Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3346

Appeal PA12-192

The Ottawa Hospital

June 5, 2014

Summary: The appellant made a request to the hospital for records relating to him and his academic performance at the hospital while he was a medical resident. The hospital located the responsive records and denied access to them, in whole or in part, on the basis of the employment and labour relations exclusion in section 65(6) and the exemption in section 49(a), with reference to section 19 (solicitor-client privilege). The appellant raised the issue of additional responsive records and the reasonableness of the hospital's search. In this order, I uphold the hospital's decision and dismiss the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1)(definition of "personal information"), 19, 49(a) and 65(6)3.

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Hospital (the hospital) for access relating to his academic performance. Specifically the request was for the following:

> All copies of all correspondence memoranda associate[d] (including emails) with respect to me generally and my academic performance at the Civic Hospital, the General Hospital and the Children's Hospital of Eastern Ontario from [specified date] to date. I expect the majority of my

> materials will be found in the offices of the division of General Surgery, the office of [named doctor], the office of the VP Medical Affairs [named doctor], the office of the Vascular Program Director [named doctor], the office of the Chair of Surgery [named doctor], the office of the program director in the division of Pediatric Surgery at the CHEO [named doctor], the account of the general surgery resident [named doctor] and other offices.

[2] Following receipt of the request, the hospital first advised the appellant that a copy of his request was being transferred to the Children's Hospital of Eastern Ontario (CHEO) pursuant to section 25 of the *Act*, as some of the requested information may be in the custody and control of CHEO.

[3] The hospital located a number of responsive records and provided the appellant with an index of records. The hospital withheld the majority of the records on the basis that they are excluded from the *Act* under section 65(6). The hospital further advised that while it took the position that several of the records were excluded from the *Act* under section 65(6), it was also claiming the discretionary exemption in section 19 (solicitor-client privilege), in the alternative. Finally, the hospital identified several records that are subject to the *Act* and denied access to them, in whole or in part, on the basis of section 19.

[4] During mediation, the following occurred:

- The mediator clarified the request. The hospital advised that the Ottawa Hospital is comprised of the Civic, General and Riverside campuses. The portion of the appellant's request relating to CHEO had been transferred to it.

- The mediator raised the possible application of section 49(a) and the hospital confirmed that it was relying on section 49(a), in conjunction with section 19, to withhold undisclosed portions of the records.

- The appellant advised the mediator that he believes additional records should exist because the hospital had not identified responsive records for part of the time period specified in his request. The mediator raised this issue with the hospital. The hospital responded with the following:

    - Section 69(2) of the *Act* states that it only applies to records that came into the custody or control of the hospital on or after January 1, 2007.
    - The hospital conducted a search for responsive records between January 1, 2007 and September 18, 2009 but no records were located.
    - Records may not have been kept due to limited storage or were deleted as the hospital was not subject to the *Act*.

[5] During my inquiry into this appeal, I sought representations from the appellant, the hospital and an organization whose interests may be affected by the outcome of the appeal, PAIRO[1] (Professional Association of Interns and Residents of Ontario). I received representations from the hospital and PARO only. The appellant was contacted by this office to confirm whether he would be making representations and he declined to do so.

[6] In this order, I uphold the hospital's decision and dismiss the appeal.

RECORDS:

Page Numbers	Date	Description	Exclusion or Exemption claimed
1	09/18/2009	Email	65(6)
2 – 3	09/25/2009	Email	65(6)
4 – 6	11/05/2009	Email	65(6)
7	11/24/2009	Letter	65(6)
8	11/26/2009	Notes	65(6)
9 – 10	11/30/2009	Email	65(6)
11 – 12	11/30/2009	Email	65(6)
13 – 15	11/30/2009	Email	65(6)
16	11/30/2009	Notes	65(6)
17 – 18	12/03/2009	Email	65(6)
19 – 21	12/07/2009	Email	65(6)
22 – 24	02/01/2010	Email	65(6)
25	03/06/2010	Email	65(6) and 49(a), 19 in the alternative
26 – 29	02/09/2010	Email	65(6) and 49(a), 19 in the alternative
30 – 33	03/12/2010	Email	65(6) and 49(a), 19 in the alternative
34 – 35	03/17/2010	Email	65(6)
36	03/24/2010	Email	65(6)
37 – 38	03/25/2010	Email	65(6)
39 – 40	03/24/2010	Email	65(6)
41 – 44	03/29/2010	Email	65(6) and 49(a), 19 in the alternative
45 – 49	04/05/2010	Email	65(6) and 49(a), 19 in the alternative
50 – 52	04/14/2010	Email	65(6) and 49(a), 19 in the alternative

