Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3408

Appeal PA12-253

University of Ottawa Heart Institute

October 7, 2014

Summary: The appellant made a request to the heart institute for records relating to him and his academic performance when he was a medical resident there. The heart institute located responsive records and provided him access to some records in full or in part. Access to other records was denied in full or in part, on the basis of the discretionary exemption in section 49(a) with reference to the solicitor-client privilege exemption in section 19 and the employment and labour relations exclusion in section 65(6). The appellant raised the issue of additional responsive records and the reasonableness of the heart institute's search for records. In this order, the adjudicator upholds the heart institute'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 under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Ottawa Heart Institute (the heart institute) for access to information regarding his academic performance when he was a medical resident there. Specifically, the request was for:

> All copies of all correspondence memoranda associates (including emails) with respect to me generally and my academic performance at the Ottawa Heart Institute. I expect the majority of my materials will be found in the

> office of the division of Cardiac Surgery, the office of [named doctor], the Chief of Cardiac Surgery division, the Program Director of Cardiac Surgery [named doctor] and [named doctor], the division of Cardiology, the office of [named doctor], the office of the Chair of Surgery [named doctor], the account of Cardiac Surgery resident [named doctor] and other offices.

[2] In his request, the appellant noted that the section 2(1) definition of "hospital" in the *Act* includes the heart institute.

[3] The heart institute located a number of responsive records and provided the appellant with an index of them. The heart institute took the position that the majority of the records were excluded from the *Act* pursuant to the labour relations employment exclusion in section 65(6). Further, the heart institute advised that even if it is later determined that several of the records are subject to the *Act*, access to them would be denied pursuant to the discretionary solicitor-client privilege exemption in section 19 and the mandatory personal privacy exemption in section 21(1).

[4] The heart institute identified other records that were subject to the *Act*, but denied access to them, in whole or in part, on the basis of sections 19 and 21(1). Lastly, the heart institute granted access to a number of records, in their entirety.

[5] During mediation, the following occurred:

- The mediator raised the possible application of sections 49(a) and (b) as the records appeared to contain the appellant's personal information. The heart institute confirmed that it would be relying on those two exemptions.

- The heart institute confirmed its position that the majority of the records were excluded from the scope of the *Act* pursuant to section 65(6) and further, some records may be excluded under section 65(6)5.

- The appellant advised that he believes additional records should exist for the time period between January 1, 2007 and January 8, 2007. He also believes there should be many additional emails.

- The appellant confirmed that he is not seeking access to the personal information of other individuals. Accordingly, the application of section 49(b) is no longer an issue in the appeal.

[6] During my inquiry into this appeal, I sought representations from the appellant, the heart institute and an organization whose interests may be affected by the outcome of this appeal, PAIRO[1] (Professional Association of Interns and Residents of Ontario). I received representations from the heart institute and PAIRO only.

[7] In this order, I uphold the heart institute's decision.

RECORDS:

[8] The records at issue are identified in the index of records which is in an appendix to this order. Please note that this index is not identical to the one provided by the heart institute.

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 heart institute's exercise of discretion proper in the circumstances?

E. Was the heart institute's search for records reasonable?

DISCUSSION:

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

[9] The heart institute submits that the appellant was a former medical resident at the Ottawa Hospital (the hospital) who was an employee of the hospital. Pursuant to an agreement between the heart institute, the hospital and the University of Ottawa (the university), hospital medical residents treat hospital patients at the heart institute. The heart institute explains this relationship as follows:

> The Heart Institute was established as a distinct legal entity pursuant to the *University of Ottawa Heart Institute Act, 1999*. Pursuant to this statute and a service agreement between the hospital and heart institute (the "TOH Agreement"), the heart institute provides cardiac services and

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

> treatment to patients of the hospital. In addition, the TOH Agreement provides that the hospital will deliver certain administrative and medical assistance to the heart institute. However, the TOH Agreement makes it clear that all hospital employees providing services to the heart institute remain employees of the hospital.
>
> The heart institute also maintains a close relationship with the university. The heart institute has an affiliation agreement with the university. Pursuant to this agreement, the university, in conjunction with the hospital, assigns medical students, residents and fellows to preceptors, supervisors and services at the heart institute. Residents remain employees of the hospital but are assigned to the heart institute to provide medical services. In addition, physicians and surgeons at the heart institute work closely with the hospital and the university in administering portions of the residency programs related to cardiac care.

[10] Accordingly, the heart institute submits that as there is an employer-employee relationship between the hospital and the medical resident, the hospital has an interest in labour relations and employment matters relating to medical residents, including the appellant. Furthermore, records relating to labour relations and employment matters involving the appellant, while he was a medical resident, are outside the application of the *Act*.

