

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4632

Appeal PA24-00181

Ontario Health

March 31, 2025

Summary: In a request made under the *Freedom of Information and Protection of Privacy Act*, a law firm asked Ontario Health (OH), for records related to a COVID-19 outbreak at a long-term care home. OH issued a decision to grant access to the records. The long-term care home appealed OH's decision and said that the mandatory exemption for third party information at section 17(1) of *FIPPA* applied to all of the information. The long-term care home also claimed that the law firm's request was an abuse of process and said that it wanted to apply various discretionary exemptions that OH did not apply. In this decision, the adjudicator dismisses the affected party's appeal and upholds OH's access decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended, sections 10(1)(b), and 17(1).

Orders Considered: Orders PO-1776-R, PO-1787, PO-3435, and PO-4165.

OVERVIEW:

[1] Ontario Health (OH) received a request from a law firm under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*, or the *Act*) for the following records:

...records pertaining to Ontario Health's, Ontario Health Central's, and/or the North Simcoe Muskoka Local Health Integration Network's involvement in the outbreak at [a long-term care home] between January 8, 2021, and

February 18, 2021, including but not limited to agendas, minutes, policies, procedures, memos, staffing, training, equipment, and supplies.

[2] Before issuing its decision, OH notified the long-term care home (the LTC Home) as an affected party pursuant to section 28(1)(a) of *FIPPA* and sought its views on the disclosure of the records at issue. The LTC Home objected to the disclosure of any of the records. After considering the LTC Home's response, OH decided to grant the requester full access to the records.

[3] The LTC Home, now the appellant, appealed OH's decision and an IPC mediator discussed the issues with the LTC Home, the requester, and OH. The LTC Home advised the mediator that it believes that section 17(1) applies to all the information in the records. The LTC Home also asserted that the law firm's request is an abuse of the access process, and that the discretionary exemptions at sections 13(1) (advice or recommendations), 14(1) (law enforcement), and 15(b) (relations with other governments) of *FIPPA* should apply to the records at issue. The mediator added the issues of whether the request was frivolous and/or vexatious (to capture the abuse of process allegations) and the raising of discretionary exemptions by a third party, in addition to the third party information exemption at section 17(1).¹

[4] The requester confirmed they continue to seek access to the records at issue and OH confirmed its position that the records should be disclosed in full. No further mediation was possible, and the matter was transferred to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry.

[5] I commenced an inquiry in which I obtained representations from the LTC Home and OH.² In this decision, I uphold OH's access decision and dismiss the LTC Home's appeal.

RECORDS:

[6] The records remaining at issue consist of four email chains and an "After-Action Report."

ISSUES:

A. Is the law firm's request an abuse of process?

¹ In the Notice of Inquiry I sent to the parties, I expanded the issue of whether the law firm's request was frivolous and/or vexatious to whether the request was an abuse of process.

² After reviewing the LTC Home and OH's representations, I determined that it was not necessary to also hear from the law firm.

- B. Can the LTC Home raise the application of the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1) (law enforcement), or 15(b) (relations with other governments) *FIPPA*?
- C. Does the mandatory exemption for third party information at section 17(1) of the *FIPPA* for third party information apply to the records?

DISCUSSION:

[7] This is one of four decisions issued together that deal with similar parties, types of records, and issues.³ The law firm is the requester in each of the appeals and the LTC Home is the appellant. The LTC Home appealed various institutions' decisions to disclose information to the law firm about a specific COVID-19 outbreak at the LTC Home.

[8] The LTC Home submitted substantially similar representations for each of the four appeals and there is significant overlap in the type of records at issue. As a result, some portions of the four decisions are duplicative. Although there is repetition in my overview of the LTC Home's representations and in some of my analysis of the issues in each of the four decisions, unique consideration was required in each appeal to take into account the individual records at issue, and the evidence provided by the parties before making each decision.

Background

[9] The LTC Home provided background information that is helpful in understanding the context of this appeal and the nature of the information at issue. As such, I have outlined the main points below and taken them into consideration when making my decision.

[10] The LTC Home operates a long-term care home. It says that that the records at issue relate to the province's first outbreak of a variant of concern of COVID-19 (the Outbreak) and its efforts to manage it within the long-term care home. It says that the Outbreak occurred in the context of a global infectious disease pandemic, the likes of which the world had not seen in over 100 years. According to the LTC Home, long-term care homes were particularly harshly impacted by COVID-19 outbreaks because of their vulnerable populations and other systemic factors. As a result, it asserts that long-term care homes needed a safe space to collaborate with other health care institutions and share confidential information to manage a crisis that none of them had ever experienced before, and which they knew very little about.

[11] The LTC Home says that throughout the Outbreak, it collaborated with various government institutions who provided oversight and guidance, including OH, the Ministry

³ The others are Appeal PA22-00549, (Order PO-4630), Appeal PA23-00123 (Order PO-4631), and Appeal PA24-00365 (PO-4633).

of Long-Term Care, the Simcoe Muskoka District Health Unit, the County of Simcoe, and local hospitals including Orillia Soldiers' Memorial Hospital and the Royal Victoria Regional Health Centre (collectively referred to in this Order as the Community Partners).

[12] The LTC Home states that as part of Outbreak management, it participated in daily Outbreak Management Team (OMT) and Incident Management System (IMS) meetings with the Community Partners and maintained frequent communications with them. It says the purpose of those meetings and communications was for the LTC Home to share openly and candidly, in confidence, information relating to the Outbreak with the Community Partners so that it could receive advice, recommendations, and assistance managing the Outbreak.

[13] The LTC Home provided an affidavit from its Director of Long-Term Care Operations (the Director) stating that the members of the LTC Home's OMT met daily and communicated amongst one and other frequently to discuss the status of the Outbreak in the home. The Director attested that her understanding was that information was provided to members of the OMT in confidence and there was an expectation that it would not be shared publicly.

[14] The LTC Home says that it prepared OMT meeting minutes, Daily Outbreak Operational Reports, Incident briefings, Incident Command Centre Situational Updates and Actions reports, Temporary IMS Structure reports, Communication Plans, After-Action Reports, and email updates relating to the Outbreak and shared these items with Community Partners for the purposes of responding to and managing the Outbreak. The LTC Home says it also participated in infection prevention and control (IPAC) assessments, workplace safety assessments and other inspections completed by various institutions. Finally, the LTC Home says that the Community Partners also communicated amongst themselves regarding the confidential information the LTC Home shared with them.

[15] The LTC Home asserts that the law firm intends to use the information at issue to advance its interests in a lawsuit against the LTC Home and that this should not be permitted. The LTC Home says this is particularly the case because Ontario's Long-Term Care COVID-19 Commission already completed a detailed and thorough investigation into how and why COVID-19 spread in long-term care homes, and what was done to prevent the spread.

ISSUE A: Is the law firm's request an abuse of process?

[16] The LTC Home says that the law firm's request is an abuse of process and argues it should be denied access to the records at issue for that reason.

