

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3366

Appeal PA12-461-2

Hamilton Health Sciences

July 25, 2014

Summary: An individual submitted a request to Hamilton Health Sciences under the *Act* for records related to herself and a member of her family. For some of the records identified as responsive, the hospital advised the appellant that she would have to obtain access through a separate process under the *Personal Health Information Protection Act, 2004*. The records not considered "records of personal health information" under *PHIPA* were disclosed to her, in part, while access to other records was denied, pursuant to the solicitor-client privilege exemption. On appeal, the adjudicator partly upholds the hospital's access decision, but orders the non-exempt portions disclosed, subject to the severance of personal health information.

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, and 49(a); *Personal Health Information Protection Act, 2004*, S.O. 2004, CH. 3, Schedule A, sections 4(1), 8(1) and 8(2).

Orders and Investigation Reports Considered: Order PO-2405.

OVERVIEW:

[1] This order addresses the issues raised by an individual's request to Hamilton Health Sciences (HHS or the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All correspondence, communications, emails, deleted emails, records, memoranda, notes, evaluations and material (electronic or hard copy) in the possession or control of the office of [named physician] relating to, referring to or in any way connected to [named individual] or [named child].

[2] In response, HHS issued a decision in which access was granted to five records. Four other records were withheld, in their entirety, pursuant to section 19 (solicitor-client privilege) of the *Act*. HHS also denied access to the personal health information of the child identified in the request because this information is accessed through a separate process at the hospital that is governed by the *Personal Health Information Protection Act, 2004 (PHIPA)*.

[3] The requester (now the appellant) appealed HHS's access decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant provided written confirmation that he is acting on behalf of the adult individual named in the request, who is also the legal guardian of the child named in the request.¹ The appellant advised that he did not wish to pursue access to the records of personal health information; however, he challenged the hospital's exemption claim and also the adequacy of its search for responsive emails. At the mediator's request, the hospital prepared a detailed index of records for the appellant that described each record and the corresponding decision on access. The appellant requested additional information and clarification from HHS following his review of the index. Once this was provided by HHS, along with a revised index, the appellant decided to pursue access only to the four emails indexed together as "record 7." The search issue was not pursued. Since the hospital was unwilling to revise its access decision respecting the emails, further mediation was not possible and the appeal was transferred to the adjudication stage for an inquiry.

[4] To begin my inquiry, I sent a Notice of Inquiry to HHS to seek representations. After I addressed an issue with sharing the hospital's representations with the appellant for response, I sent him a non-confidential version of them, along with a modified Notice of Inquiry. The appellant decided not to submit representations.

[5] In this order, I find that some parts of the records contain solicitor-client privileged information that is exempt under section 19(a) of the *Act*. The emails sent to or from the appellant's former legal counsel do not qualify for exemption and are ordered disclosed, except for the personal health information of the child, which must be severed under section 8(4) of *PHIPA*.

¹ The individual named in the request and her lawyer are referred to interchangeably as "the appellant" in this order.

RECORDS:

[6] The records at issue in this appeal consist of four emails, totaling 11 pages. A two-page letter that had been attached to one of the emails was removed from the scope of the appeal because it was disclosed in its entirety to the appellant.²

ISSUES:

Preliminary Issue – new issues raised by HHS in its representations

- A. Do the records contain solicitor client privileged information such that they are exempt under section 19?**
- B. Did the hospital properly exercise its discretion under section 19?**

DISCUSSION:

Preliminary Issue – new issues raised by HHS in its representations

[7] The hospital raised several new issues for the first time in its representations. First, the hospital argued that the presence of personal health information in the records at issue triggers the application of section 8(1) of the *PHIPA*, effectively ousting the *Act* and access rights under it;³ and second, HHS challenged the appellant's standing to request the information relating to her child, because she is only one of two guardians for the child.

[8] To begin, I note that if the records contain personal health information, section 8(4) of *PHIPA* provides that a person's right of access under the *Act* to a record of personal health information is not limited if the personal health information⁴ is reasonably severed from the record. Second, I have considered the issue of legal guardianship and am satisfied that the appellant is entitled to request access to her child's personal information in the records at issue. Both of these matters are addressed incidentally in my analysis of the discretionary exemption in section 19.

² The letter's duplicate was identified as "record 3."

³ Section 8(1) of *PHIPA* provides that: "Subject to subsection (2), the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act do not apply to personal health information in the custody or under the control of a health information custodian unless this Act specifies otherwise."

⁴ "Personal health information" is defined in section 4(1) of *PHIPA*.

A. Do the records contain solicitor-client privileged information such that they are exempt under section 19?

[9] The discretionary exemption for solicitor-client privilege is found in section 19 of the *Act* and 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.

[10] Section 19 contains two branches. HHS's exemption claim in this appeal falls under branch 1, which arises from the common law and section 19(a). Branch 1 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. HHS claims that the emails are subject to solicitor-client communication privilege.

[11] 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.⁵ The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁶

[12] 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.⁷

⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁶ Orders PO-2441, MO-2166 and MO-1925.

⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

[13] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁸ 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.⁹

[14] Under branch 1, the actions by, or on behalf of, a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege.¹⁰ Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹¹ Waiver has been found to apply where, for example: the record is disclosed to another outside party; the communication is made to an opposing party in litigation; and the document records a communication made in open court.¹²

Representations

[15] The hospital submits that the records are four confidential emails between its former Chief of Paediatrics (the client) and the hospital's lawyer, which were exchanged for the purpose of obtaining and giving legal advice. Relying on Order PO-3150, HHS submits that the privilege applies to the continuum of communications between the 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..."

[16] HHS submits that the communication between the Chief of Paediatrics and the hospital's outside legal counsel would not have occurred had it not been necessary for the chief to seek advice to assist with determining the most appropriate legal course of action to address a difficult situation. According to the hospital, this confidential communication took place within the framework of the solicitor-client relationship and, therefore, the chief's entitlement to seek legal advice without reservation ought to be recognized by exempting the information at issue.

[17] HHS maintains that there has been no waiver of the privilege. It submits that the records were "not distributed to a wider office and it is evident that the only recipients of the records were [HHS's solicitor, the Chief of Paediatrics, his administrative assistant] and the legal counsel for the appellant (at the time)..." In further support of its position, the hospital quotes "Wigmore's classic definition" and sets out some of

⁸ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) [*Chrusz*].

¹⁰ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)

¹¹ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

¹² Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514 and MO-2396-F; and Orders P-1551 and MO-2006-F.

same underlying principles for solicitor-client privilege as those set out in the introduction to this issue, above. HHS also notes that one of the emails has a footer (signature section) that states "This communication ... contains information that is privileged, confidential ..."

[18] As stated, the appellant did not submit representations.

Analysis and findings

[19] In order for me to find that the emails are subject to the common law solicitor-client privilege exemption, I must be satisfied that the records contain written communication of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.¹³

[20] As a preliminary matter, I find that the records contain the "personal information" of the appellant, as that term is defined in section 2(1) of the *Act*.¹⁴ Pursuant to section 47(1), individuals have a general right of access to their own personal information held by an institution. Section 49(a), however, provides that an institution may refuse to disclose a requester's personal information where section 19 (among other exemptions) would apply to the disclosure of that personal information. 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.¹⁵ I will review the hospital's exercise of discretion under section 49(a), together with section 19, in the next section of this order.

[21] Having considered the circumstances of the creation of these records, I find that the lawyer was in a solicitor-client relationship with hospital staff and the Chief of Paediatrics, in particular. The next part of the analysis requires a determination of whether the records reflect a written record of confidential communication between a solicitor and his client, and then whether each record is subject to privilege because of the giving or seeking of legal advice.

¹³ *Descôteaux, supra*.

¹⁴ In particular, under section 2(1) "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, (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.

¹⁵ Order M-352.

[22] As suggested previously, the 11 pages identified by the hospital as one record ("record 7") are actually four separate records, each consisting of strings of emails. For the purpose of this analysis, I will review each of the email strings separately, identifying them as records 7a, 7b, 7c and 7d.

[23] Record 7a is three pages long and contains four emails. I am satisfied that the first three of the four emails reflect written communications between HHS's then-Chief of Paediatrics and the hospital's solicitor. Furthermore, in my view, disclosure of these same emails would reveal the nature of the confidential legal advice sought by the Chief of Paediatrics as client, and received from outside counsel for the hospital. Therefore, I find that these emails fit within the solicitor-client communication privilege in section 19(a) of the *Act*.

[24] Record 7b is six pages in length and it contains eight separate emails. Based on the content of the first five emails, I am satisfied that they form part of the continuum of communications between solicitor and client aimed at permitting the hospital to address the situation involving the appellant with the advice of counsel. I find that these e-mails constitute confidential solicitor-client communications directly related to the seeking or giving of legal advice and that they qualify for exemption under section 19(a).

[25] Record 7c is one page long, containing one email to the Chief of Paediatrics, as well as an attached sticky note.¹⁶ As with record 7a, above, I am satisfied that it reflects a written record of communication between a solicitor and his client. I find that record 7c is subject to privilege because it reflects the solicitor's confidential legal advice to the Chief of Paediatrics. Although the sticky note does not itself contain confidential legal advice, I am satisfied that its release would merely result in the disclosure of meaningless snippets and is therefore unnecessary to sever it under section 10(2) of the *Act*. Therefore, I find that record 7c is subject to section 19(a), in its entirety.

[26] Record 7d is a one-page record containing two emails. In the case of the first email from the hospital's solicitor to the Chief of Paediatrics, I find that it forms part of the "continuum of communications" aimed at keeping both informed so that advice may be sought and given as required. Therefore, I find that it falls within the solicitor-client communication privilege aspect of section 19(a).

