCAC Agreements").[1]

[2] The South East Local Health Integration Network (the SE LHIN) received requests pursuant to the *Freedom of Information and* Protection *of Privacy Act* (*Act*) for records describing the volume and cost of each home health care service provider engaged by the SE LHIN pursuant to the CCAC Agreements for specified periods of time, including times before the transition from CCACs to LHINs.

[3] The SE LHIN issued a single decision denying access in full to the responsive records on the basis of the mandatory third party exemption at section 17(1) of the *Act*. The requester, now appellant, appealed these decisions to the Information and Privacy Commissioner (IPC). In this order I will refer to the two appeals of the SE LHIN's decisions as the present appeal.

[4] The appellant made similar requests to all other LHINs and access was denied on the basis of sections 17(1) and 18(1) (economic and other interests) and he appealed these decisions to the IPC (the other related appeals).

[5] An IPC mediator attempted to resolve the present appeal and the other related appeals by assisting the parties to exchange information, including providing the appellant with a website that contains related information.

[6] In relation to the present appeal only, the mediator obtained consent to disclose information from affected third parties on the basis of a sample record.

[7] However, the SE LHIN issued a supplementary decision adding the discretionary exemption for economic and other interests at section 18(1) of the *Act* to deny access to the records and affirmed its intention to rely on section 17(1).

[8] The appellant stated that because the SE LHIN introduced the discretionary section 18 exemption at a late stage, he wished to add as an issue whether the section 18(1) claims should be considered at all during the adjudication stage, as contemplated by section 11 of the IPC's *Code of Procedure*.

[9] The appellant also stated that he believes there is a public interest in disclosure of the records and the public interest override at section 23 of the *Act* is therefore an issue in the present appeal.

[10] Regarding the other related appeals, the appellant decided not to proceed to the adjudication stage of the appeal process.

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[1] According to the representations of the SE LHIN, this transfer of responsibility is described in the now repealed section 34.3 of the *Local Health System Integration Act, 2006,* S.O. 2006, c. 4.

[11] A mediated resolution of the present appeal was not possible, so it was transferred to the adjudication stage. An IPC adjudicator conducted a written inquiry under the *Act*. The parties' representations were shared with each other in accordance with the IPC's *Code of Procedure* and *Practice Direction Number 7*.

[12] The file was transferred to me to conclude the inquiry. In this order I uphold the SE LHIN's decision to withhold the records on the basis of the section 18(1) exemption and my finding that section 23 does not apply.

RECORDS:

[13] The records at issue are two spreadsheets titled, "South East LHIN – Home and Community Care Service Provider Volumes and Costs," each for distinct specified dates. I will refer to these as the spreadsheets in this order. The spreadsheets contain a breakdown of the average rates and volumes of work assigned to several service providers under contract with the SE LHIN to provide health and homecare services.[2]

ISSUES:

A. Should I consider the SE LHIN's claim that the discretionary exemption for economic or other interests at section 18(1) applies to the spreadsheets?

B. Does the discretionary exemption for economic or other interests at section 18(1) apply to the spreadsheets?

C. Did the SE LHIN consider disclosing the spreadsheets even though it is permitted not to because they are exempt under section 18(1)?

D. Is there a compelling public interest in disclosure of the spreadsheets that overrides the purpose of the section 18(1) exemption?

DISCUSSION:

Issue A: Should I consider the SE LHIN's claim that the discretionary exemption for economic or other interests at section 18(1) applies to the spreadsheets?

[14] The appellant submits that the SE LHIN raised its section 18(1) claims too late in the process and that I should not consider those claims because of the delay. As will be explained below, the *Code of Procedure* permits institutions to make additional discretionary exemption claims within 35 days that they are notified of the appeal. The SE LHIN acknowledges that it did not raise the section 18(1) claim within 35 days; however, it argues that I should consider the claims.

