Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3091

Appeal PA11-134

Ministry of Health and Long-Term Care

June 18, 2012

Summary: The Ministry of Health received a request for records relating to certain amendments made to the Schedule of Benefits governing remuneration for Ontario radiologists. The ministry took the position that the records were excluded from the operation of the *Act* by virtue of section 65(6)3. The ministry's decision is upheld on the basis that the information relates to a labour relations matter in which the ministry has an interest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(6)3.

Orders and Investigation Reports Considered: PO-1721 and PO-2497.

Cases Considered: *Ontario (Minister of Health and Long Term Care) v. Mitchinson,* 178 O.A.C. 171 (Ont. C.A.); C*anadian Medical Protective Association v. John Doe*, 241 O.A.C. 346 (Div. Ct.); and *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry) received a three-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the Schedule of Benefits:

> Any and all information (including, but not limited to, reports, memos, guidance documents, meeting minutes, presentations, etc.) regarding the October 1st, 2010 amendments to the Schedule of Benefits under the *Health Insurance Act* pertaining to: a) the new billing codes for "After Hours Premiums for Urgent CT/MRI Interpretation" in the General Preamble to the Schedule of Benefits: b) the new "[Commentary…]" section inserted under the Preamble to the "Diagnostic Radiology" section of the Schedule of Benefits; and c) Any related Ministry bulletins (herein collectively referred to as the "Schedule of Benefits Information").
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> Any and all communications/correspondence (including, but not limited to, letters, emails, memos, reports, meeting minutes, presentations, etc.) between the Ministry of Health and Long-Term Care and the Ontario Association of Radiologists, Ontario Medical Association, the General Manager, employees, staff or agents of the Ontario Health Insurance Plan, radiologists, and any other persons regarding the Schedule of Benefits Information.
>
> Any and all internal communications/correspondence (including, but not limited to, letters, emails, memos, reports, meeting minutes, presentations, etc.) within the Ministry of Health and Long-Term Care regarding the Schedule of Benefits Information.[1]

[2] The ministry issued a decision letter denying access to the responsive records pursuant to section 65(6) of the *Act*, which excludes the records from the scope of the *Act*. If the exclusion applies, the records are not accessible under the *Act.*

[3] Upon appeal of the ministry's decision, this office appointed a mediator to explore resolution. As a fully mediated resolution was not possible, the appeal was transferred to the adjudication stage of the appeals process, where a written inquiry is conducted under the *Act*.

[4] Based on a review of the file materials and the records at issue, the adjudicator originally assigned to this appeal decided that the ministry should provide its representations, initially, on the application of the section 65(6) exclusion to all of the records. The adjudicator also noted that some of the records appeared to be publicly available and that their connection to the exclusions identified by section 65(6) was not, therefore, self-evident.

[5] The adjudicator originally assigned to this file then sent a Notice of Inquiry, along with the complete representations of the ministry and an index of records to the appellant, seeking her representations in response. The appellant also provided

[1] The stated time period for the request was January 1, 2008 to December 20, 2010.

representations, which were shared with the ministry, who was invited, and did, submit additional representations by way of reply. The file was then transferred to me to complete the inquiry.

RECORDS:

[6] The records at issue in the appeal are described in the Index of Records and consist of the minutes/notes of meetings/discussions between the ministry and clinical specialties, two OMA Supplementary Reports to Council, two presentations (OMA Progress Reports to PSC), and internal and external communications, including e-mails.

ISSUES:

[7] The sole issue for determination in this appeal is whether the remaining records at issue are excluded from the *Act* as a result of the operation of section 65(6).

DISCUSSION:

Are the records excluded from the *Act* as a result of the operation of section 65(6)?

[8] In the Notice of Inquiry provided to the ministry, the adjudicator initially assigned to this appeal requested that the ministry address the application of Orders PO-1721 and PO-2497, and the judicial review decisions relating to them, to the records.[2] In its representations, the ministry clarified that it is relying on section 65(6)3 of the *Act*, which states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[9] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[10] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them. [Order MO-2589; see also

[2] *Ontario (Minister of Health and Long Term Care) v. Mitchinson,* 178 O.A.C. 171 (Ont. C.A.); PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, 241 O.A.C. 346 (Div. Ct.).

Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner, 2010 ONSC 991 (Div. Ct.).]

[11] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

Section 65(6)3: matters in which the institution has an interest

Introduction

[12] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[13] The ministry submits that all of the responsive portions of the 52 records at issue in this appeal are subject to the exclusion in section 65(6). It argues that the records reflect a set of negotiations that took place between the Ontario Medical Association (the OMA) and the ministry through the joint committee known as the Medical Services Payment Committee (the MSPC), for the setting of a fee schedule (the Schedule of Benefits or SOB) governing the remuneration of radiologists for the provision of certain insured services. The ministry adds that the records also describe the conditions or restrictions that apply to the payment of amounts under the fee schedule.

[14] The ministry relies on two decisions of the Ontario Court of Appeal issued in 2001 and 2003 respectively, *Ontario (Solicitor General)* (referred to above) and *Ontario (Ministry of Health and Long Term Care)* (also referred to above), as well as a decision of the Divisional Court in *CMPA v. Loukidelis et al.,* 2008 CanLII 45005 and the IPC's Order PO-2497 which addressed the application of section 65(6) to similar records of another Physician Services Committees (PSC) like the MSPC, which is referred to above.

[15] The ministry argues that the records are comprised of five broad categories of records consisting of:

- MSPC agendas, meeting notes, action items and records presented at MSPC meetings for discussion;
- Emails passing between MSPC members;
- Reports and recommendations drafted by the MSPC;
- Emails relating to draft language of SOB amendments; and
- Correspondence between OMA members regarding SOB wording.

[16] It also states that the records were collected, prepared, maintained and/or used by it and the MSPC on its behalf in relation to meetings, consultations and discussions about amendments to the Schedule of Benefits under the *Health Insurance Act*. The ministry submits that those amendments had a direct impact on the "amount of and the conditions that apply to the remuneration paid by the ministry to a certain class of physicians in Ontario, the ministry has a direct and substantial, financial interest in this labour relations matter."

[17] The ministry relies on the reasoning contained in the Court of Appeal's 2003 decision in *Ontario (Ministry of Health and Long Term Care)* which it argues recognized that the exclusion in section 65(6) applies to the "Ministry-physician relationship and to the work of the joint OMA-Ministry committees that focus on physician labour issues." The ministry goes on to indicate that the Court specifically held that:

> the relationship between the government and physicians, and the work of the [PSC] in discharging its mandate on their behalf, *including the provisions for the remuneration of physicians,* fall within the phrase 'labour relations', and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in s. 65(6)3. [ministry's emphasis]

[18] Finally, the ministry contends that the records and the activities of the MSPC are analogous to those under consideration in the 2003 decision by the Court of Appeal and the PSC as they also concern the payment relationship between the ministry and a class of physicians and relate to discussions and communications about "conditions of work", which was how the Court of Appeal described the "content of the term 'labour relations' as it appears in section 65(6)3."

[19] The ministry also submits that the mandate of the MSPC is analogous to that of the Medical Malpractice Coverage Committee (the MMCC), another PSC committee. In Order PO-2497, this office found that records relating to the reimbursement of physicians for liability insurance "is a form of compensation to the physicians" and fall, accordingly, within the ambit of section 65(6)3. The ministry concludes this portion of its representations by arguing that if the reimbursement of liability insurance fees is a

form of compensation, then records relating to the direct payment of fees and the restrictions that will apply to those fees by the ministry to physicians for insured services are also a form of compensation and ought to be subject to exclusion from the operation of the *Act* under section 65(6)3.

Part 1: collected, prepared, maintained or used

[20] The parties to the appeal are in agreement that the ministry collected, prepared, maintained or used *some of* the records at issue within the meaning of the first part of the test under section 65(6). The appellant, however, argues that:

> the first part of the test should not be read as broadly as to encompass third party submissions provided (and, therefore, not collected, prepared or maintained) to an Institution independent of any ongoing labour relations or employment-related matters under review that at some point in the future are considered by the Institution.