[17] In the Notice of Inquiry I sent to the LTC Home at the beginning of this inquiry I asked it to explain why it believes I should find that the request is an abuse of process, what factors I should consider when making this determination, and what the

consequences of that finding should be.

[18] After reviewing the LTC Home's representations, I determined that I did not need to hear from the other parties before deciding on this issue. Below, I have set out the most relevant parts of the LTC Home's arguments and I follow with my reasons for finding that the request is not an abuse of process.

[19] The LTC Home begins by stating that the right of access under *FIPPA* is not engaged where the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious, and the head may refuse the request in those circumstances.

[20] The LTC Home relies on the Ministry of Government and Consumer Services "Freedom of Information and Protection of Privacy Manual." According to the LTC Home, the manual says the IPC considers it an abuse of process to use the access process to "make requests that are excessively broad in scope or unusually detailed" or which "coincide with the timing of other events (e.g., court proceedings)."⁴

[21] The LTC Home says that it has received multiple notifications as an affected party relating to requests for access to records about the Outbreak. Specifically, it says that 14 separate access requests for identical or similar records have been made to OH, Ontario Health atHome⁵, Orillia Soldiers' Memorial Hospital, the Ministry of Long-Term Care, the Simcoe Muskoka District Health Unit, Simcoe County and the Royal Victoria Hospital. The LTC Home says that most of the requests have been made by the same requester, the law firm, and are broad in nature. In support of these assertions, the Director's affidavit provided 14 copies of different access to information requests that the LTC Home was notified of as a potential affected party.

[22] The LTC Home argues that it has been subjected to an excessive number of overly broad requests for access to voluminous records relating to the Outbreak, that the requests are identical or very similar to one another, and originate from the same requester. It points to Order MO-3406 and says that this high volume of excessively broad and similar requests is indicative of a pattern of conduct which amounts to an abuse of the right of access.

[23] The LTC Home says that there is ongoing litigation related to the Outbreak and that there is a real likelihood that the law firm intends to use the records to advance its own private interest. The LTC Home submits that the law firm has commenced a civil action against the LTC Home. It argues that to the extent that the law firm is seeking disclosure of the records for the purposes of civil litigation, this is a private interest, and

⁴ *Freedom of Information and Protection of Privacy Manual*, Information, Privacy and Archives Division Ministry of Government and Consumer Services, Queen's Printer for Ontario, 2018 at page 101.

⁵ I note that the 14 Local Health Integration Networks, operating as Home and Community Support Services, were amalgamated to form a new organization named "Ontario Health atHome" pursuant to section 27.2(1) of the *Continuing Care Act*.

as a result, the request is inconsistent with the express purposes of *FIPPA*.

[24] The LTC Home says that the disclosure of any of the requested information should occur within the context of the court proceedings where there are rules in place to ensure procedural fairness and the protection of privacy interests of affected individuals. The LTC Home says that this reasoning is consistent with Order MO-1782, where an adjudicator stated:

The requests are generally coincident with the LTC Home's commencement of legal proceedings against Niagara [Regional Municipality]. This fact considered in isolation is insignificant. When it is combined with other factors evident in this case, however, it contributes to the discussion about this appellant's conduct, and weighs in favour of a frivolous or vexatious finding.

[25] The LTC Home submits that the current appeal is similar to the situation in MO-1782. Specifically, it says there is an ongoing legal proceeding combined with the multiple, excessively broad requests for identical or similar records related to the Outbreak and that this weighs in favour of a frivolous and vexatious finding.

[26] Furthermore, the LTC Home says that that the request is intended to accomplish an objective other than to gain access, without reasonable or legitimate grounds. It argues that the information at issue should not be disclosed because the law firm intends to disseminate the records publicly to advance its civil action and subject the LTC Home and its employees to further public scrutiny. The LTC Home submits that this disclosure would "be a significant disincentive for [the LTC Home] and other long-term care operators in terms of having open and transparent dialogue with government authorities and community partners."

[27] The LTC Home says that the OMT meetings with Community Partners and the sharing of Outbreak-related information and documentation are part of a process used by government authorities whenever there is a communicable disease outbreak in a long-term care home. Consequently, the LTC Home submits that an order to disclose the records through *FIPPA* could adversely impact the transparency and, ultimately, the effectiveness of the outbreak management process across the province. It argues that this situation is similar to the case in *Duncanson v. Ontario (Information and Privacy Commissioner)*, where a court concluded that additional public scrutiny through disclosure of the records pursuant to *FIPPA* was not a desirable objective.⁶

[28] The LTC Home says that the Simcoe Muskoka District Health Unit (the Health Unit) also received a similar request for records that was similar to the request in this appeal and that it denied access pursuant to the mandatory exemption for third party information at section 10(1)(b) of the *Municipal Freedom of Information and Protection of Privacy*

⁶ 1999, CanLII 18726 (ON SCDC).

Act. The LTC Home says that Health Unit determined that the disclosure of the records could reasonably be expected to result in similar information no longer being supplied to the institution. The LTC Home says that “deference should be given to the views of public health experts who are statutorily charged with overseeing public health in the region.”

[29] In summary, the LTC Home submits that the requests are excessively broad, are being used to advance a private interest and/or were made with the intention of subjecting the LTC Home and its OMT members to further public scrutiny, all of which amount to an abuse of the right of access.

[30] The LTC Home made various additional arguments that I reviewed but will not set out in detail because, as I explain below, these factors are not relevant to the issue of whether the request is an abuse of process. They include the following assertions:

- the Outbreak has already garnered significant regulatory oversight, media attention and public scrutiny and additional public scrutiny would not meaningfully contribute to the public’s understanding of the activities undertaken by the parties involved,
- there is no compelling public interest which makes disclosure desirable, and
- a commission completed a thorough and detailed investigation into how and why COVID-19 spread in long-term care homes and released a publicly available report.

Findings and analysis

[31] Below are my reasons for dismissing this aspect of the LTC Home’s appeal.

[32] The LTC Home’s representations raise the possible application of the “frivolous or vexatious” provisions at section 10(1)(b) of *FIPPA* and section 5.1 of Regulation 460. A preliminary issue in that regard is whether the LTC Home is entitled to rely on those provisions, or whether they can only be claimed by an institution.

[33] Section 10(1)(b) of *FIPPA* specifies the following:

...every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, ...

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[34] Section 27.1 states

(1) A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 26,

(a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;

(b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and

(c) that the person who made the request may appeal to the Commissioner under subsection 50 (1) for a review of the decision. 1996, c. 1, Sched. K, s. 4.

