

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3796-I

Appeal PA16-62

Ministry of Health and Long-Term Care

December 22, 2017

Summary: An independent health facility appealed a decision by the Ministry of Health and Long-Term Care to disclose parts of an assessment report and other records to a newspaper reporter under the *Freedom of Information and Protection of Privacy Act (the Act)*. It claimed that several pages of these records contain information that is exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the *Act*. In this interim order, the adjudicator upholds the ministry's decision to partly disclose these records to the requester but orders it to withhold the information relating to a former employee of the IHF, pending the receipt of further information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 17(1) and 21(1).

OVERVIEW:

[1] The appellant is an independent health facility (IHF) that objects to a decision by the Ministry of Health and Long-Term Care (the ministry) to disclose parts of an assessment report and other records to a newspaper reporter. It submits that several pages of these records contain information that is exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the *Freedom of Information and Protection of Privacy Act (the Act)*.

[2] By way of background, the *Independent Health Facilities Act*¹ provides for the establishment of IHFs in Ontario. IHFs perform procedures funded by the Ontario Health Insurance Plan that are normally performed in hospitals. According to the website of the College of Physicians and Surgeons of Ontario (CPSO),² IHFs include: (1) diagnostic facilities that provide services such as radiology, ultrasound, pulmonary function studies and sleep medicine, and (2) ambulatory care facilities that provide surgical, therapeutic and diagnostic procedures.

[3] The ministry's Director of IHFs (the Director) is responsible for licensing IHFs and also contracts with the CPSO to conduct assessments of IHFs. On an annual basis, the Director selects IHFs to be assessed by the CPSO. The assessment of each IHF is based on its adherence to CPSO guidelines called "Clinic Practice Parameters and Facility Standards." In the absence of specific guidelines, the CPSO assesses the IHF's adherence to the current generally accepted standards of practice.

[4] An assessment team makes an on-site visit to an IHF to conduct an assessment. After the visit, the assessment team prepares a report outlining all findings and submits it to the CPSO. This report specifies whether the facility is meeting the "Clinical Practice Parameters and Facility Standards" or current standards of practice. If an IHF is breaching current standards, the report will indicate how the IHF can improve to meet the standards for that specialty. The CPSO forwards the assessment report to the IHF to allow it to develop a written plan of action to address any breaches that were identified. The IHF has 14 days to respond.

[5] In some circumstances, the assessment report is sent to a facility review panel established by the CPSO. The role of the panel is to provide advice to the Director on whether the IHF's response to the assessor's recommendations has placed it in compliance with the relevant standards. It appears that the assessment report and any facility review panel findings are also sent to a CPSO medical advisor for review. Finally, the CPSO Registrar sends a letter to the Director that includes relevant records, such as the assessment report, the facility review panel's findings (if any), and the medical advisor's findings.³

[6] This appeal came about as a result of an access request under the *Act* made by a newspaper reporter who requested "all quality assurance assessments submitted to [the ministry] by the [CPSO] for [IHFs] that were found to have 'not met standards.'" In response, the ministry located responsive records relating to numerous IHFs, including the appellant, which is an IHF that provides diagnostic services, such as radiology and ultrasound. The records that the ministry located relating to this IHF include a letter from the CPSO Registrar to the Director of IHFs; a medical advisor's report; and an IHF assessment report.

¹ R.S.O. 1990, c. I-3.

² www.cpso.on.ca/Member-Information/Independent-Health-Facilities

³ *Ibid.*

[7] The ministry notified the IHF under section 28(1)(a) of the *Act* that these records might contain information referred to in the section 17(1) exemption that would affect its interests if disclosed. It further stated that if the IHF objected to the ministry disclosing these records to the requester, it should submit representations explaining why the information in the records is exempt from disclosure under section 17(1). In response, the IHF submitted representations to the ministry in which it claimed that some pages of the records contain information that is exempt under section 17(1).

