

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4633

Appeal PA24-00365

Ontario Health atHome

March 31, 2025

Summary: In a request made under the *Freedom of Information and Protection of Privacy Act*, a law firm asked Ontario Health atHome (OHH), for records related to a COVID-19 outbreak at a long-term care home. OHH issued a decision to grant partial access to the responsive records. The long-term care home appealed OHH's decision to disclose the information and said the mandatory exemption for third party information at section 17(1) of the *Act* applied. The long-term care home also claimed that the records were protected from disclosure by section 3 of *Quality of Care Information Protection Act*. Additionally, it said that the law firm's request was an abuse of process and asserted that it should be permitted to apply various discretionary exemptions that OHH did not apply. In this decision, the adjudicator dismisses the long-term care home's appeal and upholds OHH'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), *Quality of Care Information Protection Act*, S.O. 2016, c. 6, Sch. 2, section 3.

Orders Considered: Orders MO-1782, PO-1776-R, PO-1787, PO-3435, and PO-4165.

OVERVIEW:

[1] A law firm requested the following information from North Simcoe Muskoka Home and Community Care Support Services under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

...any and all records pertaining to North Simcoe Muskoka Home and Community Care Support Services, 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] After the law firm made its request, Home and Community Care Support Services North Simcoe Muskoka was renamed "Ontario Health atHome" by an amendment to the *Connecting Care Act*, 2019, that came into force in 2024.¹ Regulation 460 of *FIPPA* was amended to list Ontario Health atHome as an institution. Throughout this decision, I refer to the institution responding to the law firm's request as Ontario Health atHome (OHH).

[3] OHH notified the parties it believed might be affected by the disclosure of the information the law firm requested and sought their views on the disclosure of the records at issue.² OHH received representations from a long-term care home (the LTC Home) objecting to the disclosure of any of the records. OHH then notified the LTC Home of its decision to grant the law firm partial access to the records. OHH denied the law firm access to some information in the records pursuant to the mandatory exemption for personal privacy at section 21 of *FIPPA*, or because it determined the information was not responsive to the law firm's request.³

[4] The LTC Home appealed OHH's decision. After discussions with the mediator, OHH notified the LTC Home about additional responsive records it identified and sought its views on their potential disclosure. The LTC Home provided representations objecting to the disclosure of the additional records. OHH then issued a decision to the LTC Home and the law firm advising it was granting partial access to the additional records. Again, some information was denied pursuant to section 21 of *FIPPA*, or because the information was not responsive.⁴ OHH provided both parties with an updated index of responsive records with the decision letters.

[5] The LTC Home advised the mediator that it believes the mandatory exemption for third-party information at section 17(1) applies to all the information OHH decided to disclose. It also said that the law firm's request is an abuse of the access process, and that the discretionary exemptions under sections 13 (advice and recommendations),

¹ The IPC's Registrar sent letters to the parties in this appeal explaining 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*. Section 27.2(1) provides that "the predecessor corporations are amalgamated and continued as a corporation without share capital under the name of Ontario Health atHome".

² As required by section 28 of *FIPPA*. Regulation 460 under the Freedom of Information and Protection of Privacy Act (FIPPA) has also been amended to strike the inclusion of each Local Health Integration Network as an institution under the Schedule.

³ The law firm did not appeal OHH's decision regarding section 21 or the information it said was not responsive.

⁴ Again, the law firm did not appeal OHH's decision.

14(1) (law enforcement), and 15 (relations with other governments) of *FIPPA* should also apply to the records at issue. Finally, the LTC Home also advised the mediator that the records at issue are protected from disclosure by section 3 of *Quality of Care Information Protection Act* (*QCIPA*).

[6] The mediator added the issues of frivolous or vexatious request (to capture the abuse of process allegations), the raising of discretionary exemptions by a third party, and the application of section 3 of *QCIPA* to the records at issue, in addition to the application of the mandatory exemption for third party information at section 17(1) of *FIPPA*.⁵

[7] The mediator relayed the above to the law firm, who confirmed it continued to seek access to the information OHH decided to disclose. OHH confirmed its position that no additional exemptions apply to the records. No further mediation was possible, and the matters were transferred to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry.

[8] I commenced an inquiry in which I obtained representations from the LTC Home and OHH. I determined that it was not necessary to also seek representations from the law firm before deciding to uphold OHH's decision. In this decision, I provide my reasons for upholding OHH's decision to disclose the information at issue and I dismiss the LTC Home's appeal.

RECORDS:

[9] There are 220 records remaining at issue. The records at issue include email correspondence and attachments and are described in further detail at paragraph 16 below.

