Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4294

Appeal PA19-00009

Ministry of Health

August 26, 2022

Summary: A community laboratory appealed a decision by the Ministry of Health (the ministry) to disclose 46 records to a requester under the *Freedom of Information and Protection of Privacy Act* (the *Act*). These records include various letters, reports, business cases and other records. The community laboratory claims that there is information in these records that is exempt from disclosure under the mandatory exemption for third party information in section 17(1) of the *Act*. In this order, the adjudicator finds that the information at issue in these records is not exempt from disclosure under section 17(1). He upholds the ministry's decision to disclose the records to the requester.

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

Orders Considered: Order PO-2435.

OVERVIEW:

[1] The appellant is a community laboratory that objects to a decision by the Ministry of Health (the ministry) to disclose to a requester 46 records that contain information about that community laboratory. It submits that there is information in these records 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] This appeal came about as a result of an access request under the *Act* made by a lawyer. His request was for access to the following records:

> Notes, correspondence, memoranda, reports, meeting and/or briefing notes, and agreements relating to the community laboratories - for the period of January 1, 2011 until September 1, 2016.
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> Internal and external notes, communications, records, relating to:
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> 1. The development, review, and implementation of the Deloitte Lab Services Review – Final Report – dated February 2012;
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> 2. The development, review, and implementation of the KPMG Lab System Modernization Blueprint and High- Level Work plan dated February 2013;
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> 4. The development, review and implementation of the Modernization of the Community Laboratory Sector undertaken in 2016; We're simply looking for correspondence (including emails) from/to/amongst the following Public Servants (including amongst themselves) and to/from/amongst the public servants below and the Community Laboratories:
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> Public Servants: [21 named individuals];
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> Community Laboratories: [8 named laboratories];
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> 5(b) The reduction and subsequent implementation of the $50m laboratory sector funding cut articulated in the 2015 Ontario Provincial Budget; and the 2015-2016 Access and Performance Transition Fund for each of the community laboratories.

[3] The requester subsequently clarified his access request in the following manner:

1. The precise timeframe for the correspondence is for the period of January 1, 2011 until September 1, 2016.

2. Clarification 5b), The requester is looking for "Any of the requested documents/files relating at all with the 2015-16 Access and Performance Transition Fund for each of the community laboratories".

[4] In response, the ministry located records that contain information about a number of community laboratories, including the one that is the appellant in this appeal. These records include letters from the ministry to the community laboratory, hours of operation charts, patient satisfaction reports, year-end performance reports, a standardized wait time methodology report, a letter from a family health team to the

community laboratory, various quality improvement plan (QIP) reports, QIP business plans, proposals and reports for new sites, a billing system upgrade report, access and specimen collection reports and other records.

[5] In accordance with the notification requirements in section 28 of the *Act*, the ministry then notified that community laboratory and asked for its views as to whether the records that contain information about it are exempt from disclosure under section 17(1) of the *Act*.

[6] In response, the community laboratory advised the ministry that it consented to the ministry disclosing 22 records in full to the requester. However, it submitted that the ministry should withhold 53 records (48 in full and five in part) because they contain information that is exempt from disclosure under section 17(1). After considering the community laboratory's views, the ministry sent a decision letter to the community laboratory which stated that it was in partial agreement with the community laboratory's submissions.[1] Based on my review of this decision letter and the records themselves, it appears that the ministry decided to disclose 46 records in full to the requester but also decided to withhold seven records in full containing patient wait time data under section 17(1).

[7] The requester did not appeal the ministry's access decision to withhold seven records under section 17(1). As a result, those records are not at issue in this appeal. However, the community laboratory appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). It claimed that the 46 records that the ministry decided to disclose in full contain information that is exempt from disclosure under section 17(1). It submits that most of these records should be withheld in full and others should be withheld in part under section 17(1).

[8] The IPC assigned a mediator to this 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 to review an institution's access decision. The adjudicator initially assigned to this appeal sent a Notice of Inquiry to the community laboratory and invited it to submit representations to her that explain why it believes the section 17(1) exemption applies to the information in the records that the ministry decided to disclose to the requester. The community laboratory did not submit any representations in response.

[9] This appeal was subsequently transferred to me to complete the inquiry.[2] In this order, I find that the community laboratory has failed to establish that the information in the records at issue is exempt from disclosure under section 17(1) of the *Act*. I uphold the ministry's decision to disclose the 46 records to the requester.

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[1] Dated November 20, 2018. The ministry also sent a separate decision letter to the requester.