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

[9] The requester did not appeal the ministry's refusal to withhold this information from the records. However, the IHF appealed the ministry's decision to disclose the remainder of the records to the requester. This appeal was assigned to a mediator, who attempted to resolve the issues in dispute between the parties. During mediation, the IHF reiterated its claim that some information in the records is exempt from disclosure under section 17(1) of the *Act*. In addition, the requester raised the public interest override in section 23 of the *Act*.

[10] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. The adjudicator assigned to this appeal sent a Notice of Inquiry to the IHF, the ministry and the requester. She invited them to submit representations on the section 17(1) exemption and the public interest override in section 23 of the *Act*. However, none of the parties chose to submit representations.

[11] The adjudicator also noted that the records that the ministry decided to disclose might contain additional personal information. She notified the requester, who confirmed that he is not seeking access to such information.

[12] This appeal was then transferred to me. In this interim order, I find that the records at issue are not exempt under section 17(1) of the *Act*. I uphold the ministry's decision to partly disclose these records to the requester but order it to withhold the information relating to a former employee of the IHF, pending the receipt of further information.

⁴ S.O. 2004, c. 3, Sched. A.

RECORDS:

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

General description of record	Page numbers	Ministry's decision	Exemption claimed by appellant
Letter from the CPSO registrar to the Director of IHFs	30-1	Disclose in full, except for personal information and personal health information	s. 17(1)
Medical advisor's report	30-2 to 30-3	Disclose in full, except for personal information and personal health information	s. 17(1)
IHF assessment report	30-4 to 30-28	Disclose in full, except for personal information and personal health information	s. 17(1)

DISCUSSION:

THIRD PARTY INFORMATION

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

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

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[15] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁵ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.⁶

[16] For section 17(1) to apply, the party resisting disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[17] The IHF, which is the party resisting disclosure of the records at issue, did not submit any representations to this office. The only evidence that I have before me that sets out the IHF’s position is found in the representations that it submitted to the ministry on whether the records should be disclosed.

[18] In these representations, the IHF objects to the ministry disclosing the following pages of the records: pages 30-2, 30-11, 30-12, 30-21, 30-24, 30-25, 30-26, 30-27 and 30-28. It submits that these pages contain “labour relations information supplied in confidence to assist the assessor’s understanding of their findings.” It then addresses the harms component in part 3 of the section 17(1) test and submits that public disclosure of this information could constitute an undue loss to a former employee

⁵ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

because it could undermine the fairness and completeness of a specific regulatory college committee hearing taking place relating to him. In addition, it submits that a further undue loss could occur to the IHF itself because disclosure could open it to a charge of having contributed to irreparable harm to its former employee by prejudicing his right to a fair hearing.

[19] Even if I were to accept that the parts of the records at issue identified by the IHF reveal information that is "labour relations information" that was "supplied in confidence" (parts 1 and 2 of the section 17(1) test), I find that the IHF's submissions fall short of the type of evidence required to show that the harms requirement in part 3 of the section 17(1) test is met.

[20] With respect to part 3 of the test, the party resisting disclosure must provide sufficient evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁷

[21] The IHF appears to be relying on the harm in paragraph (c) of the section 17(1), which requires an institution to refuse to disclose a record that reveals specified types of information (including labour relations information), supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to "result in undue loss or gain to any person, group, committee or financial institution or agency."

[22] The IHF was subject to an assessment to determine whether it was meeting the "Clinical Practice Parameters and Facility Standards" set by the CPSO. Some parts of the assessment report and other records make allegations about the competence of a former IHF employee with respect to the delivery of diagnostic services to patients.

[23] The thrust of the IHF's submissions is that disclosing those parts of the records to the requester could reasonably be expected to result in "undue loss" for both its former employee and itself because doing so could undermine the fairness of a specific regulatory college committee hearing relating to its former employee. However, these submissions do not explain how disclosing the information in the records to the requester could actually undermine the fairness of that hearing and reasonably be expected to result in a loss that is "undue" for both its former employee and itself. In my view, the IHF's submissions are speculative and unconvincing and I agree with the ministry's decision that the IHF has not established that these parts of the records are exempt under section 17(1)(c).

