Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3272

Appeal PA13-64

Sunnybrook Health Sciences Centre

October 29, 2013

Summary: Sunnybrook Health Sciences Centre (the hospital) received a request for records relating to complaints of harassment made against the appellant by hospital staff. Access to the responsive records was denied on the basis that they were not subject to the *Act* because of the operation of section 4(1) of the *Personal Health Information Protection Act* (*PHIPA*). In the alternative the hospital argued that the records were excluded from the operation of the *Act* under section 65(6)3 or were exempt from disclosure under sections 49(a), in conjunction with sections 13(1), 14(1)(e) or 20, and 49(b). The adjudicator found that *PHIPA* did not apply to the responsive records and that they were not excluded from the operation of the *Act* under section 65(6)3. He did, however, uphold the hospital's decision to deny access to the records under sections 49(a) and 20 on the basis that their disclosure could reasonably be expected to seriously threaten the health or safety of an individual.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) [definition of "personal information"], 20, 49(a), 65(6)3.

Personal Health Information Protection Act, 2004, R.S.O. 2004, c.3, sections 2 [definition of "health care"], 4(1) and (4), 8.1.

Orders and Investigation Reports Considered: MO-2698, PO-3228

OVERVIEW:

[1] Sunnybrook Health Sciences Centre (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a wide range of records relating to certain complaints made against him by hospital staff in December 2010. The hospital located responsive records and provided the appellant with access to some of them. Access to other records, or portions of records, was denied on the basis that they were excluded from the operation of the *Act* under section 65(6) or were exempt from disclosure under the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1)(e) and 20 (danger to health or safety), 49(a) (refusal to disclose requester's own information) and 49(b) (invasion of privacy).

[2] The appellant appealed the hospital's decision to deny access to the records, in whole or in part. During the mediation stage of the appeal the appellant agreed to limit the scope of his appeal to include eight pages maintained by the hospital's Occupational Health and Safety Department.

[3] I began my inquiry by seeking representations from the hospital on the exemptions and the exclusion claimed to apply to the records. I received representations from the hospital, portions of which were shared with the appellant. Other parts of the hospital's representations were not shared with the appellant because they met the confidentiality criteria set out in section 7 of the *IPC Code of Procedure* and *Practice Direction 7*. I also received representations from the appellant.

[4] In this order, I uphold the hospital's decision to deny access to the records to the appellant on the basis that they are exempt from disclosure under section 49(a), taken in conjunction with the exemption in section 20.

RECORDS:

[5] The sole records at issue in this appeal consist of eight pages from Occupational Health and Safety Department. These represent two versions, one of which is three pages in length while the other is five pages, of a document entitled "Incident of Domestic/Workplace Violence". Pages 1 and 4 are identical, as are pages 2 and 5. The content of page 3 also appears on pages 7 and 8, interspersed with other text.

PRELIMINARY ISSUE:

Do the records contain "personal health information"?

[6] The hospital argues that "the totality of information" in the records qualifies as personal health information, as that term is defined in section 4 of the *Personal Health Information Protection Act* (PHIPA). Section 8.1 of *PHIPA* excludes personal health information which is in the custody or control of a health information custodian, such as

the hospital, from the operation of the *Act*. The hospital argues that because the records contain personal health information, they are removed from scope of the *Act.* Specifically, the hospital argues that because the records form part of a file maintained by its Occupational Health and Safety Department (the OHSD) in relation to one of its employees (the affected party), it is "no different from a patient chart in a doctor's office." The hospital goes on to argue that:

> [the affected party] sought assistance for her health and safety concerns caused by the actions of the appellant, and the resulting record, at issue in this appeal, is part of her file in [the hospital's] OHSD. She provided information about her concerns in confidence, an expectation which is fully consistent with all of our Occupational Health Program functions, knowing that confidentiality is a key component of health care provision, and that health care records in Ontario are protected by PHIPA.

[7] Section 4(4) of *PHIPA* directly addresses these arguments. It reads:

> Personal health information does not include information contained in a record that is in the custody or under the control of a health information custodian if,
>
> (a) The identifying information contained in a record relates primarily to one or more employees or other agents of the custodian, and
> (b) The record is maintained primarily for a purpose other than the provision of health care or assistance in providing health care to the employee or other agents.

