

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3651

Appeal PA14-314

Niagara Health System

September 22, 2016

**Summary:** The issues in this appeal are whether the job titles and dollar amount of severance paid to former middle and senior managers at Niagara Health System (NHS) are exempt under the discretionary exemption in section 19 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (the *Act*), and whether the NHS conducted a reasonable search in response to part 2 of the appellant's request, which is for the employment contract of the NHS's CEO. In this order, the adjudicator finds that all of the information at issue is exempt under section 19 of the *Act*. In addition, the adjudicator does not uphold the NHS's search as being reasonable and orders it to conduct a further search for records responsive to part 2 of the appellant's request.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19 and 24.

**Cases Considered:** *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, 2010 SCC 23.

### OVERVIEW:

[1] This order disposes of the issues raised in an appeal of an access decision made by the Niagara Health System (the NHS) in response to the requester's access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. Records of severance paid to middle and senior managers from 2011 to the date of the request,<sup>1</sup> including: Vice Presidents of Nursing, Finance and Human Resources; Directors of Human Resources and Occupational Health and Safety; Directors of Nursing Programs for medical, surgical, emergency and critical care programs; and any other Directors, Nurse Managers or other Managers for Operating Rooms, Critical Care, Dialysis and Nephrology, Medical and Surgical programs, and anyone senior to these positions;
2. The employment contract with the Chief Executive Officer (CEO); and
3. Correspondence with the CEO regarding his hiring.

[2] The NHS contacted the requester and clarified that his request also included a global summary of the amount of severance paid. After taking five time extensions, the NHS issued a decision letter to the requester. The NHS denied access to the severance agreements, claiming the application of the mandatory exemption in section 21(1) (personal privacy) of the *Act*. It further advised the requester that access was denied to the global summary of amounts paid pursuant to section 29(1)(a)(i) of the *Act*, as there was no such record. In response to part 2 of the request, the NHS granted access to a copy of a Management Services Agreement between the NHS and St. Joseph's Health System (St. Joseph's).<sup>2</sup> With respect to part 3 of the request, the NHS denied access in full, claiming the application of the exclusions in sections 65(6)(3) and 65(6)(5) (employment or labour relations) of the *Act*.

[3] The requester (now the appellant) appealed the NHS's decision to this office.

[4] At the outset of the appeal, the NHS provided this office with a copy of the records relating to parts 2 and 3 of the request as well as an index of records. The NHS did not provide this office with a copy of the severance agreements relating to part 1 of the request. The index of records referred to the application of sections 13 (advice or recommendations)<sup>3</sup>, 18 (economic and other interests)<sup>4</sup> and 19 (solicitor-client privilege) of the *Act*.<sup>5</sup> During the mediation of the appeal, the NHS agreed to provide the appellant with a revised decision letter, as these discretionary exemptions were not set out in the original decision letter.

[5] In its revised decision letter, the NHS denied access to the requested severance agreements, claiming the application of the discretionary exemption in section 19 and

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<sup>1</sup> The request was made in January, 2014. According to the NHS, the employment of twenty-six middle and senior managers was terminated with the NHS during the time period set out in the request.

<sup>2</sup> The NHS and St. Joseph's, a health care corporation in Hamilton, Ontario, entered into a Management Services Agreement in order for St. Joseph's to provide management and administration services to the NHS.

<sup>3</sup> With respect to part 3 of the request.

<sup>4</sup> With respect to part 1 of the request.

<sup>5</sup> *Ibid.*

the mandatory exemption in section 21(1) of the *Act*. The NHS again advised that, with respect to the request for the global amount of severance paid, no responsive record exists. With respect to part 2 of the request, the NHS advised that no employment contract exists for the CEO; however, it granted access to a Management Services Agreement between the NHS and St. Joseph's. With respect to part 3 of the request, the NHS denied access to the records claiming the exclusion in section 65(6)(3) and the discretionary exemption in section 13.