[1] Now known as PARO – Professional Association of Residents of Ontario

Page Numbers	Date	Description	Exclusion or Exemption claimed
53 – 56	04/14/2010	Email	65(6)
57 – 60	04/22/2010	Email	65(6) and 49(a), 19 in the alternative
61	04/28 and 05/06	Notes	65(6)
62 – 63	04/29/2010	Email	65(6) and 49(a), 19 in the alternative
64	05/01/2010	Email	65(6) and 49(a), 19 in the alternative
65	05/06/2010	Email	65(6) and 49(a), 19 in the alternative
66 – 69	05/07/2010	Email	65(6) and 49(a), 19 in the alternative
70	05/07/2010	Email	49(a) and 19
71 – 75	05/09/2010	Email	65(6) and 49(a), 19 in the alternative
76	05/09/2010	Email	65(6)
77 – 112	05/10/2010	Email	49(a) and 19
113 – 116	05/13/2010	Email	65(6)
117 – 119	08/09/2010	Email	65(6) and 49(a), 19 in the alternative
120 – 121	07/08/2010	Email	65(6) and 49(a), 19 in the alternative
122 – 123	01/27/2011	Letter	65(6)
124	12/03/2010	Letter	65(6)
125 – 130	02/22/2012	Email	49(a) and 19
131	04/19/2011	Email	49(a) and 19
132 – 137	01/07/2011	Email	65(6)

ISSUES:

A. Does section 65(6) exclude the records from the *Act*?
B. Do the records 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 section 19 apply to the information at issue?
D. Was the hospital's exercise of discretion proper in the circumstances?
E. Was the hospital's search for records reasonable?

DISCUSSION:

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

[7] The university submits that subsections 1, 2 and 3 of section 65(6) apply. However, I need only consider the application of subsection 3 which reads:

> 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.

[8] 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*.

[9] 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.[2]

[10] 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.[3]

[11] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[4]

[12] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[5]

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[2] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[3] Order PO-2157.
[4] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[5] *Ministry of Correctional Services*, cited above.

[13] The hospital submits that the records are clearly communications, consultations and discussions relating to the employment of the appellant. The hospital states:

> The records withheld on the basis of section 65(6) variously deal with complaints by the Appellant about his working conditions and a grievance filed in this respect, with matters relating to his evaluation, including a remediation program on which he was placed to address concerns about his performance, and with concerns relating to the Appellant's issues and conduct in the workplace. These are all matters with some connection to the appellant's employment, and to his working conditions as set out in the PAIRO/CAHO Collective Agreement.

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

Introduction

[14] 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

[15] I accept that the records were collected, prepared and used by the hospital or on its behalf. As the hospital states, the records relate to the appellant's role and the hospital's responsibilities to him as a medical resident and then later, the appellant's grievance against the hospital. I find that the records were collected, prepared and used by the hospital or on its behalf.

Part 2: meetings, consultations, discussions or communications

[16] I also find that the records were used and prepared in relation to meetings, consultations, discussions or communications. Several of the records are emails in which information about the appellant are shared for either internal hospital consultation or discussion about the hospital's responsibilities to the appellant.

Furthermore, several of the records are draft documents which were also used in consultations and discussions. I find the hospital has met Part 2 of the test.

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

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

- a job competition[6]
- an employee's dismissal[7]
- a grievance under a collective agreement[8]
- disciplinary proceedings under the *Police Services Act* [9]
- a "voluntary exit program" [10]
- a review of "workload and working relationships"[11]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [12]

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

- an organizational or operational review[13]
- litigation in which the institution may be found vicariously liable for the actions of its employee[14]

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[6] Orders M-830 and PO-2123.
[7] Order MO-1654-I.
[8] Orders M-832 and PO-1769.
[9] Order MO-1433-F.
[10] Order M-1074.
[11] Order PO-2057.
[12] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).
[13] Orders M-941 and P-1369.
[14] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

[19] 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.[15]

[20] 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.[16]

[21] The hospital submits that medical residents are employees of the hospital and the hospital has an interest in the records at issue. The hospital submits the following in support of its position that medical residents, like the appellant, are employees of the hospital:

- PAIRO, the medical residents bargaining agent, views residents as employees and views the medical residents' relationship with the hospital as one involving employment.

- The terms and conditions of employment for residents are incorporated in a collective agreement which is negotiated through a process of collective bargaining between PAIRO and the Council of Academic Hospitals of Ontario (CAHO), an employer organization representing the hospital and other academic hospitals in Ontario.

- The hospital is partnered with the University of Ottawa (the university) for the purpose of post-graduate medical education. As a result, medical residents employed by the hospital also have status as post-graduate medical students with the university. This dual status is recognized in an affiliation agreement between the hospital (and other academic hospitals) and the university.