[27] As suggested by my findings above, the application of section 19(a) to the email strings is qualified in one important respect. HHS relies on the confidentiality statement contained in the footer of one of record 7b's emails as evidence of the purportedly confidential nature of the communications. However, there are two such footers: one appearing at the bottom of an email from the hospital's solicitor; and the other at the

¹⁶ The hospital identified the photocopied sticky note as a separate page, but for this analysis, I consider the email and the sticky note together.

bottom of an email HHS's solicitor received *from* the (former) legal counsel for the appellant. Indeed, records 7a, 7b and 7d all contain emails between the appellant's former legal counsel and the hospital's solicitor. The email exchanges between these two opposing counsel consist of: the fourth email in record 7a; the sixth, seventh and eighth emails in record 7b;¹⁷ and the second email in record 7d.

[28] Past orders of this office have consistently found that correspondence between opposing counsel is not covered by section 19 because such correspondence lacks the requisite degree of confidentiality.¹⁸ In Order PO-2405, former Senior Adjudicator John Higgins considered whether solicitor-client communication privilege attached to correspondence and memoranda exchanged between the LCBO's external counsel and an affected party's lawyer concerning the negotiation, drafting and implementation of a settlement. Regarding the communications between opposing counsel, the former senior adjudicator stated, in part:

... solicitor-client communication privilege ... exists to protect confidential communications within a different relationship, namely that of a solicitor (or solicitors) and his or her own client. **The fact that a record was either created by or sent to opposing counsel provides a clear indication that it was not intended to be confidential as between solicitor and client, and therefore such records cannot normally be subject to solicitor-client communication privilege.** Accordingly, even where a copy of a letter to opposing counsel is sent by fax from solicitor to client, or where correspondence to opposing counsel is copied to the client by the solicitor, I find that in the absence of any added confidential communication, such records cannot be found to be privileged, even as part of the "continuum of communications". ... [emphasis added]

[29] I agree with this reasoning, and I have applied it in my determination. Therefore, I find that the portions of records 7a, 7b and 7d that reflect communications between opposing counsel are not subject to solicitor-client communication privilege. As these portions are not exempt under branch 1 of section 19, I will order them disclosed.

[30] However, there is one further caveat to this finding. There are portions of records 7a and 7b that are not exempt under section 19(a) and would be disclosed pursuant to my finding directly above, were it not for the fact that they contain the personal health information of the child identified in the request according to section 4(1) of *PHIPA*. I will sever the child's personal health information under section 8(4) of *PHIPA*, as discussed earlier in this order. Alternatively, I am also satisfied, based on comments at an earlier stage of this appeal process, that the appellant does not seek

¹⁷ The eighth email of record 7b is a duplicate of the fourth email in record 7a.

¹⁸ Orders PO-2405, MO-1514 and MO-2396-F.

access to personal health information in any event. The severances of personal health information are clearly marked on the copies of the records sent to the hospital with this order.

[31] Accordingly, I find that section 49(a), together with section 19(a), applies to portions of records 7a, 7b and 7d, and all of record 7c, subject to my review of the hospital's exercise of discretion.

B. Did the hospital properly exercise its discretion under section 19?

[32] After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. Section 49(a) and the solicitor-client exemption in section 19 are discretionary, which means that HHS could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[33] In applying the exemption, the hospital was required to exercise its discretion. On appeal, the Commissioner may determine whether HHS failed to do so. In addition, the Commissioner may find that HHS erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the hospital for an exercise of discretion based on proper considerations.¹⁹ According to section 54(2), however, I may not substitute my own discretion for that of the hospital.

[34] Regarding its exercise of discretion under section 19, the hospital submits that it disclosed the majority of the responsive records to the appellant, while denying access only to the four email strings at issue now. HHS states that its practice is to carefully maintain the confidentiality of documents that are considered to be solicitor-client privileged in order to preserve the solicitor-client relationship. The hospital submits that in the context of this important exemption, its exercise of discretion in withholding the emails was not done in bad faith or for an improper purpose.

[35] As I have partly upheld HHS's decision to apply section 19, I must review its exercise of discretion under that exemption. To be clear, my review of the hospital's exercise of discretion is limited to the portions of the records that I have not otherwise ordered disclosed pursuant to this order.

[36] Based on the hospital's representations and my review of the information for which I have upheld the solicitor-client privilege exemption, I am satisfied that the hospital considered relevant factors in exercising its discretion. Therefore, I find that

¹⁹ Order MO-1573.

HHS exercised its discretion properly in the circumstances, and I will not interfere with it on appeal. Accordingly, I uphold HHS's claim for exemption under section 19(a) in relation to the portions of the four records described previously.

ORDER:

1. I order HHS to disclose the non-exempt portions of the records to the appellant by **September 2, 2014** but not before **August 28, 2014**. The information that is to be withheld pursuant to section 19(a) or because it is personal health information is highlighted in orange on the copy of the records sent to the hospital with this order.
2. To verify compliance with this provision, I reserve the right to require HHS to provide me with a copy of the records disclosed to the appellant.

Original Signed by: _____
Daphne Loukidelis
Adjudicator

_____ July 25, 2014