[2] After reviewing the file material, including the records, I determined that I did not need to seek representations from any of the other parties before rendering a decision.

RECORDS:

[10] The community laboratory objects to the ministry disclosing the following 46 records to the requester:[3]

Record number[4]	**General description of record**	**Ministry's decision**	**Exemption claimed by appellant**
169	Letter from ministry to community laboratory	Disclose in full	s. 17(1) for parts of record
348	Charts – hours of operation	Disclose in full	s. 17(1) for parts of record
358	Charts – hours of operation	Disclose in full	s. 17(1) for parts of record
392	Report on patients' satisfaction	Disclose in full	s. 17(1) for entire record
401	Innovation project report	Disclose in full	s. 17(1) for entire record
425	Year end performance report	Disclose in full	s. 17(1) for parts of record
446	QIP response	Disclose in full	s. 17(1) for entire record
461	Standard patient satisfaction survey report	Disclose in full	s. 17(1) for entire record

[3] The Notice of Inquiry sent to the community laboratory by the adjudicator initially assigned to this appeal included the following seven records in the group remaining as issue: records 749, 750, 751, 752, 753, 754 and 755. However, the ministry decided to withhold these records in full under section 17(1). As a result, these records are not issue in this third party appeal, and I have not included them in the chart.
[4] The ministry subsequently reorganized and renumbered some of the records but I will be using the original record numbers in this order.

472	Net new hours of operation report	Disclose in full	s. 17(1) for entire record
494	Standardized wait time methodology report	Disclose in full	s. 17(1) for entire record
603	QIP progress report	Disclose in full	s. 17(1) for entire record
612	QIP report	Disclose in full	s. 17(1) for entire record
627	Year end performance report	Disclose in full	s. 17(1) for entire record
638	Year end performance report	Disclose in full	s. 17(1) for entire record
647	Year end performance report	Disclose in full	s. 17(1) for entire record
659	New sites implementation report	Disclose in full	s. 17(1) for parts of record
668	New sites proposal	Disclose in full	s. 17(1) for entire record
681	Letter from family health team to community laboratory re blood draw clinic	Disclose in full	s. 17(1) for entire record
707	Patient wait times measurement and reporting	Disclose in full	s. 17(1) for entire record
731	Patient wait times measurement and reporting	Disclose in full	s. 17(1) for entire record

822	Billing system upgrade	Disclose in full	s. 17(1) for entire record
823	QIP business case	Disclose in full	s. 17(1) for entire record
824	QIP business case	Disclose in full	s. 17(1) for entire record
825	QIP business case	Disclose in full	s. 17(1) for entire record
826	QIP business case	Disclose in full	s. 17(1) for entire record
827	QIP business case	Disclose in full	s. 17(1) for entire record
828	Physician satisfaction survey	Disclose in full	s. 17(1) for entire record
829	QIP business case	Disclose in full	s. 17(1) for entire record
830	QIP business case	Disclose in full	s. 17(1) for entire record
831	QIP business case	Disclose in full	s. 17(1) for entire record
832	QIP business case	Disclose in full	s. 17(1) for entire record
893	QIP update report	Disclose in full	s. 17(1) for entire record
894	QIP update report	Disclose in full	s. 17(1) for entire record
898	Letter from ministry to community laboratory	Disclose in full	s. 17(1) for entire record

899	QIP innovation plan report	Disclose in full	s. 17(1) for entire record
900	QIP innovation plan report	Disclose in full	s. 17(1) for entire record
901	QIP innovation plan report	Disclose in full	s. 17(1) for entire record
902	QIP innovation plan report	Disclose in full	s. 17(1) for entire record
914	QIP progress report	Disclose in full	s. 17(1) for entire record
920	QIP report	Disclose in full	s. 17(1) for entire record
925	Year end performance report	Disclose in full	s. 17(1) for entire record
930	Access and specimen collection report	Disclose in full	s. 17(1) for entire record
937	QIP progress report	Disclose in full	s. 17(1) for entire record
944	QIP report	Disclose in full	s. 17(1) for entire record
952	Year end performance report	Disclose in full	s. 17(1) for entire record
958	Access and specimen collection report	Disclose in full	s. 17(1) for entire record

DISCUSSION:

[11] The sole issue in this appeal is whether the mandatory exemption at section 17(1) of the *Act* applies to any information in the above records. The community

laboratory claims that there is information in these records that is exempt from disclosure under section 17(1). The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[5] where specific harms can reasonably be expected to result from its disclosure.[6]

[12] 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, if the disclosure could reasonably be expected to,
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> > (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;
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> > (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.