[6] The appellant advised the mediator that, with respect to part 1 of his request, he did not require the names of the former employees on the severance agreements. The appellant advised that he would limit the scope of part 1 of the request to the job titles and the total dollar amount in each of the severance agreements.

[7] The appellant also advised the mediator that he was of the view that the NHS's search for responsive records may not have been reasonable, and that there is a public interest in the disclosure of the records at issue. As a result, the reasonableness of the NHS's search and the possible application of section 23 of the *Act* were added as issues in the appeal. Lastly, part 3 of the request was resolved during the mediation of the appeal.

[8] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. Representations were sought and received from the parties, and were shared in accordance with this office's *Practice Direction 7*.

[9] In his representations, the appellant reiterated that the scope of his request was limited to "job titles and the total dollar amount on each of the severance agreements,"<sup>6</sup> and the employment contract of the NHS's CEO (the subject matter of the NHS's search).

[10] Also during the inquiry, the NHS sent this office a copy of the severance agreements that are related to part 1 of the request.

[11] For the reasons that follow, I find that all of the information at issue is exempt under section 19, and I uphold the NHS's exercise of discretion. However, I do not uphold the NHS's search as being reasonable and I order it to conduct a further search for records responsive to part 2 of the appellant's request.

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<sup>6</sup> The appellant was of the view that the NHS would deny that a list of severance paid exists. Consequently, he indicated that he seeks the severance agreements fully severed with the exception of the job title and amount paid.

## **RECORDS:**

[12] The information at issue consists of the job titles and the total dollar amount in each of the severance agreements. For purposes of the NHS's search, the record is the employment contract of its CEO.

## **ISSUES:**

- A. Does the discretionary exemption at section 19 apply to the records?
- B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?
- C. Did the institution conduct a reasonable search for records?

## **DISCUSSION:**

### **Background<sup>7</sup>**

[13] In August of 2011, the provincial government announced that it had appointed a supervisor to oversee the NHS, which comprised six hospital sites and one ambulatory care centre. This measure was taken to restore public confidence in the Niagara region's local hospital system, as there were doubts remaining about its ability to meet the residents' expectations. The supervisor, an experienced hospital executive, would assume full powers of the hospital board and the corporation, and report directly to the Minister of Health and Long-Term Care.

[14] In January of 2014, the provincial government announced that it had removed the NHS from supervision, and that the supervisor would continue to serve the NHS in a continuing leadership role. The supervisor was, at that time, the CEO of St. Joseph's. In particular, the provincial government announced that the NHS had signed a management agreement (the Management Services Agreement) with St. Joseph's to allow the CEO of St. Joseph's to also serve as the NHS's CEO. The Management Services Agreement also provided for the engagement of St. Joseph's to provide management and administration services to the NHS.

### **Issue A: Does the discretionary exemption at section 19 apply to the records?**

[15] The NHS is claiming the application of the statutory litigation privilege in section 19(c) of the *Act* to all of the information at issue. Section 19(c) states:

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<sup>7</sup> Obtained from the Ministry of Health and Long-Term Care's website.

A head may refuse to disclose a record,

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.

[16] Branch 2 is a statutory privilege that applies where the records were prepared by or for counsel employed or retained by a hospital “for use in giving legal advice or in contemplation of or for use in litigation.” The statutory litigation privilege in section 19 also protects records prepared for use in the mediation or settlement of litigation.<sup>8</sup> Termination of litigation does not end the statutory litigation privilege in section 19.<sup>9</sup>

### ***Representations***

[17] The NHS submits that the severance agreements were prepared in contemplation of or for use in the settlement of litigation and, as such, are subject to the statutory litigation privilege (Branch 2) in section 19(c) of the *Act*.<sup>10</sup> The NHS notes that in *Magnotta*, the Court distinguished records created during the course of litigation which are not subject to the exemption, from records prepared to assist with settlement discussions. Further, the NHS states that in *Magnotta*, branch 2 of the section 19 exemption was found to apply to both records prepared by the institution’s counsel and counsel to the private party. Lastly, the NHS argues that where section 19 applies, the records are exempt from disclosure in their entirety.