ISSUES:

- A. What is the impact of section 3 of the *Quality of Care Information Protection Act*?
- B. Is the law firm's request an abuse of process?
- C. Can the LTC Home raise the application of the discretionary exemptions in sections 13(1) (advice or recommendations), 14 (law enforcement), or 15(b) (relations with other governments) of *FIPPA*?

⁵ In the Notice of Inquiry I sent to the parties, I expanded the issue of whether the request was frivolous and/or vexatious to whether the request was an abuse of process.

- D. Does the mandatory exemption for third party information at section 17(1) of the *FIPPA* for third party information apply to the records?

DISCUSSION:

[10] This is one of four decisions issued together that deal with similar parties, types of records, and issues.⁶ 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.

[11] The LTC Home submitted substantially similar representations for each of the four appeals and there is significant overlap in the types of records at issue. As a result, some portions of the four decisions are also 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

[12] 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.

[13] 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 these 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.

[14] The LTC Home says that throughout the Outbreak, it collaborated with various government institutions who provided oversight and guidance, including OHH (at the time, called the North Simcoe Muskoka Local Health Integration Network), the Ministry of Long-Term Care, the Simcoe Muskoka District Health Unit, the County of Simcoe, the Royal Victoria Regional Health Centre, and Orillia Soldiers' Memorial Hospital (collectively

⁶ The other three appeals and decisions are Appeal PA22-00549 (Order PO-4630), PA23-00123 (Order PO-4631), and Appeal PA24-00181 (Order PO-4632).

referred to in this Order as the Community Partners).

[15] The LTC Home states that to help manage the Outbreak, it participated in daily Outbreak Management Team (OMT) meetings with the Community Partners and maintained frequent, ongoing communication with them. It says the purpose of the OMT meetings was for the LTC Home to share openly and candidly, in confidence, information relating to the Outbreak with OMT members so that they could receive advice, recommendations, and assistance managing the Outbreak. 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.

[16] The LTC Home says that the records at issue include OMT meeting minutes, Daily Outbreak Operational (DOO) Reports, Situation Background Assessment Recommendation Reports (SBAR Reports), and email updates relating to the Outbreak. The LTC Home submits that it shared the information in these records confidentially with OHH, and the Community Partners generally, for the purpose of responding to and managing the Outbreak. It says the information in the records relates to infection prevention and control (IPAC) assessments, workplace safety assessments and other inspections completed by the Community Partners. It submits that the records described above contain information that it provided to OHH about:

- resident and staff infections, hospitalizations and deaths during the Outbreak,
- updates on IPAC and safety, operations, emergencies and human resources at the LTC Home,
- recommendations and action items received by the LTC Home in respect of staffing, use of agency staff, swabbing and testing, screening, tracing, isolation, cohorting, hospital transfers, personal protective equipment (PPE), IPAC measures, vaccination, repatriation of residents, palliative and bereavement supports, visitation, messaging to families and other aspects of outbreak management, and
- the status of the implementation of recommendations and action items at the LTC Home.

[17] The LTC Home's general position is that the disclosure of the records at issue is not desirable because they contain highly confidential and sensitive information with respect to the Outbreak and the LTC Home's response to it. It says that Ontario's Long-Term Care COVID-19 Commission completed a thorough and detailed investigation into how and why COVID-19 spread in long-term care homes, what was done to prevent the spread and the impact of key elements of the existing system on the spread. It says that

it participated in the Commission's proceedings and that a Final Report with recommendations has already been issued. As a result, the LTC Home argues that disclosure of information about the Outbreak is not necessary.

Issue A: What is the impact of section 3 of the *Quality of Care Information Protection Act*?

[18] The LTC Home says that section 3 of *QCIPA* applies to the records at issue in this inquiry, and that as a result, *FIPPA* does not apply. Section 3 of *QCIPA* states:

The Freedom of Information and Protection of Privacy Act does not apply to quality of care information.

[19] The *QCIPA* defines "Quality of care information" in section 2(2) as follows:

(2) Subject to subsection (3), in this Act,

"quality of care information" means information that,

(a) is collected or prepared by or for a quality of care committee for the sole or primary purpose of assisting the committee in carrying out its quality of care functions,

(b) relates to the discussions and deliberations of a quality of care committee in carrying out its quality of care functions, or

(c) relates solely or primarily to any activity that a quality of care committee carries on as part of its quality of care functions, including information contained in records that a quality of care committee creates or maintains related to its quality of care functions.

