

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4025

Appeal PA19-00047

Ministry of Health

January 30, 2020

**Summary:** The Ministry of Health (the ministry) is responsible for licensing independent health facilities (IHF), which are clinics that perform procedures funded by the Ontario Health Insurance Plan that are normally done in hospitals. The ministry contracts with the College of Physicians and Surgeons of Ontario to conduct assessments of IHFs. An IHF that offers diagnostic imaging services appealed a decision by the ministry to disclose parts of correspondence and three assessment reports about that IHF to an individual who made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The IHF claimed that these records are exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the *Act* but did not provide any evidence to the adjudicator to support its claim. In this order, the adjudicator finds that the records are not exempt from disclosure under section 17(1) and upholds the ministry's decision to partly disclose these records to the requester.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1); *Personal Health Information Protection Act, 2004*, section 8(4).

### OVERVIEW:

[1] The appellant is an independent health facility (IHF) that objects to a decision by the Ministry of Health (the ministry) to disclose parts of correspondence and three assessment reports to a requester. It submits that these records are 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<sup>1</sup> provides for the establishment of IHFs in Ontario. IHFs perform procedures funded by the Ontario Health Insurance Plan that are normally done in hospitals. According to the website of the College of Physicians and Surgeons of Ontario (CPSO),<sup>2</sup> 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. The CPSO also may conduct an unannounced assessment of an IHF.

[4] An assessment team makes an on-site visit to the IHF to conduct the 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.

[5] It appears that the assessment report is also sent to the CPSO's medical advisor for review. Finally, the CPSO Registrar sends a letter to the Director that includes relevant records, such as the assessment report and the medical advisor's report.<sup>3</sup>

[6] This appeal came about as a result of an access request under the Act made by a individual who was seeking records relating to an IHF that offers diagnostic imaging services. His request stated, in part:

. . . [W]e are requesting information on only the current Licensee. Of particular interest to my request is a move that medical imaging [license number] made on October 31, 2016 from [a specific address] in Guelph to [a different address] in Guelph. The move was a distance of 6.9 km. It is my understanding that a move in excess of 5km across a catchment area requires consent from the Director of the IHFP. I am inquiring whether

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<sup>1</sup> R.S.O. 1990, c. I-3.

<sup>2</sup> <http://www.cpso.on.ca/Physicians/Your-Practice/Quality-in-Practice/Clinic-Inspections-Special-Programs/Independent-Health-Facilities>

<sup>3</sup> *Ibid.*

any such relocation application and subsequent approval was obtained prior to the move.

Furthermore, it is my understanding that the holder of this license has been found in breach of best medical practices by the College of Radiologists as well as having been penalized for failings in quality and standards of services during routine IHFP inspections performed by CPSO. As a result, I would like to obtain information related to any and all failures of this licensee to abide by legislation as set out by the IHFP including but not limited to:

- 1) Failure to uphold the Personal Health Information Protection Act
- 2) Failure to adhere to a preventive maintenance schedule
- 3) Breach of clinical practice or accepted medical standards of practice
- 4) Failures in quality management
- 5) Failure to maintain proper cleanliness, disinfection or sterilization of equipment

I would also like to request information on any disciplinary actions, penalties, or sanctions imposed by the IHFP that are related to the infractions outlined above. Specifically, I would like copies of warning letters, inspection reports that indicate failures to comply with legislation, letters indicating penalties, restrictions as well as letters and/or reports outlining disciplinary actions undertaken by the Ministry against the license holder. Very specifically, I would like dates ranging from January 1st 2012 to April 30, 2018.

[7] In response, the ministry located seven records that are responsive to the access request, including correspondence and three assessment reports. It then notified the IHF to which the records relate and asked for its views as to whether these records are exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the Act. It also notified the CPSO and Wellington-Dufferin-Guelph Public Health about some of the records and asked for their views as to whether the records should be disclosed. The IHF did not respond to the ministry but the other two bodies that were notified sent responses which stated that they did not object to the ministry disclosing the records to the requester.

[8] The ministry then issued a decision letter to both the requester and the IHF stating that it had decided to disclose the records to the requester but was withholding information relating to some individuals under the mandatory exemption in section 21(1) (personal privacy) of the Act and the personal health information of the IHF's

patients under section 8(1) of the Personal Health Information Protection Act (PHIPA).

[9] The requester did not appeal the ministry's decision to withhold some information in the records under section 21(1) of the Act and section 8(1) of PHIPA. As a result, that information is not at issue in this appeal. However, the IHF appealed the ministry's decision to disclose the remainder of the records to the requester and claimed that this information is exempt from disclosure under section 17(1) of the Act.

[10] This office assigned a mediator to the appeal, who attempted to resolve the issues in dispute between the parties. This appeal was not resolved during mediation and was moved to adjudication, where an adjudicator may conduct an inquiry.