[8] The information in the records at issue relates directly to the affected party and other employees of the hospital. Further, I find that the records were not maintained primarily for the purpose of providing health care or assistance in providing health care to the affected party. Rather, it is clear the records were created for the primary purpose of addressing the affected party's concerns about the harassment she was suffering at the hands of the appellant and not for the provision of health care, which is defined in section 2 of *PHIPA* as follows:

> "health care" means any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that,
>
> (a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,
>
> (b) is carried out or provided to prevent disease or injury or to promote health, or
>
> (c) is carried out or provided as part of palliative care,

and includes,

(d) the compounding, dispensing or selling of a drug, a device, equipment or any other item to an individual, or for the use of an individual, pursuant to a prescription, and

(e) a community service that is described in subsection 2 (3) of the *Home Care and Community Services Act, 1994* and provided by a service provider within the meaning of that Act; ("soins de santé").

[9] Contrary to the arguments put forward by the hospital, I find that it was not providing health care or assistance to the affected party as that term is defined in section 2 of *PHIPA* when it responded to her harassment complaint. Instead, the hospital's Occupational Health and Safety Department conducted an investigation and took steps to ensure the affected party's safety once it was made aware of the complaint. This does not, in my view, equate with the provision of health care for the purposes of the definition in *PHIPA*. As a result, I find that the records at issue in this appeal are not excluded from the operation of the *Act* as a result of section 8.1 of *PHIPA* because the records do not contain personal health information.

ISSUES:

A. Does section 65(6)3 exclude the records from the *Act*?

B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Does the discretionary exemption at section 49(a) in conjunction with the section 20 exemption apply to the information at issue?

D. Did the institution exercise its discretion under section 49(a) and 20? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does section 65(6)3 exclude the records from the *Act*?

Introduction

[10] 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.

Part 1: collected, prepared, maintained or used

[11] Clearly, a review of the records leads to the conclusion that on their face, the information contained therein was collected, prepared, maintained and used by staff within the hospital's Occupational Health and Safety office. As a result, the first part of the test under section 65(6)3 has been satisfied.

Part 2: meetings, consultations, discussions or communications

[12] With respect to the second part of the test under section 65(6)3 the hospital submits:

> [the record] was collected, prepared, maintained and used in relation to meetings and discussions between [the affected party] and the Manager, Occupational Health, the Manager, Security Services and [the affected party's] Supervisor and meetings and discussions between the Manager, Occupational Health, the Vice-President, Human Resources and the Director, Plant Operations and Maintenance. The existence of the updated, five-page version of the report demonstrates maintenance and use of the OHSD Document. The information in the OHSD Document was also used in a meeting, discussion and communication between the Vice-President, Human Resources and the Director, Plant Operations and Maintenance and the appellant but was not disclosed to the appellant. Evidence of these uses is contained in some of the records fully or partially released to the appellant, which were submitted to the IPC in response to the Request for Documentation.

[13] Based on my review of all of the documents submitted to this office during the appeal process and the evidence quoted above from the hospital, I am satisfied that the records were maintained and used in the course of various consultations, discussions and meetings that took place involving hospital staff and, in some cases, meetings with the appellant. Accordingly, I have no difficulty in finding that the second part of the test under section 65(6)3 has been satisfied.

Part 3: labour relations or employment-related matters in which the institution has an interest

[14] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830 and PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832 and PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*[1].

[15] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee[2].

[16] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce[3].

[17] The records collected, prepared maintained or used by the Ministry … are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

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[1] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).
[2] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[3] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

[18] The hospital submits that the records are about "employment-related matters" in two ways. They describe the affected party and other individuals' reactions to the appellant's actions, as well as the action taken by the hospital to address their concerns, including "establishing conditions of employment that are safe and free from intimidation and threats." It argues that these actions are consistent with its obligations to its employees which are set out in the "Duties of Employers" portion of Part III of the *Occupational Health and Safety Act* (*OHSA*). Specifically, the hospital refers to section 25(2)(h) of *OHSA* which obliges employers to "take every precaution reasonable in the circumstances for the protection of a worker." It also relies on section 32.0.4 of *OHSA* which requires employers to take the same precautions to prevent physical injury to a worker due to domestic violence in the workplace.