[20] As set out in the Notice of Inquiry sent to the parties at the beginning of this inquiry, section 67(1) of *FIPPA* states:

This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

[21] In the Notice of Inquiry I asked the parties to explain whether any of the information in the records at issue met the criteria outlined above for "quality of care information" and, if so, to comment on the impact of section 67(1) of *FIPPA* and section 3 of the *QCIPA*, and on the applicability of *FIPPA* to the responsive records.

The LTC Home's representations

[22] The LTC Home submits that the records at issue meet the criteria for "quality of

care information” in *QCIPA*, and that as a result, *FIPPA* does not apply to them.⁷

[23] The LTC Home submits that the purpose of *QCIPA* is to enable confidential discussions between authorized health facilities about errors or systemic problems to improve the quality of health care delivered to patients. It says the goal of *QCIPA* is to create a safe space for health institutions (including the LTC Home) to talk openly about quality improvement without fear that the information will be used against them.

[24] The LTC Home asserts that the COVID-19 pandemic and related outbreaks gave rise to systemic problems in the health care sector. It explains that long-term care homes affected by COVID-19 outbreaks aligned with community partners to collaborate, in confidence, regarding opportunities for quality improvement to prevent future outbreaks and manage them when they occur.

[25] The LTC Home says the records at issue in this appeal meet the criteria for “quality of care information” as outlined in section 2(2) of the *QCPIA*. Specifically, the LTC Home submits that the information at issue was collected and prepared by or for the LTC Home’s quality of care committee (which it says formed part of the OMT) for the primary purpose of assisting the committee in carrying out its quality of care functions.

[26] The LTC Home says that “quality of care functions” means “activities carried on for the purpose of studying, assessing or evaluating the provision of health care with a view to improving or maintaining the quality of the health care and include conducting reviews of critical incidents.” It says the purpose of the information at issue is to study, assess and evaluate the provision of health care to residents during the Outbreak with a view to managing the Outbreak and thus, improving the quality of health care provided to residents overall. It submits that the information at issue relates primarily to the activities of the LTC Home’s quality of care committee in terms of its assessment of the status of the Outbreak day-to-day, its areas of concern and the implementation of quality improvement recommendations supplied by the OMT.⁸

OHH’s representations

[27] OHH agrees with the LTC Home that *QCIPA* allows health professionals to have open discussions about critical incidents involving patient care and quality improvement matters in general, and that the purpose of the legislation is to create a safe space for health professionals to talk openly about quality improvement, including the potential cause of any critical incidents, without fear that the information will be used against them.

[28] However, OHH disagrees that *QCIPA* applies to any of the information at issue in

⁷ The LTC Home says that the records that *QCIPA* applies to “include” the OMT meeting minutes, SBAR Reports, DOO Reports and emails updating OMT members on the status of the Outbreak.

⁸ I note that the LTC Home included additional representations about why the information at issue does not fit within the criteria set out at section 2(3) of *QCIPA*. However, given my finding below, it is not necessary to set out these representations here.

the records. It directs me to section 2 of *QCIPA* Regulation 483/16, which states:

The following are prescribed as criteria that a body must meet for the purposes of clause (b) of the definition of “quality of care committee” in subsection 2(1) of the Act:

1. Before beginning to act as a quality of care committee, the committee must be designated in writing as a quality of care committee for the purposes of the Act or of the Quality of Care Information Protection Act, 2004 by,

i. the health facility or the quality oversight entity that established, appointed or approved it, or

ii. if the quality of care committee was established, appointed or approved by a combination of health facilities or quality oversight entities, each such facility or entity.

[29] OHH says that the OMT meetings were chaired by the Orillia Soldiers Memorial Hospital. It says that it consulted the CEO of the hospital and was advised the hospital’s records did not indicate that the group was acting as a “quality of care committee,” as defined in the regulation set out above.

[30] OHH submits that the information at issue relates solely to the daily operational management of the Outbreak at the LTC Home. It says that the records specifically identified in the LTC Home’s representations (for example, the SBAR reports and associated emails) were for the purposes of updating the daily COVID-19 response group on the status of the Outbreak and actions taken, and not for the purposes of quality improvement.

[31] The LTC Home was provided with a copy of OHH’s representations and invited to make a reply. In its reply it stated only that it repeated and relied on its original representations.

Findings and analysis

[32] Below are my reasons for finding that the confidentiality provision at section 3 of *QCIPA* for “quality of care information” does not apply to the records at issue in this appeal. This means that section 3 does not prevail over the access rights set out in *FIPPA*.

[33] The LTC Home asserts that the records contain “quality of care information” that was collected and prepared by, or for, its “quality of care committee.” It states that the “quality of care committee” formed part of the OMT and was carrying out quality of care functions. Although the LTC Home describes these functions in its representations, it does not offer sufficient evidence in support of its assertions that a “quality of care committee” was established in the manner required by *QCIPA* and Regulation 483/16.

