

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3223

Appeal PA12-166

Niagara Health System

June 24, 2013

Summary: Niagara Health received a request for the employment contract of its former CEO. It denied access to the record under section 69(2) on the basis that because the contract came into its custody or under its control prior to January 1, 2007, it is excluded from the operation of the *Act*. This order upholds the decision of Niagara Health and concludes that the record falls outside the *Act* because of the operation of section 69(2).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 69(2).

OVERVIEW:

[1] The Niagara Health System (Niagara Health) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to “documents relating to employment contracts and or vendor contracts” of four named past executives of Niagara Health System from Jan. 1, 2007 to present. Niagara Health located responsive records pertaining to all four individuals and granted complete access to those records that related to two of them. Access to the employment contracts of the other two individuals was denied on the basis that they are excluded from the operation of the *Act* pursuant to section 69(2) of the *Act*.

[2] The requester, now the appellant, appealed Niagara Health’s decision. During the course of mediation, the appellant advised the mediator that he sought access to

the employment contracts of two named individuals that were withheld in full. Following further discussion with the parties and the mediator, Niagara Health disclosed the employment contract of one of the two individuals, and indicated that it was no longer relying on section 69(2) of the *Act* to deny access to the other. Instead, it determined that it is relying on the exclusionary provision in section 65(6)(1) of the *Act* to withhold the remaining employment contract.

[3] The appellant subsequently advised the mediator that he wishes to pursue access to the remaining employment contract. Niagara Health then decided to contact an individual whose interests may be affected by the disclosure of the employment contract (the affected person). This individual responded by raising the possible application of the exclusion in section 69(2) to the record. Niagara Health then issued a new decision letter to the appellant advising him that it was now relying on the section 69(2) exclusion.

[4] Initially, I sought and received the representations of the affected person and Niagara Health on the application of the exclusion in section 69(2), initially. I summarized these representations and shared them with the appellant, who also provided representations. I then shared the appellant's representations with counsel for the affected party, who submitted additional representations by way of reply.

RECORDS:

[5] The sole record remaining at issue in this appeal consists of an employment contract between the affected person and Niagara Health.

DISCUSSION:

[6] The sole issue for determination in this appeal is whether the record is excluded from the scope of the *Act* as a result of the operation of section 69(2), which reads, in part:

...this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007.

[7] In their initial submissions, Niagara Health and the affected party state that under section 69(2) of the *Act*, a hospital is only subject to disclosure of records in its custody or under its control where the records came into the custody or under the control of the hospital on or after January 1, 2007. As the employment agreement which is the subject of the request is dated prior to January 1, 2007 and only came into the custody or control of Niagara Health before that date, it is not subject to disclosure because it is excluded from the application of the *Act* owing to the operation of section 69(2). In addition, the affected person submits that the employment contract at issue in

this appeal was entered into prior to January 1, 2007 and "was of indefinite duration and there were no letters . . . extending the contract" after that date.

[8] The appellant argues that the provision in section 69(2) does not apply to the requested agreement as it represents a "living document" which continued in force for many years past the January 1, 2007 date. He suggests that because the agreement was "in force" after January 1, 2007, it was "in circulation within the organization and was from time to time referred to by both [Niagara Health] and the [affected person]." Finally, the appellant states that the agreement was not an archived, historic document, but instead was easily accessible and "may have even been amended after signing of the document by additional letters or documents."

[9] In her reply representations, the affected party submits as follows:

The language of section 69(2) is plain and unambiguous. The *Act* only applies to records in the custody or under the control of a hospital where the records came into the custody or control of [Niagara Health] on or after January 1, 2007.

The provision establishes a clear and certain threshold for the application of the *Act* as it pertains to hospitals. The provision refers only to 'custody' or 'control'. It does not refer, directly or indirectly, to the date or dates upon which the requested document was legally effective. It makes no exceptions for employment contracts or similar documents.

The Appellant's interpretation effectively re-writes the provision, by introducing a new consideration (i.e. when the document is legally effective) that is otherwise absent. This approach is contrary to the plain meaning of the provision and is inconsistent with the legislative intent of creating a clear threshold for determining when the *Act* applies to documents held by hospitals.

[10] The affected party goes on to point out that if I were to accept the interpretation suggested by the appellant, the Commissioner's office would be required:

. . . to assess not only when the document came into the custody or control of the hospital (which is what the provision currently requires), but also the timeframe when the document was legally effective or binding. This is a question of law which may well be complicated or uncertain in certain cases, or of uncertain application in others. Leaving aside the plain meaning of the provision, as a practical matter this consideration would unduly and unnecessarily complicate what ought to be a straightforward exercise of applying section 69(2) of the *Act*.

[11] In the present appeal, the employment agreement at issue was entered into prior to January 1, 2007, but remained in effect up to the date that the affected person ceased her employment with Niagara Health, several years after that date. I accept the evidence of the affected person that there has been no post-January 1, 2007 extension agreement or other contract entered into between the affected person and Niagara Health which incorporated the terms of the earlier agreement. Based on the evidence provided to me by the affected person and Niagara Health, I find that the original contract remained in effect and was not supplanted or adopted by another agreement after January 1, 2007.

[12] The contract was entered into between Niagara Health and the affected person prior to the January 1, 2007 date prescribed in section 69(2) and, as a result, came into the custody or under the control of Niagara Health on the date it was executed. Because the record in question came into the custody or under the control of Niagara Health prior to January 1, 2007, it is excluded from the operation of the *Act* by virtue of section 69(2).

[13] Accordingly, the requested document falls outside the scope of the *Act* and I have no jurisdiction to review Niagara Health's decision to deny access to it. I must, therefore, dismiss the appeal on that basis.

ORDER:

I dismiss the appeal.

Original Signed By: _____
Donald Hale
Adjudicator

_____ June 25, 2013