Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4361

Appeal PA21-00122

Ministry of Health

March 13, 2023

Summary: A media requester made a request to the Ministry of Health (the ministry) for access to historical data in the Narcotics Monitoring System database concerning each filled prescription since 2012. In response, the ministry created one record with all of the requested information; however, it severed out the names and license numbers of the prescribers and dispensers of the medications before disclosing the record. The ministry claimed the exemptions at section 14(1)(e), (i) and (l) (law enforcement) and section 20 (danger to safety or health) for all of the withheld information. The appellant appealed and claimed the possible application of the public interest override. In this order, the adjudicator upholds the ministry's reliance on section 14(1)(e) for all of the information at issue and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 14(1)(e).

Orders and Investigation Reports Considered: Orders P-1499, PO-1747, PO-3617 and B.C. OIPC Order 323-1999.

Cases Considered: *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner),* 2014 SCC 31, [2014] 1 S.C.R. 674.

OVERVIEW:

[1] The Ministry of Health (the ministry), through its narcotics monitoring system, collects and stores information on prescribing and dispensing activities for prescription narcotics and other controlled substance medications. The ministry received a media

request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for an itemized list of all prescriptions filled and listed on the Narcotics Monitoring System (the NMS) database since its inception. The request, after some clarification, was as follows:

> Please provide a machine-readable itemized database, spreadsheet or dump/export (i.e. Microsoft Excel, Access, SQL or CSV file format, not .PDF) of the Narcotics Monitoring System (NMS) database. Data should be a full historical record of filled prescriptions going back to the database's inception in 2012. The data should be record-level (i.e., one row per prescription) and include the following fields:
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> - Dispensation date (and time, if available)
> - Length of therapy, in days, for drug
> - Gender of patient
> - Age of patient
> - Generic name
> - Brand name
> - Description
> - DIN (drug identification number)
> - Drug strength
> - Quantity of drug dispensed
> - Oral or written
> - Form (e.g. "tablet")
> - Route (e.g. "oral")
> - Drug manufacturer
> - Drug schedule
> - Strength
> - Patient cardholder identity code (e.g. AB, BC, RCMP, FNIAH)
> - Prescriber's name

- Prescriber's registration number
- Prescriber's ID reference (e.g. CPSO, RCDSO, etc.)
- Prescriber's address, including postal code (forward sortation area – first three digits of postal code – will suffice if full address is deemed too specific)
- Pharmacy ID
- Pharmacy postal code
- Pharmacist name
- Pharmacist ID

Do not include patient names, patient addresses or other patient personally- identifiable information.

[2] The ministry issued a decision to grant access in part to the information requested, creating one record in response to the request, but severed information that could identify the prescriber and pharmacy from the record pursuant to the law enforcement and threat to health or safety exemptions in the *Act,* as described below:

The following fields are being severed under clauses 14(1)(e), (i) and (l) as well as section 20 of FIPPA:

- Prescriber's name
- Prescriber's registration number
- Prescriber's address
- Pharmacy ID
- Pharmacy postal code
- Pharmacist name
- Pharmacist ID[1]

[3] The media requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was

[1] The ministry also stated in the decision that there is no way to identify individual patients using the record it disclosed as that as a result the record does not contain personal health information that is subject to the *Personal Health Information Protection Act, 2004.* From my review of the record, I agree.

assigned to explore resolution.

[4] During the mediation, the ministry provided additional information about the nature of some of the information being severed. The ministry advised the mediator that it would maintain its reliance on the discretionary exemptions at sections 14(1) and 20 to withhold the specified fields of data contained in the record.

[5] The appellant confirmed that he is pursuing access to some of the withheld information, specifically the name and licence number of the prescriber and the name and ID number of the pharmacist.[2] He also raised the applicability of the public interest override at section 23 of the *Act* in the event that the information otherwise qualifies for exemption under section 20 but not section 14(1).[3]

[6] The file was transferred to the adjudication stage of the appeal process. The original adjudicator assigned to the appeal decided to conduct a written inquiry and invited and received representations from the ministry, some affected parties (made up of several professional colleges and associations), and the appellant. The appeal was transferred to me to continue the adjudication, and I invited and received sur-reply representations from the appellant.