[19] The hospital also relies on several decisions of this office which have held that records relating to an investigation undertaken by an institution in its capacity as an employer into the conduct of *one of its employees* that could result in disciplinary action fall within the ambit of "employment-related" records for the purposes of section 65(6)3. [my emphasis] In the present appeal, I note that the appellant is not an employee of the hospital and is not, accordingly, subject to disciplinary action by it.

[20] The hospital concludes its arguments on this issue by indicating that it has a strong interest in the subject matter of the records as part of its legal responsibility to "maintain a safe environment for its workforce" and to "protect workers from domestic violence in the workplace."

[21] In Order MO-2698, Adjudicator Jennifer James addressed a similar fact situation in which an institution was required to take steps to prevent its employees from being harassed by a member of the public, as opposed to one of its own employees. In that case, records relating to the actions taken by the institution were found not to fall within the ambit of "employment-related" records. Adjudicator James found that:

> Previous decisions from this office have consistently held that records relating to the investigation of complaints about employees by an employer are employment-related, as they could result in disciplinary action against the employee.[4] In this appeal, the appellant is not an employee, but a member of the public seeking access to records relating to a complaint made against him by city employees. Though employees concerns about the appellant are set out in the records, the records do not contain information which review, assess or investigate city employees' responses, actions or conduct. In addition, the records do not contain the employer's replies to the employees who complained about the appellant. Having regard to the contents of the record, I am satisfied

[4] See for example, Orders MO-1635, MO-1723, PO-2748 and PO-2809.

> that they do not contain any information which allege employee misconduct.
>
> I have considered the city's submission that it has an obligation under the *Occupational Health and Safety Act* to protect its workers from violence and harassment in workplaces. However, I do not accept the city's position that any records relating to a complaint of violence and harassment in the workplace automatically removes such records from the scope of the *Act*. In my view, the information in the records and the specific circumstances of the incident described therein must be reviewed to determine whether the records contain information relating to the employment of a person or employment-related matters. The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].
>
> Having regard to the contents of the records, I find that the records do not contain information relating to any human resources or staff relations issues between the city and the two employees who complained about the appellant. Instead, the records describe staff observations about the appellant, who is not a city employee, and is not in an employment-like relationship with the city.
>
> Having regard to the above, I find that any meetings, consultations, discussions or communications that the city had relating to their use of the records does not relate to an "employment-related matter". Accordingly, I find that the third requirement for the application of section 52(3)3 has not been met and as such the records are subject to the application of the *Act*.

[22] In the present case, the records relate to certain complaints made by hospital employees about the appellant's conduct, and the hospital's reaction to those complaints. The appellant is not an employee of the hospital. Rather, he is employed by an outside contractor that performs work at the hospital. It cannot be said that he has an "employment-like relationship" with the hospital. Accordingly, I find that the records are not about an "employment-related matter" since they do not address any human resources or staff relations issues between the hospital and one of its employees, such as the individuals who are referred to in the records. The cases relied upon by the hospital address the situation where a complaint has been made against an employee of an institution and the records address its' management of that issue, as opposed to the situation in the present case and in Order MO-2698 which involved a complaint made about an individual who is not an employee.

[23] In addition, I find that the records do not relate to a labour relations matter for the purposes of section 65(6) as the communications which are reflected in the records do not relate to the employer's collective relationship with its employees. Therefore, the contents of the records are not "about labour relations" for the purpose of section 65(6)3 [Orders P-1223 and P-1242].

[24] Because of my finding that the records are not about "labour relations or employment-related matters" for the purposes of section 65(6)3, I find that they are not excluded from the operation of the *Act* and I will go on to determine if they contain "personal information" and whether they qualify for exemption under sections 49(a) or (b), in conjunction with sections 13(1), 14(1)(e) and 20.

B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[25] In order to determine whether the records are exempt under sections 49(a) or (b) of the *Act*, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or

> confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[26] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[27] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[28] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual[5].

[29] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual[6].

[30] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed[7].

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[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.
[7] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[31] Based on my review of the records, I find that all of them contain information which qualifies as the personal information of the appellant for the purposes of the definition of that term in section 2(1), including information relating to his age and marital status [paragraph (a)], employment history [paragraph (b)], the views or opinions of other individuals about him [paragraph (g)] and the appellant's name where it appears with other personal information relating to him [paragraph (h)].