[24] In these circumstances, I find that disclosing these parts of the records to the requester could not reasonably be expected to result in the harms contemplated in

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

section 17(1)(c). In short, I find that the parts of the records that the ministry decided to disclose to the requester are not exempt from disclosure under section 17(1).

ADDITIONAL ISSUE – PERSONAL INFORMATION/PERSONAL PRIVACY

[25] The mandatory personal privacy exemption in section 21(1) of the *Act* only applies to “personal information.” The term “personal information” is defined in section 2(1) as “recorded information about an identifiable individual” and includes the types of information listed in paragraphs (a) to (h) of that definition.

[26] However, under section 2(3) of the *Act*, 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. Similarly, IPC orders have found that to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.⁸ However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁹

[27] A series of orders have found that information that involves an examination of an employee’s performance, or an investigation into their conduct, qualifies as that individual’s “personal information,” as that term is defined in section 2(1), because it reveals something of a personal nature about the individual.¹⁰ However, whether such information qualifies as an individual’s “personal information” and, if so, whether it is exempt under the mandatory personal privacy exemption in section 21(1), is fact specific and must be assessed on a case-by-case basis.

[28] As noted above, the ministry decided to disclose to the requester those parts of the records that include allegations made about the competence of the IHF’s former employee, including that individual’s name and job title. However, because the ministry did not submit any representations to the IPC during this inquiry, it is not clear to me whether it decided to disclose this information because it did not consider it to be the “personal information” of the IHF’s former employee, which means that it cannot qualify for exemption under section 21(1), or for some other reason.

[29] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹¹ I would emphasize that I have not decided whether the information relating to the IHF’s former employee is that

⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁹ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁰ See, for example, Orders MO-3449-I, MO-2477, PO-3117, PO-2570, PO-2516, PO-2271 and P-1180.

¹¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

individual's "personal information" or whether it is exempt under section 21(1). Nevertheless, I have considered whether it is possible to de-identify the information relating to the IHF's former employee by severing his name, which would mean that the remaining information could not qualify as his "personal information," as that term is defined in section 2(1), and could therefore be disclosed.¹² I find that even if the name of the former IHF employee is severed, it would still be reasonable to expect that he may be identified if the remaining information is disclosed, because it appears that he was the only individual at that facility who performed a particular job function.

[30] As a result, I have decided to resolve this issue in the following manner. My decision here will be an interim order, and I will order the ministry to sever the information relating to the IHF's former employee before disclosing the parts of records to the requester that are not exempt under section 17(1) of the *Act*. In order provision 4 below, I will give the requester an opportunity to notify me within 45 days whether he is seeking access to the information in the records relating to that individual.

[31] If the requester does not wish to seek access to this information, no final order will be issued. However, if he confirms that he is seeking access to this information, I will make reasonable efforts to provide the IHF's former employee with a Notice of Inquiry and give him an opportunity to submit representations to me on the issues in this appeal, including whether the records contain his personal information.

ORDER:

1. I uphold the ministry's decision to partly disclose the records to the requester, except for the information relating to the IHF's former employee.
2. I am providing the ministry with a copy of the records and highlighted this information relating to the IHF's former employee in green. To be clear, before disclosing the records to the requester, the ministry should withhold both the personal information and the personal health information that it previously severed under its original access decision. In addition, it should withhold the information relating to the IHF's former employee that I have highlighted in green.
3. I order the ministry to disclose the severed records to the requester by **February 5, 2018** but not before **January 29, 2018**.

¹² Section 10(2) of the *Act* requires an institution to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. In Order P-230, the adjudicator found that in applying subsection 10(2) to the information at issue in an appeal, it is necessary to determine whether severing personal identifiers will remove the remaining information from the scope of the definition of "personal information" under subsection 2(1).

4. The requester should notify me by **February 12, 2018** whether he is seeking access to the information relating to the IHF's former employee. This information includes that individual's name, job title and the allegations about his competence.

Original Signed by: _____
Colin Bhattacharjee
Adjudicator

December 22, 2017 _____