Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3189

Appeal PA11-557

Ministry of Health and Long-Term Care

April 24, 2013

Summary: A member of the media sought access to specified licensee versions of inspection reports arising out of incidents at long-term care homes in Ontario. The Ministry of Health and Long-Term Care disclosed the public versions of the reports in their entirety and provided access to portions of the licensee versions. Portions of the licensee versions were severed on the basis that they contain personal health information under the *Personal Health Information Protection Act, 2004,* or in reliance on the mandatory personal privacy exemption under section 21(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In this order the adjudicator upholds the decision of the ministry in part, finding, among other things, that personal health information in the records is excluded from the *Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2, 21(1), 21(3)(b), 23, *Personal Health Information Protection Act, 2004*, sections 4(1), 4(2), 8(1), 8(4), *Long Term Care Homes Act, 2007*, S.O. 2007, Chapter 8, Ontario Regulation 79/10.

Orders and Investigation Reports Considered: Orders PO-1733, PO-3110.

OVERVIEW:

[1] This appeal arises out of a request made to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to inspection reports arising out of incidents at long-term care homes in Ontario. The requester is a member of the media. He described the reports

sought by date, name of home and name of inspector. The requester specified that he was not seeking the "public" reports but, rather, the more detailed reports prepared by ministry inspectors which are not made public. These will be referred to in this order as the "licensee" reports. The requester stated that the names of residents and staff could be redacted from the reports.

Legislative framework

[2] The following description of the legislative framework for the issuance of these inspection reports is taken from the ministry's representations.

[3] All long-term care homes in Ontario are governed by the *Long Term Care Homes Act, 2007* (LTCHA)[1] and Ontario Regulation 79/10 (the Regulation) made under the LTCHA, which came into force on July 1, 2010. Under the LTCHA, ministry inspectors are required to conduct an inspection or make inquiries where the ministry receives information indicating that certain specified events may have occurred, such as improper treatment or care of a resident or abuse of a resident by anyone. After completing an inspection, the inspector must prepare an inspection report.

[4] As part of the new legislative scheme, the ministry introduced the concept of "public inspection reports". Previous to this legislation, although homes were inspected and reports prepared based on those inspections, those reports were intended primarily for the licensee (the home) and the affected residents. The prior legislation contained no provision requiring the ministry to publish any aspects of the reports.

[5] In the ministry's explanation,

> …the only way the public could obtain copies of inspection reports related to complaints and critical incident reports, prior to the LTCHA coming into force was through the access process under the Act. The limitations of that process were significant: because inspection reports can contain extensive, very sensitive phi [personal health information], they had to be heavily redacted to protect the privacy of home residents and their families, and to ensure the Ministry was not inadvertently breaching the privacy provisions of the Act.
>
> Once PHIPA[2] came into force in 2004, the access process became even less effective for the public because PHIPA expressly excludes records of phi from the scope of the Act. Consequently, if a particular inspection report was, as a whole, dedicated primarily to the phi of a home resident (as opposed to a review of a licensee's fire safety procedures, for

[1] S.O. 2007, Chapter 8.
[2] *Personal Health Information Protection Act, 2004*, S.O. 2004, Chapter 3, Schedule A (PHIPA).

> example), the report would only be accessible to the resident/substitute decision maker and, moreover, the phi could not, in most cases, be "reasonably severed" from the report so as to make even portions of it accessible to the public.
>
> Recognizing these limitations, the Ministry included express provisions in the LTCHA to address the issue of public access to inspection reports, while yet protecting residents' privacy. The goal was to strike a balance between the government's commitment to information transparency about operations and management of homes, and the need to protect the privacy of residents in those homes.

[6] Under section 149 of the LTCHA, an inspector must prepare an inspection report after completing an inspection and give a copy of it to the licensee, the Residents' Council and the Family Council, if any. These reports are the "licensee" reports referred to in this order. In addition, under section 173(a) of that Act, the Director is required to publish "in any format or manner the Director considers appropriate", every inspection report under section 149. The reports published under section 173(a), which are posted on the ministry's website, are the "public" reports referred to in this order.