[7] In this order, I uphold the ministry's claim that the exemption at section 14(1)(e) applies to the information at issue and dismiss the appeal.

RECORDS:

[8] The information at issue consists of portions of the one large record – a data file-created by the ministry, specifically the prescriber and pharmacist information contained in the following fields:

- PRESCRIBER_LAST_NAME
- PRESCRIBER_FIRST_NAME
- PRESCRIBER_LICENSE_NO
- PHARMACIST_LAST_NAME

[2] These fields appear in the record as follows:
- PRESCRIBER_LAST_NAME
- PRESCRIBER_FIRST_NAME
- PRESCRIBER_LICENSE_NO
- PHARMACIST_LAST_NAME
- PHARMACIST_FIRST_NAME
- PHARMACIST_ID

[3] The public interest override in section 23 does not list section 14 as an exemption that is capable of being overridden.

- PHARMACIST_FIRST_NAME
- PHARMACIST_ID

ISSUES:

A. Do the discretionary exemptions at sections 14(1)(e), 14(1)(i) and/or 14(1)(l) related to law enforcement activities apply to the record?

B. Did the institution exercise its discretion under section 14(1)(e)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Background

[9] The ministry provides some background to the Narcotics Monitoring System. The *Narcotics Safety Awareness Act*[4] (the *NSAA*) enables the ministry to track prescribing and dispensing activities related to prescription narcotics and other controlled substance medications ("monitored drugs")[5] in Ontario. It explains that the *NSAA* also sets out the requirements that apply to the collection, use, disclosure, and record-keeping of information about the prescribing and dispensing of monitored drugs.

[10] The ministry explains that the Narcotics Monitoring System (the NMS) was activated in 2012 and collects dispensing data from pharmacies in relation to all prescription narcotics and other controlled substances, pursuant to a direction issued by the ministry under section 8 of the *NSAA*. It notes that the NMS serves as a central database to enable retrospective reviews of prescribing and dispensing activities.

[11] The ministry further explains that if potential issues are detected, such as a multiple number of instances of prescribing to the same patient by different doctors or dispensing by different pharmacies, the NMS will issue an alert to the pharmacy in real time. The ministry submits that it reviews the data to notify prescribers and dispensers (pharmacists) of potential issues. The ministry submits that it may also refer instances

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[4] SO 2010, c22.

[5] The ministry explains that "monitored drugs" are defined in the NSAA and its regulation as:

> (1) any controlled substance under the federal *Controlled Drugs and Substances Act*. For example, narcotic analgesics (e.g., codeine, morphine, oxycodone, etc.), and controlled drugs such as methylphenidate and barbiturates, as well as benzodiazepines and targeted substances; and
> (2) any drug product that is an opioid that is not listed in the federal *Controlled Drugs and Substances Act* such as tramadol containing products.
> The complete list of monitored products is set out in Monitored Drugs List: https://www.health.gov.on.ca/en/pro/programs/drugs/monitored_productlist.aspx

of unusual prescribing or dispensing to regulatory health colleges for investigation.

[12] In essence, the NMS is a centralized provincial database, administered by the ministry, which allows prescribers, pharmacists, administrators and law enforcement to review the dispensation of various controlled drugs, including opioids.

Issue A: Does the discretionary exemption at sections 14(1)(e) apply to the record?

[13] Based on my review of the record and the parties' representations, I find that section 14(1)(e) applies to exempt the information at issue from disclosure. As a result, it is not necessary for me to consider the other exemptions the ministry relies on.

[14] Sections 14(1)(e) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > endanger the life or physical safety of a law enforcement officer or any other person;

[15] For section 14(1)(e) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to endanger someone's life or physical safety. A person's subjective fear, or their sincere belief that they could be harmed, is important, but is not enough on its own to establish this exemption.[6]

[16] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[7] However, they do 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.[8]

[17] In relation to the "reasonably be expected to" language contained in section 14(1), the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services)* v. Ontario (Information and Privacy Commissioner),[9] stated:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to

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[6] Order PO-2003.
[7] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[8] *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.
[9] 2014 SCC 31 at para. 54.

> mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII),[2008] 3 S.C.R. 41, at para. 40.

[18] I adopt this approach in considering whether the information at issue can be withheld under section 14(1)(e).

