

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3526

Appeal PA14-363

London Health Sciences Centre

August 31, 2015

Summary: The appellant, a physician with hospital privileges, sought access to an investigation report relating to complaints made about him to the hospital. The hospital denied access to the investigation report on the basis that it was excluded from the application of the *Freedom of Information and Protection of Privacy Act* under section 65(6)5 of the *Act*, which addresses records relating to individuals with hospital privileges. The hospital's decision is upheld as section 65(6)5 applies to exclude the investigation report from the purview of the *Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(6)5.

Orders and Investigation Reports Considered: Order PO-3336.

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

BACKGROUND:

[1] The appellant submitted a request to London Health Services Centre (LHSC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an investigation report relating to complaints made against him. In response, LHSC issued a decision denying the appellant access to the investigation report. In its decision, LHSC stated that the investigation report was excluded from the application of

the *Act* by virtue of sections 65(6)3 and 65(6)5, and in the alternative, it was exempt from disclosure under the discretionary solicitor-client privilege exemption at section 19 of the *Act*.

[2] The appellant, through his legal counsel, appealed LHSC's decision to this office. Mediation was attempted but did not resolve the issues and the appeal was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. During my inquiry, I sought and received representations from LHSC and the appellant, and shared these in accordance with this office's *Code of Procedure and Practice Direction Number 7*.

[3] For the reasons that follow, I find that the investigation report at issue is excluded from the application of the *Act* by section 65(6)5. As a result of my finding, it is unnecessary for me to consider the other sections of the *Act* relied on by LHSC and the corresponding submissions of the parties.

RECORD:

[4] The sole record at issue in this appeal is a report prepared by an investigator retained by LHSC to investigate complaints made by a number of hospital staff against the appellant, a physician with hospital privileges at LHSC.

DISCUSSION:

[5] Section 65(6)5 is one of the five clauses of section 65(6) – a provision that operates to exclude from the scope of the *Act* records related to matters in which an institution is acting as an employer and terms and conditions of employment or human resources questions are at issue. The section 65(6)5 exclusion removes records relating to individuals with hospital privileges from the purview of the *Act*. It states:

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:

5. Meetings, consultations, discussions or communications about applications for hospital privileges, the appointments or privileges of persons who have hospital privileges, and anything that forms part of the personnel file of those persons.

[6] If the investigation report at issue falls within the class of records described in section 65(6)5 and none of the exceptions found in section 65(7) applies, it is excluded from the scope of the *Act* and I have no jurisdiction to deal with it. There is no

suggestion that any of the exceptions in section 65(7) applies and I find that section 65(7) has no application in the circumstances of this appeal.

[7] For section 65(6)5 to apply, LHSC must establish that:

1. the report was collected, prepared, maintained or used by it 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 applications for hospital privileges, the appointments or privileges of persons who have hospital privileges or anything that forms part of the personnel file of those persons.

[8] In applying the exclusions under section 65(6), this office has adopted the definition of the Divisional Court in *Ministry of the Attorney General v. Toronto Star*.¹ In *Toronto Star*, the Divisional Court defined "relating to" in section 65(5.2) of the *Act* as requiring "some connection" between the records and the subject matter of that section. Accordingly, for the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in section 65(6)5, it must be reasonable to conclude that there is "some connection" between them.

[9] LHSC states that at all material times, the appellant held an appointment and privileges with it and was also subject to a contract for services. LHSC explains that the investigation report was prepared for its Vice-President of Medical Affairs who is responsible for overseeing medical staff issues within the hospital, including concerns regarding clinical performance and conduct issues involving members of the professional staff. LHSC submits that the report relates to meetings, consultations, discussions and communications undertaken in the course of its review of a number of complaints about the appellant in the context of his relationship with it. LHSC asserts that the meetings, consultations, discussions and communications related to the appellant's ongoing appointment and privileges given the concerns raised in the complaints. LHSC concludes by stating that the report forms part of the appellant's personnel file.

[10] The appellant begins his representations by noting that LHSC has not provided me with a copy of the investigation report nor has it disclosed to me the appellant's personnel file so that I can verify its claim that the report forms part of his personnel file. The appellant asserts that LHSC should provide me with a copy of the report so that I can fully, fairly and properly review and adjudicate the section 65(6)5 exclusion.

¹ 2010 ONSC 991 (Div. Ct.). (*Toronto Star*)

The appellant submits that I should interpret the section 65(6)5 exclusion in light of the purposes of the *Act* found in section 1 and argues that the *Act* should not be used by public institutions to retroactively shield a record from access that was at all times expected to be shared with an individual or the public. The appellant further submits that any interpretation that seriously curtails access to government records undermines the public's right to information about the government and an individual's right to information about himself, and he cites the decision of the Divisional Court in *Ministry of Correctional Services v. Goodis*² in support of this submission.

