Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3358

Appeal PA12-191

The Ottawa Hospital

June 26, 2014

Summary: The appellant made a request to the hospital for records relating to her that were compiled when she was a medical resident at the hospital. The hospital located the responsive records and withheld them on the basis of the employment and labour-relations exclusion in section 65(6) and the discretionary exemption in section 49(a), with reference to the solicitor-client privilege exemption in section 19. The appellant also raised the issue of the reasonableness of the hospital's search and the possibility of additional responsive 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 her "personal updated record…in the offices of" the hospital and in specific departments of the hospital, including "all faculty of Ob/Gyn," from September 2008 to the date of the request.

[2] After discussions between the appellant and the hospital, the scope of the request was narrowed to include only the following:

> All correspondence mentioning either [appellant's first or last name] from the following people: [specified named doctors].

[3] In response to the narrowed request, the hospital identified the responsive records and denied access to the majority of them on the basis that they were excluded from the scope of the *Act* as employment or labour relations records under section 65(6). The hospital identified other responsive records that were subject to the *Act*, but denied access to them pursuant to section 19 (solicitor-client privilege) and section 21(1) (personal privacy).

[4] During mediation, the following occurred:

- The request was limited to those records in the custody or control of the hospital after January 1, 2007.
- The request does not include emails passing between the hospital and the appellant.
- The hospital widened the scope of the request to include the record-holdings of two additional doctors.
- The hospital advised that for those records which are subject to the *Act*, section 49(a) and (b) applied with, reference to sections 19 and 21, respectively. This was confirmed in a supplemental decision.
- The appellant reviewed the partially disclosed records and advised that she was not seeking access to the personal information of other individuals. Accordingly, the application of section 49(b) and section 21(1) is no longer an issue in this appeal.
- The appellant takes the position that additional responsive records should exist. Thus, the reasonableness of the hospital's search for records is at issue in the appeal.

[5] During my inquiry into this appeal, I sought and received representations from the hospital, the appellant, and PAIRO[1] (the Professional Association of Interns and Residents of Ontario). Representations were shared in accordance with section 7 of the *IPC's Code of Procedure* and *Practice Direction 7*.

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

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[1] Now known as PARO. However, for the rest of this order I will be referring to the organization as PAIRO.

RECORDS:

Page number	Date	Description	Exclusion or exemption claimed
1 – 6	May 6, 2008	Email	65(6)
11	December 7, 2008	Email	65(6)
12	January 26, 2009	Email	65(6)
13 – 15	March 14, 2009	Email	65(6)
16 – 17	March 15, 2009	Email	65(6)
18	March 15, 2009	Email	65(6)
19	March 16, 2009	Email	65(6)
20	March 26, 2009	Email	65(6)
21 – 22	April 3, 2009	Email	65(6)
23	May 13, 2009	Email	65(6)
24 – 26	May 19, 2009	Email	65(6)
27 – 29	July 17, 2009	Email	65(6)
30	August 6, 2009	Email	65(6)
31	August 7, 2009	Email	65(6)
32 – 34	September 18, 2009	Email	65(6)
35 – 36	October 1, 2009	Email	65(6)
37	October 15, 2009	Email	65(6)
38	October 14, 2009	Email	65(6)
39	November 5, 2009	Email	65(6)
40 – 41	November 4, 2009	Email	65(6)
42 – 43	November 4, 2009	Email	65(6)
44 – 45	November 6, 2009	Email	65(6)
46		Letter	65(6)
47 – 48	November 6, 2009	Email	65(6)
49 – 50	November 6, 2009	Email	65(6)
51 – 53	November 6, 2009	Letter	65(6)
54	November 8, 2009	Email	65(6)
55 – 57	November 19, 2009	Email	65(6)
58 – 59	November 19, 2009	Email	65(6)
60 – 61	November 17, 2009	Email	65(6)
62	November 19, 2009	Email	65(6)
63 – 64	November 23, 2009	Email	65(6)
65 – 66	November 25, 2009	Email	65(6)
67		Email	65(6)
68	December 2, 2009	Email	65(6)
69	December 3, 2009	Email	65(6)
70	December 7, 2009	Email	65(6)
71	December 15, 2009	Letter	65(6)