Representations[10]

Representations of the ministry

[19] The ministry submits that prescribers and dispensers of prescription narcotics have been, and continue to be, victims of crime (including prescription forgery, assault, and armed robbery) by persons seeking to gain illegal access to narcotics. It submits that releasing the information at issue would not only identify prescribers and dispensers of monitored drugs, but also specifically identify those who are "high volume" prescribers and dispensers and make them a target for persons looking to commit crimes, thereby endangering the prescribers' and dispensers' lives, threatening their safety or health, facilitating the commission of an unlawful act, and hampering the control of crime.

[20] The ministry submits that section 14(1)(e) applies to all of the information at issue because disclosure would endanger the life, physical safety, and health not only of prescribers and dispensers of the monitored drugs, but also of persons seeking to obtain drugs illegally, members of the public, responding police officers, and individuals with legitimate prescriptions who need these drugs for treatment purposes (for example, to treat their addiction or for chronic severe pain).

[21] It submits that this is the case because disclosure of the information at issue, combined with what it has already disclosed, would provide individuals with the names of prescribers and dispensers who have access to or store monitored drugs, and information about which of them likely stores significant quantities of such drugs. It submits that an individual can use this information, in combination with contact information that can be found in a regulatory college directory, to identify and locate

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[10] As noted, a number of affected parties were invited to provide representations and many did. The representations that were received were shared with the appellant. After my review of those representations, I decided to focus on the representations of the ministry and the appellant in this order, for the sake of brevity. However, the representations of these affected parties were reviewed and considered prior to making my final decision and may be specifically referred to, when relevant.

prescribers and dispensers from whom they would be able to steal monitored drugs or prescription pads to generate forged prescriptions to obtain monitored drugs.

[22] The ministry submits that if a person were to use the information at issue to rob a pharmacy or prescriber's office, there is a potential for violent acts to occur during the robbery, and for the safety and lives of the person committing the crime, the prescriber or dispenser, other employees, the responding police officers, and the pharmacy's customers (i.e. members of the public) to be endangered. Moreover, it submits that if the information is disclosed, a person would be able to identify prescribers and dispensers resulting in an increased risk of harassment or violence towards prescribers who may be targeted.

[23] It also submits that if a person seeking to illegally obtain these drugs succeeds, they may use them incorrectly or sell or give them to someone else who does so, resulting in potential serious consequences for the health, life, and safety of such individuals using the drugs without prescriber supervision.

[24] The ministry also submits that if the information at issue is disclosed, prescribers and dispensers may fear that they will be targeted, resulting in a decision to stop prescribing and dispensing monitored drugs. It submits that this could create hurdles for individuals who need to access these drugs for a legitimate purpose, thereby seriously threatening the health of such individuals.

[25] As such, the ministry submits that disclosure of the information at issue could reasonably be expected to endanger and seriously threaten the life, health, or physical safety of a prescriber, a dispenser, a person seeking to obtain drugs illegally, members of the public, responding police officers and other individuals with legitimate prescriptions who need these drugs for treatment purposes. It submits that individuals may commit violent acts in order to commit theft or robbery of monitored substances or prescription pads, such as property damage and threats of harm and actual harm to individuals' safety, in spaces such as pharmacies where the presence of security systems and security measures indicate that protection is reasonably required.

[26] The ministry submits that a simple search of the internet reveals numerous media articles that describe the devastating harms that could reasonably be expected to result if the information at issue is disclosed.[11] It submits that the articles provide detailed evidence that:

- pharmacies and prescribers' offices are at risk of thefts and harm to their safety as a result of such thefts

[11] The ministry's representations included thirteen references to media articles (Canada and US) relating to "risks related to prescription drug theft – break-ins and robberies of pharmacies and doctor's offices," four references to "Prescription Pad theft and prescription forgery," a reference to "Threats to prescriber safety for denial of medication" one reference, and three references to "Illicit drug possession and sale".

- narcotics and controlled substances have been targeted by thieves, fraudsters, and possibly drug traffickers
- many of these monitored drugs can be dangerous and potentially lethal if used without prescriber supervision
- as a result of a pharmacy robbery, violent acts occurred at a pharmacy, the safety and lives of police officers were endangered, and a life was lost, and
- the safety of prescribers may be at risk where they refuse to prescribe certain monitored drugs.

