

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3826-I

Appeal PA16-53

Ministry of Health and Long-Term Care

March 8, 2018

Summary: An independent health facility appealed a decision by the Ministry of Health and Long-Term Care to disclose parts of an assessment report and other records to a newspaper reporter under the *Freedom of Information and Protection of Privacy Act (the Act)*. It claimed that these records contain information that is exempt from disclosure under the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. In this interim order, the adjudicator finds that most of the information in these records is not exempt under sections 17(1) or 21(1) and upholds the ministry's decision to disclose this information to the requester. However, he orders the ministry to withhold information relating to two IHF employees that might constitute their personal information, 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 these records contain information that is exempt from disclosure under the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) 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 or consultant 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 or consultant'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 sleep medicine. 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; an IHF facility review panel 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 about the access request under section 28 of the *Act* and 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 sections 17(1) or 21(1). In response, the IHF submitted representations to the ministry in which it claimed that the records contain information that is exempt under both sections 17(1) and 21(1).

[8] The ministry then sent a decision letter to both the requester and the IHF which stated that it did not agree with most of the IHF's representations 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) of the *Act* and also the personal health information of patients, which is protected from disclosure under the *Personal Health Information Protection Act (PHIPA)*.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 and reiterated its claim that these parts of the records are exempt from disclosure under sections 17(1) and 21(1). In addition to setting out the reasons for its appeal in an appeal form, the IHF also attached other documents to support its position, including an affidavit from one of its legal counsel and the submissions that it had provided to the ministry.

[10] This appeal was assigned to a mediator, who attempted to resolve the issues in dispute between the parties. During mediation, the requester raised the public interest override in section 23 of the *Act*.

[11] 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 issues to be resolved in this appeal. Neither the ministry nor the requester submitted any representations.

[12] The IHF stated that it did not wish to make "any further submissions." As noted above, the IHF submitted a number of documents to the IPC at the time it filed its appeal, including an affidavit from one of its legal counsel and the submissions that it had provided to the ministry. Consequently, I have decided to treat all of these documents as the IHF's representations in this appeal.

[13] This appeal was then transferred to me. In this interim order, I find that most of the information in the records is not exempt from disclosure under sections 17(1) or 21(1) of the *Act*, and I uphold the ministry's decision to disclose this information to the requester. However, I order the ministry to withhold information relating to two IHF employees that might constitute their personal information, pending the receipt of

⁴ S.O. 2004, c. 3, Sched. A.

further information.

RECORDS:

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

General description of record	Page numbers	Ministry's decision	Exemption(s) claimed by appellant
Letter from CPSO Registrar to ministry's Director of IHFs	39-1	Disclose in full, except for personal information	s. 17(1)
Medical advisor's report	39-2 to 39-3	Disclose in full, except for personal information and personal health information	s. 17(1) s. 21(1)
IHF facility review panel report	39-4 to 39-5	Disclose in full, except for personal information and personal health information	s. 17(1) s. 21(1)
IHF assessment report	39-6 to 39-34	Disclose in full, except for personal information and personal health information	s. 17(1) s. 21(1)

ISSUES:

- A. Does the mandatory exemption at section 17(1) apply to the records?
- B. Does the mandatory exemption at section 21(1) apply to any information in the records?

DISCUSSION:

THIRD PARTY INFORMATION

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

[15] The IHF claims that some 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.

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

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

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.

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

[18] With respect to part 1 of the section 17(1) test, the IHF submits that the records reveal a trade secret, scientific, technical and commercial information, and it provides some examples of such information in the records. With respect to part 2 of the test, the IHF submits that because of confidentiality and other requirements in the *Independent Health Facilities Act*⁷, it provided this information to the ministry in confidence on the understanding and belief that such information would not be released to the public.

[19] Even if I were to accept that the IHF's submissions satisfy parts 1 and 2 of the section 17(1) test, I find, for the reasons that follow, that its submissions fall short of the type of evidence required to show that the harms requirement in part 3 of the section 17(1) test is met.