[7] Section 301(2) of the Regulation, headed "Protection of privacy in reports", describes the "format and manner" the Director has determined is "appropriate" for the publication of reports under section 173(a):

> Where an inspection report... contains personal information or personal health information, only the following shall be... published…
>
> 1. Where there is a finding of non-compliance, a version of the report that has been edited by an inspector so as to provide only the finding and a summary of the evidence supporting the finding.
>
> 2. Where there is no finding of non-compliance, a version of the report that has been edited by an inspector so as to provide only a summary of the report.

[8] In editing inspection reports for the purpose of publication, inspectors are not required to remove all PHI and personal information. The ministry explains,

> The LTCHA and Regulation effectively permit inspectors to retain some phi in the public reports and, correspondingly, permit the Ministry to publish inspection reports that contain some phi. For example, a public report could include some general information about a resident's medical conditions and/or behaviour, together with the name of the home and the date it was inspected. Such a report could potentially be used to identify

> the resident, particularly in smaller communities or when high profile incidents have received media attention.

[9] The ministry has created a "Tip Sheet" giving guidance to its inspectors about how to edit their inspection reports for publication. This Tip Sheet, which the ministry provided to this office and which was shared with the appellant, states among other things that its guiding principle is that public inspection reports and orders must "strike a balance between the government's commitment to information transparency about operations and management of long-term care homes, and the need to protect the privacy of residents in those homes." The Tip Sheet also states:

> The amount of personal information (PI) and personal health information (PHI) removed from the report and orders depends on the specific issue(s) being inspect. PHI should be removed from inspection reports and orders to the greatest extent possible. Be assured that if it is not possible to remove all of the PHI…there are no legal concerns with publishing, posting or giving this public report and public order in accordance with the requirement of the *Long-Term Care Homes Act, 2007* and its regulations.

[10] The editing obligation under the Regulation, therefore, is not equivalent to the severing obligation under PHIPA or the *Act*. The ministry states,

> Whereas 'severing" requires the redaction of all phi and personal information, as those terms are defined in PHIPA and FIPPA, the "editing" obligation under the Regulation does not.
> ….
> The result, which is immediately apparent from a comparison of the severed version of the records the appellant received in March 2012 with the public version the Ministry provided in September, 2012[3], is that the public version can actually contain more phi than the severed version.

[11] The effect of the LTCHA and its Regulation is that where an inspection report contains personal information or personal health information, only the public report can be given to a Residents' Council or Family Council. Further, in such a case, only the public report can be published by the ministry or posted by the licensee in the home. Under the LTCHA, therefore, even the residents of a home do not see the licensee version of the inspection report.

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[3] See discussion below.

[12] In response to the request, the ministry located 14 records which it disclosed in part. Some of the ministry's severances were based on section 21(1) of the *Act*. In addition, the ministry severed other portions because, in its view, they contain personal health information to which the *Act* does not apply, as a result of the operation of PHIPA.

[13] The requester (now the appellant) appealed the ministry's decision to deny access to portions of the records. As the appellant is not seeking the names of residents and staff, those portions are not at issue. In this appeal, the appellant also raises the application of the public interest override in section 23 of the *Act*. The appeal also raised issues about the ministry's fee decision, but because of subsequent developments that issue is now moot.

[14] Mediation did not resolve the appeal and it was forwarded to the adjudication stage of the appeals process. I began my inquiry by sending a Notice of Inquiry to the ministry, inviting it to submit representations. The ministry's representations were shared in full with the appellant, who also provided representations.

[15] During the inquiry, the ministry disclosed the public reports relating to the incidents identified by the appellant, in what it described as a new access decision. It also refunded to the appellant the fee he had previously paid. The ministry provided me with copies of these public reports. The appellant continues to seek access to the severed portions of the licensee reports.

[16] Also, during the inquiry I asked the ministry to clarify the records at issue as it appeared that the sets of public and licensee reports provided to this office were incomplete. As a result, the ministry located additional records and, in a supplementary decision, disclosed several public reports in their entirety to the appellant, and one licensee report, in part.