72 – 73	December 17, 2009	Email	65(6)
74	January 8, 2010	Email	65(6)
75	January 15, 2010	Email	65(6)
76 – 77	January 25, 2010	Email	65(6)
78 -79	January 26, 2010	Email	65(6)
80	January 26, 2010	Email	65(6)
81 – 86	February 11, 2010	Email	65(6)
87	February 24, 2010	Email	65(6)
88	February 24, 2010	Email	65(6)
89	February 24, 2010	Email	65(6)
90	February 24, 2010	Email	65(6)
91	March 2, 2010	Email	65(6)
92 – 94		Notes	65(6)
95		Notes	65(6)
96 – 98	April 7, 2010	Email	65(6)
99	April 9, 2010	Email	65(6)
100 – 101	April 9, 2010	Email	65(6)
102 – 107	August 6, 2010	Email	65(6)
108 – 109	August 6, 2010	Email	65(6)
110 – 113	August 24, 2010	Email	65(6)
114 – 116	September 21, 2010	Email	65(6)
117	September 15, 2010	Email	65(6)
118	September 21, 2010	Email	65(6)
119 – 121	September 21, 2010	Email	65(6)
122	November 1, 2010	Email	65(6)
123 – 124	November 1, 2010	Email	65(6)
125 – 131	December 9, 2010	Email	65(6)
132 – 133	September 29, 2010	Email	65(6)
134	September 15, 2010	Email	65(6)
135 – 144	December 9, 2010	Email	65(6)
145 – 148	December 9, 2010	Email	65(6)
149 – 156	December 9, 2010	Email	65(6)
157 – 158	December 21, 2010	Email	65(6)
159	December 28, 2010	Email	65(6)
160	January 12, 2011	Email	65(6)
161 – 163	February 28, 2011	Email	65(6)
164 – 165	February 28, 2011	Email	65(6)
166 – 169	February 2, 2011	Email	65(6)
170 – 171	February 26, 2011	Email	65(6)
172 – 174		Letter	65(6)
175 – 180	May 17, 2011	Email	65(6)
181 – 184	April 7, 2011	Email	65(6)
185 -186	April 8, 2011	Email	65(6)

187 – 192	May 6, 2011	Email	65(6)
193 – 195	May 10, 2011	Email	65(6)
196 – 203	May 10, 2011	Email	65(6)
204 – 206	November 15, 2011	Email	49(a), 19
207 – 208	January 27, 2012	Email	65(6)
209 – 211	October 17, 2009	Email	65(6)
212 – 213	November 15, 2011	Email	49(a), 19
214	August 23, 2010	Email	65(6)
215 – 217	November 15, 2011	Email	49(a), 19
219 – 221	February 2, 2012	Email	49(a), 19
222 – 223	August 24, 2010	Email	65(6)
233	December 20, 2009	Email	65(6)
234 – 235	August 20, 2010	Email	65(6)
241 – 242	November 26, 2009	Email	65(6)
244 – 245	July 25, 2008	Email	65(6)
246 – 248	October 20, 2006	Email	65(6)
249 – 250	October 20, 2008	Email	65(6)
251	October 16, 2008	Email	65(6)
252	February 19, 2009	Email	65(6)
253 – 254	October 17, 2009	Email	65(6)
255 – 256	October 26, 2009	Email	65(6)
260 – 261	February 10, 2010	Email	65(6)
262 – 263		Document	65(6)
264 – 265	September 19, 2009	Email	65(6)
266 – 268	October 1, 2009	Email	65(6)
269 – 271	October 1, 2009	Email	65(6)
272 – 273	November 4, 2009	Email	65(6)
274	October 20, 2009	Email	65(6)
275	October 20, 2009	Email	65(6)
276	November 4, 3009	Email	65(6)
277 – 278	December 3, 2009	Email	65(6)
3 pages	March 23, 2009[2]	Email	65(6)
2 pages	November 2, 2009[3]	Email	65(6)
4 pages	March 23, 2009[4]	Email	65(6)

[2] 3:00:08pm – Record located as a result of another search.
[3] Record located as a result of another search.
[4] 4:26:28pm – Record located as a result of another search.