[11] While the heart institute claims the application of section 65(6)1, 2 and 3, it also claims that, in the alternative, section 65(6)5 applies. However, due to my finding under sections 65(6)3, I do not have to consider the application of section 65(6)5 to the records at issue. Section 65(6) 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:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[12] 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*.

[13] 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]

[14] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[3]

[15] 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.[4]

[16] 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.*[5]

[17] 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.[6]

[18] The heart institute submits that the records were collected, prepared, maintained or used by or on behalf of the hospital in relation to:

- Proceedings related to labour relations or the employment of a person by the hospital;

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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] *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.
[4] Order PO-2157.
[5] Orders P-1560 and PO-2106.
[6] *Ministry of Correctional Services*, cited above.

- Negotiation or anticipated negotiations relating to labour relations or the employment of a person by the hospital between the hospital and the person; or

- Meetings, consultations, discussions or communications about labour relations or employment related matters in which the hospital has an interest.

[19] The heart institute made confidential representations which were not shared with the appellant about each of the specific records; however, the heart institute stated the following:

- The hospital has an interest in meetings, consultations, discussions or communications about workplace performance, evaluation and progress of one of its residents including an interest in any grievance filed by that resident under the PAIRO contract with respect to the hospital.

- Some of the records relate to negotiations over the terms and conditions of the appellant's return to the workplace and workplace remediation following his appeal of his termination.

- The records excluded under section 65(6)3 include discussions, meeting minutes and correspondence about specific employees' workplace performance, workplace behaviour and conduct, and remedial training to address workplace weakness and deficiencies.

[20] While I find that paragraphs 1 and 2 of section 65(6) are relevant to some specific records, I find that paragraph 3 applies to all of them. For section 65(6)3 to apply, the heart institute 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.

[21] I find that the records were collected, prepared and used by the heart institute and the hospital in relation to meetings, discussions, consultations and communications. I find that the records, which consist mainly of emails and draft documents, relate to the appellant's role as a medical resident, and the hospital and heart institute's

evaluation of his residency, and the appeals and proceedings surrounding his residency, including his 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

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

- an employee's dismissal[7]
- a grievance under a collective agreement[8]
- a review of "workload and working relationships"[9]

[23] 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. [10]

[24] The heart institute submits that the appellant, as a medical resident, was an employee of the hospital and, as such, the hospital has an interest in the records. The heart institute submits the following in support of this position:

- Medical residents are doctors licensed by the College of Physicians and Surgeons of Ontario and the Royal College of Physicians and Surgeons of Canada to practice medicine in a teaching hospital under the supervision of fully licensed physicians as part of a training program with an associated Faculty of Medicine.
- As part of the medical resident's employment they provide care to patients at the heart institute on a full-time basis, while being enrolled as postgraduate students with the University of Ottawa.
- The terms and conditions of employment for Ontario medical residents are incorporated in the collective agreement between PAIRO and the Council of Academic Hospitals of Ontario ("CAHO").

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[7] Order MO-1654-I.
[8] Orders M-832 and PO-1769.
[9] Order PO-2057.
[10] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

- The PAIRO agreement references the "employment" of residents with academic hospitals and the "employment relationship" between hospitals and residents.

- The residency program is administered jointly between the Faculty of medicine at the university and the teaching hospital. Accordingly, a resident may be dismissed from their employment with a hospital where the Faculty of medicine determines the resident should be "released".

- Joint administration also extends to workplace supervision and performance review. Medical residents are supervised by fully licensed physicians with privileges at the hospital and appointed to the university.

[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 the heart institute's representations and the records before me, I find that the appellant was an employee of the hospital for the purpose 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.

[26] The heart institute's representations establish that medical residents are employed by teaching hospitals and this employment relationship is subject to the collective agreement between PAIRO and the hospitals. I find that the appellant was an employee of the hospital and was providing medical services as part of his residency at the heart institute for the purposes of section 65(6)3. The appellant's complaints and appeals against the heart institute and the hospital about his evaluations as a medical resident are matters involving the hospital's responsibilities to its workforce. The appellant's evaluation, training and advancement are all employment related matters in which the hospital has an interest. Furthermore, the appellant's grievance against the hospital for his treatment made pursuant to the collective agreement between the hospital and PAIRO is also a labour-related matter in which the hospital has an interest.

[27] 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 labour and 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?

[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.[11]

[11] Order 11.