[22] The hospital submits that it has an interest in the records and states:

> The records withheld on the basis of [the exclusion] variously deal with complaints by the appellant about his working conditions and a grievance filed in this respect, with matters relating to his evaluation, including a remediation program on which he was placed to address concerns about his performance, and with concerns relating to the appellant's issues and conduct in the workplace. These are all matters with some connection to the appellant's employment, and to his working conditions as set out in the PAIRO/CAHO collective agreement.

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[15] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[16] *Ministry of Correctional Services*, cited above.

> The hospital has an interest in the negotiation and determination of the PAIRO grievance, described above, relating to the working conditions of the appellant. In the case of the other records withheld on the basis of [the exclusion], the hospital has an interest through its relationship with the appellant, a member of its own workforce.

[23] The hospital further submits that it has an interest in matters not only relating to the appellant's employment, but also his training, evaluation, and advancement. The hospital states:

> The training and evaluation of medical residents is inextricably linked to their clinical service role. The same physicians who supervise the clinical work of the residents are responsible for the evaluation of that work for learning and advancement purposes. Residents who successfully advance are given more challenging clinical work. Residents who do not advance may be placed on closer supervision and oversight, in the form of remediation or probation. They may ultimately see their employment with the hospital terminated as a result of unsuccessful evaluations.

[24] PAIRO also submits that medical residents are employees of the hospital for the purposes of section 65(6) and provides the relevant portions of the agreement between itself and the Council of the Academic Teaching Hospitals.

[25] As stated above, the phrase "in which the institution has an interest" has been interpreted to refer to matters involving an institution's own workforce. Based on hospital's representations and the records before me, I find that the appellant was an employee of the hospital for the purposes of section 65(6) and, as such, the hospital has an interest in these records because the relate to its workforce.

[26] The hospital's representations establish that medical residents are employed by the teaching hospitals and this employment relationship is subject to the collective agreement between PAIRO and the hospitals. I find that the appellant is an employee of the hospital for the purposes of section 65(6)3 and the grievance between the hospital and the appellant is a matter involving the hospital's workforce. In the circumstances of this appeal, I find that the appellant's grievance is a labour-relations matter in which the hospital has an interest. Furthermore, the appellant's evaluation, training and advancement are all employment matters in which the hospital also has an interest.

[27] Accordingly, I find that the records for which the exclusion has been claimed were collected, prepared and used for meetings, discussions and consultations about employment and labour-related matters in which the hospital has an interest. I find the records for which the exclusion has been claimed are excluded from the application of the *Act* pursuant to section 65(6)3.

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

[28] In order to determine which sections of the *Act* may apply, 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;

[29] 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.[17]

[30] The hospital submits that the records for which it has claimed the application of the exemption in section 19 contain the personal information of the appellant. The hospital submits that the appellant's name, when taken in combination with the other information in the records would disclose personal information about the appellant.

[31] I find that the records contain information about the appellant which qualifies as his personal information within the meaning of that term as it is defined in subsections (a), (b), (g) and (h) of section 2(1). Accordingly, I will consider whether section 49(a), in conjunction with section 19 of the *Act*, applies to the records.

C. Does the discretionary exemption at section 49(a) in conjunction with section 19 apply to the information at issue?

[32] Section 47(1) 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. Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > 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.

[33] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[18]

[34] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[35] In this case, the institution relies on section 49(a) in conjunction with section 19 which states:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;

[17] Order 11.
[18] Order M-352.

> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[36] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[37] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[19]

Solicitor-client communication privilege

[38] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[20]

[39] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[21]

[40] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[22]

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[19] Order PO-2538-R; *Blank* v. *Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[20] *Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[21] Orders PO-2441, MO-2166 and MO-1925.
[22] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[41] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[23]

[42] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[24]

Litigation privilege

[43] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[25]

[44] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

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[23] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[24] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[25] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

[45] The hospital submits that the withheld information, including the records for which section 19 was claimed in the alternative to section 65(6), are exempt under Branch 1 of section 19. The hospital states:

> The records relate to various legal advice received from counsel to the hospital in respect of the appellant's grievance. In addition some of the records relate to legal advice received from counsel to a number of physicians…Other records relate to a discussion among counsel of ongoing litigation.

[46] The hospital submits that, with respect to the solicitor-client privilege, all of the withheld records form part of the "continuum of communications" between the various hospital clients and their counsel. The records also contain specific advice received from counsel with respect to the grievance, the preservation of documents, and with respect to the implications of the decision in question.

[47] With respect to litigation privilege, the hospital submits that the withheld records were created for the dominant purpose of reasonably contemplated and actual litigation.

[48] Lastly, the hospital submits that its privilege in the records has not been waived or otherwise lost.