[35] As previous IPC orders have made clear, these provisions exist for the benefit of “institutions” under *FIPPA*.⁷ Section 10(1)(b) sets a condition precedent for its application that “the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.”⁸ This theme is repeated in the notice requirement established by section 27.1(1). Similarly, sections 5.1(a) and (b) of Regulation 460 prescribe the following:

5.1 A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

(a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

(b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[36] Numerous IPC orders have stated that section 10(1)(b) can only be relied upon by the head of an institution under *FIPPA*.⁹ As explained in Order PO-2490:

...the universal requirement in these provisions that *the head* (i.e., the head of an institution under the *Act* – see the definition in section 2) must have *formed an opinion* that the request is frivolous or vexatious make it even more difficult for an affected party or appellant to rely on these provisions than to rely on a discretionary exemption, as discussed above. In fact, based on the statutory wording, I believe this is an insurmountable hurdle. I find that the appellant is not entitled to rely on these sections, *per se*. [Emphases in original.]

[37] Previous IPC decisions have specified that the application of the frivolous and

⁷ Orders PO-2050, PO-2906, and PO-3738-I.

⁸ Order PO-2906 at pages 35 to 36.

⁹ For example, Orders PO-2050, PO-2906, and PO-3738-I.

vexatious provisions is only relevant to the use of the “processes” of *FIPPA*.¹⁰ According to these previous decisions, the frivolous and vexatious provisions of *FIPPA* were enacted to provide institutions with a tool to enable them to address abuses of the processes of the legislation that may impede the operation of an institution. The abuses referred to under *FIPPA* would not have an impact on affected persons in a way that would trigger the application of this provision.

[38] Furthermore, IPC adjudicators have agreed that the frivolous and vexatious provisions were not intended to be used by institutions to prevent the disclosure of records that would otherwise be available under *FIPPA* because they do not like the nature of the request or the person requesting the information.¹¹

[39] I agree with and adopt the findings of the adjudicators who have considered this issue already.¹² I agree that the frivolous or vexatious provisions at section 10(1)(b) of *FIPPA* are not intended to be available to affected parties who object to the disclosure of records that institutions have decided should be disclosed under *FIPPA*.

[40] However, even though an affected party cannot rely upon *FIPPA*’s frivolous or vexatious provisions, previous IPC orders have held that parties to an appeal have a right to argue that a request made under the *FIPPA* constitutes an abuse of process at common law and to have an appeal dismissed based on that finding.¹³ In this case, the LTC Home argues that the law firm’s request for information should be denied because it is an abuse of process. I will consider that issue next.

Abuse of process at common law

[41] In Order MO-2635, Adjudicator Faughnan explained that the principles that would apply to an allegation that a request is an abuse of process at common law are, to a significant extent, the foundation of the frivolous or vexatious provisions in *FIPPA*. As a result, he concluded that the following issues should be considered:

- whether the request was part of a pattern of conduct that amounts to an abuse of the right of access,
- whether the request was made in bad faith or for a purpose other than to obtain access.

[42] In this appeal, the LTC Home submits that the law firm engaged in a pattern of conduct amounting to an abuse of process, and that its request was made for an improper purpose. I consider both claims below.

¹⁰ See, for example, Orders M-906 and MO-1488.

¹¹ Order PO-2050.

¹² Orders PO-2050, PO-2688, MO-3647, and PO-3728-I.

¹³ Most recently, Order MO-4404. See also, Orders PO-3728-I, PO-2906, PO-2490, MO-2635 and M-618.

Pattern of Conduct

[43] A pattern of conduct must be found to exist before determining whether that pattern of conduct amounts to an abuse of the right of access.¹⁴ In Order M-850, the adjudicator defined a “pattern of conduct” as follows:

... a “pattern of conduct” requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

[44] The following factors may be relevant in determining whether a pattern of conduct amounts to an “abuse of the right of access”:

- *Number of requests*: is the number excessive by reasonable standards?
- *Nature and scope of the requests*: are the requests overly broad and varied in scope or unusually detailed? Are they identical or similar to previous requests?
- *Purpose of the requests*: are the requests intended to accomplish some objective other than to gain access to the requested information? For example, are they made for “nuisance” value, or is the requester’s aim to harass the institution or to break or burden the system?
- *Timing of the requests*: is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?¹⁵

[45] If I find that the request is part of a pattern of conduct, then I must determine whether that pattern of conduct amounts to an “abuse of the right of access.” In making that determination, various factors may be relevant, including the cumulative effect of the number, nature, scope, purpose, and timing of the requests.¹⁶ Other factors specific to the case can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.¹⁷

[46] In the current case, I am not satisfied that the law firm has engaged in a pattern of conduct that would amount to an abuse of process. The LTC Home provided affidavit evidence indicating that it has received 14 notifications of requests for information from various institutions. The Director states that she believes most of these requests were made by the law firm.

[47] The law firm is the requester on four appeals currently before me at the inquiry stage of the appeals process.¹⁸ One additional appeal was withdrawn by the law firm at

¹⁴ Order MO-4513.

¹⁵ Most recently, Order MO-4513. See also, Orders M-618, M-850, MO-1782.

¹⁶ Most recently, Order MO-4513. See also, Orders M-618, M-850, MO-1782 and MO-1810.

¹⁷ Order MO-1782.

¹⁸ This appeal, as well as Appeals PA22-00549, PA23-00123, and PA24-00365.

the adjudication stage, and four other appeals arising from requests made by the law firm were closed at the intake or mediation stages.¹⁹ As such, I can confirm that the law firm made at least 9 requests for information to various institutions for records related to the LTC Home.²⁰

[48] Although the law firm's requests all seek information about the LTC Home, each request was submitted to different institution. Based on my understanding of the context from the file materials, it appears the law firm has a good faith interest in obtain information from each of the institutions about the LTC Home and the Outbreak. In my view, the requests were not made for "nuisance" value or to place a burden on any system.²¹

[49] I note the LTC Home's reliance on Order MO-3406, which specifies that a high volume of excessively broad and similar requests is indicative of a pattern of conduct which amounts to an abuse of the right of access. I do not find this case helpful to the LTC Home's cause. In Order MO-3406 the adjudicator noted that the appellant in that appeal had made three requests within three months. The adjudicator concluded that the three requests were not excessive. The adjudicator differentiated the case before her from others, such as Orders MO-2111 and MO-2289, where there were 27 and 626 requests, respectively.

[50] In my view, 9 requests made to different institutions does not amount to a high volume of requests, particularly where each of those institutions may have different information to which the law firm seeks access.²² In this appeal, the law firm requested access to records about OH's involvement in the Outbreak during a month-long period. In my view, the request was not overly broad or unusually detailed. Overall, I am not satisfied that this is a circumstance where there is a pattern of conduct that results in an abuse of process.

Bad faith or a purpose other than to obtain access

[51] As noted above, a request may also be an abuse of process if it is made in bad faith or for a purpose other than to obtain access.²³ In short, "bad faith" implies the conscious doing of a wrong for a dishonest purpose. The IPC has defined the term "bad faith" as,

¹⁹ Appeals PA22-00570, MA22-00751, MA23-00341, PA23-00122 and PA24-00212.

²⁰ Four other requests for similar information were made by another individual who does not appear to have a connection to the law firm.