[2] The SE LHIN explains that it created the spreadsheets as a way to reflect the requested information in a summary format and in good faith at the mediation stage of the inquiry. Although it created the spreadsheets in this appeal, it states that it was under no obligation to do so as it is not required to create a record to respond to an access request, citing Orders P-50, PO-3907 and M-436. I acknowledge but make no finding on this issue.

[15] For the reasons that follow I have decided to consider the SE LHIN's section 18(1) claims.

[16] The *Code of Procedure* provides basic procedural guidelines for parties involved in appeals. Section 11 of the *Code of Procedure* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states (emphasis added):

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[17] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. The adjudicator in Order PO-1832 explained the rationale for the policy as follows:

> In Order P-658, [the adjudicator] explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.
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> She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, she made the point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

[18] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[3] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, adjudicators may balance the relative prejudice to the institution and to the appellant.[4]

Representations/positions

[19] The appellant's position is that I should exercise my discretion not to consider the section 18(1) claims. Although he was provided with the opportunity to do so, he did not

[3] Orders PO-2113 and PO-2331.
[4] Order PO-1832.

make any representations about prejudice that he may have suffered because of the late-raising.

[20] The SE LHIN acknowledges that it raised section 18(1) late; however, it submits that if I do not consider the exemption, it will suffer prejudices that outweigh any that may be suffered by the appellant. It disputes that the appellant has been prejudiced noting that section 18(1) was raised by the other LHINs in the other related appeals and so it cannot reasonably be said to onerous for the appellant to have to respond on the basis of section 18(1). The SE LHIN submits that in any event it raised the exemption prior to the conclusion of the mediation and that the appellant was therefore given full opportunity to respond to the section 18(1) claim in the inquiry.

Analysis

[21] Section 11.01 permits an institution to add a new discretionary claim to its original decision within 35 days of being notified of an appeal. This time limit promotes a fair and efficient appeal process that allows for a full mediation of issues in dispute and ensures that the parties are given an opportunity to make their best case. As contemplated by Section 11.01, there will be circumstances where fairness requires that an adjudicator refuse to hear a discretionary claim made after the 35 days. In my view, this is not one of those cases.

[22] While it would have been better if the SE LHIN had marshalled its section 18(1) claim earlier and this *may have* resulted in a different flow of the mediation, the fact is that it added the claim during the mediation so there was an opportunity to adjust or react to the added claim.

[23] I am unable to identify any prejudice suffered by the appellant. The appellant may have perceived that because the consents were obtained during mediation he was imminently about to receive the information. However, the fact that consents were obtained did not render the SE LHIN's section 17(1) claim moot; it continues to advance this claim, although it is arguably a discretionary exemption claim now.[5]

[24] Lastly, there was a full opportunity for the appellant to respond to the SE LHIN's section 18 claim in this inquiry. This is not a case where a claim has been made for the first time after the inquiry commenced.

[25] I have considered the appellant's position that I should not consider the section 18(1) claim. After taking into account the circumstances and the purposes of the procedure, I have decided to consider the SE LHIN's section 18(1) claim.

Issue B: Does the discretionary exemption for economic or other interests at section 18(1) apply to the spreadsheets?

[26] The SE LHIN relies on sections 18(1)(a), (c) and (d) to withhold the spreadsheets in their entirety. As will be seen, it is only necessary for me to consider section 18(1)(a).

[27] The purpose of section 18(1) is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the

[5] See Order PO-3540-F at para 18.

same extent that similar information of non-governmental organizations is protected under the mandatory exemption for third party information at section 17(1) of the *Act*.[6]

The contextual background, according to the SE LHIN

[28] In its response to this appeal, the SE LHIN provided a detailed contextual background that it says ought to be taken into account in the appeal. What follows is a summary of this context.

[29] As noted, the SE LHIN is one of several LHINs in the province of Ontario; it is a Crown Agency funded by the Ministry of Health (the ministry). In 2017, the LHINs' statutory mandate[7] was expanded to take on the provision of patient services that were previously provided by CCACs. The circumstances of the transition from CCACs to LHINs are set out in the *Local Health System Integration Act, 2006* [8](the *LHSIA*).