ISSUES:

A. Does section 65(6) operate to exclude certain 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 the section 19 exemption, apply to the information at issue?

D. Did the hospital exercise its discretion under section 49(a) and if so, should it be upheld?

E. Did the hospital conduct a reasonable search for records?

DISCUSSION:

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

[7] The hospital submits that all of the withheld records are excluded from the *Act* pursuant to subsection 3 of section 65(6) 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.[5]

[10] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining

[5] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[6]

[11] 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.[7]

[12] 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.[8]

[13] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.[9]

[14] 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.[10]

[15] The hospital submits that the records have been collected, prepared, maintained and/or used by the hospital in relation to meetings, discussions, consultations and communications related to the employment of the appellant, and/or related to labour relations matters involving the appellant.

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

Introduction

[16] 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

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[6] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.
[7] Order PO-2157.
[8] *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.
[9] Orders P-1560 and PO-2106.
[10] *Ministry of Correctional Services*, cited above.

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

[17] I accept that the records were collected, prepared and used by the hospital or on its behalf. The records relate to the appellant's employment as a medical resident by the hospital and further relate to her duties and address issues relating to the completion of her training with the hospital.

Part 2: meetings, consultations, discussions or communications

[18] I further find that the collection, preparation, maintenance and usage of the records was in relation to meetings, consultations, discussions and communications regarding the appellant's performance as a medical resident and the completion of her training.

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[11]
- an employee's dismissal[12]
- a grievance under a collective agreement[13]
- disciplinary proceedings under the *Police Services Act*[14]
- a "voluntary exit program"[15]
- a review of "workload and working relationships"[16]

[11] Orders M-830 and PO-2123.
[12] Order MO-1654-I.
[13] Orders M-832 and PO-1769.
[14] Order MO-1433-F.
[15] Order M-1074.
[16] Order PO-2057.

- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [17]

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

- an organizational or operational review[18]

- litigation in which the institution may be found vicariously liable for the actions of its employee[19]

[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.[20]

[22] 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, 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.

[23] The hospital submits that as the appellant was a member of its workforce, it had an interest in matters relating to her employment. The hospital states:

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[17] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).
[18] Orders M-941 and P-1369.
[19] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[20] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

> …the hospital clearly has an interest in records regarding the training, evaluation and advancement of residents. 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.

[24] PAIRO submits that, since 1974 there has been a clear recognition by the teaching hospitals in Ontario that residents enrolled in post-graduate training programs are employees of the hospitals providing essential medical services for which they receive compensation. PAIRO indicates that the PAIRO and CAHO agreement establish the terms and conditions of employment for residents, including such matters as salary; call stipends; benefits; vacation; leaves; holidays; maximum duty hours; and a grievance and arbitration process in the event of disputes. Finally, PAIRO sets out the general purpose section of the agreement and article 1 which describes the medical resident's dual status:

> **General Purpose and Definition of Parties**
>
> The purposes of this Agreement is to provide an orderly employment relationship between Ontario teaching hospitals as represented by the Council of Academic Hospitals of Ontario, hereinafter CAHO, and the resident in these teaching hospitals, represented by the Professional Association of Internes and Resident of Ontario, hereinafter PAIRO, in order to facilitate the relationship between residents and hospitals in so that house staff will be reasonably compensated for the duties which they perform as hospital employees, and at the same time be able to take advantage of the training program which each individual house staff enjoys.
>
> **ARTICLE 1**
>
> A) It is agreed that all the Professional Association of Internes and Residents of Ontario represents all residents regardless of their source of funding in Ontario teaching hospitals save and except research residents as hereinafter defined, for the purpose of negotiating terms and conditions of employment in these teaching hospitals.
>
> It is agreed that residents have dual status; viz they are post-graduate medical trainees registered in approved university programs leading to licensure and/or certification; and they are physicians employed by the hospitals performing essential service functions.