²¹ I address the LTC Home's assertion that the law firm is attempting to gather information for a civil proceeding and that this is an inappropriate use of *FIPPA* later in this decision.

²² I note that there could be an additional request from the law firm, according to the LTC Home. I am not aware of an additional request for information from the law firm or an IPC appeal. However, if there were an additional request from the law firm that was similar in nature to the other nine already accounted for, this would not have affected my decision.

²³ Order MO-2635.

The opposite of “good faith,” generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one’s rights, but by some interested or sinister motive...²⁴

[52] A “purpose other than to obtain access” would require a requester to “have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.”²⁵ In Order MO-1924, Adjudicator Higgins noted that requesters may have “some collateral purpose over and above an abstract desire to obtain information” when making requests. He emphasized,

Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay.²⁶

[53] As confirmed by Adjudicator Higgins, these purposes are permissible. He emphasized that to find otherwise would contradict the fundamental principles underlying *FIPPA*.²⁷ Potential examples of purposes other than to gain access, as stated above, could include harassing an institution to break or burden their systems, or purely to create a nuisance.²⁸

[54] I do not accept the LTC Home’s assertion that the law firm should be prohibited from seeking information under *FIPPA* because it commenced a civil proceeding, or that any information disclosed should be under the guidance of the court in the litigation process. As noted in Order MO-1782, relied on by the LTC Home, the fact that a request for information is coincident with legal proceedings, considered in isolation, is insignificant.

[55] Previous IPC orders have been clear that litigants are not prohibited from seeking access to information pursuant to *FIPPA*. As explained in Interim Order MO-2573-I, “the *Act* does not contain any provision aimed at preventing a requester from making an access request, even where the requester is involved in litigation with the institution, and the requested records may be related to the litigation.”²⁹ The adjudicator confirmed that “a request for information that could also be sought on discovery in contemporaneous

²⁴ Order MO-4513.

²⁵ Order MO-1924.

²⁶ Order MO-1924.

²⁷ Order MO-1924.

²⁸ Order M-618 and MO-3761.

²⁹ Interim Order MO-2573-I was determined pursuant to the municipal counterpart to *FIPPA*, the *Municipal Freedom of Information and Protection of Privacy Act*.

litigation is not, per se, an abuse of process.”³⁰

[56] As emphasized in Order PO-3435, although an appellant may be able to seek the same information through the rules of discovery, those rules do not preclude them from seeking access under *FIPPA*. To be clear, the fact that an appellant has chosen to make a request instead of (or in addition to) pursuing the discovery process does not, in itself, amount to an abuse of process.³¹ While the timing of a request aligning with court proceedings may, in combination with other factors, lead to a conclusion that a requester is acting in bad faith, the existence of litigation, in isolation, does not support a finding of bad faith. The fact that there is contemporaneous litigation is not sufficient evidence to base a finding of bad faith on if there no other factors that suggest a requester is acting in bad faith. In this case, I see no other factors indicating that the law firm has an alternative purpose other than obtaining the requested information, or that it is acting in bad faith.

[57] Having reviewed all the LTC Home’s submissions, I find that the remaining arguments are not relevant to the issue of whether the law firm’s request is an abuse of process, based on the criteria above. The IPC does not weigh factors related to public scrutiny, regulatory oversight, or the public interest when considering whether a request is an abuse of process.

[58] I have considered the decisions relied on by the LTC Home, namely, *Duncanson v. Ontario (Information and Privacy Commissioner)* and *John Doe v. Hale*, and find that they are not applicable to the issue of whether the law firm’s request is an abuse of process.³² Each of these cases dealt with different issues than those before me. The paragraph highlighted by the LTC Home in *Duncanson v. Ontario (Information and Privacy Commissioner)* relates to the potential application of section 14(2)(a) of the personal privacy exemption in the *Municipal Freedom of Information and Protection of Privacy Act*. The paragraph the LTC Home highlighted in *John Doe v. Hale* is about whether the public interest override at section 23 of *FIPPA* is engaged. The analysis in both cases concerns issues other than whether the underlying request for records is either frivolous or vexatious or an abuse of process.

[59] Next, I find that the fact that some of the information is already publicly available is not, absent any other connecting arguments or evidence, relevant to the determination of whether a request is an abuse of process. I also do not agree that the fact that the Health Unit made a different access decision in response to a similar request for information is relevant to the issue of whether the law firm’s request in this appeal is an

³⁰ Order MO-2573-I.

³¹ Order PO-3435 at para. 40.

³² *Duncanson v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 2464, 175 D.L.R. (4th) 340, 124 O.A.C. 170, 87 C.P.R. (3d) 94, Court File Nos. 284/97, 376/97, 410/97, 509/97 and 5/98 (Div. Ct.) and *Doe v. Hale*, 2006 CanLII 24240 (ON SCDC).

abuse of process.³³ Institutions make decisions based on the records before them and their understanding and application of the access to information legislation. In my view, these are separate matters and the Health Unit's decision does not support the LTC Home's argument that the law firm's request in this appeal is an abuse of process.

[60] Finally, I find that the LTC Home's arguments that focus on whether disclosing the information would disincentivize long-term care operators from communicating openly and transparently with government authorities and compromise the effectiveness of future outbreak management processes across the province are also not relevant to whether the request is an abuse of process. These types of harms-related arguments are typically the subject of the analysis under section 17(1) of *FIPPA*. In my view, these arguments are not relevant to the determination of whether a request is an abuse of process at common law.

[61] For the reasons set out above, I find that the law firm's request is not an abuse of process pursuant to common law, and I dismiss this aspect of the appeal.

Issue B: Can the LTC Home raise the application of the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1) (law enforcement), and/or 15(b) (relations with other governments) of the *Act*?

[62] The LTC Home submits that this appeal involves rare and unusual circumstances that and as a result, it should be permitted to raise the application of the discretionary exemptions at sections 13(1), 14(1), 15(b), and 18(1)(j) of *FIPPA*, even though OH did not claim those sections applied to any of the information at issue.

[63] *FIPPA* contains both mandatory and discretionary exemptions. A mandatory exemption indicates that a head "shall" refuse to disclose a record if the record qualifies for exemption under the exemption. A discretionary exemption uses the permissive "may." The legislature expressly contemplated that the head of the institution is given the discretion to claim, or not to claim, these exemptions.

[64] As set out in Order P-1137, and reiterated by many decisions of the IPC, if the head of an institution determines that, despite the application of a discretionary exemption, a record should be disclosed, they may do so.³⁴ Previous orders have emphasized that the purpose of the discretionary exemptions is to protect institutional interests, and that as a result, it would only be in the most unusual of cases that an affected party could raise the application of an exemption which has not been claimed by the head of an institution.³⁵

[65] As explained in the Notice of Inquiry provided to the LTC Home, affected party

³³ I also note that the request that was the subject of another appeal (since withdrawn) was made by someone other than the law firm.