[18] The appellant submits that the information at issue, which is the job title and total dollar amount on each of the severance agreements, is not subject to solicitor-client privilege.

[19] In reply, the NHS argues that:

- The information that is the subject matter of the request is part of settlement agreements created in contemplation of litigation;
- The fact that some of the individuals were represented by counsel is evidence that litigation was contemplated; and
- Some of the individuals who did not retain counsel did not necessarily accept the severance package offered, and it was reasonable for the NHS to have contemplated litigation notwithstanding that it was negotiating directly with the individual rather than counsel.

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<sup>8</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (*Magnotta*).

<sup>9</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002) 62 O.R. (3d) 167 (Ont. C.A.).

<sup>10</sup> The NHS cites the *Magnotta* case in support of its position.

### ***Analysis and findings***

[20] I find that the information at issue is exempt under branch 2, which is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation.

[21] The Ontario Court of Appeal decision cited above in the *Magnotta* case found that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege aspect found in branch 2 of section 19. Based on the wording of section 19, this would extend to “contemplated” litigation. Similar to the information at issue here, the record in *Magnotta* was a settlement agreement. More particularly, in *Magnotta* the Court of Appeal found that the word “litigation” in the second branch encompasses mediation and settlement discussions

[22] In my view, in order to conclude that there was “contemplated” litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.<sup>11</sup> The question of whether records were prepared for use in mediation or settlement of litigation or contemplated litigation, and/or whether litigation is reasonably contemplated, is a question of fact that must be decided in the specific circumstances of each case.<sup>12</sup>

[23] In the specific circumstances of this appeal, based on the NHS’s representations, I am satisfied that litigation was reasonably contemplated, and that there was more than a vague or general apprehension of litigation between it and the former managers. I am also satisfied that the information at issue consists of agreements that were made in settlement of this reasonably contemplated litigation, or records that were used in the settlement of the issues among the parties. Most of the records were prepared by counsel for the NHS or by counsel for the former managers. Other records were prepared by the NHS’s human resources staff. In all cases, the information was prepared to settle the issue of the cessation of the employees’ employment with the NHS. In other words, I find that all the records at issue were prepared for use in the settlement of contemplated litigation.

[24] Accordingly, like the records in *Magnotta*, I find that the information at issue was prepared for the institution in contemplation of or for use in litigation, including settlement discussions, and is therefore subject to branch 2 statutory litigation privilege. I also find that there is no waiver of this privilege. On this basis, I find the information at issue is subject to the section 19 solicitor-client exemption in section 19(c).

[25] Having found that the information at issue is exempt from disclosure under section 19, the public interest override is not applicable. However, as articulated by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers’*

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<sup>11</sup> See Order PO-2323.

<sup>12</sup> See Order PO-3059-R.

*Association*,<sup>13</sup> an institution must consider the public interest in the disclosure of the information when exercising its discretion under section 19, which I consider below. In addition, as I have found that section 19 applies to exempt the records from disclosure, it is not necessary for me to consider whether the exemption in section 21(1) applies.

**Issue B: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?**

[26] The section 19 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.

[27] 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; or
- it fails to take into account relevant considerations.

[28] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>14</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>15</sup>

[29] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>16</sup>

- the purposes of the *Act*, including the principles that: information should be available to the public; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;

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<sup>13</sup> [2010] 1 S.R.R. 815, 2010 SCC 23.

<sup>14</sup> Order MO-1573.

<sup>15</sup> Section 54(2).

<sup>16</sup> Orders P-344 and MO-1573.