[49] Based on my review of the records which are the subject of the section 19 claim, I find that Branch 1 of section 19 applies to all of them. The records predominantly consist of email chains between doctors at the hospital who hold academic positions with the university and external counsel relating to legal advice being sought and given regarding the appellant. Several of the records also contain draft letters written by counsel relating to the appellant's grievance with the hospital. I find that all of the records were confidential communications between solicitor and client made for the purpose of seeking or providing legal advice. Furthermore, I find that some of the records were created for the dominant purpose of reasonably contemplated and actual litigation with the appellant. I find that neither privilege has been waived or lost.

[50] As I have found that section 19 applies, I find that the records are exempt under section 49(a), subject to my finding on the hospital's exercise of discretion.

D. Was the hospital's exercise of discretion proper in the circumstances?

[51] The section 49(a) exemption is discretionary, and permits 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.

[52] 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.

[53] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] This office may not, however, substitute its own discretion for that of the institution.[27]

[54] The hospital submits that it properly exercised its discretion in withholding records under section 49(a) that were privileged under section 19. The hospital states:

> The interaction of section 49(a) and section 19 requires the hospital to balance the competing objectives of permitting access by an individual to his or her own personal information, and the compelling public interest in upholding the confidentiality of documents subject to solicitor-client and litigation privilege. The hospital weighed these interests and determined that the potential harm from disclosure far outweighed any public interest in the release of records in question to the appellant.

[55] The hospital notes that there is very little personal information remaining at issue as the records relate to the appellant filing a human rights complaint and separate litigation. On the other hand, the hospital submits that the application of the privilege to the information is clear and disclosure of the privileged records to the appellant could expose the hospital to allegations that it had waived privilege with respect to an ongoing litigation matter.

[56] Based on my review of the hospital's representations and the records and information remaining at issue, I find that the hospital properly exercised its discretion in withholding the records under section 49(a).

E. Was the hospital's search for records reasonable?

[57] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[28] If I am satisfied that the

[26] Order MO-1573.
[27] Section 54(2).
[28] Orders P-85, P-221 and PO-1954-I.

search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[58] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[29] To be responsive, a record must be "reasonably related" to the request.[30]

[59] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[31] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[32]

[60] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[33]

[61] The hospital submits that the appellant failed to provide a reasonable basis for his belief that additional records should exist. The hospital notes that the only basis the appellant provided was his allegation that other documents should exist for certain time periods. The hospital notes that the appellant did not refer to specific records which are alleged to be missing; nor did he identify specific records not identified during the hospital's searches.

[62] The hospital provided an affidavit from its Senior Specialist, Freedom of Information Security Officer, who coordinated the search for responsive records on behalf of the hospital. The affiant swears the following:

- She requested the named doctors specified in the appellant's request search for responsive records by providing them with instructions on where to conduct email searches and listing key words to use, as agreed with the appellant.

- The searches were conducted in the record holdings of those individuals and those searches are addressed in the additional affidavits provided by the hospital.

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[29] Orders P-624 and PO-2559.
[30] Order PO-2554.
[31] Orders M-909, PO-2469, PO-2592.
[32] Order MO-2185.
[33] Order MO-2246.

- Once the affiant received the records she reviewed them to determine the application of the exclusions and exemptions and requested that an index be created.

- Once the second request was received, the affiant conducted an additional search and also provided instructions to the specified named individuals on how to conduct the search.

- Three of the named individuals requested that the hospital conduct the search for responsive records on their behalf and these searches were done with the assistance of the hospital's IT department.

- The hospital's email system offers limited storage space for users. Given the limited space, users are encouraged to make other arrangements for storage of operationally necessary records, where possible.

- Hospital email users had a practice of preserving limited storage space by routinely deleting emails which are no longer operationally necessary, particularly before the hospital became subject to the *Act*.

- She is not aware of any records that were in the custody or control of the hospital that may have been lost or destroyed.

[63] The affiant provided an example of the instructions that were sent to the named individuals to direct their searches for responsive records. The hospital also provided affidavits from the named doctors and individuals specified in the appellant's request outlining the nature and extent of the searches they conducted.

[64] As stated above, the hospital is not required to prove with absolute certainty that further records do not exist. However, the hospital must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. I find that in this appeal, the hospital has done so. Specifically, I am satisfied that the hospital searched for the responsive records which would be in the record-holdings of the individuals specified in the appellant's request. I find that both the paper and electronic records were searched. I further accept the hospital's submission that records from the period prior to it being subject to the *Act* may have been destroyed or lost and that these records are not subject to my consideration of whether the hospital's search was reasonable.

[65] Accordingly, I uphold the hospital's search as reasonable.

ORDER:

I uphold the hospital's decision and dismiss the appeal.

Original signed by: June 5, 2014
Stephanie Haly
Adjudicator