[27] The ministry submits that the articles demonstrate that disclosure of prescriber and dispenser information at issue "will result in a risk of harm that is well beyond the merely possible or speculative," and could easily be used to target prescribers and dispensers.

[28] The ministry submits that in this appeal, even if certain prescribers are already known to prescribe certain monitored drugs and certain pharmacies are known to dispense certain monitored drugs, disclosure of the volume of particular monitored drugs prescribed and dispensed by particular prescribers and dispensers could lead to violence directed against them. For example, it submits that if an individual looking to illegally obtain fentanyl, oxycodone, methadone, morphine, or hydromorphone – some of the more highly sought-after monitored drugs on the streets – knows that a particular dispenser dispenses a significant quantity of such drugs or that a particular prescriber prescribes a significant quantity of such drugs, then they may be more likely to target that dispenser or prescriber. It submits that the more information that is available, the more likely it is that the dispensers and prescribers listed in the record at issue will be targeted for crime and violence.

[29] The ministry relies on a number of previous IPC orders in support of its position. In Order P-1499, the requester sought access to a record revealing the number of abortions performed by each Ontario hospital and clinic. The ministry submits that in that case, it had argued that even though it was known that the clinics and hospitals listed in the record provided abortion services, disclosing the number of abortions performed at these facilities "could escalate the harassment and violence directed against them." The adjudicator found that the records qualified for exemption under section 14(1)(e) and agreed with the ministry's position that "the more abortion-related information that is made available, such as the numbers associated with each facility, the more likely specific individuals will be targeted for harassment and violence." The ministry submits that the same reasoning should apply to the information at issue in this appeal.

[30] The ministry submits that Order PO-1747 also supports this conclusion. In this order, the adjudicator referenced a line of decisions about access requests for

information relating to animal experimentation. Although he did not uphold the law enforcement exemption for the particular information at issue, the adjudicator acknowledged that certain information about animal experimentation and about abortions could be used by certain groups in a way that would meet the 'harm' threshold in section 14.

[31] The ministry submits that while the adjudicator in Order PO-1747 did not uphold the section 14(1) exemption claims, the information at issue in that appeal was significantly different from the information at issue in this appeal. The information in Order PO-1747 consisted of generalized, province-wide, non-identifying statistical information, whereas the record at issue in this appeal contains an extensive amount of extremely specific, identifying information about particular prescribers and particular dispensers and the quantity and frequency in which they prescribe or dispense monitored drugs in Ontario.

[32] The ministry submits that, just as members of certain groups could reasonably be expected to threaten the safety of individuals or the security of facilities if identifying information about abortions or animal experimentation were disclosed, those looking to obtain drugs illegally, could reasonably be expected to threaten the safety of prescribers, dispensers, and others, and threaten the security of pharmacies and prescriber's offices if the severed information were disclosed.

Representations of the appellant

[33] The appellant submits that prescribers and dispensers are naturally expected to be handling drugs, including opioids. He submits that the College of Physicians and Surgeons of Ontario's (CPSO) website and other public resources (e.g., information from chronic pain clinics) already note whether a doctor specializes in pain management or addiction treatment. He argues that since these resources already point to high volume prescribers, disclosure of the information at issue would not significantly increase the prescribers' safety risk.

[34] The appellant argues that the ministry simply assumes future harm by relying on news reports of robberies, extorted doctors and forgeries as evidence of probable harm. He submits that this evidence does not alone meet that test. The appellant submits that there is always a risk that a doctor's office or pharmacy will be broken into, that prescribers and dispensers will be threatened with violence, or that a prescription pad will be stolen and prescriptions forged.

[35] The appellant questions why a doctor who prescribes many opioids would be more likely than any other doctor to be subject or vulnerable to blackmail. He submits that a cursory glance of the news reports makes it apparent the crimes are overwhelmingly crimes of opportunity: organized crime may become aware of a doctor susceptible to extortion, or an individual may jump the counter at their town pharmacy, smash the lock to the box containing controlled drugs and take the opioids within. The

appellant agrees that opioids do attract crime, violence, and can be problematic for prescribers, dispensers, police officers and the public; but he maintains that the disclosure of the data at issue would not materially increase these risks.

