Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4136

Appeal PA18-283

Ministry of Long-Term Care

March 31, 2021

Summary: This is a third party appeal of an access decision made by the former Ministry of Health and Long-Term Care to disclose, in part, a survey completed by long-term care homes relating to payments made to them by pharmacy service providers. The appellant claims that the record is exempt from disclosure under the mandatory exemption in section 17(1) (third party information). In this order, the adjudicator finds that the appellant has not provided sufficient evidence that the three-part test in section 17(1) is met and, therefore, the record is not exempt under section 17(1). The ministry is ordered to disclose the record, in part, to the requester.

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

Cases Considered: *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v Canada (Health),* 2012 SCC 3 (CanLII).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the former Ministry of Health and Long-Term Care (the ministry). The access request, made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) was for copies of all past, present and future correspondence between the

ministry and licenced long-term care (LTC) homes relating to the reporting of payments to LTC homes from their pharmacy service provider(s) and co-payments charged to Ontario Drug Benefit recipients in LTC homes, including without limitation any relevant reports prepared through Survey Monkey.

[2] The ministry identified numerous responsive records. Before making its decision on access to the records, the ministry notified approximately 600 long-term care homes (third parties) to obtain their views on disclosure of the records. Some of the third parties provided the ministry with submissions on whether or not the records should be disclosed.

[3] After considering the representations from the third parties, the ministry issued its final decision. The ministry decided that the records could be disclosed in part, but that portions of the records should be withheld, claiming the application of the mandatory exemption in sections 17(1)(a), (b) and/or (c) (third party information) and the discretionary exemption in sections 18(1)(a) and/or (c) (economic and other interests) of the *Act.*

[4] Three of the third parties appealed the ministry's decision to this office, and three appeal files were opened. In this appeal, the third party (now the appellant) appealed the ministry's decision to disclose a record related to the long-term care homes it owns and manages. The ministry withheld substantial portions of this record, claiming the application of sections 17(1) and 18(1).

[5] During the mediation of the appeal, the appellant confirmed that it does not object to the names of the long-term care homes, the number of beds at each home and the applicable LHIN for each home being disclosed. As a result, this information is no longer at issue and it should be disclosed to the requester. The appellant also confirmed that it objected to any other information in the survey being disclosed, claiming the application of section 17(1)(a), (b) and (c) of the *Act* to that information.

[6] The requester confirmed with the mediator that she was seeking access only to the survey results, and that she was not seeking access to emails or other documents. As a result, the email addresses of staff members are no longer at issue, and should not be disclosed to the requester. In addition, the requester confirmed that she sought access only to the portions of the records that the ministry agreed to disclose, and that she was not appealing the ministry's decision to withhold the remaining information.

[7] The appeal was then transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act.*

[8] The adjudicator assigned to this appeal commenced her inquiry by seeking representations from the ministry and the appellant. Both the ministry and the appellant provided representations. Portions of both sets of representations were withheld, as they meet this office's confidentiality criteria. The adjudicator then sought, and

received, reply representations from the appellant. The appeal was then transferred to me to continue the inquiry. I provided the requester with the opportunity to provide representations, but none were received. While I will not be referring to the confidential representations provided by the appellant and the ministry, I took them into consideration in making my decision.

[9] For the reasons that follow, I find that the appellant has not provided sufficient evidence the meet the three-part test in section 17(1) and, therefore, the record is not exempt under section 17(1). I order the ministry to disclose the record to the requester, subject to certain severances detailed in order provision 1.

RECORDS:

[10] The record at issue is a completed survey, consisting of a 29-page excel spreadsheet.

DISCUSSION:

[11] The ministry provided background information about the record at issue, which consists of a survey that was completed by the appellant as a long-term care home provider. This survey was completed in response to a request under section 88(2) of the *Long-Term Care Homes Act, 2007*. The ministry required the completed survey in order to gain a better understanding of the prevalence of monetary payments and payments-in-kind that some long-term care homes received or were receiving from their pharmacy service providers. Even long-term care homes that did not receive payments or payments-in-kind from their pharmacy service provider were required to complete and submit the survey.