[30] Accordingly, the LHINs now provide and deliver home and community care (the services) across the province either directly or through contracted service provider organizations (SPOs). Examples of the services are personal support workers, nursing, physiotherapy, nutrition, or social work.

[31] The SE LHIN submits that the historical context and prior involvement of CCACs should inform my assessment and be taken into account when assessing its and the SPOs' expectations of confidentiality over the information at issue. The SE LHIN explains that the SPOs' agreements with CCACs – the CCAC Agreements – contained a definition of confidential information and that CCAC's were not subject to the *Act*. The SE LHIN concedes that the *Act* applies to the information as a result of the *LHSIA*, which specifies that the CCAC Agreements are subject to the *Act*.[9]

[32] The SE LHIN also explains that the ministry sets the procurement model of LHINs to obtain services and that LHINs may only competitively procure services in limited circumstances permitted by the ministry.

[33] As noted above, the appellant requested information about the cost, type and volume of services provided by the SPOs under contract with the SE LHIN to provide services. The spreadsheets contain this information, with the identity of the SPOs anonymized.

[34] The SE LHIN explains that successive governments have imposed a variety of reforms to the procurement procedures and requirements for contracting with SPOs to provide the services. The SE LHIN submits that the historical context is relevant to understanding the nature of the commercial arrangements between LHINs and SPOs and that information such as the type of information requested has "always received special treatment in light of the commercial sensitivity for both SPOs and the CCACs/LHINs." The SE LHIN refers to Order PO-2794 in support of its position on this point, an order in which the adjudicator upheld the University of Guelph's decision to withhold portions of a

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[6] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.
[7] Under the *Home and Community Care Services Act, 1994,* S.O. 1994, c.26.
[8] Cited above.
[9] Section 34.3(9).

confidential donor agreement under section 18(1)(c).

[35] The SE LHIN submits that there are further reforms underway that will impact on the delivery of services and that as a result of these changes, it is starting to face increased competition from other publicly-funded entities such as Ontario Health Teams (OHTs) to purchase the same or similar services provided by the SPOs. If these competitors gain insight into the SE LHIN's pricing structure, which had been "determined in confidence with" the SPOs, the SE LHIN's competitive advantage would be negatively impacted. The SE LHIN submits that caution is warranted during this time of change.

[36] Specifically, the SE LHIN submits that disclosure of volume and pricing information for the services, even average rates, could permit a direct competitor to gain insight into the SE LHIN's delivery model and to adjust its strategy to compete more effectively against the SE LHIN. The SE LHIN submits that this would mean that it would have to pay more for services or its ability to retain SPOs would be undermined. The SE LHIN acknowledges that the overall goal of the sector is effective patient care through cooperation of providers but it states that, "this must be achieved through an orderly transition."

[37] The SE LHIN submits that there is a finite pool of SPOs available to it to provide services, both geographically and by area of specialty. As an example, it states that there is a supply challenge for personal support workers. The SE LHIN says that the shortage would be exacerbated if SPOs decide not to conduct business with "some or all of the LHINs" in reaction to the disclosure of commercially sensitive information – it says that this outcome would negatively impact patient care.

[38] The SE LHIN submits that it will face increased financial pressure to provide services to patients within its allotted budget if the SPOs use the information at issue to seek rates that are higher than the average rates. It reiterates that because it is required to follow ministry rules, it may only competitively procure services in limited circumstances and that disclosure may undermine its bargaining power to retain or attract SPOs.

[39] The SE LHIN submits that the outcome of this appeal may have impacts beyond the circumstances of the present appeal because it will be one of the first orders to determine the treatment of the section 17(1) and 18(1) exemptions to LHINs.[10] It says that a decision to disclose SPO volume and pricing information "will likely result in a wave of access requests for all LHINs in Ontario by other SPOs and interested parties wanting to learn the exact details of the LHIN-SPO confidential contracted rates."