[17] In this order I uphold, with a few exceptions, the ministry's decision about which portions of the licensee reports contain PHI. These portions are excluded from the *Act*. I find that some records which do not contain PHI are subject to the appellant's right of access under the *Act* and should be disclosed since no mandatory exemption under the *Act* applies to them.

[18] I also determine that some of the information the ministry severed under section 21(1) of the *Act* is not personal information. The remaining information severed under section 21(1) of the *Act* is exempt as it contains personal information, its disclosure is presumed to constitute an unjustified invasion of personal privacy, and the public interest override in section 23 does not apply.

RECORDS:

[19] Although the ministry stated that there are 14 records at issue, some records may consist of more than one report. Each of the 14 "records" encompasses the licensee inspection reports for 14 separate long-term care homes, for the dates identified by the appellant in his request. Thus, one "record" may include several different inspection reports, about the same or different incidents, on different dates.

[20] For ease of reference, I will refer to the records as Records 1 to 14, with the above caveat.

PRELIMINARY ISSUE:

[21] In its representations, the ministry raised, as a preliminary issue, the question of which records are responsive to the request, the public versions or the severed, licensee versions. It submits that the public versions should be treated as the only responsive records.

[22] I do not accept this submission. "Responsiveness" is a concept that describes the records covered by a request for access under the *Act*. It determines the bounds of the search an institution must perform to locate records in response to a request and, therefore, the scope of records for which a decision on access must be made. Previous orders have established that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Where there is lack of clarity about the records sought, section 24(2) of the *Act* places a positive obligation on an institution to not only inform a requester that a request does not sufficiently describe the record sought, but also requires an institution to offer assistance in reformulating the request.[4]

[23] In this appeal, there is no ambiguity about the request. The appellant clearly distinguished between the public and licensee reports in his request and specified he was seeking access to the latter and not the former. The scope of records responsiveness to his request is clear. In such a situation, it is not up to the ministry to re-write his request for him.

[24] I therefore reject the submission that the only records responsive to the request are the public reports.

ISSUES:

Issue A: Are the records or portions of the records at issue excluded from the *Act*?

[4] See, for example, PO-2889.

Issue B: Do the records contain "personal information" as defined in section 2(1) of the *Act*?

Issue C: Does the mandatory exemption at section 21(1) apply?

Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption?

DISCUSSION:

Issue A: Are the records at issue excluded from the *Act*?

Do the records contain "personal health information" as defined in PHIPA?

[25] Section 8(1) of PHIPA states:

> Subject to subsection (2), the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* do not apply to personal health information in the custody or under the control of a health information custodian unless this Act specifies otherwise.

[26] "Personal health information" is defined in section 4 of PHIPA as:

> identifying information about an individual in oral or recorded form, if the information,
>
> (a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
>
> (b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,
>
> (c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,
>
> (d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,
>
> (e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from

> the testing or examination of any such body part or bodily substance,
>
> (f) is the individual's health number, or
>
> (g) identifies an individual's substitute decision-maker.

[27] In addition, sections 4(2) and (3) of *PHIPA* provide,

> (2) In this section,
>
> "identifying information" means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual. 2004, c. 3, Sched. A, s. 4 (2).
>
> (3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection. 2009, c. 33, Sched. 18, s. 25 (3).

[28] Under section 8(1) of PHIPA, the *Act* does not apply to personal health information in the custody or control of the ministry. There is no right of access under the *Act* to this information, unless an exception in PHIPA applies. It is important to note that while individuals have the right to obtain access to records of their own personal health information, and PHIPA provides a process for the exercise of that right, PHIPA does not otherwise provide any access rights. As a starting principle, the appellant has no right to access PHI in the records, under either PHIPA or the *Act*.

[29] The initial question is therefore whether the records contain PHI.

[30] In this appeal, the appellant acknowledges that the reports contain some PHI. He states that he also expects them to contain the names of residents and staff, and the genders and room numbers of affected residents. He indicates that he is content to have this information redacted. In his submission, the factual details of what happened in these incidents are "details of an occurrence, not of an individual's personal health." The appellant suggests that these factual details would not assist anyone in identifying who the affected residents are and that by withholding this information, the ministry is not so much protecting the personal health information of the residents as withholding public health and safety information to protect the nursing home from being scrutinized by the public.