[12] As previously stated, the ministry withheld substantial information in the record, claiming the mandatory exemption in section 17(1) and the discretionary exemption in section 18. These withheld portions at not at issue in this appeal. The sole issue in this appeal is whether, as the appellant claims, sections 17(1)(a) through (c) apply to the remaining information at issue. These sections state:

> 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;

[13] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

[14] For section 17(1) to apply, the institution and/or the third party 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), and/or (c) of section 17(1) will occur.

Part 1: type of information

[15] The types of information listed in section 17(1) have been discussed in prior orders. The types of information that may be relevant in this appeal include the following:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[3] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[4]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

[1] *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.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] Order PO-2010.
[4] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[5]

[16] The appellant submits that some of the information in the record is financial in that it discloses information about payments received by it, and includes information about how it reports payments in its financial records. The appellant further argues that all of the information at issue qualifies as commercial information, as it describes the terms of commercial agreements between it and certain pharmacy service providers, that is, agreements that concern the buying, selling or exchange of services.

[17] The ministry submits that the information at issue does not qualify as commercial or financial information, given its general nature. In particular, the ministry argues that the remaining information at issue is void of any specific financial values, and that generalized information on strategies or practices that have financial implications will not qualify as "financial information" for the purposes of section 17(1).

[18] In reply, the appellant argues that the information in the survey is individually and collectively commercial and financial information. In particular, the appellant submits that the information describes various core details of contracts with pharmacy service providers including the following contractual terms:

- When the contract will expire;
- Whether a payment or in-kind contribution occurred;
- Whether the compensation was framed as a per bed fee, annual or lump sum fee, including the amount;
- Whether payments or payments in-kind were made to an associated charity;
- Whether the contract involved the dispensing of particular kinds of drugs;
- Whether overall fees including component fees (lease payment and patient programs payment); and
- Whether in-kind contributions took specific forms, such as training/education, sponsorship to conferences, equipment, supplies, gift cards or discounts.

[19] The appellant goes on to argue that even if the pharmacy service providers are not identified, the appellant would be identified, revealing that it has entered into contractual relationships with the provisions and business arrangements described in the information at issue. In addition, any requester who is familiar with the long-term care sector could readily deduce who the appellant's pharmacy service providers are, and link them to the provisions of the contracts.

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[5] Order PO-2010.

[20] I have reviewed the record at issue and I agree with the ministry that there is no information in it that would qualify as "financial" information for the purposes of the first part of the three-part test in section 17(1). Conversely, I find that the record contains information that would qualify as "commercial information," as this record relates to the buying and selling of pharmacy services. As a result, the first part of the three-part test has been met.

Part 2: supplied in confidence

[21] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[6]

[22] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[7]

[23] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[8]

[24] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[9]

[25] The appellant submits that it supplied the information to the ministry at the ministry's request, and that in its cover email to the ministry, it explicitly stated that the information was highly confidential and had been consistently treated by the appellant as confidential. The appellant provided a copy of the statement it provided to the ministry, which sets out its expectation, among others, that the information would be

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[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8] Order PO-2020.
[9] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

accessed only by ministry staff who required the information in connection with their employment. The appellant also submits that, in addition to its clear statement made to the ministry, it was provided with reassurances by the ministry that the information at issue would be treated as confidential and not disclosed.

[26] The ministry submits that it does not contest that some or all of the information at issue was supplied to it in confidence, either implicitly or explicitly, by the appellant.

[27] In reply, the appellant reiterates that the information at issue was provided to the ministry based on the understanding that it would be kept in confidence, which was an understanding that was based, in part, on assurances made by the ministry. In addition, the appellant advises that it passed along those assurances to its pharmacy service providers, who in turn consented to the appellant sharing their confidential information with the ministry.