[20] With respect to part 3 of the test, the party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not 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.⁸

[21] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁹

[22] The IHF is relying on sections 17(1)(a), (b) and (c) of the *Act*. At the outset, I note that the IHF has provided no evidence to support the application of section 17(1)(b), which requires the party resisting disclosure to show that disclosing the records could reasonably be expected "to 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." Instead, most of its submissions seem to focus on the types of harms that might fall within sections 17(1)(a) and (c). To satisfy the harms

⁷ See note 1.

⁸Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII) at paras. 52-4.

⁹ Order PO-2435.

requirements in those provisions, the IHF must show that disclosing the information in the records could reasonably be expected to:

- prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization [section 17(1)(a)]; or
- result in undue loss or gain to any person, group, committee or financial institution or agency [section 17(1)(c)].

[23] I do not find the IHF's submissions to be convincing as they relate to the harms in sections 17(1)(a) and (c) for several reasons.

[24] First, the IHF claims the records do not include the IHF's response to the assessors' findings and recommendations or the follow-up that took place after the assessment in 2013. It submits that the records provide inaccurate, outdated and misleading information and disclosing them would have "far reaching and detrimental implications" for itself.

[25] In my view, there is nothing that precludes the IHF from providing the requester with its response to the assessors' findings and recommendations and other information, if it is concerned that the records at issue alone provide inaccurate, outdated or misleading information. Given that the IHF has the option of providing the requester with such information, I am not persuaded that disclosing the information in the records could reasonably be expected to prejudice "significantly" the IHF's competitive position or interfere significantly with the contractual or other negotiations of the IHF, as stipulated in section 17(1)(a) or result in an "undue" loss for the IHF or an "undue" gain for another person or group, as required by section 17(1)(c).

[26] Second, the IHF claims that a previous access request under the *Act* for similar records relating to itself had an adverse impact on a potential financial transaction. It submits that disclosing the records at issue in this particular appeal would have a similar impact by prejudicing its competitive position in the marketplace and resulting in "interference with the facility's contractual relations with other parties" and a "potentially significant financial loss" for itself.

[27] It is possible that disclosing the information in the records might have some impact on the potential financial transaction that the IHF refers to in its representations. However, to satisfy the harms requirements in section 17(1)(a), the IHF must show that disclosing the information in the assessment report and other records could reasonably be expected to prejudice "significantly" its competitive position or interfere "significantly" with the contractual or other negotiations of a person, group of persons, or organization. I have reviewed the findings and recommendations in the assessment report and other information in the records, and given their nature, am not convinced that disclosing such information could reasonably be expected to hamper such a

potential financial transaction in a manner that meet the threshold set out in section 17(1)(a).

[28] In addition, although the IHF claims that disclosing the records would result in a “potentially significant financial loss” for itself by impacting the potential financial transaction, that is not the test set out in section 17(1)(c). With respect to the “loss” component in that provision, the IHF must show that disclosing the assessment report and other records could reasonably be expected to result in an “undue” loss for itself. Given that the assessors’ findings and recommendations are based on the IHF’s own failure to meet the sleep medicine parameters and standards set by the CPSO, any loss for the IHF that could reasonably be expected to occur from disclosing the information in the records would not, in my view, be “undue.”

[29] Third, the IHF refers to the impact of a previous access request and claims disclosing the records would have adverse staffing implications, which would be “devastating” to the IHF and would negatively impact patient care. However, it has not presented any supporting evidence to show that there was an actual adverse impact on its human resources capacity or patient care as a result of the previous access request. In my view, the IHF’s submissions with respect to the staffing implications of the disclosing the information in the records are largely speculative.

[30] Moreover, even if disclosing the records at issue in this appeal had adverse staffing implications, I am not convinced, given the nature of the assessment report’s findings and recommendations and other records, that this disclosure could reasonably be expected to prejudice “significantly” its competitive position, as required by section 17(1)(a). I also find that any loss for the IHF that could reasonably be expected to result by disclosing the information in the records would not be “undue,” as required by section 17(1)(c), given that the assessors’ findings and recommendations in the records are based on the IHF’s own failure to meet the sleep medicine parameters and standards set by the CPSO.