[31] In effect, the appellant's argument is that severance of certain information such as names, genders and room numbers results in removal of the PHI from the records.

[32] The ministry submits that removing the names of residents and staff does not effectively remove the PHI from the records. The remaining information still contains PHI because it contains enough detail to make it "reasonably foreseeable in the circumstances" that this information "could be utilized, either alone with other information, to identify an individual." The ministry submits that

> …other residents in the home, who may share a room with or be on the same floor as the resident described in the inspection report, the families of residents, staff, or visitors who are not related to the residents, may have witnessed the incidents described in an inspection report, and may be able to identify the resident – particularly since the date of the incident and the name of the home are included in these reports. For this reason, the records were severed to remove incident dates, and the very detailed description of incidents or the residents themselves.

[33] The ministry relies on the following excerpt from the *Guide to the Ontario Personal Health Information Protection Act*[5] which discusses the meaning of "reasonably foreseeable in the circumstances" as used in section 4(2) of PHIPA:

> [i]t is probable that it is reasonably foreseeable in the circumstances that information can be used to identify an individual when the recipient of the information is known to have access to other information that, when combined with the information that it received, would identify the individual to whom the information relates... As a result, it is necessary to consider the resources of the recipient of the information. Information disclosed to a recipient with access to extensive data holdings may be identifying information. The same information disclosed to a person with no known ability to access data may not be [phi]. (p.78)

[34] The ministry further submits that

> Given that the appellant works for a major newspaper, it is reasonably foreseeable that s/he would in fact have the "ability to access" other data that, combined with the severed portions of the record, could be used to identify a resident. The Guide points out that the "collection of certain data elements may increase the likelihood of a patient being identified:
>
> - geographic location (e.g. location of health event)
> - names of health care facilities and providers

[5] Halyna Perun et al (Toronto: Irwin Law Inc., 2005) (Perun).

- rare characteristics of the patient (e.g. unusual health condition); or
- highly visible characteristics of the patient (p. 78)

Since the appellant already knows the geographic location of the incidents, the name of the home and the dates of the inspections, the Ministry removed all information about the patient (their condition, their gender, their treatment) in order to render the information "non-identifiable", and ensure phi was not deducible from the remaining information.

[35] In response, the appellant submits that this information would not assist anyone in identifying who the affected patient is any more than its corresponding public report already does. Rather, he states, it would inform the public of the severity and conditions of the abuse, which is important public health and safety information.

Analysis

[36] On my review, I find that, with a few exceptions discussed below, the records contain PHI. The records indicate that inspections were conducted in response to complaints or critical incidents at long-term care homes. They describe the inspectors' observations and findings. The type of incidents described includes resident-on-resident abuse and neglect or abuse by staff. The reports identify residents of long-term care homes and describe their physical and mental health. Some make references to a plan of care, or identify a substitute decision-maker.

[37] I find that the reports (except as discussed below) and specifically, the severed portions, contain in varying degrees information that, as described in section 4(1),

> (a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
>
> (b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,
>
> (c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,
>
> ….
>
> (g) identifies an individual's substitute decision-maker.

[38] The appellant argues that the factual details of what happened in these incidents are details of an occurrence and not of an individual's personal health. While, on my review, many of the severed portions explicitly discuss the mental or physical health of residents, even those that are devoted to descriptions of occurrences qualify as PHI. This information "relates to the providing of health to the individual, including the identification of a person as a provider of health care to the individual", within the meaning of section 4(1)(b).

[39] As indicated above, the appellant also argues that once the names, genders and room numbers are removed from the reports, the remaining information is not PHI because it cannot be associated with an identifiable individual.

[40] In this respect, section 4(2) of PHIPA is significant. As set out above, that section provides that "identifying information" means information that identifies an individual or for which *it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual*.