³⁴ See, for example, Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

³⁵ Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

interests are typically considered in the context of the mandatory exemptions in sections 17 or 21(1) of the *Act*. The LTC Home was asked to explain why it should be permitted to raise any of the discretionary exemptions in this case.

The LTC Home's representations

[66] The LTC Home submits that this appeal involves rare and unusual circumstances such that it should be permitted to raise the application of discretionary exemptions not claimed by OH. The LTC Home refers me to Order P-257, which states the following:

[The IPC] has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, **there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act.** It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it. [emphasis added by the LTC Home]

[67] The LTC Home says that IPC decisions about what rare and usual circumstances will justify the use of discretionary exemptions by third parties have largely hinged on the motivation of the discretionary exemption, as well as the consequences of the information release. The IPC has determined that the "rare" occasion in which a third party may rely on a discretionary exemption would be "where release of a record would seriously jeopardize the rights of a third party."³⁶

[68] The LTC Home provided two examples where the IPC allowed individuals to raise discretionary exemptions when the institution had not done so:

1. Order PO-1787, where an adjudicator allowed an individual to raise the discretionary exemption at section 14(1)(e) of *FIPPA*. That section 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," and

³⁶ The LTC Home relies on Order M-430.

2. Order PO-1776-R, in which an adjudicator allowed an individual to raise the discretionary exemption at section 20. Section 20 states, "a head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual."

[69] The LTC Home submits that although the IPC has been reluctant to permit third parties to raise discretionary exemptions under *FIPPA*, it has demonstrated a willingness to allow it when disclosure of a record would affect the rights of an individual, where the institution's actions would be clearly inconsistent with the application of a mandatory exemption, or where third-party health and safety would be impacted. In this case, the LTC Home submits that the unprecedented COVID-19 pandemic in general, and the Outbreak at the LTC Home specifically, give rise to the "rare and unusual circumstances" that would justify the IPC allowing it to raise the discretionary exemptions.

[70] The LTC Home asserts that it is "evident that disclosure of the records would affect the rights of the LTC Home." It says the records outline responses and/or strategies, recommendations, and action items relating to the Outbreak provided to it by employees of institutions who were members of the OMT (Outbreak Management Team).³⁷ The LTC Home argues that it has the right to maintain the confidentiality of government advice which it received in the context of an unprecedented outbreak pursuant to section 13(1) of *FIPPA*.

[71] It also submits that inspections were conducted by the ministry and other institutions, and that the records related to these inspections are subject to the law enforcement exemption at section 14(1) of the *Act*.

[72] The LTC Home also says the following about section 15(b) of *FIPPA*:

Lastly, according to section 15(b) of *FIPPA*, the head must refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from the government of Ontario or one of its agencies.³⁸

[73] The LTC Home reiterates that confidential information was shared amongst the LTC Home, OH, and the other Community Partners during the Outbreak, for the purpose of outbreak management. In short, the LTC Home argues that the records arise from information OH received in confidence from government agencies and thus, should not be disclosed. The LTC Home argues that procedural fairness requires that it be permitted to raise the discretionary exemptions in the context of the unique circumstances created by the COVID-19 pandemic in order to protect its rights.

³⁷ As defined above, OMT refers to the "Outbreak Management Team."

³⁸ I note that this restatement of section 15(b) is incorrect. Section 15(b) states that "a head may refuse to disclose a record where the disclosure could reasonably be expected to reveal information received in confidence from another government or its agencies by an institution."

[74] The LTC Home made some additional arguments that it did not connect to any of its discretionary exemption claims. For example, it asserts that the disclosure of the information at issue “would be entirely inconsistent with both [OH’s] advisory role during the Outbreak (as members of the OMT) and the supply of confidential third-party information to them in carrying out this role.” It submits that OH’s decision not to apply the mandatory exemption for third-party information at section 17(1) to all the information is inconsistent with the application of that mandatory exemption. The LTC Home says that the IPC has demonstrated a willingness to allow an affected party to raise a discretionary exemption when an institution’s actions would be clearly inconsistent with the application of a mandatory exemption. It argues that this is one of those cases.

[75] In short, the LTC Home says the forced disclosure of confidential and highly sensitive information shared between long-term care homes and other institutions while managing an unprecedented pandemic will have a chilling effect on the sharing of information when managing a “rare and unusual” health crisis, which would ultimately compromise public safety. The LTC Home notes that Health Unit shares this concern and denied a requester access to similar records on the basis that disclosure of the records could result in similar information no longer being shared.³⁹

[76] The LTC Home submits that the unprecedented COVID-19 pandemic and the potential harm associated with the lack of cooperation and transparency between the various stakeholders during an outbreak is a “rare and unusual” circumstance that justifies the use of discretionary exceptions by the LTC Home. The LTC Home submits that, as a matter of procedural fairness, it should be permitted to make representations on how the discretionary exemptions apply to the records so that these exemptions can be considered by the IPC in the full context of this unique case.⁴⁰

Findings and analysis

[77] Below are my reasons for finding that the LTC Home has not established that it should be permitted to raise the application of the discretionary exemptions at sections 13(1) (advice or recommendations), 14(1) (law enforcement), or 15(b) (relations with another government) of *FIPPA*.

[78] As explained above, the purpose of the discretionary exemptions is to protect institutional interests, and it is only in “the most unusual of cases” that an affected party may raise the application of a discretionary exemption that has not been claimed by an institution.⁴¹ The LTC Home was asked to explain why it should be permitted to raise the discretionary exemptions it alleges apply in this case when the institution did not. Having

³⁹ The LTC Home is referring to a decision made by the Health Unit in response to a request from a different individual. The requester appealed the Health Unit’s decision and later, they withdrew that appeal.

⁴⁰ I note that after reviewing the LTC Home’s representations about whether it should be permitted to raise the discretionary exemptions when OH had not done so, I determined that I had sufficient evidence to make a decision, and it was unnecessary to seek representations from the other parties to this appeal.

⁴¹ Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

reviewed its representations, I find that it has not demonstrated that this is one of those “rare occasions” where it is necessary to consider the application of a discretionary exemption that was not applied by the OH.

[79] Previous orders have clearly stated that the discretionary exemptions exist for institutions to claim. As emphasized in Order P-257 stated,

The Act does not require the head [of an institution] to notify an affected person in respect of any other exemption, nor does it provide for an affected person to raise any other exemption for consideration during the appeal process. The Act acknowledges that the views of an affected person are a valuable component of the head's decision-making process with respect to the specific types of information covered by sections 17(1) and 21(1). However, the Act makes no similar acknowledgement with respect to other exemptions and, in the absence of the circumstances which give rise to the application of section 28(1), an affected person would have no knowledge of the head's intention to release records prior to the actual release.

[80] It follows that while an institution has the right to apply discretionary exemptions, the same right does not exist for the LTC Home. As such, I disagree with the LTC Home's assertion that section 13 provides it “the right to maintain the confidentiality of government advice which it received in the context of an unprecedented Outbreak.” Section 13(1) of *FIPPA* states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution [emphasis added].