[36] The appellant disagrees that releasing this information could have a chilling effect on prescribers and pharmacies, discouraging them from prescribing controlled drugs. He submits that doctors, nurses, pharmacists and other health practitioners have ethical and professional responsibilities to their patients and should not be expected to stop offering treatment simply because their name is now associated with opioid or methadone prescriptions. He also submits that doctors who treat opioid use disorders with methadone or suboxone are already noted as having such specialties and are frequently quite public and willing to "evangelize" their life-saving work.

[37] The appellant also submits that it is unreasonable to suggest that an overdose death could be attributed directly to the release of this data, given the high availability of illicit opioids and the widespread nature of addictions in Canada.

[38] The appellant takes issue with the ministry's reliance on Order P-1499, arguing that narcotic prescriptions are significantly different from abortions and therefore the reasoning in Order P-1499 does not necessarily apply. He notes that opioid use has been called an epidemic, referring to the Canadian Public Health Association's 2016 report.[12]

[39] The appellant submits that this epidemic has been fuelled by a series of policy decisions (or, in many cases, a lack of decisions), the sales efforts of pharmaceutical companies and manufacturers, and doctors and dispensers who dole out legal opioids.[13] He submits that opioids are clearly a public policy issue, whereas there is no abortion epidemic and they are provided as needed. The appellant also submits that while abortions are administered by only a certain subset of health care professionals, opioids and other controlled drugs captured by the NMS database are routinely prescribed by virtually all kinds of physicians, and there is an expectation that those drugs will be prescribed to individuals during the normal course of their health care.

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[12] The Canadian Public Health Association 2016 report states, "[there] is an expanding opioid crisis in Canada that is resulting in epidemic-like numbers of overdose deaths. These deaths are the result of an interaction between prescribed, diverted and illegal opioids (such as fentanyl) and the recent entry into the illegal drug market of newer, more powerful synthetic opioids."

[13] The appellant relied on a number of news articles which include: on "overprescribing and trafficking," *Opioid prescriptions increasing in Ontario*, May 17, 2017, The Globe and Mail. *Only one of 80 Ontario doctors flagged by province to face disciplinary hearing over opioid prescriptions.* February 23, 2018, The Globe and Mail; on "Policy and proposals," *Safe-supply pilot project findings promising, but advocates say more action is needed*. March 27, 2022, The Globe and Mail. *As Canada's overdose deaths soar, the safe-supply debate enters a new and urgent phase*. February 18, 2021, The Globe and Mail. *Feds urged to decriminalize drugs to save lives amid growing opioid crisis*. March 1, 2022, The Globe and Mail; on "the pipeline to illicit use," *At the root of the opioid crisis is our belief that Big Pharma can cure pain. Can we kick that habit?* January 9, 2021, The Globe and Mail; on "the human toll of the crisis," *Portraits of loss: One hundred lives, felled by an overdose crisis*. February 12, 2021, The Globe and Mail.

[40] In support of this latter submission, the appellant relies on Order PO-3617, an appeal concerning the dollar amounts paid to top 100 OHIP billers, where the adjudicator stated:

> I am also not satisfied by the evidence that harm could reasonably be expected to occur as the result of added risk factors arising from disclosure of the information at issue where it is already known in the community that these individuals are physicians.

[41] While the exemptions at issue in that appeal were sections 21(1) and 17(1), the appellant submits that a similar interpretation applies here. He submits that it is already known that doctors and pharmacists prescribe and dispense controlled drugs, including opioids, and disclosing their names does not on its own mean that harm could be reasonably expected to occur.

[42] The appellant also relies on a BC OIPC decision, Order No. 323-1999 (referenced in Order PO-1747, relied on by the ministry). That case dealt with an access request for the number of abortions performed at Vancouver General Hospital (VGH). In that case, VGH withheld the records, arguing that disclosure would threaten peoples' health and public safety. The adjudicator found that since the public already knew that VGH conducted abortions, disclosure of the information about the number of abortions could not reasonably be expected to result in harm.

[43] The appellant submits that the issue in this appeal is similar, as doctors are already known and expected to prescribe opioids and other controlled substances, and pharmacists are known and expected to dispense them. The appellant suggests it would be different if his request were for something more specific like hormone-replacement therapy drug prescription, that could be used to identify doctors offering gender affirming therapies who may not otherwise be identified. However, with the broad use of narcotics, the appellant submits that prescriber offices and dispensers are already robbed and disclosure of names and other identifying information does not increase that risk. He also notes that pharmacies are required by law to have certain security mechanisms in place, and that many choose to employ guards and additional layers of security.