[31] Fourth, the IHF claims that if the information in the records is disclosed, physicians will stop referring patients to it for sleep medicine services, which will cause it harm. In my view, it is certainly possible that some physicians might decide to refer their patients elsewhere if they agree with the findings in the records that the IHF is not meeting the CPSO’s parameters and standards for sleep medicine. However, given the nature of the findings and recommendations in the assessment report and other records, I am not convinced that any loss in physician referrals that might result from disclosing this information could reasonably be expected to prejudice “significantly” its competitive position, as required by section 17(1)(a).

[32] In addition, similar to my findings above, I find that any drop in patient referrals by physicians that might occur because the information in the records is disclosed could not reasonably be expected to result in a loss for the IHF that is “undue,” given that the assessors’ findings and recommendations in the records are based on the IHF’s own

failure to meet the sleep medicine parameters and standards set by the CPSO.

[33] Finally, the IHF claims that disclosing the records would have a “direct negative impact” on its competitive position because disclosing information relating to its policies, types of equipment and procedures, would reveal its business practices and how it operates. In its submissions on part 1 of the section 17(1) test, it claims that such information is not available in any text book or other resources available to physicians, service providers or the public.

[34] However, beyond these generalized claims, the IHF does not provide specific evidence to explain how or why its policies, types of equipment and procedures are unique or different from its competitors or how its competitors could use this information to undermine the IHF’s competitive position. In these circumstances I find that the IHF has not provided the type of evidence required to show that disclosing such information could reasonably be expected to prejudice “significantly” its competitive position, as required by section 17(1)(a) or result in an “undue” loss for itself or an “undue” gain for any competitors, as required by section 17(1)(c).

[35] In short, I find that the IHF has not met the burden of showing that disclosing the information in the records could reasonably be expected to result in the harms set out in sections 17(1)(a), (b) or (c) of the *Act*. As a result, I uphold the ministry’s decision that such information is not exempt under section 17(1).

[36] Finally, it should be noted that section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions,¹⁰ and it serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.¹¹ However, as noted above, the information in the records that are at issue in this appeal relates to the assessors’ findings that the IHF did not meet some parameters and standards set by the CPSO. In my view, the harms requirements in section 17(1) were not designed to shield such information, which could impact patient safety, from public scrutiny.

PERSONAL PRIVACY

B. Does the mandatory exemption at section 21(1) apply to any information in the records?

[37] The personal privacy exemption in section 21(1) of the *Act* is mandatory and I am required to consider whether it applies to any information in the records.

[38] Where a requester seeks personal information of another individual, section

¹⁰ See note 5.

¹¹ See note 6.

21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The exception in section 21(1)(f) allows an institution to disclose personal information if doing so would not be an unjustified invasion of personal privacy.

[39] However, section 21(1) only applies to “personal information,” as that term is defined in section 2(1) of the *Act*. Consequently, as a preliminary matter, it must first be determined whether information relating to an individual in a record constitutes their “personal information,” because if it is not, it cannot be exempt from disclosure under section 21(1).

[40] As noted above, after the ministry received the requester’s access request, it notified the IHF under section 28 of the *Act* and 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 the mandatory exemptions in the *Act*, including section 21(1). In response, the IHF submitted representations to the ministry in which it claimed, in part, that the records contain information that is exempt under 21(1).

[41] In these representations, the IHF claimed that the identities of the IHF’s owner and its staff are exempt under section 21(1). In addition, it claimed that the records also contained the personal health information of its patients, which should be withheld from the requester. In its decision letter to the IHF and the appellant, the ministry withheld some personal information under section 21(1), including “billing numbers” and “facility ownership information.” In addition, it withheld the personal health information of patients, which is protected from disclosure under *PHIPA*.¹²

[42] The requester did not appeal the ministry’s decision to withhold some personal information and the personal health information of patients. As a result, that information is not at issue in this appeal and is not subject to disclosure. However, the ministry did not decide to withhold the names and other information relating to the IHF’s employees, which includes both physicians and technical staff. In its representations, the IHF objects to the disclosure of such information and submits that it is exempt from disclosure under section 21(1), based on the application of specific factors in section 21(2) and presumptions in section 21(3).¹³

[43] During the adjudication stage of the appeal process, the Notice of Inquiry that was sent to the requester identified some information in the records that might be “personal information,” as that term is defined in section 2(1) of the *Act*. The requester did not submit representations but he advised the IPC that he is not seeking any personal information.