[81] As an affected party, the LTC Home does not have that same right to assert the application of section 13 of *FIPPA*, unless it can establish that the “rare and unusual circumstances” discussed above at paragraph 64 exist such that it should be permitted to claim the discretionary exemption.⁴²

[82] The LTC Home argues that the unprecedented situation surrounding the COVID-19 pandemic, and specifically, the Outbreak at its location, give rise to the “rare and unusual circumstances” that should allow it to raise the discretionary exemption at section 13 of *FIPPA*.⁴³ I do not agree. While I acknowledge that the pandemic was an unprecedented event and I accept that long-term care homes were particularly vulnerable in outbreak situations, I do not see how this justifies allowing the LTC Home to invoke discretionary exemptions that the institution (OH) decided not to apply.

⁴² Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

⁴³ I note the LTC Home argues due to the circumstances surrounding the Outbreak, it should be permitted to raise all of the discretionary exemptions it claims apply, specifically, sections 13(1), 14(1) and 15(b).

[83] The IPC provided guidance to institutions dealing with access to information requests during the COVID-19 pandemic in 2021. As former Assistant Commissioner Sherry Liang instructed in Order PO-4165, the expectation was that institutions must continue to respect their transparency obligations, even during the pandemic. The former Assistant Commissioner referred to a public “Joint Statement of the Federal, Provincial and Territorial Access and Privacy Commissioners” issued June 2, 2021⁴⁴, emphasizing the following points:

- Access to government information and respect for privacy are essential for governments to be held accountable for their actions and decisions, and to maintain the public’s trust in times of widespread crisis. By ensuring confidence in decision-making, design and implementation of emergency measures and the systems that support them, access to information and privacy laws promote and assist the health and well-being of individuals and their families.
- Governments should emphasize both the proactive and voluntary disclosure of government information – particularly, information of significant public interest related to policy-making, public health, public safety, economy, procurements and benefits.
- Public bodies must be open and transparent with non-personal or aggregate-level information that the public needs to know to make informed choices and decisions about how to protect themselves and to ensure fair distribution of risks and benefits among all members of society, including the most vulnerable and marginalized groups.

[84] As is clear from the points set out above, the IPC’s view was that the importance of access to information was heightened during the pandemic. It encouraged institutions to proactively disclose information. In this case, OH considered the information at issue and applied the discretionary exemptions as it determined was appropriate. OH decided not to apply section 13, or any of the other discretionary exemptions noted by the LTC Home, to the information that remains at issue in this inquiry.⁴⁵ I do not see the uniqueness of the pandemic, or the Outbreak at the LTC Home, as a persuasive reason to allow the LTC Home to raise those discretionary exemptions when OH did not.

[85] Similarly, I do not accept the LTC Home’s assertion that procedural fairness requires it be permitted to raise the discretionary exemptions due to the unique circumstances created by the COVID-19 pandemic. As emphasized above, the principles of *FIPPA* continued to apply, even during the COVID-19 pandemic, and I am not convinced that there are any procedural fairness issues arising from this finding.

[86] I also do not accept that the LTC Home should be permitted to raise the

⁴⁴ Available at: <https://www.ipc.on.ca/en/media-centre/news-releases/federal-provincial-and-territorial-information-and-privacy-commissioners-and-ombudsman-issue-joint>

⁴⁵ Or possibly, it decided that the discretionary exemptions did not apply.

discretionary exemption for law enforcement related matters at section 14(1) of *FIPPA* simply because inspections were conducted that may fall within that exemption. The “discretionary” part of the exemption means that an institution may choose to disclose information, despite the fact that it may have been able to withhold it under the exemption.

[87] Although the LTC Home did not specifically refer to any other subsections of section 14(1), it raised Orders PO-1776-I and PO-1787, which both relate to health and safety. I considered these decisions in the context of section 14(1)(e), which specifies that:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(e) endanger the life or physical safety of a law enforcement officer or any other person; ...

[88] I note that both the decisions the LTC Home refers to are examples of cases where affected individuals have been permitted raise discretionary exemptions related to safety matters, when institutions have not done so.

[89] For example, in PO-1787, the requester sought access to the name, title, firm name and address of a lawyer that drafted a response anonymously to a complaint made by the requester about a company to the Ontario Human Rights Commission (OHRC). The adjudicator allowed the lawyer (as an affected individual) to raise the discretionary exemption at section 14(1)(e), even though the OHRC did not apply it. The lawyer referred to documentation in the records as evidence of the requester’s past aggressive and violent behaviour and pointed out the requested information would enable the requester to contact him. The adjudicator ultimately determined that it was appropriate to consider the discretionary exemption because the lawyer expressed concerns about potential danger to his physical safety if the information was disclosed.

[90] In PO-1776-R, an adjudicator applied the discretionary exemption at section 20 (health and safety) of *FIPPA* even though the Ministry of the Attorney General had not done so.⁴⁶ Section 20 states that “a head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.” The adjudicator determined that it was appropriate to consider the discretionary exemption because it was not clear that the Ministry of the Attorney General was aware of the personal safety concerns of the affected individual when it issued its decision.⁴⁷

⁴⁶ Reconsideration Order PO-1776-R is a reconsideration of Reconsideration Order R-980015. Reconsideration Order PO-1776-R overturns the adjudicator’s decision that section 20 did not apply to the information at issue. In Reconsideration Order R-980015, the adjudicator allowed the affected party to raise the discretionary exemption at section 20 but concluded that it did not apply.

⁴⁷ See Reconsideration Order R-980015 at page 20.

[91] I do not agree with the LTC Home that this appeal raises similar health or safety concerns such as those outlined above. The LTC Home asserts that third party health and safety would be impacted by the disclosure of the records because the LTC Home and other long-term care operators would become reluctant to supply fulsome information about outbreak management with institutions, to the detriment of long-term care residents, their families and the public generally. However, the LTC Home has not explained why the reluctance would arise. The LTC Home has not referred to any specific information in the emails or the After-Action Report that, if disclosed, would have a chilling effect on information sharing in the future. The LTC Home's argument seems to be that if long-term care home operators knew that *any* information would be subject to freedom of information legislation, they would be reluctant to share it with institutions such as OH, or the Ministry of Long-Term Care. In my view, this is simply too general of an argument to accept.

[92] I am also not persuaded that long-term care homes would risk patient and staff safety by refusing to share information and obtain assistance from the Community Partners in an outbreak situation because they are concerned about information being disclosed through freedom of information legislation.