[40] Relatedly, the SE LHIN submits that unlike the affected SPOs in this appeal – all of which provided consent to disclose information – other SPOs would not likely be so willing and that, as I understand the argument, an order for disclosure would set a "firm precedent," which would be negatively viewed by other non-consenting SPOs.

[41] I will now discuss the SE LHIN's arguments more detailed arguments about how it says that section 18(1) applies. As noted already, I am persuaded that section 18(1)(a) applies to the spreadsheets and so it is not necessary to consider the LHIN's other section

[10] The LHIN was aware of and referred to appeal PA18-180, which was resolved by Order PO-4116 on February 25, 2021. The adjudicator upheld the South West LHIN's section 18(1)(c) claim in relation to price forms of a particular service provider.

18(1) claims.

Section 18(1)(a): information that belongs to government

[42] Section 18(1)(a) states:

> A head may refuse to disclose a record that contains,
>
> > (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

[43] For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

The information is commercial information

[44] The SE LHIN claims that the spreadsheets contain commercial and financial information.

[45] The SE LHIN refers to the definition of "financial information" that has been well-established in prior IPC orders[11] and argues that the information at issue relates directly to its pricing, services, geographic and service volume obligations to purchase services from its SPOs.

[46] The SE LHIN also refers to the definition of "commercial information" that has also been well-established in prior IPC orders[12] and argues that the information consists of geographic-based services descriptions, volume commitments, volume ranges and blended service rates attached to fixed period visits or hourly rates relating to the SE LHIN's buying of services. It submits that this commercial information has a monetary value because it can be leveraged for financial gain by SPOs and other organizations competing with the SE LHIN for SPOs.

[47] The appellant did not address the elements of any part of section 18 in his representations.[13]

[48] Based on my review of it, I find that the information is commercial information as it summarizes the SE LHIN's buying of services from a variety of SPOs.

The commercial information belongs to the SE LHIN

[49] For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as

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[11] Order PO-2010.
[12] Orders PO-2010 and P-1621.
[13] Nor did he address the elements of section 17.

copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[50] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,[14] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.[15]

[51] The SE LHIN submits that the information at issue – it describes as "contract information containing volumes and blended costs by service" – is proprietary and that this specific compilation of information creates a copyright interest or a "general proprietary interest requiring protection from misappropriation." The SE LHIN elaborates that its staff use skill and effort to develop service provider volumes and costs to respond to service needs.

[52] The SE LHIN says that the information has a "quality of confidence," referencing Order PO-1763, because its distribution is limited only to another government agency that is not accessible by SPOs. In this regard, the SE LHIN submits that the information at issue is analogous to a price or customer list and that it therefore has an inherent monetary value that arises because of the SE LHIN's responsibility to plan for service delivery to its patients.

[53] As I understand the argument, taking into account the historical information, the LHIN uses the information at issue to plan and deliver services.

[54] Based on my review of the information and in consideration of the context and the arguments made by the SE LHIN, I find that the information in the spreadsheets belongs to the SE LHIN. In particular, the rates and historical mix of services provided have been established by the SE LHIN (or the predecessor CCAC) using its specialized knowledge, in response to and taking account of its unique responsibility to deliver the services and the limitations on its abilities to procure those services due to ministry regulations. Taking into account the unique and specialized role of the SE LHIN in setting the rates and mix of services, I am satisfied that the summary the services provided reflected in the spreadsheets is of a significant proprietary interest to the SE LHIN.

The information has monetary value or potential monetary value

[55] To have "monetary value," the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.[16] The

[14] Order P-636.
[15] Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.
[16] Orders M-654 and PO-2226.

mere fact that the institution kept the information confidential does not mean it has monetary value for the purposes of this section.[17]

[56] The SE LHIN argues that the information in the spreadsheets has a monetary value. It submits that if it were to be disclosed it would deprive the SE LHIN of the monetary value of the information in its own hands. It says that other public and private organizations who wish to enter into contracts with SPOs could exploit the information to their gain and the SE LHIN's detriment. The SE LHIN submits that this would hinder its ability to effectively plan and deliver the services.

