Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3389

Appeal PA12-252

The Ottawa Hospital

September 2, 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 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 for records. In this order, the adjudicator upholds the hospital's decision and dismisses 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), 65(6)3.

OVERVIEW:

[1] The appellant made a request to the Ottawa Hospital (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to his academic performance while he was a resident. The request specifically stated the following:

> All copies of all correspondence memoranda associates (including emails) with respect to me generally and my academic performance at the Civic Hospital and the General Hospital from [specified date] to date. The requested materials will be found in the offices of the division of General

> Surgery, the office of [named individual], the office of [named individual], the office of [named individual] and the office of [named individual].

[2] The hospital located a number of responsive records and granted partial access to them, withholding information in full or in part on the basis of the discretionary exemption in section 19 (solicitor-client privilege) and the labour-employment-related exclusion in section 65(6) of the *Act*.

[3] During mediation, the mediator noted that the request was for records from the Civic and General hospitals. The hospital explained that the Ottawa Hospital is comprised of three campuses: Civic, General and Riverside. The hospital confirmed that a corporate search was done for all three campuses.

[4] The mediator raised with the hospital the possible application of the discretionary exemption in section 49(a), as the records appear to contain the personal information of the appellant. The hospital subsequently confirmed that it wished to rely on section 49(a), in conjunction with section 19, and issued a supplemental decision setting this out.

[5] The appellant raised the issue of possible additional responsive records existing and questioned the university's search. In response to the appellant's position, the hospital indicated the following:

- The search for responsive records did not include records between March 1, 2006 and January 1, 2007 as section 69(2) of the *Act* states that it only applies to records coming in the custody and control of the hospital on or after January 1, 2007.

- The hospital's search was for records between January 2, 2007 and [specified date] but no further records beyond those originally identified were located.

- The hospital advised that additional records may have existed, but due to limited storage capacity on its computer system, they are no longer available.

- Even if limited storage was one of the reasons why further records were not located, another reason may be that records were simply deleted. The hospital was not subject to the *Act* at that time and there were no requirements to keep the records.

[6] The appellant indicated that he did not accept the hospital's position and the issue of the hospital's search was added to the scope of the appeal.

[7] During my inquiry into this appeal, I sought representations from the hospital, the appellant 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 PAIRO only.

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

RECORDS:

[9] The withheld records consist of emails and correspondence.

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 records 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*?

[10] The hospital submits that some of the records are excluded from the *Act* under section 65(6) which states, in part:

> 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.

[11] 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*.

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

[12] 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]

[13] 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]

[14] 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]

[15] 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]

[16] The hospital submits that the records are clearly communications, consultations and discussion amongst hospital staff relating to the employment of the appellant including the appellant's complaints about his working conditions and evaluations of the appellant's performance and conduct at the hospital.

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

[17] 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.

[18] I find that the records were collected, prepared and used by the hospital in relation to meetings, discussions, consultations and communications. I find the records,

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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] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

which consist of emails and a piece of correspondence, relates to the appellant's role, the hospital's responsibilities to him as a medial resident, and then later, the appellant's Human Rights complaint against the hospital. I find that parts 1 and 2 of section 65(6)3 have been met.

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

[19] 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]

[20] 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.

[21] 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]

[22] The records collected, prepared maintained or used by the institution 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]

[23] 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 bargaining agent for medical residents in Ontario, 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.

[24] The hospital submits that it has an interest in the records as their content relates to the appellant's complaints about his working conditions and the Human Rights complaint he filed in respect of the working conditions. The hospital takes the position that the appellant was employed by the hospital and was part of the hospital's workforce. The hospital also submits that it has an interest in the records regarding the training, evaluation and advancement of residents and 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

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

> 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.

[25] 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 CAHO as evidence of the relationship that exists between medical residents and member hospitals.

[26] 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 the 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 they relate to a member of its own workforce.

[27] 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 appellant's complaints against the hospital and his evaluation as a medical resident are matters involving the hospital's responsibilities toward its workforce. The appellant's evaluation, training and advancement are all employment-related matters in which the hospital has an interest.