[44] The appellant submits that while they are extremely important to health care, opioids can also have destructive, deadly consequences, and those consequences come to pass far more frequently than abortion complications ever do. As a result, the appellant submits that increased transparency around opioid prescriptions is important and will lead to more information being made public about how prescribers administer these drugs, how they are dispensed, and ultimately how they are used, affording greater accountability in respect of Ontario's drug-prescribing system.

The ministry's reply representations

[45] The ministry takes issue with the appellant's reliance on B.C. OICP Order No. 323- 1999, noting that the information at issue in this appeal, for specific identifying information, is completely different from the requested information in BC Order No. 323- 1999.

[46] The ministry also addresses the appellant's submission that "disclosing their names does not on its own mean that harm could be reasonably expected to occur," noting that disclosure of the severed identifying information, when linked with the volume of monitored drugs prescribed by particular prescribers or dispensed by particular pharmacies, would enable individuals to identify the prescribers and dispensers who have access to and store monitored drugs, specifically those who are "high volume", making them a target for persons looking to commit crimes.

[47] The ministry submits that the appellant is overstating the complexity of the data in the record and submits that although the dataset cannot be opened in a typical software like Excel, it would not be difficult to find software that can open it and, once accessed, a simple filter function would allow any individual to analyse the data. The ministry submits that, in looking at the record, the average person could see direct links between dispensing events and specific prescribers, dispensers, and pharmacies, identified by name (from which an address could easily be ascertained).

The appellant's sur-reply representations

[48] The appellant made sur-reply representations which I address as necessary below.

Analysis and finding

[49] For the section 14(1)(e) exemption to apply to the information at issue, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to endanger someone's life or physical safety.

[50] As set out above, the ministry must show that the risk of harm is real and not just a possibility, however, it does not have to prove that disclosure will in fact result in harm.[14] As I stated above, the law on the standard of proof is clear. In *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*,[15] the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two exemptions under the *Act*, and found that it requires a reasonable expectation of probable harm. In addition, the Court observed that "the reasonable expectation of probable harm formulation… should be used whenever the 'could reasonably be expected to' language is used in access to

[14] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[15] 2014 SCC 31, [2014] 1 S.C.R. 674.

information statutes." [16]

[51] In the circumstances of this appeal, based on my review of the record at issue and the parties' representations, I find that the exemption at section 14(1)(e) applies to the information at issue. In my view, there is a reasonable basis to conclude that disclosure of this information could be expected to endanger someone's life or physical safety.

[52] First, I find that the information can be manipulated to show high volume prescribers and dispensers. I reject the appellant's submission that the information is too voluminous or complicated to be capable of interpretation. I also observe that if that were the case, there would be little point in the appellant's seeking access to it.

[53] It is clear when reviewing the representations and the information at issue that disclosure of this information would not only identify prescribers and dispensers of the monitored drug, but would also, when combined with what the ministry has already disclosed, specifically identify those who are "high volume" prescribers and dispensers.

[54] The appellant suggests that the record, if disclosed, would require significant analysis, storage and a person with experience writing SQL loading and indexing function and submits that the ministry's suggestion that the record could be easily manipulated is not reasonable. However, the appellant concedes that once the data is analyzed, if shared publicly, would not require this type of further analysis. As noted by the ministry, the IPC has found that disclosure of withheld information would be disclosure to the world because the *Act* does not impose any restrictions or limits on what a requester can do with the records disclosed to them. It is this disclosure to the world that I consider in upholding the exemption below.

[55] I accept that this information could reasonably be expected to be used by individuals or groups seeking illegal access to narcotics. The ministry has provided information concerning criminal activity linked to the desire to procure narcotics as a growing concern in society, a point the appellant agrees with. It has argued, and it is clear from a review of the information at issue, that disclosure would specifically identify high volume prescribers and dispensers.