[34] As outlined in OHH's representations, Regulation 483/16 stipulates that certain steps must be taken to form a "quality of care committee," including designating the committee in writing as a quality of care committee for the purposes of *QCIPA*. I note the Regulation also states that the terms of reference of a quality of care committee and its designation must be available on request to members of the public.

[35] In its representations, OHH referred to Regulation 483/16 and indicated that, based on its consultation with another institution, it did not believe that the group referred to by the LTC Home was acting as a quality of care committee, as defined in Regulation 483/16.

[36] I provided a copy of OHH's representations to the LTC Home and invited it to submit a reply. In its responding submission, the LTC Home stated only that it repeated and relied on its previous representations. In my view, the LTC Home's decision not to address the points raised by OHH, most importantly, the regulatory requirements to establish a quality of care committee, is detrimental to its position. It seems to me that if a "quality of care committee" was established, the LTC Home could have easily provided a copy of the terms of reference and designation, which Regulation 483/16 states must be available to the public.⁹ The fact that it did not provide this information, nor did it offer an explanation or reason for not providing it, suggests that a quality of care team may not have been established pursuant to Regulation 483/16.

[37] In any event, because section 3 of *QCIPA* states that *FIPPA* does not apply to "quality of care information," I have also reviewed each of the records that the LTC Home says contain this information to determine whether it is apparent that it may in fact be "quality of care information" despite the LTC Home's lack of evidence to that point. I see nothing specific that suggests these records were collected or prepared for or by a "quality of care committee," or that they otherwise relate to discussions or deliberations of a quality of care committee.

[38] I am also not satisfied that any of the information in the records at issue served "other quality of care functions" as set out in Section 2(2) of *QCIPA*. Many of the records are DOO or SBAR Reports (described above at paragraph 16). Based on my review of the emails discussing these reports, it is clear to me that the purpose of the communications and reports was to manage the Outbreak. Having reviewed all the records at issue, I accept OHH's assertion that the purpose of these reports was to update the daily COVID-19 response group.

[39] In summary, it is clear from the content of the records at issue that the purpose of the meetings, communications, reporting tools and/or reports was not related to "quality of care" matters. The records appear to be aimed at assisting with the management of the Outbreak. I agree with OHH that this is distinct from "quality of care"

⁹ Specifically, the Regulation states that "The terms of reference of the quality of care committee and its designation must be available on request to members of the public." O. Reg. 483/16, s. 2; O. Reg. 80/17, s. 1.

functions as contemplated by *QCIPA*.

[40] For all these reasons I find that the information at issue is not “quality of care information” for the purposes of section 2(2) of *QCIPA* and as a result, section 3 of *QCIPA* has no application to this appeal.

ISSUE B: Is the request for access an abuse of process?

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

[42] 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.

[43] After reviewing the LTC Home’s representations on this issue, 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.

[44] 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 such circumstances.

[45] The LTC Home relies on the Ministry of Government and Consumer Services “Freedom of Information and Protection of Privacy Manual” which it says describes a frivolous and vexatious request as including those which amount to an abuse of the right of access. 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).”¹⁰

[46] The LTC Home says that it has received multiple notifications as an affected third party of requests for access to records pertaining to the Outbreak. Specifically, it says that 14 separate access requests for identical or similar records were made to OHH (or the North Simcoe Muskoka Local Health Integration Network), the Ministry of Long-Term Care, the Simcoe Muskoka District Health Unit, the Orillia Soldiers Memorial Hospital, Simcoe County and the Royal Victoria Hospital. It says that most of the requests have been made by the same requester and are broad in nature. In support of these assertions, the Director’s affidavit provided 14 copies of different access to information requests that

¹⁰ *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.

the LTC Home was notified of as a potential affected party.

[47] In its representations, 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 appear to 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.

[48] The LTC Home says that there is ongoing litigation related to the Outbreak and that there is a real likelihood that the requester intends to use the records to advance its own private interest. The LTC Home argues that to the extent that the requester is seeking disclosure of the records for the purposes of civil litigation, this is a private interest and the request is inconsistent with the express purposes of *FIPPA*.

[49] The LTC Home also argues that the request was made to accomplish an objective other than to gain access, without reasonable or legitimate grounds. It maintains that there is a real likelihood that the law firm intends to disseminate them publicly to subject the LTC Home to further public scrutiny.

[50] The LTC Home says that the Simcoe Muskoka District Health Unit (the Health Unit) also received a similar request for records 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 Act*.¹¹ The LTC Home says that the 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."