[30] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[12]

[31] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[13]

[32] The heart institute submits that only 19 records were withheld pursuant to section 21(1) of the Act, and of these 19, 16 were provided in part to the appellant. The other three records were withheld in their entirety. Of the 16 withheld in part, the only information withheld, the heart institute claims, is information which constitutes the "personal information" of other individuals including:

- An individual's social insurance number and date of birth;
- An individual's home address;
- Information about other resident's status or performance within their respective training programs;
- Names of individuals that were included on minutes for the purposes of discussions

[33] The heart institute states that the withheld information does not include business contact information only. If the business contact information was withheld it was only because that this information, in combination with other information already available to the appellant, would disclose personal information about the other individuals.

[34] I find that the records contain information which would constitute the "personal information" of the appellant and other individuals with the meaning of that term as it is set out in paragraphs (a) through (h) of the definition of that term in section 2(1) of the *Act*. Accordingly, as the appellant has indicated that he is not interested in pursuing access to the personal information of other individuals, I will only consider whether section 49(a) in conjunction with section 19 applies to the remaining records at issue.

[12] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[13] Orders P-1409, R-980015, PO-2225 and MO-2344.

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

[35] 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, including section 49(a) which 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.

[36] 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.[14]

[37] 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.

[38] In this case, the heart institute 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.

[39] 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.

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[14] Order M-352.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[41] 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.[15] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[16] 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.[17]

[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.[18] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[19]

Litigation privilege

[43] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[20] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[21] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[22] The litigation must be ongoing or reasonably contemplated.[23]

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[15] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[16] Orders PO-2441, MO-2166 and MO-1925.
[17] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[18] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[19] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[20] *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).
[21] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[22] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[23] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

Branch 2: statutory privileges

[44] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[45] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "for use in giving legal advice."

Statutory litigation privilege

[46] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "in contemplation of or for use in litigation."

[47] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[24]

Representations

[48] The heart institute submits that both Branch 1 and 2 of section 19 apply to the information withheld under section 49(a) as the heart institute had both internal hospital counsel and external legal counsel working on various issues dealing with the appellant. Furthermore, both the solicitor-client communication and litigation privilege of both branches also apply.

[49] The heart institute submitted confidential representations for each record where section 19 was claimed, but it also provided some general representations. Regarding solicitor-client communication privilege, the heart institute submits that the emails consist of communications between medical practitioners and internal hospital and/or university counsel with external legal counsel regarding the appellant's participation in the residency program. With respect to the litigation privilege, the heart institute states:

> Firstly, the communications were made at the time when litigation was anticipated or commenced. The appellant first appealed his placement on probation after two failed rotations in January 2007, beginning the adversarial processes. The appellant continually appealed his dismissal through the university's appeal mechanisms and subsequently sued in the Ontario Superior Court of Justice, and [on specified date] that action was

[24] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* (cited above).

> struck without leave to amend. An appeal was commenced but later abandoned. On [specified date] the appellant brought an application to the Human Rights Tribunal of Ontario. The Human Rights Tribunal ruled on [specified date] that it had no jurisdiction to proceed with the application before it. The appellant also appealed a subsequent probation due to him failing his remediation period. On [specified date], the Postgraduate Medical Education Committee dismissed a further appeal. The appellant then appealed to the Faculty Council which denied the appeal in April 2012. A final appeal to the Senate Appeals Committee was also denied. On [specified date], the appellant and two [other] residents brought an action in the Superior Court of Justice. The Superior Court of Justice dismissed the action for abuse of process in April 2013. The Plaintiffs then appealed to the Ontario Court of Appeal in May. The appeal will be heard in late 2013 or early 2014.

[50] The heart institute states that the dominant purpose of these communications was for use in giving or receiving advice about the litigation described in the paragraphs above.

[51] Finally, the heart institute submits that the litigation privilege claimed with respect to some of the records has not lapsed and is ongoing. It states:

> While some of the records withheld pursuant to litigation privilege and section 19 of the *Act* relate to different proceedings, the proceedings all arise from the appellant's employment, remediation and termination at the hospital as part of the cardiac surgery residency program. A continuous chain of proceedings involving the same parties, arising from the same or related cause of action, continues to this day. As noted above, the appellant currently has an appeal before the Ontario Court of Appeal in one such related proceeding.

[52] I note that while the Court of Appeal heard the matter in October 2013 and denied the appellant leave to appeal, the appellant and his co-plaintiff also sought leave to appeal to the Supreme Court of Canada. This leave was also denied and the appellant and his co-plaintiff have filed a series of complaints with the College of Physicians and Surgeons of Ontario against the university.[25]

[53] The heart institute submits that there has been no waiver of solicitor-client, litigation or statutory privileges. Moreover, the heart institute submits it, the hospital, and the university have a common and joint interest privilege in the records because of their relationship for the purpose of training medical residents.