[93] Furthermore, I note that OH provided a copy of a Memorandum from the Ministry of Long-Term Care to all Long-Term Care Home Licensees with the title, "Seasonal Respiratory Illness Preparedness for Long-Term Care Homes" as part of its representations in response to the LTC Home's assertion that section 17(1) of *FIPPA* applies to the information at issue. In the Memorandum, the Ministry of Long-Term Care specifies that the *Fixing Long-Term Care Act* requires long-term care homes to notify their local public health unit of suspected outbreaks immediately, that confirmed outbreaks must be reported to the Ministry of Long-Term Care, and that homes must continue to work with their local public health unit to manage outbreaks. As such, it appears that the LTC Home has an obligation to share information with the Ministry and other Community Partners. Additionally, I note that long-term care homes that contravene the *Fixing Long-Term Care Act* risk losing their license and/or may face financial and criminal penalties.⁴⁸

[94] The LTC Home was provided with a copy of OH's representations and offered an opportunity to make representations in response to the assertion that it has a duty to communicate about these matters. The LTC Home declined to provide any response on this issue. In the absence of any additional evidence from the LTC Home, I find that it has an obligation to communicate about outbreak-related matters and that as a result, the chilling effect it describes is not likely to occur.

[95] In any event, I am satisfied that the circumstances in this matter are distinct from those in PO-1787 and PO-1776-R. I am not persuaded that long-term care homes would withhold information about potential outbreaks from Community Partners and endanger residents by not seeking assistance managing an outbreak of a contagious illness because

⁴⁸ *Fixing Long-Term Care Act*, 2021, SO 2021, c 39, sch 1.

information they share may be subject to freedom of information legislation.

[96] Finally, the LTC Home says that it should be permitted to raise section 15(b) because confidential information was shared amongst the LTC Home, OH, the Ministry, the Health Unit, the County and local hospitals. Section 15(b) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to, [...]

(b) reveal information received in confidence from another government or its agencies by an institution; or

[97] The LTC Home has not identified any specific information in the records that has any connection to another government.⁴⁹ The entities referred to by the LTC Home are all within the province of Ontario. Based on my review of the records, I did not identify any information that could potentially qualify for the discretionary exemption at section 15(b), even if I were to conclude that the LTC Home were permitted to raise it. As such, I will not consider section 15(b) further.

[98] The LTC Home made additional general arguments about why I should permit it to raise the discretionary exemptions it seeks to apply. I will address those arguments now.

[99] To begin, I am not persuaded by the LTC Home's argument that OH has acted inconsistently with the mandatory exemption for third party information at section 17(1) of *FIPPA* and that as a result, it should be permitted to raise various discretionary exemptions that OH did not. I consider the potential application of section 17(1) of *FIPPA* later in this decision. The LTC Home had an opportunity to make representations on the potential application of that section and I do not see any basis to also consider its arguments in that regard here.

[100] Finally, I have considered the LTC Home's argument that, as a matter of procedural fairness, it should have been permitted to make representations on how the discretionary exemptions applied to the information at issue. As I explained above, the first step for a party other than an institution that wants to claim a discretionary exemption is to establish that it should be permitted to do so.⁵⁰ The LTC Home's representations indicate it understood this requirement. It stated that IPC decisions about what rare and usual circumstances will justify the use of discretionary exemptions by third parties have largely hinged on the purpose of the discretionary exemption, as well as the consequences of the information release. In my view, it was up to the LTC Home to make any relevant arguments in its representations to that end. If the facts surrounding the application of

⁴⁹ "Another government" refers to governments outside of the Province of Ontario and does not include municipal entities (Order PO-2751). Examples of "another government" have included the Government of the Province of New Brunswick (Order P-210) and the Government of Canada (PO-2569).

⁵⁰ Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

the discretionary exemption the LTC Home sought to apply were relevant to why it should be permitted to raise it when the institution had not done so, the LTC Home should have made those arguments in its representations. The LTC Home had an opportunity to make arguments in support of its assertions that it should be permitted to raise discretionary exemptions not applied by OH and I see no procedural unfairness in the inquiry process.

[101] For all of these reasons I find that the “rare and unusual circumstances” that might justify a third party raising a discretionary exemption do not exist in this case. As a result, I decline to allow the LTC Home to raise any of the discretionary exemptions that were not applied by OH.

Issue C: Does the mandatory exemption at section 17(1) for third party information apply to the records?

[102] The LTC Home submits that section 17(1) of the *Act* applies to the information at issue.

[103] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,⁵¹ where specific harms can reasonably be expected to result from its disclosure.⁵²

[104] The relevant portions of section 17(1) 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, if 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; ...

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

⁵¹ *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.*).

⁵² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

Part 1: Type of information

[106] The LTC Home says that the information it supplied to OH includes information that is scientific, commercial, or financial in nature. The IPC has described the types of information protected under section 17(1) as follows:

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as “scientific,” it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.⁵³

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.⁵⁴ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁵⁵

Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁵⁶

The LTC Home’s representations

[107] The LTC Home submits that the information it supplied to OH during the Outbreak included information that fits the definition of scientific, commercial, or financial for the purposes of section 17(1) of *FIPPA*.

[108] First, the LTC Home argues that the records at issue in this appeal contain information similar in nature to information an adjudicator determined was scientific information for the purposes of section 17(1) of *FIPPA* in Order PO-4090. In that matter,

⁵³ Order PO-2010.

⁵⁴ Order PO-2010.

⁵⁵ Order P-1621.

⁵⁶ Order PO-2010.

an adjudicator agreed with the institution that some of the information at issue could be characterized as “scientific” for the purposes of section 17(1) because it included

information relating to study objectives, background or contextual information, conclusions drawn from data, and recommendations resulting from studies that were conducted by third parties, including stakeholders interested in laws and policies relating to the provision of abortion services.⁵⁷

[109] The LTC Home submits that the records at issue in this appeal, consist of “conclusions drawn from data relating to the Outbreak and recommendations with respect to outbreak management made by Community Partners, who are interested in laws and policies relating to outbreak management during the COVID-19 pandemic.”

[110] Next, the LTC Home says that the records include information that is commercial or financial information. Specifically, it says the After-Action Report and emails contain information relating to staffing, use of agency staff, swabbing and testing, screening, tracing, isolation, cohorting, hospital transfers, personal protective equipment, IPAC measures, vaccination, repatriation of residents, palliative and bereavement supports, visitation, messaging to families, media inquiries and other aspects of outbreak management. The LTC Home argues that this information “clearly relates” to its operations in the provisions of services to its residents and employees and is therefore, commercial in nature.

[111] Finally, the LTC Home says that the data contained in the records (including, for example, testing, staffing levels and human resource supports, and personal protective equipment inventory) relates to the purchase or obtaining of supplies and services, as well as to how it distributed its resources with reference to specific data. It argues that “such information clearly relates to [its] financial operations.”

OH's representations

[112] OH denies that any of the records at issue contain scientific, technical, commercial, financial, or labour relations information, as contemplated by section 17(1) of *FIPPA*.

[113] OH says that each of the four emails at issue are communications between Ministry of Long-Term Care officials and former Local Health Integration Network staff (who transitioned to OH). It says the emails consist of high-level updates regarding the Outbreak at the LTC Home, including descriptions of actions taken by the ministry, supporting hospitals, and public health officials. OH submits that the email communications were intended to update OH leadership and staff on the status of the Outbreak and associated action plans.