[13] For section 17(1) to apply, the party arguing against 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;

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.

[14] Given that the ministry has decided to disclose the 46 records at issue, the onus is on the community laboratory to establish that the information that it submits should

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[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.

be withheld meets the requirements of the section 17(1) exemption.

Analysis and findings

[15] As noted in the overview section of this order, a Notice of Inquiry was sent to the community laboratory at the outset of adjudication and it was invited to submit representations that explain why it believes the section 17(1) exemption applies to the information in the 46 records that the ministry decided to disclose to the requester. In response, the community laboratory did not provide representations on section 17(1), nor did it point to any evidence that the adjudicator could rely upon.

[16] Because the onus is on the community laboratory to establish that the information that it submits should be withheld meets the requirements of the section 17(1) exemption, its failure to submit legal arguments and evidence in response to the Notice of Inquiry undermines its appeal. However, because section 17(1) is a mandatory exemption, I have decided to scrutinize other documents in the record of proceedings before me in considering whether this exemption applies to the information in the records that the community laboratory submits should be withheld from the requester.

[17] In particular, I have reviewed the 46 records at issue, which include letters from the ministry to the community laboratory, hours of operation charts, patient satisfaction reports, year-end performance reports, a standardized wait time methodology report, a letter from a family health team to the community laboratory, various quality improvement plan (QIP) reports, QIP business plans, proposals and reports for new sites, a billing system upgrade report, access and specimen collection reports and other records.

[18] The record of proceedings also includes the community laboratory's submissions on section 17(1) that are found in a response letter that it sent to the ministry after being notified of the access request.[7] In this letter, the community laboratory identified 53 records (48 in full and five in part) that it claims contain information that is exempt from disclosure under section 17(1).

[19] This letter also included a marked-up copy of the five records that the community laboratory submits should be withheld in part under section 17(1). The community laboratory has redacted in black the information in these records that it submits is exempt from disclosure under section 17(1). This redacted information includes a funding amount provided by the ministry, whether the community laboratory's various centres initiated reduced hours of operation prior to signing an agreement with the ministry (yes or no), the target date for reduced hours of operation, which category best represents a reduction in hours of operation (categories 1 to 5), whether the criteria stated in the relevant category were met and a related comment,

[7] Dated October 31, 2018.

and comments on the submission of a new sites implementation report.

[20] In this letter, the community laboratory characterizes its contents as "confidential" and states that it does not agree to it being disclosed without prior written consent. After receiving the Notice of Inquiry that was issued to it at the outset of adjudication, the community laboratory did not indicate whether it would like me to consider this letter in reaching my decision or whether it consented to sharing its contents with the requester in order to give him an opportunity to respond to its submissions and evidence.

[21] I have decided to review and consider the community laboratory's submissions on section 17(1) found in this letter. However, in the absence of consent from the community laboratory to share or disclose this letter, I will only refer to the community laboratory's general arguments and will not be revealing the detailed contents of the letter in this public order.

[22] The ministry did not agree with the community laboratory's submissions for most of the 53 records. It decided to disclose 46 records in full to the requester but also decided to withhold seven records in full containing patient wait time data under section 17(1).

[23] For the reasons that follow, I find that even if I were to accept that there is information in the 46 records at issue that meets parts 1 and 2 of the section 17(1) test, the community laboratory's submissions in its letter to the ministry 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. As a result, I uphold the ministry's decision to disclose these 46 records in full to the requester.

Part 3 of test - harms

[24] Part 3 of the section 17(1) test requires that the community laboratory establish that the prospect of disclosure of the information in the records gives 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.

[25] The party resisting disclosure of the information in a record cannot simply assert that the harms under section 17(1) are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act.*[8]

[26] The party resisting disclosure must show that the risk of harm is real and not just

[8] Orders MO-2363 and PO-2435.

a possibility.[9] However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[10]

[27] In its submissions on section 17(1) in its letter to the ministry, the community laboratory appears to be relying primarily on the competitive harm requirement in section 17(1)(a) and the undue gain/loss requirements in section 17(1)(c). To meet the competitive harm requirement in section 17(1)(a), the community laboratory must show that disclosing the information in the records at issue could reasonably be expected to prejudice significantly its competitive position. To satisfy the requirements of section 17(1)(c), it must show that disclosure could reasonably be expected to result in an undue loss for itself or an undue gain for its competitors.