[56] The appellant agrees with the ministry's submission that opioids attract crime and violence, and can be a problem for prescribers, dispensers, police officers and the public. He suggests that since the risks to prescribers and dispensers already exists, disclosure of the information at issue would not materially increase that risk. I disagree. The fact that there is pre-existing risk for prescribers and dispensers by virtue of their professions and the desirability for these drugs stemming from their street value/demand is relevant factual background that must be considered and underscores

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[16] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

the sensitivity of the information, the context in which it could be used and misused, and the seriousness of the consequences that would flow from disclosure.

[57] Considering the pre-existing risks, in my view, there is significant potential that the information at issue, if disclosed, could exacerbate that risk. This is because it stands to reason that disclosure would put high volume prescribers and dispensers at risk where they otherwise may not have been targeted. In my view, this increased risk to specific individuals meets the harm set out in section 14(1)(e); the fact that being a prescriber or dispenser already comes with a certain level of inherent risk makes the information at issue in this appeal more sensitive and supports rather than undermines the ministry's argument that the exemption at section 14(1)(e) applies.

[58] The appellant also suggests that information on high-volume prescribers is already available with a search of the College of Physicians and Surgeons of Ontario website and other public resources which note whether a doctor specializes in pain management or addiction treatment and therefore routinely prescribes narcotics. I disagree. While it may stand to reason that certain specialties prescribe these drugs at a higher rate, that is not necessarily the case. From my review of the record, I am satisfied that it contains specific information that cannot be ascertained through specialty designations alone.

[59] There is no suggestion by any of the parties in this appeal that there already exists a public list of high-volume prescribers and dispensers. As I noted above, the appellant suggests that a list of doctors working in the field of chronic pain, or similar specialist, would show the doctors that are prescribing this sort of medication repeatedly. However, the information at issue would reveal a specific list of high-volume prescribers. While some specialties may be more likely than others to prescribe narcotics, it stands to reason that there is considerable variability even within specialties. The information at issue would remove the need to speculate and, in my view, could be used, and, likely would be used, to target certain individuals, or businesses linked to an individual, who may not have otherwise been targeted.

[60] The evidence supports that prescribers and dispensers of prescription narcotics have been, and continue to be, victims of crime (including prescription forgery, assault, and armed robbery) by persons seeking to gain illegal access to these drugs. I agree that even if it is commonly and generally known that certain classes of prescribers prescribe monitored drugs or that certain, or that most dispensers dispense monitored drugs, the more specificity with which this type of information is made publicly available, such as volume data based on name (and location), the more likely specific prescribers and dispensers will be subjected to increased harassment, violence, and harm. In addition, there is the potential for ancillary harm to others who may be in those premises such as staff, members of the public, or law enforcement when unlawful acts are committed.

[61] In my view, the appellant's reliance on the OHIP billings decision, Order PO-

3617, is misplaced. The adjudicator in Order PO-3617 dismissed the third parties' claim of harms because their submissions did not draw a sufficient linkage between disclosure and the endangerment of safety or health.[17] However, in the appeal before me, the ministry has provided sufficient evidence to show that the disclosure of the information at issue could reasonably be expected to endanger the life or physical safety of prescribers and dispensers along with others. The facts are materially different from those in Order PO- 3617 and that order is not helpful to my analysis.

[62] The appellant suggests that the request in BC OIPC Order 323-1999, where the adjudicator ordered a hospital to disclose records showing the number of abortions performed there for certain calendar years, is similar to the request in this appeal. In that appeal, the BC adjudicator noted that the public was already aware that the hospital conducted abortions and disclosing the number of abortions performed by the hospital could not reasonably be expected to result in harm to specific individuals. I do not agree that this order is relevant because the information at issue in that case was annual statistics as to the number of abortions performed at the hospital while the information at issue in this appeal is more specific and consists of the identities of individual prescribers and dispensers. Despite the appellant's assertion that narcotic prescriptions are widespread, suggesting that identifying these individuals will not result in an increase of crimes related to narcotics, he does not adequately address that if disclosed, the record will reveal specific high-volume prescribers and dispensers, information that is not currently in the public sphere.