[41] Thus, regardless of the removal of identifiers, if the severed portions relate to the health of an individual as described in section 4(1), and it is reasonably foreseeable that they could be used, together with other information, to identify the residents of the homes, these portions still qualify as PHI.

[42] A determination of what is "reasonably foreseeable" under PHIPA is comparable to a conclusion under the *Act* about what constitutes "personal information." This office has said that "to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed"[6], and that each decision on this question is based on its own facts.

[43] In considering this issue, I have reviewed the information in each record and the severances made by the ministry. I have also considered what information is already publicly available about the incidents. The public reports about these incidents provide various levels of detail about them, but they contain, at a minimum, the name of the homes, the date of the inspection, the name of the inspector, a summary of the inspector's findings, and orders issued, if any. Some of the public summaries give the dates of the incidents and describe the residents involved, their medical condition, plan of care, and describe the incident. For instance, one summary states that a certain resident hit two other residents on a specific date, one of whom sustained a bruise and scratch and the other pain to the wrist and face. Another summary states that a caregiver was observed grabbing a resident's hand and face and using foul language.

[44] Other summaries in the public reports are less detailed and do not, for instance, disclose the dates of the incidents or provide little detail about the incidents themselves.

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

I agree with the statement in the Guide, above, that the "collection of certain data elements may increase the likelihood of a patient being identified".[7] Here, the more data elements are disclosed about the incidents, the greater the possibility that the residents involved will be identified. I also agree that one of the factors that may be relevant to an assessment of whether it is "reasonably foreseeable in the circumstances" that an individual resident will be identified is the nature of the resources available to this appellant and his ability to access other data. It is no secret that this appellant is a reporter with a large newspaper that has researched and published articles on abuses at long-term care homes and has a variety of sources from which it has obtained information about those homes and the residents in them.

[45] But even if the appellant is not an individual who is particularly well-positioned to gather data, this office has described disclosure under the *Act* as amounting to "disclosure to the world", in the sense that the information disclosed would be in the public domain.[8] In this appeal, this is not a hypothetical scenario. The appellant has made submissions about the public interest in disclosure of this information that candidly reveal his intent to report on the contents of the licensee reports. He states that the licensee reports contain information that residents and their families, as well as prospective residents of these homes, should know. Thus, in deciding whether it is "reasonably foreseeable in the circumstances" that the severed information could be used to identify the residents involved, I must also consider whether the dissemination of the information to the general public, including to other residents or their families, or members of the communities in which the homes are located, could enable identification of these residents.

[46] I find persuasive in this regard the ministry's submissions that, where other details such as the name of the home and date of the inspection is known, the detailed description of the incident could enable other residents in the home, their families or staff to identify the residents involved in the incident. I find it reasonably foreseeable in the circumstances that the descriptions of the incidents could be used, despite the removal of names, genders and room numbers, to identify the residents involved. This information is therefore "identifying information" within the meaning of section 4(2) and is the PHI of the residents.

[47] Applying the above, I find that whether or not the names, genders and room numbers of residents are removed, severed portions of Records 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 14 that describe the incidents and, in some instances, give the dates of the incidents, contain PHI of the residents as defined in sections 4(1) and (2). Under section 8(1) of PHIPA, the *Act* does not apply to this information.

[48] In arriving at this conclusion, I note that my copy of the records indicates that the ministry severed some information about an incident involving a resident in Record

[7] Perun, p. 77.
[8] See Orders PO-2197 and MO-1719.

6 under the *Act*, instead of PHIPA. I find that this information about the resident is PHI and is therefore excluded from the *Act*.

[49] Record 7 contains no PHI. No resident is identified and the information about the incident is so generalized that it is not reasonably foreseeable in the circumstances that the information in this record could be used to identify the resident involved in the incident. The ministry made severances to this record on the basis that it contained personal information under the *Act*, and not PHI. As there is no PHI in this record, it is subject to the *Act* and not PHIPA.

[50] As with Record 6, it appears from my copy of the records that the ministry severed some information about a resident on page 2 of 3 in Record 8 under the *Act* instead of PHIPA. As this information is the PHI of a resident, I find that it is excluded from the *Act*.