[28] I do not find the community laboratory's submissions to be sufficiently detailed and persuasive for three reasons.

[29] First, the community laboratory submits that disclosing, for example, the specific funding that it received from the ministry, could be advantageous to its competitors. However, the IPC has previously found that the fact that a third party working for the government may be subject to a more competitive bidding process for future contracts if the amount it charges for services rendered is disclosed, does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.[11] In the circumstances of the appeal before me, I find that the fact that the community laboratory may be subject to a more competitive application process for obtaining ministry funding could not reasonably be expected, in and of itself, to significantly prejudice its competitive position or result in an undue loss for itself or an undue gain for its competitors.

[30] Second, the community laboratory submits that disclosing various reports, business cases and briefing notes would provide an advantage to its competitors, because doing so would provide them with insight into its business strategies. However, its submissions do not explain in sufficient detail how its competitors could use such information in a manner that 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 these competitors, as required by section 17(1)(c).

[31] For example, what could the community laboratory's competitors do with the information in the records and the insight it allegedly provides? In particular, how could they specifically use this information and insight in a manner that could reasonably be

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[9] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.
[10] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.
[11] Order PO-2435.

expected to prejudice significantly the community laboratory's competitive position or result in an undue loss for the community laboratory or an undue gain for themselves? The community laboratory's submissions in its letter to the ministry do not shed adequate light on these questions.

[32] Third, it is not sufficient for the community laboratory to merely show that disclosing the records at issue could reasonably be expected to prejudice its competitive position or result in a loss for itself or a gain for its competitors. To satisfy the requirements of sections 17(1)(a) and (c), it must establish that disclosure could reasonably be expected to prejudice "significantly" its competitive position or result in an "undue" loss for itself and an "undue" gain for its competitors.

[33] Although the community laboratory submits that disclosing the records at issue could reasonably be expected to "prejudice" its competitive position, it does not explain how it is reasonable to expect that such prejudice would reach the threshold of being significant, nor does not explain how it is reasonable to expect that any loss for itself or gain for its competitors would be undue.

[34] In my view, the community laboratory's submissions are insufficiently detailed and persuasive to establish that disclosing the information in the records at issue could reasonably be expected to lead to the harms set out in sections 17(1)(a) or (c). In addition, there is no evidence before me to establish that the second harm set out in section 17(a) or the harms in sections 17(1)(b) or (d) could reasonably be expected to occur if the information in the records at issue is disclosed to the requester.

[35] I find, therefore, that the community laboratory has failed to meet the harms requirement in part 3 of the section 17(1) test. Given that the community laboratory must satisfy each part of the section 17(1) three-part test to establish that the exemption applies, I find that its failure to meet part 3 means that the information at issue in the records is not exempt from disclosure under section 17(1). I uphold the ministry's decision to disclose the 46 records to the requester.

[36] Finally, I note that the response letter that the community laboratory sent to the ministry, after being notified of the access request, stated that it did not object to the ministry disclosing the following 22 records to the requester: records 49, 70, 72, 73, 74, 75, 76, 80, 82, 84, 97, 103, 112, 116, 332, 357, 424, 436, 453, 485, 653 and 768. The mediator's report sent to the parties stated that the ministry had not yet disclosed these records to the requester.

[37] When this appeal moved to adjudication, an IPC adjudication review officer followed up with staff in the ministry's access, privacy and corporate information office to determine whether it had disclosed these records to the requester but the ministry did not provide a response. Consequently, I will be ordering the ministry, if it has not already done so, to disclose to the requester any records to which the community laboratory had previously consented to being disclosed.

ORDER:

1. I uphold the ministry's decision to disclose the following 46 records in full to the requester: records 169, 348, 358, 392, 401, 425, 446, 461, 472, 494, 603, 612, 627, 638, 647, 659, 668, 681, 707, 731, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 893, 894, 898, 899, 900, 901, 902, 914, 920, 925, 930, 937, 944, 952 and 958.

2. I order the ministry to disclose these records to the requester by **October 3, 2022** but no earlier than **September 27, 2022**.

3. I order the ministry, if it has not already done so, to disclose to the requester any records to which the community laboratory had previously consented to being disclosed, including: records 49, 70, 72, 73, 74, 75, 76, 80, 82, 84, 97, 103, 112, 116, 332, 357, 424, 436, 453, 485, 653 and 768.

Original signed by: August 26, 2022

Colin Bhattacharjee
Adjudicator