[28] Based on the evidence provided by the appellant, I am satisfied that it explicitly advised the ministry that the information it supplied to the ministry was highly confidential and had been consistently treated by the appellant as confidential. As a result, I find that the information at issue was "supplied in confidence" to the ministry by the appellant, and that the second part of the three-part test has been met.

Part 3: harms

[29] Parties 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.[10]

[30] Parties 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.[11] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or 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*.[12]

Section 17(1)(a) and (c)

[31] The appellant submits that the record concerns confidential business arrangements between two private sector entities and that its agreement with its current pharmacy provider requires that all of the terms and conditions be kept

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[10] *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.

[11] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.

[12] Order PO-2435.

confidential. The appellant argues that it could reasonably be expected that the disclosure of information would prejudice its competitive position. In particular, the disclosure could result in the transfer of pharmacy services to another provider on an extremely compressed timeline, resulting in the potential for serious errors and harms to the long-term care residents.

[32] The appellant further argues that the disclosure of the record could reasonably be expected to cause undue loss to the pharmacy service provider, stating:

> It is also our understanding that the disclosure of the Confidential Survey Information would also result in undue loss to our pharmacy service provider. The pharmacy business is extremely competitive. Hence, competitors could use information from our agreement terms to undercut our pharmacy service provider and unfairly steal customers away from them.
>
> This outcome is especially likely given that it is our belief that the Requester is a private business. We assume that the Requester is a pharmacy service provider that has requested this information in order to obtain confidential information about its competitors that will put it at a competitive advantage. Therefore, the disclosure of the Confidential Survey Information would put our current pharmacy service provider in an extremely disadvantageous negotiating position and result in undue loss to them as well. It would also put the Requester in a position where it would stand to realize undue gain.

[33] As a final comment, the appellant also notes that the ministry severed the actual dollar amounts from the record, but not the payments-in-kind. The appellant argues that it finds it "baffling" that the ministry has taken the position that payments-in-kind somehow do not deserve confidentiality, given that payments-in-kind have commercial value and can be converted to dollar amounts.

[34] The ministry submits that its position is that the appellant did not provide submissions to it capable of establishing a reasonable expectation of harm. The ministry also notes that the appellant is in the best position to demonstrate how the disclosure of the remaining information can reasonably be expected to result in one of the harms in section 17(1).

Section 17(1)(b)

[35] The appellant submits that in such a highly regulated and complex industry as long-term care, where operators are entrusted with caring for and protecting extremely vulnerable individuals, there is a strong public interest in maintaining trust and open lines of communications between regulators and owners and operators. Doing so, the appellant argues, will help ensure that challenges faced by the industry are dealt with in

a timely and appropriate manner and that the best possible care is provided for residents.

[36] The appellant goes on to argue that if owners and operators feel that any information they provide to the government going forward, regardless of how sensitive, can easily be accessed by anyone, this would have a profound chilling effect on the willingness of owners and operators to provide more information to government entities than they are strictly required by law.

[37] The ministry reiterates its position that the appellant did not provide submissions to it capable of establishing a reasonable expectation of harm. The ministry also notes that the appellant is in the best position to demonstrate how the disclosure of the remaining information can reasonably be expected to result in one of the harms in section 17(1).

[38] In reply, the appellant argues that it objects to the ministry's assertion that it has not described a sufficient level of harm to qualify for exemption under section 17(1), and affirms its section 17(1)(b) arguments.

Analysis and findings

[39] The Supreme Court of Canada has held that wherever the "could reasonably be expected to" language is used in access to information statutes, evidence well beyond or considerably above a mere possibility of harm must be provided to meet the standard of proof.[13] Accordingly, in this appeal, the appellant must provide evidence that demonstrates a risk of harm that is well beyond the merely possible or speculative to satisfy part 3 of the section 17(1) test.