[51] 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.

[52] 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:

- Disclosure of the records would disincentivize long-term care operators from communicating openly and transparently with government authorities and community partners, compromising the effectiveness of future outbreak management process across the province,

¹¹ The LTC Home is referring to another appeal, which was withdrawn by the requester and closed.

- Additional public scrutiny is not a desirable objective in these circumstances,
- 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

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

[54] 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, as the third party appellant, is entitled to rely on those provisions, or whether they can only be claimed by an institution.

[55] 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.

[56] 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.

[57] As previous IPC orders have made clear, these provisions exist for the benefit of

"institutions" under *FIPPA*.¹² 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."¹³ 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.

[58] There are numerous IPC orders that have consistently held that section 10(1)(b) can only be relied upon by the head of an institution under *FIPPA*.¹⁴ 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.]

[59] IPC adjudicators have consistently held that the application of the frivolous and vexatious provisions is only relevant to the use of the "processes" of *FIPPA*.¹⁵ 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.

[60] 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

¹² Orders PO-2050, PO-2906, and PO-3738-I.

¹³ Order PO-2906 at pages 35 to 36.

¹⁴ For example, Orders PO-2050, PO-2906, and PO-3738-I.

¹⁵ See, for example, Orders M-906 and MO-1488.

nature of the request or the person requesting the information.¹⁶

[61] I agree with and adopt the findings of the adjudicators who have considered this issue already.¹⁷ 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*.

[62] However, even though the LTC Home 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.¹⁸ 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

[63] In Order MO-2635, Adjudicator Faughnan explained that the principles that would apply to an allegation that a request is an abuse of process or "frivolous or vexatious" 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.

[64] 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 the request that forms the basis for this appeal was made for an improper purpose. As such, I will consider both claims below.

Pattern of Conduct

[65] 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.¹⁹ 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).

¹⁶ Order PO-2050.

¹⁷ Orders PO-2050, PO-2688, MO-3647, and PO-3728-I.

¹⁸ Most recently, Order MO-4404. See also, Orders PO-3728-I, PO-2906, PO-2490, MO-2635 and M-618.

¹⁹ Order MO-4513.

[66] 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?²⁰

[67] 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.²¹ 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.²²

[68] In the current case, I am not satisfied that the law firm has engaged in a pattern of conduct that would amount 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.

[69] The law firm is the requester on four appeals currently before me at the inquiry stage of the appeals process.²³ One additional appeal was withdrawn by the law firm at the adjudication stage, and four other appeals arising from requests made by the law firm were closed at the intake or mediation stage.²⁴ 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.²⁵

[70] Although the law firm’s requests all seek information about the LTC Home, each request was submitted to different institutions or sought different information. Based on my understanding of the context from the file materials, it appears the law firm has a

²⁰ Most recently, Order MO-4513. See also, Orders M-618, M-850, MO-1782.

²¹ Most recently, Order MO-4513. See also, Orders M-618, M-850, MO-1782 and MO-1810.

²² Order MO-1782.

²³ This appeal, as well as Appeals PA22-00549, PA23-00123, and PA24-00181.

²⁴ Appeals PA22-00570, MA22-00751, MA23-00341, PA23-00122 and PA24-00212.

²⁵ Four other requests were made by another individual, who does not appear to have a connection to the law firm. Although there were appeals filed in these requests, these have been withdrawn.

good faith interest to 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.²⁶

[71] 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.

[72] 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 that the law firm seeks.²⁷ In this appeal, the law firm requested access to records about OHH’s involvement in the Outbreak during a month-long period. I disagree with the LTC Home that the request was 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

[73] 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.²⁸ In short, “bad faith” implies the conscious doing of a wrong for a dishonest purpose. The IPC has defined the term “bad faith” as,

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...²⁹

[74] 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.”³⁰ In Order MO-1924, Adjudicator Higgins noted that requesters may have “some collateral purpose over and above an abstract desire to obtain information”

²⁶ I note that 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* and I address this argument later in this decision.

²⁷ I note that there may be one additional request from the law firm according to the LTC Home. I am not aware of an additional 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.

²⁸ Order MO-2635

²⁹ Order MO-4513.

³⁰ Order MO-1924.

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.³¹

[75] As confirmed by Adjudicator Higgins, these purposes are permissible. He emphasized that to find otherwise would contradict the fundamental principles underlying the *Act*.³² 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.³³

[76] 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.

[77] 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."³⁴ The adjudicator confirmed that "a request for information that could also be sought on discovery in contemporaneous litigation is not, per se, an abuse of process."