- whether disclosure will increase public confidence in the operation of the institution; and
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

### ***Representations***

[30] The NHS states that the discussions and correspondence between it and the appellant and the time and attention it has taken in processing the request “speak” to its exercise of discretion. It states:

The NHS put considerable effort into trying to notify and protect the affected individuals and retain the confidence of current employees. There were a number of internal consultations regarding the disclosure of the severance agreements, in response to the suggestions of the appellant and the mediator. A number of individuals and departments have been involved in this process. The NHS considered the representations made by affected individuals, its role as a key employer in the community, its commitment to its staff, and its understanding to keep matters related to the severances confidential. It consulted with Ministry staff as well as legal counsel. . .

[31] The NHS goes on to argue that it exercised its discretion in good faith after having taken into account:

- the purposes of the *Act*;
- the fact that the appellant is making the request in his professional rather than personal, capacity;
- the appellant’s offers to narrow the request;
- the individuals’ opposition to disclosure;
- environmental issues, such as the size of the community which impacts the degree of harm it is reasonable to expect the individuals to experience should the records be disclosed;
- the sensitivity of information related to job loss;
- the fact that the NHS was unable to provide notice to some of the individuals;
- the appointment of a supervisor and changes made since the supervision terminated;
- this office’s interpretation of sections 19 and 21(1); and



- judicial consideration of section 19.

[32] The appellant submits that the NHS improperly applied irrelevant exemptions, and that it has a “well-established track record” of arguing that non-disclosure is in the public interest. Instead, the appellant states that there is a public interest in knowing that hospitals are being managed in a way that is fiscally responsible, and that salary and severance structures inform the citizenry how their healthcare dollars are being spent.

[33] In reply, the NHS states that the pressures on hospital funding are public knowledge, and that the arrangements between the NHS and St. Joseph’s Health System are also public knowledge. It was foreseeable, the NHS submits, given the publicly available information, that certain management positions at the NHS would be redundant.<sup>17</sup> The NHS argues that the suggestion that the disclosure of sensitive, confidential information about a group of former employees is required to ensure the public has the information it requires to make political choices is not credible.

### ***Analysis and findings***

[34] An institution’s exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.<sup>18</sup> It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.<sup>19</sup> In addition, as previously stated, in *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*,<sup>20</sup> the Supreme Court of Canada stated that an institution must consider the public interest in the disclosure of the information when exercising its discretion under section 19.

[35] Based on the NHS’s representations, I am satisfied that it exercised its discretion under section 19 in a proper manner. I am satisfied that it considered relevant factors, including the nature of the withheld information, the importance of solicitor-client privilege, including settlement privilege, as well as the purposes of the *Act*, including the appellant’s right of access, in exercising its discretion. I am also satisfied that the NHS did not consider irrelevant factors. Consequently, I uphold the NHS’s exercise of discretion under section 19.

### **Issue C: Did the institution conduct a reasonable search for records?**

[36] The appellant is of the view that the NHS did not conduct a reasonable search

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<sup>17</sup> See the Management Services Agreement between the NHS and St. Joseph’s.

<sup>18</sup> Order MO-1287-I.

<sup>19</sup> Order 58.

<sup>20</sup> 2010 SCC 23, [2010] 1 S.C.R. 815.

for the employment contract of its Chief Executive Officer (CEO).<sup>21</sup> 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.<sup>22</sup> 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.

[37] 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.<sup>23</sup> To be responsive, a record must be "reasonably related" to the request.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

### ***Representations***

[38] The appellant states that the NHS has posted its executive team employment contracts on its website,<sup>27</sup> yet there is no contract on the site for its CEO. The appellant submits that it does not make sense that the CEO would not have an employment contract with the NHS. The executive contracts that are on the NHS's website, the appellant states, include all salary ranges and benefits. The Management Services agreement which is publicly available, does not contain information about compensation and benefits. The appellant further submits that the NHS did not provide a summary of the steps it took to locate the CEO's employment contract and, consequently, it did not conduct a reasonable search.