[114] According to OH, the After-Action Report was produced by Orillia Soldiers’

⁵⁷ PO-4090 at paragraph 66.

Memorial Hospital, who confirmed with OH that it had no concern with its release. OH says the final record is a report that outlines the steps taken to control the Outbreak. It submits that the report outlines the objectives and associated corrective actions that were implemented over a four-week period to manage the Outbreak. OH says that based on its review, the report does not appear to contain scientific, technical, commercial, financial, or labour relations information.

Findings and analysis

[115] Having reviewed each page at issue, I find that none of them contain any of the types of information section 17(1) of *FIPPA* is meant to protect, and as a result, that section does not apply.

Scientific information

[116] Based on my understanding of the context the records were created in and each record's specific content, I find that they do not contain scientific information for the purposes of section 17(1) of *FIPPA*.

[117] In my view, the records at issue in this appeal relate to efforts to support the LTC Home to manage the Outbreak, and are not aimed at the "observation and testing of a specific hypothesis or conclusion", as in Order PO-4090. In Order PO-4090, referred to by the LTC Home, the adjudicator concluded the following about certain information at issue in the records:

Having reviewed the records, it is clear that they contain information that can be characterized as belonging to the social sciences. [The relevant portions] include, for example, information relating to study objectives, background or contextual information, conclusions drawn from data, and recommendations resulting from studies that were conducted by third parties, including stakeholders interested in laws and policies relating to the provision of abortion services. I am satisfied that the information relates to the "observation and testing of a specific hypothesis or conclusion," such that it satisfies the definition of "scientific information" for the purpose of section 17(1).

[118] While some of the records at issue in the matter before me contain observations, I am unable to identify any information that could be considered the "testing of a specific hypothesis or conclusion." In my view, the records at issue all relate to the Community Partners efforts help manage the Outbreak. The four email chains contain communications about what next steps the Community Partners plan to take regarding the Outbreak and how they might support the LTC Home. While the information in the emails is about the LTC Home, the LTC Home is not directly involved in the communications. None of the information in the emails relates to "the observation and testing of a specific hypothesis or conclusion." As a result, I find that none of the

information is scientific information for the purposes of section 17(1).

[119] Next, I agree with OH's characterization of the After-Action Report. It provides a summary of the objectives and steps taken to control the Outbreak over a four-week period. There is no scientific method or analysis. The conclusions the LTC Home refers to are not drawn from the observation and testing of a hypothesis. They are more accurately characterized as reflections on the experience of managing the Outbreak. It is clear to me that the information in the After-Action Report was not intended to be used for observing or testing a specific hypothesis.

[120] As noted in the Notice of Inquiry provided to the LTC Home at the beginning of this process, in order for information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.⁵⁸ In my view, the LTC Home has not established that any of the information at issue meets that criteria. As such, the information cannot be characterized as "scientific" for the purpose of section 17(1) of *FIPPA*.

Commercial information

[121] The LTC Home says that the information at issue clearly relates to its operations in the provisions of services to its residents and employees and is, as a result, commercial in nature.

[122] While I accept that the LTC Home runs a commercial business, and I accept the information in the records relates to that business in a general sense, it does not automatically follow that all the information in the records at issue is commercial information for the purposes of section 17(1) of *FIPPA*. Each individual record must be examined to determine whether or not the information in it meets the definition of the types of information set out in Part 1 of the three-part test.

[123] Order P-493 sets out the foundation for the meaning of "commercial" information. In Order P-493, the Inquiry Officer explained that although previous orders had dealt with the issue of whether information is "commercial" information, no one definition had been adopted. She noted that:

The Concise Oxford Dictionary (8th ed.) defined "commercial", in part, as follows:

"of, engage in, bearing on, commerce"

"Commerce" is defined, in part, as:

"exchange of merchandise or services ... buying and selling"

⁵⁸ Order PO-2010.

Black's Law Dictionary (5th ed.) defines "commercial" as:

relating to or is connected with trade and traffic or commerce in general; is occupied with business and commerce; generic term for most aspects of buying and selling.

[124] The inquiry officer ultimately concluded that "commercial information is information which relates solely to the buying, selling or exchange of merchandise or services."⁵⁹ This characterization of commercial information has been adopted in subsequent orders.⁶⁰

[125] In Order MO-3335, the adjudicator noted that while it is not an exhaustive list, the types of information that fall under the heading "commercial" include price lists, lists of suppliers or customers, market research surveys, and other similar information relating to the commercial operation of a business.

[126] As I explained above, the emails and After-Action Report include descriptions of the Outbreak situation and discuss plans for outbreak management. While this information is connected to the LTC Home's commercial business, I am unable to see how this relates to the buying or selling of commercial goods or services for the purposes of section 17(1) of *FIPPA*.

[127] The information at issue does not refer to the specifics of the LTC Home's commercial activities. In my view, the circumstances are similar to those in Order PO-3146-I, where the adjudicator concluded that the information claimed to be commercial information was simply too general to fit the definition.⁶¹

[128] The emails and After-Action Report include discussions and information about the Outbreak, which Community Partners were involved and what support they were providing. I do not agree that any of this information is commercial information as it does not directly relate to the buying, selling or exchange of merchandise or services.⁶² As such, I find that none of the information at issue is "commercial information" for the purposes of section 17(1) of *FIPPA*.

Financial information

[129] Finally, I also find that none of the records at issue contain "financial information" for the purposes of section 17(1) of *FIPPA*. As noted above, financial information has been defined as follows:

⁵⁹ Order P-493, emphasis added.

⁶⁰ Order MO-3335, PO-2010.

⁶¹ Order PO-3146-I at paragraphs 37 to 39.

⁶² Order P-1621.

information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁶³

[130] I confirm that based on my review, none of the records at issue relate to accounting, pricing, profit or loss data or operating costs. While some of the records refer to personal protective equipment stock or staffing matters, I find that this information is far too general to be considered "financial information" for the purposes of section 17(1) of *FIPPA*. I did not locate any numerical information in the records at issue that corresponds to finances. While staffing and stocking matters are included, they are not associated with any specific dollar amount. As such, I find that the information at issue is not financial information for the purposes of section 17(1) of *FIPPA*.

[131] As all three parts of the section 17(1) test must be met, it is not necessary for me to consider the second or third parts of the test. I find that section 17(1) of *FIPPA* does not apply. I uphold OH's decision that the records at issue do not qualify for exemption and I will order it to disclose them to the law firm.

ORDER:

1. I uphold OH's access decision and dismiss the appeal.
2. I order OH to disclose the records in accordance with its access decision by **May 7, 2025** but not before **May 2, 2025**.
3. I reserve the right to require the OH to provide me with a copy of the records disclosed to the requester upon request to verify compliance with this order.

Original Signed by: _____

Meganne Cameron
Adjudicator

March 31, 2025 _____

⁶³ Order PO-2010.