[21] It goes on to suggest that this interpretation "would prevent access to any record submitted by a third party to an Institution that in the future is used by the Institution in meetings, consultations, discussions or communications about labour relations or employment-related matters."

[22] I cannot agree with the position taken by the appellant. In my view, all of the records at issue in this appeal, regardless of their origin, were collected, prepared, maintained and/or used by the ministry. This collection, preparation, maintenance or use of the records identified them as the responsive records in this appeal. While the logical conclusion of this approach to identifying records which will fall within the exclusion may see records supplied by outside sources falling within its rubric, a plain reading of the exclusion in section 65(6) can lead to no other conclusion.

Part 2: in relation to meetings, consultations or communications

[23] The ministry submits, and I agree, that all of the records were collected, prepared, used and or maintained in relation to MSPC meetings, consultations or communications involving both members of the committee itself and the OMA.

Part 3: about labour relations matters in which the ministry has an interest

[24] The ministry submits that all of the identified records describe and relate to meetings, discussions and communications about physician remuneration, which was found to be a labour relations matter in which the ministry had an interest for the purposes of section 65(6) in Order PO-2497. It argues that since the records relate directly to the work of the MSPC, they are analogous to the records under consideration by the Court of Appeal in *Ministry of Health* where it was held that the work of "an

advisory committee regarding the relationship between the government and physicians" is a labour relations matter in which the ministry has an interest.

[25] The ministry goes on to state that the ministry's interest in the subject matter of the records arises as a result of its relationship with Ontario's physicians, its statutory mandate under the *Health Insurance Act* and the *Commitment to the Future of Medicare Act*, as well as its responsibility for managing and controlling health care costs in general. It also points out that there are substantial financial implications for the ministry which are reflected in the records at issue in this appeal.

[26] The appellant takes issue with the ministry's position that all of the responsive records, including those produced by the OMA or the Ontario Association of Radiologists (the OAR) for a purpose other than "labour or employment negotiations", fall within the ambit of the exclusion in section 65(6). The appellant argues that these records, which it describes as "indirect communications", are comprised of Records 5, 8, 12-14, 19-23, 25, 43 and 46-53 and reflect communications between the ministry and the OAR, the OMA and the OAR or records where the OAR is copied on communications between the ministry and the OMA. Essentially, the appellant suggests that section 65(6) ought not to be read so broadly as to include records about the issue of physician remuneration and the SOB which originate with third parties, like the OAR, as they do not "constitute negotiations between the OMA and the government."

[27] In its reply representations, the ministry indicates that "it is clear from both their context and their contents that all of the records identified by the Appellant [Records 5, 8, 12-14, 19-23, 25, 43 and 46-53] were records which were collected, prepared, maintained and/or used by the ministry, the OMA and/or the MSPC with regard to meetings, consultations, discussions and communications concerning ministry/OMA labour relations negotiations regarding amendments to the Schedule of Benefits." It refutes the appellant's arguments in favour of a more narrow reading of the exclusion, referring to the decision of the Court of Appeal in *Ontario (Solicitor General)* where the Court looked at the circumstances surrounding the use of the document.

[28] I have carefully examined each of the records at issue in this appeal, particularly those referred to by the appellant above. Based on my review of the contents of all of their records, I am satisfied that regardless of their origin, they were collected, prepared, maintained or used by the ministry, through the mechanism of the MSPC. I also find that this collection, preparation, maintenance and use was in relation to meetings, consultations and discussions about a labour relations matter, the negotiation of physician remuneration as reflected in the Schedule of Benefits. I further conclude that the ministry has the requisite interest in the subject matter of the records.

[29] As all three elements necessary to establish the application of the exclusion in section 65(6)3 have been satisfied, I find that the records fall outside the ambit of the *Act* and I uphold the ministry's decision to deny access to them on that basis.

ORDER:

I uphold the ministry's decision to deny access to the records on the basis that they fall within the ambit of the exclusion in section 65(6)3.

Original signed by: June 18, 2012
Donald Hale
Adjudicator