[51] The only information severed from Record 12 are certain dates, which the ministry claims meet the definition of PHI. As with Record 7, the information about the incident is extremely general. On my review of the record, the submissions and the information in the public report, I find that the severances do not contain PHI as defined in section 4(1) and (2). They do not identify any individual and it is not reasonably foreseeable in the circumstances that they could be used to identify the resident involved in the incident. This record is therefore subject to the *Act* and not PHIPA. As no exemptions under the *Act* were claimed to withhold the information in this record, and no mandatory exemptions apply, I will order it to be disclosed in its entirety to the appellant.

[52] I also find that Record 13 does not contain PHI. Once the name of the resident is severed, the other information in the record, which provides no detail about the incident, could not reasonably be used to identify the resident. As with Record 12, this record is subject to the *Act* and not PHIPA. As no exemptions under the *Act* were claimed to withhold the information in this record, and no mandatory exemptions apply, I will order it to be disclosed in its entirety to the appellant.

[53] As I have stated, the appellant has no right of access to PHI in the records under either PHIPA or the *Act*, unless an exception in PHIPA applies. But my conclusion that the records contain the PHI of residents of long-term care homes does not preclude the possibility that the appellant may have access to some of the information in them. The ministry has in fact granted access to portions of the records, and has referred to section 8(4).

Can the personal health information be reasonably severed from the records?

[54] Section 8(4) of PHIPA states,

> (4) This Act does not limit a person's right of access under section 10 of the *Freedom of Information and Protection of Privacy Act* or section 4 of the *Municipal Freedom of Information and Protection of Privacy Act* to a record of personal health information if all the types of information referred to in subsection 4 (1) are reasonably severed from the record.

[55] The effect of section 8(4) is that the rights of access under the *Act* may be exercised in respect of records covered by PHIPA, but only where all the types of personal health information described in section 4(1) can be reasonably severed. The intent of section 8(4) is to provide a limited right of access to information in records containing personal health information, while maintaining the exclusion of personal health information from the *Act*.

[56] The ministry submits that it has complied with its obligation under section 8(4) by severing the PHI from the reports and providing the resulting records to the appellant.

[57] I agree with its submission, except to the extent that I have found some information that the ministry described as PHI, not to be PHI. I find, taking into account the severances made by the ministry and my conclusions above on what information meets the definition of PHI, that all the information described in section 4(1) has now been reasonably severed.

[58] Accordingly, the appellant has a right of access under the *Act* to the remaining information, subject to the application of any exemption. I will turn to consider whether the mandatory personal privacy exemption in section 21(1) of the *Act* applies to information the ministry severed based on that exemption.

Issue B: Do the records contain "personal information" as defined in section 2(1) of the *Act*?

[59] In order to determine whether the exemption in section 21(1) applies, it is first necessary to decide whether the records contain "personal information" as defined in the *Act*. Under section 2(1) of the *Act*, "personal information" is defined as follows:

> "personal information" means recorded information about an identifiable individual, including,

> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (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,
>
> (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;

[60] 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[9].

[61] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

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[9] Order 11.

> (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.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[62] 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[10].

[63] 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[11].

[64] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed[12].

Representations

[65] The appellant does not seek the names of staff, and the ministry has severed those as non-responsive. Other severed portions contain information such as descriptions of alleged improper conduct of staff, their personal views, reactions of staff to the events or disciplinary action taken against them. The ministry states that it severed some information, such as interview and incident dates, because they could reasonably be used to identify the staff in particular incidents.

[66] The ministry submits that the information described above qualifies as the "personal information" of staff in the homes.

The appellant again acknowledges that the records contain some personal information, which he submits should be redacted as the IPC sees fit. However, he states that the heavily redacted reports censor far more information than was necessary, and that it is not reasonable to expect that an individual may be identified if the information he requests is disclosed.

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[10] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[11] Orders P-1409, R-980015, PO-2225 and MO-2344.
[12] See footnote 4, above.