[78] 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.³⁵ 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. To be clear, 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

³¹ Order MO-1924.

³² Order MO-1924.

³³ Order M-618 and MO-3761.

³⁴ Interim Order MO-2573-I was determined pursuant to the municipal counterpart to *FIPPA*, the *Municipal Freedom of Information and Protection of Privacy Act*.

³⁵ Order PO-3435 at para. 40.

requester is acting in bad faith.

[79] 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.

[80] 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.³⁶ 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.

[81] 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 abuse of process.³⁷ 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.

[82] 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.

[83] For the reasons set out above, I find that the law firm's request is not an abuse of

³⁶ *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).

³⁷ I also note that the request that was the subject of another appeal (since withdrawn) was made by someone other than the law firm.

process pursuant to common law, and I dismiss this aspect of the appeal.

Issue C: 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*?

[84] 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) (advice or recommendations), 14 (law enforcement), or 15(b) (relations with other governments) of *FIPPA*, even though OHH did not claim those sections applied to any of the information at issue.

[85] *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.

[86] 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.³⁸ 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.³⁹

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

[88] 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 OHH. 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**

³⁸ See, for example, Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

³⁹ Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

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 appellant]

[89] 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. It says that 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."⁴⁰

[90] 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
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."

[91] 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.

[92] The LTC Home asserts that it is "evident that disclosure of the records would affect

⁴⁰ The LTC Home relies on Order M-430.

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).⁴¹ 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 of *FIPPA*.

[93] 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*.

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

Lastly, according to s.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.⁴²

[95] It reiterates that it shared confidential information with OHH and the other Community Partners during the Outbreak, for the purposes of outbreak management. In short, the LTC Home argues that the records arise from information OHH 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.

[96] 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 [OHH’s] advisory role during the Outbreak (as a member of the OMT) and the supply of confidential third-party information to them in carrying out this role.” It submits that the OHH’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.

[97] 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

⁴¹ As defined above, OMT refers to the “Outbreak Management Team.”

⁴² 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.”

compromise public safety. The LTC Home notes that the 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.⁴³

[98] 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.⁴⁴

Findings and analysis

[99] Below are my reasons for finding that the LTC Home has not established that it should be permitted to raise the application of any of the discretionary exemptions it seeks to apply.

[100] 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.⁴⁵ 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 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 OHH, as the institution.

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

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

⁴³ The LTC Home is referring to an appeal that has since been withdrawn by the requester.

⁴⁴ I note that after reviewing the LTC Home's representations about whether it should be permitted to raise the discretionary exemptions when OHH 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.

⁴⁵ Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

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.

[102] 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].

[103] As an affected party, the LTC Home does not have that same right to assert the application of section 13(1) of *FIPPA*, unless it can establish that the "rare and unusual circumstances" discussed above at paragraph 86 exist such that it should be permitted to claim the discretionary exemption.

[104] 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(1) of *FIPPA*.⁴⁶ 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 (OHH) decided not to apply.

[105] 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, 2021⁴⁷, 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

⁴⁶ 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 14(2)(a) and (c), 15(b) and 18(1)(j).

⁴⁷ Available at: <https://www.ipc.on.ca/en/media-centre/news-releases/federal-provincial-and-territorial-information-and-privacy-commissioners-and-ombudsman-issue-joint>

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.

[106] 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, OHH considered the information at issue and decided not to apply section 13(1), or any of the other discretionary exemptions noted by the LTC Home, to the information that remains at issue in this inquiry.⁴⁸ 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 OHH did not.

[107] 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.

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

[109] 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,

⁴⁸ Or possibly decided that the discretionary exemptions did not apply.

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

[110] 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. 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.

[111] 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.

[112] 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.⁴⁹ 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.⁵⁰

[113] 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. There are 220 records at issue in this appeal, each varying in length from 1 to 20 pages. The LTC Home has not referred to any specific information 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 OHH, or the Ministry of Long-Term Care. In my view, this is simply too general of an argument to accept. The LTC Home's argument seems to be that if long-term care home operators knew that *any* information

⁴⁹ 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.

⁵⁰ See Reconsideration Order R-980015 at page 20.

would be subject to freedom of information legislation, they would be reluctant to share it with institutions such as OHH, or the Ministry of Long-Term Care. In my view, this is simply too general of an argument to accept.

[114] 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 community partners in an outbreak situation because they are concerned about information being disclosed through freedom of information legislation.