¹² See note 4.

¹³ Sections 21(2)(e) and (i) and 21(3)(d) and (f).

[44] As a preliminary matter, it must first be determined whether the names and other information relating to the IHF's staff constitute their "personal information," because if it is not, it cannot be exempt from disclosure under section 21(1). 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.

[45] 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.¹⁴ 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.¹⁵

[46] In my view, some of the information in the assessment report and other records specifically the names and job titles of the IHF's staff, clearly identifies them in a professional capacity, rather than a personal capacity, as contemplated by section 2(3). Given that this information is not these individuals' personal information, I find that it cannot be exempt from disclosure under section 21(1) of the *Act*.

[47] There is some information in the records that refers to the fact that specific IHF staff do not have particular training or qualifications. On its face, this information does not appear to qualify as these individuals' "personal information," because it is associated with them in their professional capacity, not their personal capacity, and does not reveal anything of a personal nature about them.

[48] I have also considered whether this information might be these individuals' "personal information" because paragraph (b) of the definition of that term in section 2(1) includes an individual's "education" or "employment history." In my view, the information in the records that refers to the fact that an employee lacks particular training or qualifications is a reference to their current employment, not their education or employment history. I find that this information does not qualify as these individuals' "personal information" and cannot, therefore, be exempt under section 21(1).

[49] As noted above, most of the information in the records relates to the assessors' findings that the IHF did not meet some parameters and standards set by the CPSO. Some of these findings are not directly linked to any particular IHF employee, while others discuss a particular employee's job duties but do not makes allegations about their competence or job performance. In my view, the latter type of information is

¹⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

associated with these individuals in their professional rather than their personal capacities and does not reveal anything personal about them. I find that such information does not qualify as their "personal information" and cannot, therefore, be exempt under section 21(1).

[50] However, there is also some information in the records relating to two IHF employees that makes allegations about their competence or job performance by associating them with the deficiencies identified by the assessors. A series of IPC 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.¹⁶ Whether such information qualifies as an individual's "personal information" and, if so, whether it is exempt under section 21(1), is fact specific and must be assessed on a case-by-case basis. Moreover, even such information is exempt under section 21(1), it must still be disclosed if the public interest override in section 23 applies.

[51] The ministry decided to disclose to the requester those parts of the records that include the allegations about the competence or job performance of the two employees. However, because the ministry did not submit any representations to the IPC during this inquiry, it is not clear to me whether it decided to disclose this information because it did not consider it to be these individuals' "personal information," which means that it cannot qualify for exemption under section 21(1), or for some other reason.

[52] 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 two IHF employees that makes allegations about their competence or job performance before disclosing the remaining parts of records to the requester that are not exempt under sections 17(1) or 21(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 those individuals.

[53] 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, in the interests of procedural fairness, to provide the IHF's two employees with a Notice of Inquiry and give them an opportunity to submit representations to me on the issues in this appeal, including whether the records contain their personal information.

¹⁶ See, for example, Orders MO-3449-I, MO-2477, PO-3117, PO-2570, PO-2516, PO-2271 and P-1180.

ORDER:

1. I uphold the ministry's decision to partly disclose the records to the requester, except for the information relating to the two IHF employees that makes allegations about their competence or job performance.
2. I am providing the ministry with a copy of the records and have highlighted the information relating to the two IHF employees 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 two IHF employees that I have highlighted in green.
3. I order the ministry to disclose the severed records to the requester by **April 16, 2018** but not before **April 9, 2018**.
4. The requester should notify me by **April 23, 2018** whether he is seeking access to the information relating to the two IHF employees that makes allegations about their competence or job performance.

Original Signed by: _____

Colin Bhattacharjee
Adjudicator

March 8, 2018 _____