Analysis

[67] The detailed descriptions of the incidents have been severed from the records as they contain PHI. These portions are therefore not at issue here. The parts of the records that appear to have been withheld solely on the basis that they contain personal information under the *Act* are:

- in Record 3, the dates that certain individuals reported alleged abuse to management at the home;
- in Record 6, the dates the inspector spoke to certain staff members at the home, a reference to a policy at the home, and information about a staff member involved in the incident including his/her mental state and disciplinary action taken;
- In Record 7, information about an incident of alleged abuse of a resident by a staff member;
- In Record 8, a reference to disciplinary action against a staff member;
- In Record 10, although it is not clearly marked, it appears that information about disciplinary action taken against a staff member was severed on the basis that it is personal information;
- In Record 14, information about the actions of a staff member.

[68] In assessing whether these portions contain personal information I have considered whether the information is about identifiable individuals, even if not named, taking into account other information disclosed in the records as well as in the public reports. I have also considered whether the information is about these individuals in their personal capacity and if not, whether it nonetheless reveals something personal about them.

[69] I find that some of this information does not qualify as personal information. In Record 3, the dates the inspector spoke to management staff at the home as part of an investigation is not their personal information, as they were acting in a professional and not personal capacity and this information does not reveal anything personal about them. The ministry argues that disclosure of interview and incident dates could reasonably be used to identify the staff in particular incidents. In my discussion of the application of PHIPA above, I found that the incident dates are excluded from the *Act*, along with other details of the incidents. In this context, and on my review of the records, I do not agree that disclosure of dates on which staff members were interviewed about the incidents reveals anything personal about staff members whose conduct was being investigated. The dates when police or others were notified are also not personal information of an identifiable individual within the meaning of that term as defined in section 2(1).

[70] Consistent with the above, I find the dates withheld from Record 6 under the *Act* are not personal information. A reference to a certain policy at the home, which the ministry also withheld, is similarly not information about any identifiable individual.

[71] I find that other information severed from Record 6, relating to an identified staff member, his/her mental state and disciplinary action taken against him/her, is this individual's personal information as it both reveals something of a personal nature and relates to the individual's employment history. I also accept that, given other information available about this incident, this staff member could be identified even if his/her name is severed from the Record.

[72] Record 7 contains very generalized information and I find it cannot reasonably be used to identify either the staff member or resident involved in the incident. As stated above, the ministry did not claim that this record contains PHI. I am not satisfied that the information severed from this record is the personal information of any individual.

[73] I find that information about disciplinary action taken against an employee on page 2 of 3 of the first report in Record 8 is that employee's personal information, in that it relates to the "employment history" of an identifiable individual.

[74] For the same reason, information in Record 10 about misconduct by an employee and the subsequent disciplinary action taken, is that employee's personal information.

[75] Information severed on page 4 of 6 in Record 14 does not qualify as personal information. The information is very general and I do not find that the employee whose conduct was being investigated could reasonably be identified through disclosure of this information.

[76] Because I have found that some of the information severed by the ministry does not qualify as personal information, and no other mandatory exemption applies to this information, I will order it disclosed.

[77] The parts of the record that contain personal information within the meaning of the *Act*, and which have not been excluded under PHIPA, are found on the following pages:

- Pages 6 of 7 and 7 of 7 of the first report and 4 of 6 of the second report in Record 6;
- Page 2 of 3 of the first report in Record 8;
- Pages 3 of 4 and 4 of 4 of the second report in Record 10.

Issue C: Does the mandatory personal privacy exemption in section 21(1) apply?

[78] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. In the circumstances, the only exception that could apply is paragraph (f), which permits disclosure only if such disclosure is *not* an unjustified invasion of personal privacy.

[79] The *Act* sets out factors and presumptions in sections 21(2), (3) and (4) that help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

[80] In this case, the ministry submits that disclosure of the personal information at issue in the records would be presumed to constitute an unjustified invasion of personal privacy under section 21(3)(b) of the *Act*, as the information was "compiled and identifiable as part of an investigation into a possible violation of the law." It submits that the information was compiled by inspectors pursuant to their obligations under section 25(1) and 142 of the LTCHA to conduct inspections "for the purpose of ensuring compliance with the requirements" of a law, namely, the LTCHA. A finding of "non-compliance", as contained in these records, means a finding of non-compliance with requirements under the LTCHA.