[115] Furthermore, OHH alleges in its representations that long-term care home operators are legally obliged to advise on any urgent or critical issues that have an impact to their operations, and any inaction or failures to report issues are offences under their governing legislation.⁵¹ I understand OHH to be saying that the LTC Home, and other long-term care home operators, do not have the option not to communicate with the Ministry of Long-Term Care or other authorities designated in the relevant legislation about outbreak management matters.

[116] Once again, I note that the LTC Home was provided with a copy of OHH's representations and offered an opportunity to make representations in response to its claim that the LTC Home has a legal duty to communicate about these matters. The LTC Home declined to provide any response on this issue. Absent any additional information from the LTC Home, I agree with OHH that the chilling effect described by the LTC Home is not likely to occur.

[117] 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 information they share may be subject to freedom of information legislation.

[118] Finally, the LTC Home says that it should be permitted to raise section 15(b) because confidential information was shared amongst the LTC Home, OHH, the Ministry, the Health Unit, Simcoe 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

[119] The LTC Home has not identified any specific information in the records that has

⁵¹ OHH refers to reporting obligations in the *Long-Term Care Homes Act*, 2007 and the *Retirement Homes Act*, 2010 in its representations regarding the potential application of section 17(1) of the *Act*. My understanding is that the relevant legislation is now the *Fixing Long-Term Care Act*, 2021, S.O. 2021, c. 39, Sched. 1.

any connection to another government. The entities referred to by the LTC Home are all within the province of Ontario.⁵² 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.

[120] 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.

[121] I am also not persuaded by the LTC Home's argument that OHH 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 the OHH 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.

[122] 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.⁵³ 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 motivation 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 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 OHH and I see no procedural unfairness in the inquiry process.

[123] 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 OHH.

⁵² "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 (Order PO-2569).

⁵³ Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

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

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

[125] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,⁵⁴ where specific harms can reasonably be expected to result from its disclosure.⁵⁵

[126] 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; ...

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

⁵⁴ *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.*).

⁵⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: Type of information

[128] The IPC has described the relevant 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.⁵⁶

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.⁵⁷ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁵⁸

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.⁵⁹

The LTC Home’s representations

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

[130] 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, 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.⁶⁰

[131] The LTC Home submits that the records at issue in this appeal similarly consist of

⁵⁶ Order PO-2010.

⁵⁷ Order PO-2010.

⁵⁸ Order P-1621.

⁵⁹ Order PO-2010.

⁶⁰ Order PO-4090.

"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."

[132] Next, the LTC Home says that the records (specifically, the SBAR and DOO Reports and email updates) include information that is commercial or financial information. It says the records contain information about staffing, use of agency staff, swabbing and testing, screening, tracing, isolation, cohorting, hospital transfers, personal protective equipment, Infection Prevention and Control 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.

[133] 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."

OHH's representations

[134] OHH 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*. It says that the records at issue include brief situational updates, daily infection counts, and summaries of actions taken. It submits that in many cases, the same information was available through other sources such as the media or the Ontario COVID-19 Data Tool.

[135] OHH does not agree with the LTC Home that the information at issue is "scientific" for the purposes of section 17(1). It submits that the records at issue were generated to provide information for the OMT meetings to support the handling of the Outbreak, and not for the purpose of "observation and testing of a specific hypothesis or conclusion", as in Order PO-4090.

[136] OHH also denies that the information can be characterized as "commercial" or "financial," as those terms are contemplated by the *Act*. OHH submits that to be "commercial" or "financial" the information must contain or refer to specific data. It submits that the information at issue (e.g. high-level staffing levels, swabbing/testing numbers, immunization rates, overall personal protective equipment inventory, etc.) does not qualify as commercial or financial information, given its general nature.

Findings and analysis

[137] 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

[138] Based 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*.

[139] In my view, the records at issue in this appeal relate to efforts to support the LTC Home to manage the Outbreak, and do not include 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).

[140] 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 LTC Home and Community Partners efforts to help manage the Outbreak. I find that information in the records supports this characterization. For example, I note that the first paragraph at the top of the SBAR Report template specifies that

the purpose of this tool is to provide a daily "SBAR" (Situation, Background, Assessment, and Recommendation) report for each facility in outbreak and risk... It should identify emerging risks and issues within the [long term care home] that need to be escalated to IMS to create a follow-up action plan.⁶¹

[141] The SBAR report is a form/chart with various categories that can be filled out each day to keep track of and manage an outbreak. There is no hypothesis being tested. It is clearly an outbreak management tool. I am not persuaded that it contains scientific

⁶¹ For example, record 150A. This document has an Ontario Health Central logo at the top and is identified as a form to be filled out. As a result, I have determined that the content in the form can be referenced publicly in this decision. Some additional examples of completed SBAR Reports can be located at records 28A, 62A2, 69A, 76A, 83A, 87A, 89A, 92A, 100A, 109A, 113A, 117A, 129A, and 146A.

information, as that term has been defined for the purposes of section 17(1) of *FIPPA*.