[57] It admits that the information is not of the type that can be bought or sold; however, it says that it has an intrinsic monetary value that would inform others who provide the services and that this would advance those competitors' commercial gain, citing Order PO-2941 regarding the Ontario Lottery and Gaming Corporation.

[58] The SE LHIN summarizes that the volume and service rate information, including the average rates, relate to how the services are provided in the geographic region of the SE LHIN, but are also tied to contract-awarded volumes, market shares and the negotiated rates for service. The SE LHIN explains that the information is part of an overall market share model for delivery of the services that reflects balancing of the market shares allocated to each SPO.

[59] The SE LHIN also submits that if the information is disclosed and obtained by competitors it could be used to disrupt how the SE LHIN plans and pays for the services in its geographic region. Specifically, the SE LHIN says that other SPOs may demand higher rates, other entities would enable competitors to draw away the SE LHIN's SPOs, and private pay providers could draw volume and resources away from the SE LHIN or – it says – all LHINs.

[60] In my view, the SE LHIN has provided sufficient evidence to establish that the spreadsheets have monetary value. Based on my review and considering the SE LHIN's arguments, I find that the spreadsheets represent detailed snapshots of how the SE LHIN contracts with a finite number of SPOs to carry out its statutorily mandated functions to provide the services to patients. The value of the information arises because of the length of time that the SE LHINs (or the predecessor CCACs) have been engaged in contractual arrangements with the SPOs for the services and to arrive at the rates, the wide variety of services that the SE LHIN is required to provide, the geographic focus of its mandate and the limitations on its ability to engage in competitive procurement to obtain service agreements with the SPOs.

[61] I accept that the information in the spreadsheets represents the results of the balancing that the SE LHIN (or the CCAC before) has been able and required to do to provide the services it is required to provide while contending with a competitive market for SPOs to provide sometimes scarce services. The SE LHIN has some leverage or buying power in the SPO market because of its statutory duty to provide the services; however, the SE LHIN is limited in how it can procure the services by ministry procedures, a sometime scarce market of SPOs to draw upon and an increasing competition from other purchasers. The information in the spreadsheets is valuable to the SE LHIN to help it to

[17] Order PO-2724.

contend with the variables with which it must contend to provide the services. Indeed, the compilation of the information into the spreadsheets into what I have termed a "snapshot" may bring an even greater monetary value to the raw information that it depicts.

[62] To summarize, I find that the SE LHIN has established that all three parts of the section 18(1)(a) test have been met, which means that the spreadsheets are eligible for exemption under section 18(1)(a). It is therefore not necessary to consider the LHIN's other exemption claims (i.e., sections 18(c), (d) or 17(1)).

Issue C: Did the SE LHIN consider disclosing the spreadsheets even though it is permitted not to because they are exempt under section 18(1)?

[63] I have found that the section 18(1) exemption applies to the spreadsheets. The section 18(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. Review of the institution's discretion is separate from the IPC's jurisdiction to review whether records at issue are eligible for an exemption.

[64] An institution must exercise its discretion. This means that after determining that a discretionary exemption applies, the institution must then consider whether the record should nevertheless be disclosed.

[65] Also, an institution must not err when exercising its discretion. An institution may be found to have erred where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or,
- it fails to take into account relevant considerations.

[66] If an institution fails to exercise its discretion or it does so improperly, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[18] I may not, however, substitute my own discretion for that of the institution.[19]

[67] Relevant to the present appeal, this office has found that following considerations are relevant:[20]

- the purposes of the *Act*, including the principles that information should be available to the public and that exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;

[18] Order MO-1573.
[19] Section 54(2).
[20] Not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant: Orders P-344 and MO-1573.

- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person; or,
- the historic practice of the institution with respect to similar information.

Representations

[68] The SE LHIN submits that it exercised its discretion and took into account only relevant considerations. It says that it applied the exemption in a "limited and specific way" and considered the financial and economic interests that it seeks to protect and the importance of the SE LHIN being able to effectively manage service delivery costs with a limited operating budget. It considered the currency of the information and the nature of it, as well as the context described in the representations above. It explains that it also took into account the possible "sector-wide" implications of the outcome of this appeal.

[69] The SE LHIN says that it considered whether the appellant had a sympathetic or compelling need for the information and assessed that he did not, stating that disclosure "would likely be a greater benefit to the appellant's private interest" because the appellant "is in the business of procuring and providing" some services. The SE LHIN perceived the request to be motivated by an interest in gaining a competitive advantage and not for purposes that are sympathetic or in furtherance of the objectives of the *Act.*

[70] The LHIN says that it balanced the need for transparency with the public with its need to manage service delivery costs. It assessed that withholding the information would not materially affect public confidence and that, it believes, withholding the information is in the public interest because it enables the SE LHIN to continue to secure favourable terms with the SPOs to provide services.

[71] Lastly, the SE LHIN says that it considered and assessed that disclosure could have negative ripple effects across the sector, namely that SPOs become reluctant to do business with the LHINs in the future or cause the LHINs to have to reduce or cut services due to resultant higher costs of the services demanded by the SPOs.

[72] The appellant disagrees with the SE LHIN's assumptions about his motives for making the request.[21] He states his motive as follows: "Ensuring that taxpayers are getting good value for their money is an essential part of making our publicly funded system sustainable for the future."

[73] In reply, the SE LHIN takes issue with the appellant's contention that disclosure would have any impact on value for money. The SE LHIN states that it has seen no evidence that the appellant would provide the information, if disclosed to him, to the

[21] The appellant understood the LHIN to be suggesting that he had a conflict of interest in making the request, a term that the LHIN did not use. In reply, the LHIN stated that it does not suggest that the appellant has a conflict of interest but rather than his role is relevant to its exercise of discretion.

public.

Analysis and finding

[74] Having concluded that the spreadsheets are exempt under the discretionary exemption at section 18(1), I must now decide whether the SE LHIN nevertheless weighed and considered whether to disclose the spreadsheets even when it has the right not to do so. This analysis is distinct from the analysis about whether the section 18(1) exemption applies to the spreadsheets.

[75] After reviewing the SE LHIN's representations and considering the information at issue, I am satisfied that the SE LHIN properly weighed and balanced the right to access government information with an institution's right to claim certain exemptions narrowly and specifically.

[76] In reaching this conclusion, I considered carefully the SE LHIN's arguments about the potential motivation of the appellant or whether the appellant had demonstrated an intention to disclose or advance the information for a public interest objective. These arguments gave me some pause because how a requester intends to use information is not a proper consideration when applying the exemptions in the *Act*.[22]

[77] However, when viewed in the context of its overall representations I find that the SE LHIN's arguments on this point are intended to demonstrate that the appellant does not have a compelling or sympathetic need for the information, which has long been held to be a proper consideration by the IPC when assessing an institutions' exercise of discretion.[23]

[78] I uphold the SE LHIN's exercise of discretion.

Issue D: Is there a compelling public interest in disclosure of the spreadsheets that overrides the purpose of the section 18(1) exemption?

[79] The final issue that requires consideration is whether, as stated by the appellant, there is a compelling public interest to outweigh the purpose of the section 18(1) exemption that the public interest override in section 23 should apply. The LHIN disputes that section 23 applies.

[80] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 17, **18**, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[81] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

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[22] *Ontario Medical Association v. Ontario (Information and Privacy Commissioner),* 2017 ONSC 4090 at paras 33 and 34 (upheld on judicial review: *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 673, leave to appeal to the Supreme Court of Canada refused: *Ontario Medical Association, et al. v. Information and Privacy Commissioner of Ontario, et al.*, 2019 CanLII 29760).
[23] Order MO-1573; see also Order PO-4056.