[11] The appellant asserts that the exclusion does not apply because: his privileges have not been the subject of a hearing before the Medical Advisory Committee; LHSC has not acted pursuant to its by-laws and the *Public Hospitals Act* to amend, alter or revoke his privileges; LHSC has not taken any action against his privileges which was confirmed by LHSC's general counsel during the inquiry; he has no application for privileges outstanding at this time; and he was not employed by LHSC but rather was engaged as an independent contractor. Given the foregoing, the appellant argues that the report does not have "some connection" to his privileges. The appellant concludes by stating that if I accept LHSC's representations, "the exclusion for any records regarding a physician created by a hospital would seriously curtail the right to access records created in a hospital environment."

Analysis and findings

[12] As noted by the appellant in his representations, LHSC did not provide this office with a copy of the investigation report. However, because of the nature of the report at issue, the wording of the exclusion and the evidence of the parties, I am satisfied that I am able to fully, fairly and properly review and adjudicate the application of the section 65(6)5 exclusion in this appeal.³

[13] Both parties agree that the report was prepared on behalf of LHSC by an external investigator and addresses complaints made about the appellant in his capacity as a physician with hospital privileges providing services to LHSC pursuant to a service agreement. I accept, therefore, that the report was prepared on LHSC's behalf and that it was maintained by LHSC and used by it in relation to meetings, consultations, discussions or communications. While LHSC has not provided me with details of the specific meetings, consultations, discussions or communications that took place in respect of the report, it is reasonable to expect that at the very least, some communication occurred upon LHSC's receipt of the investigation report. The key question is, were these meetings, consultations, discussions or communications

² (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.) at para 26.

³ Had I not been satisfied, I could have ordered LHSC to produce the record to me. See Order P-623, upheld on judicial review in *Ontario (Minister of Health) v. Big Canoe*, Toronto Doc. 111/94 (Div. Ct.), affirmed [1995] O.J. No. 1277 (C.A.).

connected to the appellant's hospital appointment or privileges or to anything that forms part of his personnel file?

[14] In determining whether the third part of the test is satisfied, I note the first order issued by this office that considered the section 65(6)5 exclusion, Order PO-3336. In that order, Adjudicator Donald Hale addressed a similar appeal by a physician with hospital privileges who sought access to information relating to complaints lodged against him. In upholding the application of the exclusion to email correspondence that examined the complaints, Adjudicator Hale accepted that there was some connection between the subject matter of the records and the continuation of the appellant's hospital privileges.

[15] Although Order PO-3336 dealt with emails rather than an investigation report, the report in this appeal, like the emails in Order PO-3336, was created for the purpose of addressing complaints about the conduct of a physician with hospital privileges and determining whether there was a violation of hospital policy. I am satisfied that the subject matter of the investigation report – complaints made about the appellant and investigated for the benefit of LHSC's consideration of them in the context of its relationship with the appellant – has some connection to the appellant's hospital appointment and privileges. I therefore accept LHSC's submission that the meetings, consultations, discussions or communications that took place regarding the investigation report were connected to the appellant's appointment or privileges with LHSC. In addition, based on the nature of the report and LHSC's representations, I accept that the investigation report forms part of the appellant's personnel file.

[16] I do not accept the appellant's arguments which attempt to qualify and limit the application of the section 65(6)5 exclusion in ways that are not supported by the wording of the exclusion. Specifically, I note that there is no requirement that some action be taken in respect of the appellant's appointment or privileges in order for the exclusion to apply. The exclusion does not contain any language indicating that an application for privileges must be outstanding or that an amendment, alteration or revocation of privileges is necessary to engage it. Such action is similarly not a prerequisite for establishing that a record prepared for a hospital was used by it in communications about the appointment or privileges of a physician. As well, the exclusion does not require the individual with privileges to be an employee of the hospital in order for it to apply. All of the appellant's arguments in this regard must therefore fail.

[17] In respect of the appellant's concluding argument that if I were to accept LHSC's representations the exclusion would seriously curtail the right to access hospital records relating to physicians, I note that it is not my acceptance of LHSC's arguments that results in the denial of access, but the wording of the exclusion that demands it. The exclusion specifically dictates that the *Act* does not apply to any record collected, prepared, maintained or used by or on behalf of an institution that has some connection

to meetings, consultations, discussions or communications about the appointments or privileges of persons who have hospital privileges and anything that forms part of the personnel file of those persons. I find that the report and circumstances of this appeal fall squarely within the wording of section 65(6)5 which applies to exclude the report from the application of the *Act*.

ORDER:

I uphold LHSC's decision to deny access to the report under section 65(6)5 and I dismiss the appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ August 31, 2015