[40] The failure of the appellant to satisfy the standard of proof will not defeat the claim for exemption if the harms claimed can be inferred from the surrounding circumstances. However, the IPC has repeatedly affirmed that 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.*[14]

Section 17(1)(b)

[41] Turning to section 17(1)(b), section 88(2) of the *Long Term Care Homes Act, 2007* compels a licensee of a long term care home to submit a report to the Director on any matter in a form acceptable to the Director and the licensee shall comply. The record at issue consists of a list of survey questions posed by the ministry, and the corresponding answers provided by the appellant.

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[13] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) at paras. 52-4; *Merck Frosst Canada Ltd. v Canada (Health),* 2012 SCC 3 (CanLII) paras. 197 and 199.
[14] Order PO-2435.

[42] I find that the appellant has not provided sufficient evidence to establish that if the record is disclosed, similar information will no longer be supplied to the ministry.

[43] I do not accept the appellant's representations that the "sensitivity" of the information in the survey would dampen the willingness of the appellant or similar companies or, by extension pharmacy service providers to provide the ministry with information necessary for the ministry to conduct its regulatory function regarding long term care homes.

[44] Rather, I find that section 17(1)(b) does not apply because the appellant (and companies like it) are required by law to provide the ministry with information such as that found in the record. Therefore, I find that the appellant has not demonstrated that disclosure of the information at issue would reasonably be expected to lead to the harms contemplated in section 17(1)(b). This is because of the type of information at issue, the regulatory nature of the ministry, and the requirements of the *Long Term Care Homes Act, 2007* compelling such disclosure. This is consistent with many IPC orders[15] that have found that section 17(1)(b) does not apply if a ministry has authority to compel the supplying of information, even if the ministry would prefer to have that information supplied voluntarily. Finally, even if the appellant provided more information to the ministry than required by law, I do not accept that the application of section 17(1)(b) is established simply because a record may contain information that was not statutorily required to be provided to the ministry; by itself, this is not determinative in establishing the harm under section 17(1)(b). I find that the appellant's representations are vague and speculative, and they do not establish the harms in section 17(1)(b).

Sections 17(1)(a) and 17(1)(c)

[45] With respect to sections 17(1)(a) and 17(1)(c), I find that the appellant has not persuaded me how the information at issue in the record could reasonably be expected to result in any alleged harm or how specific information from the record could be used to bring about the alleged harm in either section 17(1)(a) or 17(1)(c). The record consists of a series of questions posed by the ministry, and the appellant's answers to those questions. In my view, the information at issue is general in nature and could not reasonably be expected to prejudice significantly the appellant's competitive position or interfere significantly with contractual or other negotiations. In addition, I am not satisfied that the disclosure of the information at issue could reasonably be expected to cause undue loss to the appellant's pharmacy services provider. I also note that the appellant's assertion that the requester is a competitor of its current pharmacy provider is not relevant, as past orders of this office have held that disclosure of a record is essentially "disclosure to the world."

[46] In sum, I am not persuaded by the appellant's speculative and unsupported assertions that disclosure of the record at issue could reasonably be expected to cause

[15] See, for example, Orders PO-1666 and PO-2629.

it section 17(1) harms. I am also not satisfied on my review of the record that any of the section 17(1) harms can be inferred from the surrounding circumstances or established by the information at issue, noting that the ministry withheld substantial portions of the record, which are not at issue in this appeal.

[47] For the foregoing reasons, I uphold the ministry's decision and dismiss the appeal.

ORDER:

1. I order the ministry to disclose the record to the requester by **May 7, 2021** but not before **May 3, 2021**. The ministry is to sever the information it originally decided to withhold, as well as the email addresses in the record. In addition, I order the ministry to disclose the information that the appellant consented to disclose during this inquiry.

2. I reserve the right to require the ministry to provide this office with a copy of the record it discloses to the requester.

3. The timelines noted in order provisions 1 and 2 may be extended if the ministry is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by
Cathy Hamilton
Adjudicator

March 31, 2021