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[25] Don Butler, "Supreme Court won't hear appeal by Saudi doctors who sued University of Ottawa", The Ottawa Citizen (14 March 2014), online: http://ottawacitizen.com.

Finding

[54] Based on my review of the records, I find that both Branch 1 and 2 of section 19 applies to them. Some of the records consist of emailed correspondence between doctors who supervised the appellant while he was a medical student and internal legal counsel for the university and hospital as well as external counsel hired by the hospital or university. I find that these emailed correspondences were for the purpose of seeking or providing legal advice relating to the appellant's residency. I find that the subject matter and the content of these emails establish that were made both expressly and impliedly in confidence. I find that there is no evidence to suggest that the heart institute has waived this privilege.

[55] I further find that some of the records were emailed correspondence created for the dominant purposes of contemplated and actual litigation between the hospital, the university and the appellant. These emails consist of emails between doctors at the hospital and both internal and external counsel relating to the collection of information and preparation of documents for the litigation. I find that while much of the litigation for which these records were created has been completed, there is evidence to suggest that there is still ongoing litigation or that it is reasonably contemplated. Further, as stated above, the statutory litigation privilege continues even though litigation has terminated.

[56] Accordingly, as I find that section 19 applies to the records, I find that the records are exempt from disclosure under section 49(a), subject to my finding on the heart institute's exercise of discretion.

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

[57] 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 has failed to do so.

[58] In exercising its discretion to withhold records under section 49(a), the heart institute submits that considered the purposes of the *Act* and, specifically the appellant's right to access his own personal information, and weighed this against the following factors:

- At the time of the request, the appellant had filed one or more civil actions or administrative complaints against the university, the hospital and individuals administering the appellant's residency program.

- These actions were with respect to his participation in a residency program administered jointly by the two institutions in conjunction with the heart institute and individuals with privileges and administrative roles at the heart institute were personally named as respondents and or defendants.

- The solicitor-client privilege and litigation privilege is essential to the functioning of the Canadian legal system and it is essential for professionals including those with cross-appointments between the heart institute, the university and the hospital to have access to confidential legal advice.

- The civil actions and administrative complaints affected the heart institute insofar as they affected the cardiac surgery residency program and the individuals with appointments at the heart institute.

[59] I find that the heart institute considered only relevant facts in its exercising its discretion to withhold the records under section 49(a). The appellant's right to access his own personal information was balanced against the heart institute's considerations surrounding the interests to be protected under section 19. I find the heart institute's exercise of discretion was proper in the circumstances.

E. Was the heart institute's search for records reasonable?

[60] 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.[26] 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.

[61] 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.[27] To be responsive, a record must be "reasonably related" to the request.[28]

[62] 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.[29]

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

[63] 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.[30]

[64] 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.[31]

[65] The appellant submitted to the mediator that he believes additional records should exist as well as additional emails for the time period of January 1, 2007 to January 8, 2007. The appellant did not provide representations on the reasonable basis for his belief.

[66] The heart institute submits that its search for responsive records was thorough and as evidence of this thoroughness, the heart institute submits that over 6000 pages of records were located. The heart institute also provided an affidavit of its Freedom of Information Coordinator, who swears the following:

- The affiant clarified the request with the appellant.
- In response to the request the affiant identified and searched possible locations where electronic files and hard copy files responsive to the request may be located including:
    - The heart institute computer, network files and emails of a number of named doctors.
    - Hard copy files under the custody and control of the heart institute and maintained by named doctors.
- The search was limited to records created after January 1, 2007.

[67] The heart institute submits that if the appellant sent emails to heart institute addresses in the January 1, 2007 through January 8, 2007 period, or other time periods, these emails may have been deleted as part of its mailbox maintenance prior to the heart institute receiving the request.

[68] As stated above, the heart institute is not required to prove with absolute certainty that further records do not exist. However, the heart institute must provide sufficient evidence to show that it made a reasonable effort to identify and locate responsive records. I find that in this appeal, the heart institute has done so. I am

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

satisfied that the heart institute searched for the responsive records in the record holdings of the individuals specified in the appellant's request. I find that both the electronic and paper records were searched. I also find the heart institute's explanation that responsive email for the period specified by the appellant may have been deleted to be reasonable given the passage of time and in accordance with its records retention schedules.

[69] Accordingly, I find the heart institute's search was reasonable and dismiss this part of the appeal.

ORDER:

I uphold the heart institute's decision and dismiss the appeal.

Original Signed by: October 7, 2014
Stephanie Haly
Adjudicator