[142] I am also not persuaded that any of the other remaining information at issue can be categorized as scientific. In my view, the OMT (Outbreak Management Team) Meeting minutes contain exactly what the title suggests: information related to outbreak management.⁶² There are no hypotheses, scientific methods, or testing. The DOO Reports contain statistics about outbreak numbers in residents and staff at the LTC Home, as well as PPE stock levels and IPAC audits conducted, and Community Partner support.⁶³ This is not scientific information for the purposes of section 17(1) of *FIPPA*.

[143] The remaining records at issue can generally be described as follows:

- various emails forwarding or discussing the reports noted above,⁶⁴
- Emails about locating additional staffing support and logistics regarding staff onboarding, and other updates about the Outbreak,⁶⁵
- Emails about the logistics of swabbing for residents and staff, and general efforts to support the LTC Home through the Outbreak,⁶⁶
- Emails correspondence with or about the LTC Home discussing the response to the Outbreak,⁶⁷
- Charts tracking Outbreak related information for staff and residents,⁶⁸
- Ministry of Long-Term Care Inspection Reports identified as public, and emails discussing that report,⁶⁹ and
- A blank audit form.⁷⁰

[144] None of the information in the information outlined above relates to “the observation and testing of a specific hypothesis or conclusion.”⁷¹ As a result, I find that none of the information is scientific information for the purposes of section 17(1) of

⁶² For example, records 61A, 65A, 67A, 79A

⁶³ For example, record 3A, 5A, 27A, 29A, 32A, 33A, 39A, 42A, 50A, 58A, and 62A1.

⁶⁴ For example, records 50, 58 and 61

⁶⁵ For example, record 26, 60

⁶⁶ For example, records 12, 30, 51, 54 and 63.

⁶⁷ For example, record 128.

⁶⁸ For example, record 66A.

⁶⁹ Records 147 and 147A.

⁷⁰ Record 101A2.

⁷¹ The footnotes above are intended to provide references to examples of the different types of information in the records at issue. I have not identified or categorized all the information at issue. However, I confirm that I reviewed the remaining records not identified above and am satisfied that they generally fit into one or more of the categories I listed, and do not qualify as scientific information.

FIPPA.

Commercial information

[145] 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.”

[146] 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*. The content of each individual record must be examined to determine whether the information in it meets the definition of the types of information set out in Part 1 of the three-part test.

[147] 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”

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.

[148] The inquiry officer ultimately concluded that “commercial information is information which relates solely to the buying, selling or exchange of merchandise or services.”⁷² This characterization of commercial information has been adopted in subsequent orders.⁷³

[149] 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. The records I described and categorized above

⁷² Order P-493, emphasis added.

⁷³ Order MO-3335, PO-2010.

at paragraphs 140 to 143 do not fit this description. They generally include descriptions of, and information about, the Outbreak and discuss plans for outbreak management. While this information is connected to the LTC Home's 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*.

[150] I find that 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 an adjudicator concluded that the information claimed to be commercial information was simply too general to fit the definition.

[151] The records described above include discussions and information about the Outbreak, plans for managing it, and which community partners were involved and what support they were providing. Many relate to COVID-19 testing taking place at the LTC Home, performed by Community Partners. Others track information related to the Outbreak. 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. 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

[152] 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:

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.⁷⁴

[153] 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 PPE 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*.

[154] The LTC Home did not direct me to any numerical information in the records at issue that corresponds to finances, and I did not locate any of that information myself. 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*.

[155] 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

⁷⁴ Order PO-2010.

not apply. I uphold OHH's decision that the records at issue do not qualify for exemption and I will order it to disclose them to the law firm.

Outstanding matter

[156] While reviewing the records at issue in this appeal I identified some small portions of personal information in record 37. The law firm confirmed that it is not seeking access to any personal information. I am providing OHH with a copy of record 37 with the personal information highlighted. OHH must sever the personal information from the copy of record 37 that it provides to the law firm.

ORDER:

1. I uphold OHH's access decision and dismiss the LTC Home's appeal.
2. I order OHH to disclose the records in accordance with its access decision by **May 7, 2025** but not before **May 2, 2025**. OHH must not disclose the personal information in record 37.
3. In order to verify compliance with this order, I reserve the right to require OHH to provide me with a copy of the records disclosed to the requester upon request.

Original Signed by: _____
Meganne Cameron
Adjudicator

March 31, 2025 _____