[25] The appellant submits that while she was a medical resident with the hospital, she was not an employee of the hospital for the following reasons:

- She did not sign any letter of appointment nor did she receive any kind of employment benefits.
- Her funding was provided by the Ministry of Health.
- She was a student of Postgraduate Medical Education at University of Ottawa.
- Her Letter of Appointment stated that she could be assigned to any hospitals, institutions or teaching practices associated with the education program of the university.
- The hospital records relating to her relate to her postgraduate medical training and do not relate to labour relations.
- Continuous and transparent feedback is an essential key of the Postgraduate Medical Education and thus these records cannot be excluded from the *Act*.

[26] In response to the appellant's representations, the hospital relies on its earlier representations and states:

- Neither the absence of a "letter of appointment" nor the non-payment of employment benefits is an indication that the appellant was not an employee of the hospital.
- The appellant's own bargaining agent describes residents as employees.
- It is not significant that the appellant's salary is paid by the Ministry of Health.
- The system of training and evaluation of Residents has functioned effectively for decades, while the hospital has been subject to FIPPA for only a few short years. Transparent feedback and evaluation is accomplished in many ways – direct verbal and written feedback being the most frequent. A formal freedom of information request for evaluation records has never been a part of the hospital's process of continuous and ongoing feedback.

[27] As stated above, the hospital's interest in the meetings, consultations and discussions must be about employment or labour relations matters. Based on my

review of the parties' representations and the records at issue, I find that the appellant was an employee of the hospital while she was a medical resident there. The appellant does not dispute that PAIRO is the bargaining agent representing medical residents while they complete their training and studies at the teaching hospitals. While I accept the appellant's submission that her relationship with the hospital does not have some of the traditional hallmarks of an employment relationship, I find that medical residents have the status of employees with the teaching hospitals. The dual status of medical residents as both students enrolled in a post-secondary medical program and employees at a teaching hospital is enshrined in the PAIRO and CAHO agreement. Accordingly, I find that, for the purposes of section 65(6), the appellant was an employee of the hospital.

[28] Further, I find that the hospital has an interest in the records as they relate to employment-related matters involving the appellant. Namely, the records relate to the appellant's ability to complete her duties as an obstetrical and gynecological resident and her ability to meet the requirements of her residency training.

[29] 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 that these 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?

[30] For records not excluded under section 65(6), specifically records: 204 – 206, 212 – 213, 215 – 217 and 219 – 221, it is necessary to determine which sections of the *Act* may apply. This requires a determination of 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;

[31] 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.[21]

[32] The hospital submits that those records which are not excluded under section 65(6)3 contain the personal information of the appellant. In particular, it argues that these records contain the appellant's name, combined with other information which would disclose personal information about her, if disclosed.

[33] I find that the remaining records at issue contain information about the appellant which qualifies as her personal information within the meaning of that term as it is defined in paragraphs (a), (b), (e), (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.

[21] Order 11.

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

[34] 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:

> 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. [emphasis added]

[35] 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.[22]

[36] 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.

[37] 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;
> >
> > (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.

[38] 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.

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[22] Order M-352.

Branch 1: common law privilege

[39] 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.[23]

Solicitor-client communication privilege

[40] 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.[24]

[41] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[25]

[42] 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.[26]

[43] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[27]

[44] 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.[28]

Litigation privilege

[45] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[29]

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[23]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).
[24] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[25] Orders PO-2441, MO-2166 and MO-1925.
[26] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[27] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[28] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[29] 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).

[46] 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[30] in 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.

[47] The hospital relies on Branch 1 of section 19 and submits that both the solicitor-client and litigation privilege apply to pages 204 – 206, 212 – 213, 215 – 217, 219 – 221. The hospital submits that these records relate to a human rights complaint filed by the appellant. In particular, they contain the advice of external legal counsel to hospital staff regarding the appellant's human rights complaint and are, therefore, confidential communications between a solicitor and his clients. Furthermore, the hospital submits that these records were created for the dominant purpose of actual litigation. Lastly, the hospital submits that privilege has not been waived or lost.