[81] Previous decisions of this office have found records created in connection with inspections under the LTCHA and its predecessor legislation to be covered by the section 21(3)(b) presumption.[13] I agree with the conclusions reached there and find that the information at issue was compiled as part of an investigation into a possible violation of the LTCHA. Accordingly, its disclosure is presumed to be an unjustified invasion of personal privacy and it is exempt from disclosure under section 21(1).

Public interest override

[82] Under the Act, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[14]

[83] 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.

[84] In his submissions on the public interest override, the appellant states that the quality of care in government-funded nursing homes is a health and safety issue

[13] Orders PO-1733 and PO-3110.
[14] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

involving some of Ontario's most vulnerable citizens. He submits that the ministry is failing in its duty to adequately inform the public of this important public health issue in that the public versions of the nursing home inspections sanitize and whitewash the severity of abuse that has occurred.

[85] The appellant states that the public interest in disclosure of the licensee reports outweighs any perceived invasion of privacy from the release of the requested information. Further it could shine a light on the disparity of information between the public and licensee reports and spur the ministry to make the system more transparent.

Analysis

[86] The appellant does not explicitly take the position that information otherwise covered by PHIPA can nonetheless be disclosed in the public interest. For clarity, I must emphasize that once a determination is made that information is PHI and governed by PHIPA, the *Act* (including the public interest override in section 23) does not apply.

[87] The Legislature has recognized that personal health information is among the most sensitive of personal information and it has determined that its collection, use and disclosure should be regulated under a special regime, which does not allow for the disclosure of PHI except as permitted under PHIPA.

[88] No one can disagree with the appellant's views on the public interest in having access to information about conditions in long-term care homes. But through the provisions of PHIPA, the Legislature has also given recognition to the public interest in limiting disclosure of an individual's health information. The terms of PHIPA do not permit me to disclose PHI under a general public interest override.

[89] The only information to which section 23 of the *Act* may apply, therefore, is information subject to the *Act*, and not PHIPA, and which is covered by the personal privacy exemption in section 21(1). This information essentially consists of information about the employees who were involved in the incidents, the nature of the misconduct and their actions (where it can be severed from the PHI), and disciplinary action taken against them.

[90] Applying section 23, although I accept that there may be a public interest in disclosure of the details of disciplinary action taken against employees in long-term care homes, I am not convinced that it is a "compelling" public interest that clearly outweighs the purpose of the section 21(1) personal privacy exemption. The arguments made in favour of disclosure of these reports focus on the public's interest in knowing the nature and severity of abuse at long-term care homes, but provide less support for disclosure of information about the consequences to staff members arising out of the incidents.

[91] I therefore find that section 23 does not apply to support disclosure of the information I have found exempt under section 21(1) of the *Act*.

[92] In conclusion, I have upheld, with a few exceptions, the ministry's decision about which portions of the licensee reports contain PHI. These portions are excluded from the *Act*. I have found that some portions do not contain PHI, are subject to the *Act* and should be disclosed since no exemption under the *Act* applies.

[93] I have determined that some of the information the ministry severed under section 21(1) of the *Act* is not personal information. The remaining information severed under section 21(1) of the *Act* is exempt from disclosure as its disclosure is presumed to constitute an unjustified invasion of personal privacy, and section 23 does not apply.

ORDER:

1. I order the ministry to disclose Records 7, 12 and 13 in their entirety.

2. I order the ministry to disclose the highlighted information in Records 3, 6 and 14.

3. Disclosure is to be made to the appellant by providing him a copy of the records by **May 22, 2013**.

4. I uphold the ministry's decision with respect to the remaining information in the records.

5. In order to verify compliance with Order provisions 1 and 2, I reserve the right to require the ministry to provide me with a copy of the records provided to the appellant.

Original Signed By: April 24, 2013
Sherry Liang
Senior Adjudicator