[32] In addition, I conclude that the records also contain the personal information of the affected party, including her age and marital status [paragraph (a)], employment history [paragraph (b)], and her name, along with other personal information relating to her [paragraph (h)].

[33] The records also contain personal information relating to other identifiable individuals, including their employment history [paragraph (b)] and their names, along with other personal information relating to them [paragraph (h)].

[34] While some of the information relates to these individuals' employment and professional responsibilities, I find that because of the very personal circumstances surrounding the creation and use of the information in the records, it concerns them in their personal, as opposed to their professional, capacity and is properly considered to be "personal information" within the meaning of the definition in section 2(1).

[35] Because the records contain the personal information of the appellant, I will next determine whether they qualify for exemption under section 49(a), in conjunction with section 20 in this appeal.

C. Does the discretionary exemption at section 49(a) in conjunction with the section 20 exemption apply to the information at issue?

[36] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right and the parts of section 49 that are relevant in this appeal state:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, **20** or 22 would apply to the disclosure of that personal information [emphasis added];
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[37] The hospital has withheld the records in this appeal under section 49(a) on the basis that section 20 applies to the withheld information. The hospital also takes the position that the disclosure of the records would constitute an unjustified invasion of another individual's personal privacy under section 49(b).

[38] I will first evaluate whether the records qualify for exemption under section 20, which states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[39] For this exemption to apply, the hospital is required to demonstrate that disclosure of the records could reasonably be expected to lead to the specified result. To meet this test, the hospital must satisfy me that a reasonable basis exists for believing that endangerment will result from disclosure. In other words, the hospital must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[8] An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-3228].[9]

[40] Regarding section 20 of the *Act*, the hospital submits that there is a reasonable basis for believing that endangerment will result from disclosure. The hospital has provided me with confidential representations on the application of section 20, in addition to those which were shared with the appellant. I note that the information, including records that were disclosed to the appellant, provided to me by the hospital in addition to the responsive records consist of detailed information about the surrounding circumstances, as well as supporting documentation received from other parties to the *OHSA* investigation. The hospital's representations identify the relevant individuals whom it argues could reasonably be subjected to endangerment if the records are disclosed.

[41] The appellant's representations focus on his wish to know the information that was relied upon by the hospital and to be informed as to what was said about him by others. He also submits that he is not a threat to anyone and that this was acknowledged by the affected party, though he does not provide the source of this attribution.

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[8] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.) (*Office of the Worker Advisor*). See also, for example, Orders PO-2910, PO-2916, PO-2967 and MO-2229

[9] Orders PO-2003.

Analysis and findings

[42] The question to be asked in reviewing the possible application of section 20 is whether the hospital has provided sufficient evidence to demonstrate that disclosure of the specific information at issue could reasonably be expected to threaten the safety or health of the other individuals. However, while the expectation of harm must be reasonable, it need not be probable.[10]

[43] In Order PO-3228, Adjudicator Daphne Loukidelis recently determined the application of section 20 to certain records requested under the *Act*. In that case, she evaluated the evidence tendered by examining it in two steps, as follows:

> Past orders relating to this exemption have emphasized the need to consider both the type of information at issue and the behaviour of the individual who is requesting the information.[11]
>
> On the first point, an important case dealing with this exemption is the Ontario Court of Appeal decision in *Office of the Worker Advisor* where the court referred to the necessity of considering the nature of the information at issue and, more specifically, whether it is "potentially inflammatory."
>
> . . .
>
> . . . my analysis does not end with the conclusion that they contain information that is inflammatory in nature. The decision of the Court of Appeal in *Office of the Worker Advisor* also provides guidance respecting the evaluation of the risk of threat from an appellant. In that case, affidavit evidence of threatening behaviour exhibited by the appellant towards staff from the institution's program offices had been provided and the evidence was not challenged. The Court of Appeal stated that uncontroverted evidence of this type was sufficient to establish the evidentiary foundation for the second requirement of this exemption, which is that the appellant could reasonably be expected to pose a threat to safety or health to an individual if the information at issue were to be disclosed.
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> In the appeal before me, the ministry has provided evidence, from a number of sources, of threatening behaviour on the part of the appellant. The ministry's representations clearly and directly link specific behaviour of the appellant to the information at issue and a corresponding,

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[10] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).
[11] For example, see Order PO-1939.