[28] Accordingly, I find that the records, to which section 65(6) have been applied, were collected, prepared and used for meetings, discussions and consultations about employment related matters in which the hospital has an interest. I find the records 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?

[29] 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), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (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,
>
> (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.

[30] 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]

[31] The hospital submits that the records for which it has claimed section 19, contain the personal information of the appellant. Specifically, these records indicate the appellant's name, which when taken in combination with the other information in the records, would disclose information that constitutes the appellant's personal information within the meaning of that term as defined in section 2(1).

[32] 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 paragraphs (b), (c), (e), (f), (g) and (h) of the definition of that term in 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?

[33] 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 and reads:

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[17] Order 11.

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

[34] 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]

[35] 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.

[36] In this case, the hospital 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;
> >
> > (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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[37] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[38] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[39] Solicitor-client communication privilege protects direct communications of a

[18] Order M-352.

confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[19] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[20] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[21]

[40] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[22]

[41] 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.[23] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[24]

[42] The hospital submits that Branch 1 of section 19 applies to the records for which it has claimed section 49(a). The hospital submits that the records are confidential communications containing legal advice sought or received from external counsel to a number of physicians relating to the appellant's Human Rights complaint and also forming part of the "continuum of communications" between the various clients and counsel. The hospital further notes that there has been no waiver of its privilege in the records.

[43] Based on my review of the records and the hospital's representations, I find that Branch 1 of section 19 applies to all of them. The records are all email communications between external counsel hired by the hospital and physicians employed by the hospital. The emails relate to legal advice being sought and received relating to the appellant and his Human Rights complaint. I find that given the nature of the information contained in the records, these communications were confidential and there is no evidence to establish waiver of the solicitor-client privilege.

[44] 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?

[45] 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

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[19] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[20] Orders PO-2441, MO-2166 and MO-1925.
[21] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[22] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[23] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[24] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[46] In exercising its discretion to withhold the records under section 49(a), the hospital submits that it sought to balance the competing objectives of permitting the appellant access to his own personal information and the compelling public interest in upholding the confidentiality of documents subjects to the solicitor-client privilege. The hospital weighed these interests and determined that the potential harm from disclosure far outweighed any public interest in the release of the records to the appellant.

[47] The hospital submits that the records actually contain very little of the appellant's personal information and in contrast, the application of the solicitor-client privilege to the records is clear.

[48] Based on my review of the records withheld under section 49(a) and the hospital's representations, I find that the hospital properly exercised its discretion in the circumstances. I find the hospital considered only relevant factors and did not consider any irrelevant or improper factors.

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

[49] 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.[25] If I am satisfied that the 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.

[50] 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.[26] To be responsive, a record must be "reasonably related" to the request.[27]

[51] 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.[28]

[52] 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.[29]

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[25] Orders P-85, P-221 and PO-1954-I.
[26] Orders P-624 and PO-2559.
[27] Order PO-2554.
[28] Orders M-909, PO-2469 and PO-2592.

[53] 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.[30]

[54] The hospital submits that the appellant has failed to provide a reasonable basis for his belief that additional responsive 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 captured in his request. The hospital notes that the appellant did not refer to specific records which are alleged to be missing; nor did he indicate specific records not identified during the hospital's searches.

[55] In support of its position that its search was reasonable, the hospital provided an affidavit of 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:

- After receiving the appellant's request, she confirmed by letter the individuals whose offices would be searched, the search terms to be used as well as the record-holdings to be searched (electronic and paper records).

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

- Several of the individuals requested that the hospital's Freedom of Information office conduct the search for electronic correspondence on their behalf. The affiant instructed the hospital's IT department to allow the affiant and another individual to conduct the necessary searches.

- Once the affiant received the records from the searches, she reviewed them and prepared an index.

- 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*.

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[29] Order MO-2185.
[30] Order MO-2246.

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

[56] 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.

[57] 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. I am satisfied that the hospital searched for the responsive records 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 that may have been created prior to it being subject to the *Act* may have been destroyed or lost. Because any such records pre-date the application of the *Act* to the hospital, they are not subject to my consideration of whether the hospital's search was reasonable.

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

ORDER:

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

Original Signed By: September 2, 2014
Stephanie Haly
Adjudicator