[48] Based on my review of these records, I find that they represent confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice. Furthermore, I find that the records were created for the dominant purpose of actual litigation with the appellant. Accordingly, I find that they qualify under both the solicitor-client communication and litigation privilege of section 19. Accordingly the records are exempt under section 49(a), subject to my finding with respect to the hospital's exercise of discretion below.

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[30] *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169.

D. Did the hospital exercise its discretion under section 49(a) and if so, should it be upheld?

[49] 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.

[50] 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.

[51] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] This office may not, however, substitute its own discretion for that of the institution.[32]

[52] The hospital submits that it properly exercised its discretion in withholding the privileged records under section 49(a). In exercising its discretion to withhold the records, the hospital sought to balance the competing interests of granting the appellant access to her own personal information and the public interest in upholding the confidentiality of documents subject to the solicitor-client and litigation privilege. In choosing to withhold the records, the hospital considered the fact that the records directly relate to legal advice between the solicitor and client for actual litigation.

[53] The appellant submits that the hospital acted in bad faith and withheld the records in order to conceal information in her human rights complaint.

[54] Based on my review of the records withheld under section 49(a) and the parties' representations, I find that the appellant has not provided sufficient evidence to establish that the hospital exercised its discretion to withhold the records in bad faith. As set out above, I found the records to be properly exempt under section 49(a) as the section 19 exemption clearly applied to them. I find the hospital properly considered the appellant's right to records that contain her personal information, as well as the interests sought to be protected by the section 19 exemption. Accordingly, I find that the hospital properly exercised its discretion.

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[31] Order MO-1573.
[32] Section 54(2).

E. Did the hospital conduct a reasonable search for records?

[55] 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.[33] 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.

[56] 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.[34] To be responsive, a record must be "reasonably related" to the request.[35]

[57] 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.[36]

[58] 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.[37]

[59] 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.[38]

[60] The appellant submits that when she received a copy of the index it did not include a record which she knew existed. The appellant raised the issue of the missing record during mediation and the hospital later found the record. Based on this evidence, the appellant submits that she has a reasonable basis for her belief that there may be additional responsive records.

[61] The hospital submits that its search for responsive records was reasonable and as evidence of its search submitted an affidavit from the Senior Specialist, Freedom of Information Security Officer. She affirms that she:

- helped clarify the appellant's request;

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[33] Orders P-85, P-221 and PO-1954-I.
[34] Orders P-624 and PO-2559.
[35] Order PO-2554.
[36] Orders M-909, PO-2469 and PO-2592.
[37] Order MO-2185.
[38] Order MO-2246.

- requested that the individuals named in the request search their own record holdings and provided instructions to them on how to conduct the necessary searches;

- in some cases, personally directed and supervised the necessary searches;

- once she received the records she reviewed them for exclusions and exemptions.

[62] The Senior Specialist also affirms that, during the inquiry of this appeal, she received the additional records that were located by a named doctor and she reviewed these records.

[63] Finally, the Senior Specialist affirms the following:

> The Hospital's email system offers limited storage space for users. Generally, users are limited to 100MB of storage, which can be increased upon request (although prior to 2011, Vice-President approval was required for such an increase). Given the limited space, users are encouraged to make other arrangements for storage of operationally necessary records where possible, as in the case of the records which were located in [the appellant's] residency file. I am not aware of any responsive which may once have been in the custody of the Hospital but have since been lost or destroyed.

[64] The hospital also provided affidavits from the individuals who conducted the searches, the email sent to the individuals instructing them how to conduct the search, and copies of the emails that were located during the inquiry.

[65] While the hospital does not directly address the appellant's specific concern about the missing record that was later located, the hospital submits that its evidence provided during the inquiry, more than meets its obligation under the *Act*.

[66] I have reviewed the parties' representations and the evidence provided by the hospital. I have also considered the responsive records that were located by the hospital. I find the hospital has provided sufficient evidence to establish that it made reasonable efforts to locate and identify the responsive records. As stated above, the hospital is not required to to prove with absolute certainty that further records do not exist. I uphold the hospital's search as reasonable and dismiss the appeal.

ORDER:

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

Original signed by: June 26, 2014
Stephanie Haly
Adjudicator