[82] The *Act* does not state who bears the burden to prove that section 23 applies. The IPC has established that the appellant does not fully bear the burden because they do not have the benefit of reviewing the information at issue. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[24]

[83] In considering whether there is a *public interest* in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[25] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[26]

[84] A public interest does not exist where the interests being advanced are essentially private in nature.[27] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[28]

[85] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[29]

[86] Any public interest in *non*-disclosure that may exist also must be considered.[30] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of *compelling*.[31]

[87] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[88] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[32]

Representations

[89] The SE LHIN submits that the interests to be advanced by disclosure are private in nature, and refers to Orders P-12, P347 and P-1439 in support of its position. Specifically, the SE LHIN submits that disclosure would advance the private interests of the appellant, some SPOs and organizations that compete with the SE LHIN to provide them with a competitive advantage. It submits that disclosure would be detrimental to the public interest.

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[24] Order P-244.
[25] Orders P-984 and PO-2607.
[26] Orders P-984 and PO-2556.
[27] Orders P-12, P-347 and P-1439.
[28] Order MO-1564.
[29] Order P-984.
[30] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[31] Orders PO-2072-F, PO-2098-R and PO-3197.
[32] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484.

[90] The SE LHIN disputes that disclosure would drive competition in a way that would benefit the health sector as a whole. It refers to its arguments detailed above in relation to section 18(1) that disclosure would harm its bargaining position with SPOs because of the unique features associated with procuring services, such as ministry requirements and market share allocations.

[91] The appellant argues that disclosure would assist with ensuring value for money in the procurement of services. He states, "Ensuring that taxpayers are getting good value for their money is an essential part of making our publicly funded system sustainable for the future."

[92] In reply, the SE LHIN reiterates that the interests advanced by disclosure are essentially private in nature and disputes that the appellant is motivated by a public interest objective.

Analysis and finding

[93] I understand the appellant argues that disclosure of the spreadsheets would advance an oft-cited public interest objective of value for money in the health sector; however, he does not explain how disclosure would advance this objective. Without further explanation or argument, I am unable to determine how disclosure of the spreadsheets could advance value for money in the market for services or in the overall health sector. On the other hand, I have evidence before me about the harms that would arise if disclosure occurred and the SE LHIN makes the case that non-disclosure is in the public interest.

[94] The appellant does not have the benefit of the specific data contained in the spreadsheets, but he is aware of the type of information that they contain – information responsive to his requests about the volumes and costs of services arranged and paid for by the SE LHIN for specified time periods. In my view, the appellant had sufficient information to make arguments about how the information could advance the public interest objective of value for money. He was provided the opportunity to do so when he was invited to make representations in response to a Notice of inquiry that summarized the issues that would be considered in this appeal and in response to the SE LHIN's representations.

[95] Although he had the opportunity to do so, the unique procurement model and historical context described by the SE LHIN has been unchallenged by the appellant. The appellant made only the very brief representations, quoted above.

[96] I have also reviewed the spreadsheets and considered whether it is inherent from them that disclosure would advance a compelling public interest. Without further context about the sector, I am unable to reasonably deduce how disclosure could impact on the ability of the SE LHIN to achieve greater value for money or the health sector in general, as the appellant notes. While there is likely no meaningful debate that value for money is a sound public interest objective, I am simply not able to determine how disclosure could advance that objective, a problem that is compounded because of the other context that I have been provided by the SE LHIN that demonstrates that there is public interest in *non*-disclosure.

[97] As I am unable to conclude that there is a compelling public interest in disclosure, it not necessary for me to consider the second part of the section 23 test and I find that it does not apply.

ORDER:

I uphold the SE LHIN's decision and dismiss the appeal.

Original Signed by: July 27, 2021

Valerie Jepson
Adjudicator