[11] I started my inquiry by sending a notice of inquiry to the IHF which invited it to submit representations to me that explain why the information in the records is exempt from disclosure under section 17(1). I did not receive any representations from the IHF. An adjudication review officer with this office followed up with the IHF but did not receive a response. I then decided that it was not necessary to seek representations from the other parties.

[12] In this order, I find that the records are not exempt from disclosure under section 17(1) of the Act and uphold the ministry's decision to partly disclose these records to the requester.

## **RECORDS:**

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

<b>Record number</b>	<b>General description of record</b>	<b>Ministry's decision</b>	<b>Exemption claimed by appellant</b>
1	<ul style="list-style-type: none"><li>• Letter from CPSO registrar to the Director of IHFs</li><li>• CPSO medical advisor's report</li><li>• Independent Health Facilities Assessment Report</li></ul>	Disclose in full, except for personal information and personal health information	s. 17(1)
2	<ul style="list-style-type: none"><li>• Letter from ministry to IHF</li></ul>	Disclose in full, except for personal information	s. 17(1)

3	<ul style="list-style-type: none"> <li>• Letter from CPSO registrar to Director of IHFs</li> <li>• CPSO medical advisor's report</li> <li>• Unannounced IHF Assessment Report</li> </ul>	Disclose in full, except for personal information and personal health information	s. 17(1)
4	<ul style="list-style-type: none"> <li>• Letter from ministry to IHF</li> </ul>	Disclose in full, except for personal information	s. 17(1)
5	<ul style="list-style-type: none"> <li>• Letter from ministry to IHF</li> </ul>	Disclose in full, except for personal information	s. 17(1)
6	<ul style="list-style-type: none"> <li>• Memo to IHFs re infection prevention and control</li> </ul>	Disclose in full	s. 17(1)
7	<ul style="list-style-type: none"> <li>• Letter from CPSO registrar to Director of IHFs</li> <li>• Independent Health Facilities Assessment Report</li> </ul>	Disclose in full, except for personal information	s. 17(1)

**DISCUSSION:**

**PRELIMINARY ISSUE**

[14] Before assessing whether the records are exempt from disclosure under section 17(1) of the Act, I have decided to briefly address a preliminary issue that arises from section 8(4) of PHIPA. This provision states:

8(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.

[15] Section 4(1) of PHIPA, which defines "personal health information," states, in part:

In this Act,

“personal health information”, subject to subsections (3) and (4), means 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,

. . . .

[16] The only types of “personal health information” that are found in the records at issue fall within paragraphs (a) and (b) of section 4(1). Based on my review of the records, I am satisfied that the ministry has reasonably severed all of these types of personal health information from these records. I find, therefore, that in accordance with section 8(4) of PHIPA, the requester’s right to access these records under section 10 of the Act is not limited by PHIPA.

### **THIRD PARTY INFORMATION**

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

[17] The IHF claims that the records at issue are exempt from disclosure under section 17(1) of the Act. However, with the exception of the appeal form that it submitted to this office, it did not provide any representations on whether this exemption applies to the records. Nevertheless, because section 17(1) is a mandatory exemption, I will consider whether it applies to the records.

[18] Section 17(1) 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.

[19] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>4</sup> 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.<sup>5</sup>

[20] 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.

[21] In the appeal form that it submitted to this office, the IHF does not specifically address any part of the three-part test that the party resisting disclosure must satisfy to demonstrate that the section 17(1) exemption applies to the records at issue. It simply states:

We are currently involved in litigation and do not wish disclosure. Request was related to another location, items related to another location have been disclosed.

[22] With respect to part 3 of the test, the party resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.<sup>6</sup> It

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<sup>4</sup> *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.*).

<sup>5</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>6</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>7</sup>

[23] The reasons cited by the IHF in its appeal letter for not wanting the records disclosed fall far short of the type of evidence required to show that the harms listed in paragraph (a), (b), (c) and/or (d) of section 17(1) could reasonably be expected to occur if the records are disclosed to the requester. For example, the IHF has not provided any evidence to show that disclosure of the records could reasonably be expected to prejudice significantly its competitive position [section 17(1)(a)] or result in undue loss to it [section 17(1)(c)].

[24] Since all three parts of the test must be satisfied for a record to be exempt from disclosure under section 17(1), and since I have found that part 3 is not satisfied, I do not need to consider the first two parts of the test.

[25] In short, I find that the records are not exempt from disclosure under section 17(1).

**ORDER:**

1. I uphold the ministry's decision to partly disclose the records to the requester. The appeal is dismissed.
2. I order the ministry to disclose the severed records to the requester by **March 6, 2020** but not before **February 28, 2020**.

Original signed by \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

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January 30, 2020

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<sup>7</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674.