[39] The NHS states that there is no contract for the services to be provided by the CEO of St. Joseph's to the NHS other than the Management Services Agreement, which is posted on both the NHS's and St. Joseph's websites. It goes on to state that section 5.4 of the Management Services Agreement sets out the CEO's responsibilities, and also that the CEO's contract with St. Joseph's is posted on St. Joseph's website.

[40] The NHS goes on to state that section 7.1 of the Management Services Agreement addresses the fees to be paid by it to St. Joseph's for the services of the

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<sup>21</sup> Part 2 of the appellant's request.

<sup>22</sup> Orders P-85, P-221 and PO-1954-I.

<sup>23</sup> Orders P-624 and PO-2559.

<sup>24</sup> Order PO-2554.

<sup>25</sup> Orders M-909, PO-2469 and PO-2592.

<sup>26</sup> Order MO-2185.

<sup>27</sup> See <http://www.niagarahealth.on.ca/en/executive-contracts>.

CEO. It advises that the section states that the NHS shall pay St. Joseph's a mutually agreed fee for the time and services of the CEO of St. Joseph's as well as other members of St. Joseph's Executive Team until the NHS President has commenced performing services. Once the NHS President has begun to provide services, the agreement provides that the fee paid by the NHS to St. Joseph's will be reduced.

[41] Lastly, the NHS states that it has appointed a President under section 5.1 of the Management Services Agreement which states that the President is the "administrator of the NHS as that term is defined in the Public Hospitals Act and the chief executive officer of NHS as defined in the Commitment to the Future of Medicare Act."

### ***Analysis and findings***

[42] As previously stated, part 2 of the appellant's request is for the employment contract of a named individual as the NHS's CEO. The NHS's website, which it cited in its representations, refers to that individual as its CEO. The NHS also states in its representations that there is no contract for services to be provided by St. Joseph's CEO to the NHS except for the Management Services Agreement, and it refers to section 7.1 of that agreement. In particular, the NHS notes that the agreement provides for NHS to pay St. Joseph's a mutually agreed fee for the time and services of the CEO of St. Joseph's as well as other members of St. Joseph's Executive Team.

[43] I note that section 7.1 of the Management Services Agreement also states that the fee to be paid to St. Joseph's by the NHS shall be agreed annually, in advance. The fee includes the direct costs of providing the services, including salary and employee benefits, which includes vacation, statutory holidays, sick-time, pension, Canada Pension Plan, Unemployment Insurance Compensation, dental and health benefits. Section 7.1 further states that the direct costs of all shared positions shall be set out in a memorandum of understanding. Section 6.2(f) of the agreement states that the memorandum of understanding shall be written.

[44] The NHS's representations regarding its search for the CEO's employment contract refers to the Management Services Agreement, but not the memorandum of understanding, which sets out the direct costs of shared positions. In my view, this memorandum of understanding is part of the Management Services Agreement, which the NHS acknowledges is the record regarding the CEO's contract for services to be provided to it. I find that the memorandum of understanding is reasonably related to part 2 of the appellant's request.

[45] I further find that the NHS has not provided sufficient evidence to show that it made a reasonable effort to identify and locate responsive records, as there is no indication in its representations that it conducted a search for the memorandum of understanding. Consequently, I do not uphold the NHS's search for records responsive to part 2 of the appellant's request and I order it to conduct a further search for these records.

**ORDER:**

1. I uphold the NHS's application of the exemption in section 19 to the records at issue.
2. I do not uphold the NHS's search for records that are responsive to part 2 of the appellant's request and order it to conduct a further search for these records as detailed in this order by **October 21, 2016**. I order the NHS to provide a decision letter to the appellant following its search in accordance with sections 26, 28 and 29 of the *Act*, considering the date of this order as the date of the request and without recourse to a time extension. The NHS is to provide this office with a copy of any decision letter it issues to the appellant.

Original Signed by: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

\_\_\_\_\_ September 22, 2016