[63] I agree that Orders P-1499 and PO-1747 are relevant in this appeal to the extent that they address the harms that could reasonably be expected to result if certain information concerning abortion provider and animal experimentation is disclosed. The adjudicator in Order PO-1747 recognized that cases involving abortion and animal experimentation presented different contexts, yet acknowledged they were nonetheless similar to the extent that they both involved concerns about how the information could be used by certain groups to target and harm individuals. In my view, that reasoning is applicable here, and although information on narcotics prescribers and dispensers has not been examined by the IPC before, it is evident, based on the record and the submissions (as discussed) that harms exist and that section 14(1)(e) applies.

[64] The appellant submits that I must weigh the risk of disclosure against the benefits. It is important to note that in examining whether or not the exemption at section 14(1)(e) applies, the benefit of disclosing the information is not one of my considerations. While the *Act* has a specific provision requiring disclosure of exempt information where there is a compelling public interest that overrides the purpose of certain enumerated exemptions, this provision cannot apply to information found to be

[17] The adjudicator noted that the third parties' submissions were too speculative to meet the requirement that harm "could reasonably be expected to occur" in the event of disclosure.

exempt under section 14.[18] However, I will address public interest considerations below in my assessment of the ministry's exercise of discretion.

[65] For the above reasons, I find that disclosure of the information at issue could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Accordingly, I uphold the ministry's claim that the discretionary exemption at section 14(1)(e) applies to the information at issue. Next, I will review the ministry's exercise of discretion.

Issue B: Did the institution exercise its discretion under section 14? If so, should the IPC uphold the exercise of discretion?

[66] The section 14 exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[67] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[68] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] The IPC cannot, however, substitute its own discretion for that of the institution.[20]

[69] The ministry submits that it properly exercised its discretion in applying the exemption under sections 14. It submits that it exercised its discretion based on all proper and relevant factors, not in bad faith or for an improper purpose and not based on any irrelevant factors. The relevant factors it took into account included:

- The potential for misuse of the information in question to target prescribers and dispensers for illegal and violent acts. The ministry submits that it also considered this in the context of the significant increase in rates of opioid-related harm, including fatal overdoses, during the COVID-19 pandemic and how the increased likelihood of large quantities of drugs being diverted to the streets as a result of targeted robberies or break-ins would further exacerbate this on- going

[18] The public interest override at section 23 of the *Act* states: An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.
[19] Order MO-1573.
[20] Section 54(2).

crisis. It submits that these potential harms were balanced against the potential public interest that might be served by the disclosure of this information to the appellant.

- The views of various regulatory colleges and professional associations representing individuals who would be affected by the disclosure of the information.

- That the ministry consistently treats this information as confidential and that the information at the detailed level that the appellant requests has not been released to the public at large.

- That the ministry limited its exemption claims and only severed portions of the records based on these exemptions; it otherwise disclosed the record.

[70] While the appellant did not directly address the ministry's exercise of discretion in his representations, I have considered the appellant's public interest arguments made about the section 14(1) exemption claim here.

[71] The appellant submits that opioids are a public policy issue and that there is a clear public policy benefit in disclosing the information at issue as it would hold prescribers, dispensers, regulatory bodies, police and government accountable. He submits that given the scale of the opioid crisis, one should not assume, as the ministry submits, that the regulatory colleges have the issue under control. As noted, the appellant submits that it is important to weigh any substantiated risk of disclosure against its benefits.

[72] Based on my review of the information at issue, the parties' representations and the circumstances of the appeal, I find that the ministry did not err in exercising its discretion to withhold information under section 14(1)(e) of the *Act*.

[73] After reviewing the factors the ministry considered when making its decision, I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. I am satisfied that it considered relevant factors and did not consider irrelevant factors in the exercise of its discretion. The ministry considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal. It also balanced the potential harms against any potential public interest in disclosure.

[74] Despite the appellant's submission concerning the benefits of disclosure, it is evident that the ministry disclosed as much responsive information as it could without disclosing the identities of the prescribers and dispensers. It is evident that the ministry considered the public interest in the information when it decided to disclose certain information to the appellant while withholding the identities of the prescribers and dispensers. I find that the ministry's exercise of discretion was not improper simply because it found that risks of disclosing the information outweighed the public interest

in disclosure. The ministry considered the right factors and balanced them; it is not for me to substitute my discretion for the ministry's.

[75] Accordingly, I uphold the ministry's exercise of discretion.

ORDER:

The appeal is dismissed.

Original signed by: March 13, 2023
Alec Fadel
Adjudicator