> reasonable expectation of harm with its disclosure.[12] In my view, therefore, the ministry's confidential representations respecting the application of section 20 are sufficient to support a finding that there is a reasonable expectation of serious threat to the safety or health of the identified individuals if these particular records are disclosed.

[44] In this present case, the hospital has provided me with both confidential and non-confidential representations on this issue. In addition, I am relying on other information contained in records maintained by its Facility Services Department, Human Resources office, Legal Services and the office of the Chief Administrative Officer that were disclosed to the appellant, in whole or in part, and the records at issue in the appeal themselves.

[45] The records and other documentation clearly demonstrate that the appellant has invested an enormous amount of time and energy in obtaining what he views as a satisfactory outcome not only from the appeal process in the case which resulted from his request for this information under the *Act*, but also his pursuit of other remedies in other venues.

[46] The evidence clearly demonstrates that the appellant is prepared to ignore bail conditions and a trespass notice restricting his right of access to parts of the hospital to further his harassing and threatening behaviour towards the affected party. The evidence tendered in the records disclosed to the appellant and the non-confidential representations of the hospital lead me to conclude that the disclosure of the records at issue could reasonably be expected to be "inflammatory in nature." The records describe in great detail the appellant's actions and the impact those actions have had not only on the affected party, but also other individuals at the hospital. The records also go on to describe the steps taken by the hospital and the affected party to counter the actions of the appellant and limit their contact with him. I find that the disclosure of the information set out in the record would be inflammatory in nature. As a result, I find that the first part of the analysis under section 20 has been satisfied.

[47] The records themselves and the supporting documentation provided by the hospital also support a finding that the appellant's behaviour indicates that there is a significant risk of threat to the health or safety of not only the affected party, but other individuals as well. The supporting documents include a number of strongly-worded letters written by the appellant's counsel at his behest seeking compensation for damages from individuals who the appellant thinks have wronged him. These records also describe in detail the obsessive nature of the appellant's behaviour towards the affected party and her justified fear of him. Based on the evidence presented by the hospital and the contents of the records, I find that the hospital has provided me with

[12] Orders PO-1939 and MO-2229.

sufficient reason to find a link between the appellant's behaviour and a threat to the health or safety of other individuals.

[48] I conclude that there is a reasonable expectation of serious threat to the safety or health of the affected party and other identified individuals if these particular records are disclosed. Accordingly, I find that the records qualify for exemption under section 20 and are, accordingly, exempt under section 49(a). Because of the manner in which I have addressed the application of section 20 to the records, it is not necessary for me to also consider whether they are also exempt under sections 13(1), 14(1)(e)or 49(b).

D. Did the institution exercise its discretion under section 49(a) and 20? If so, should this office uphold the exercise of discretion?

[49] The section 20 and 49(a) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[51] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information

    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[52] The hospital submits that it has provided the appellant with 406 pages of unsevered records, along with a further 24 pages with severances, leaving only 12 pages completely undisclosed, eight of which are at issue in this appeal. It states that it has applied only the "limited and specific exclusions and exemptions that apply to these records." It indicates that the information that was not disclosed consists of the personal information of other individuals and that their privacy interests were considered when deciding whether or not to disclose the records. The hospital is also well aware of the nature of the relationship and history of harassment of the affected party by the appellant, and this knowledge was used when making the determination of what ought to be disclosed to him.

[53] The hospital goes on to conclude that its primary focus in the process of responding to this request was to ensure that the appellant obtained access to the information he was seeking, but not at the risk of causing harm to the safety of its employees.

[54] The appellant did not address this issue in his representations.

[55] Based on the hospital's representations, I am satisfied that it exercised its discretion to deny access to a small number of responsive records appropriately and that it did not consider any irrelevant or improper factors in making that decision. As a result, I uphold the hospital's exercise of discretion in this matter.

ORDER:

I uphold the hospital's decision to deny access to the records at issue in this appeal.

Original Signed By: October 29, 2013
Donald Hale
Adjudicator