

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3665

Appeal PA15-553

The Ottawa Hospital

November 2, 2016

Summary: The issues in this appeal are whether reporting records of an investigation are excluded or exempt under the *Freedom of Information and Protection of Privacy Act*. In response to the access request for these records, the Ottawa Hospital denied access claiming the application of the exclusion in section 65(6) (employment or labour relations), and the exemptions in sections 14(1) (law enforcement), 17(1) (third party information), 19 (solicitor-client privilege) and 21(1) (personal privacy). In this order, the adjudicator finds that the records are exempt from disclosure under section 19(c). The hospital's exercise of discretion is upheld and the appeal is dismissed.

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

Cases Considered: *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 as a result of an appeal of an access decision made by The Ottawa Hospital (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for all records relating to an investigation into financial irregularities in the hospital's facilities and planning department during a specified time period.

[2] In response to the request, the hospital issued a decision letter to the requester, denying access to all of the responsive records. The hospital claimed the application of

the discretionary exemption in section 19 (solicitor-client privilege) to all of the records. The requester (now the appellant) filed an appeal of the hospital's decision to this office.

[3] During the mediation of the appeal, the appellant narrowed the scope of his request to only the final version (or last draft if a final version was not available) of the investigation summary and reporting documents.

[4] The hospital subsequently issued a revised decision letter, claiming the application of section 19 to eight records it identified as responsive to the narrowed request. The hospital also claimed the application of the exclusion in section 65(6) (employment or labour relations), the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemption in section 14(1) (law enforcement). The appellant raised the possible application of the public interest override in section 23. Consequently, it was added as an issue in the appeal.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the hospital and the appellant. Portions of the hospital's representations will not be disclosed in this order, as they meet this office's confidentiality criteria. However, I have taken them into consideration.

[6] For the reasons that follow, I find that the records are exempt from disclosure under section 19(c) of the *Act*. I uphold the hospital's exercise of discretion and I dismiss the appeal.

RECORDS:

[7] The hospital describes the records as consisting of eight reports, totalling 107 pages. The records are further described, as follows:

- Initial investigation report at the request of legal counsel;
- On-going investigation report and summary at the request of legal counsel;
- Two in-camera reports to the Board of Governors authored by legal counsel;
- Appendices to the Board of Governors reports authored by legal counsel;
- Memorandum authored by legal counsel to HROC; and
- Appendix to the Board of Governors report at the request of legal counsel.

ISSUES:

- A. Does the discretionary exemption in section 19 apply to the records?
- B. Did the hospital exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Preliminary Issue

[8] As previously stated, in its original decision provided to the appellant in response to the access request, the hospital relied solely on the discretionary exemption in section 19 to deny access to the records. During the course of the mediation of the appeal, the hospital claimed the application of further exemptions, as well as the exclusion in section 65(6).

[9] During the inquiry of this appeal, the hospital did not provide this office with copies of the records at issue. Instead, the hospital provided sworn affidavit evidence from its in-house General Counsel confirming the application of the solicitor-client exemption in section 19, which I discuss below.

[10] However, given that the hospital has also relied on the exclusion in section 65(6), I will also address its application in the specific circumstances of this appeal. The relevant portions of section 65(6) state:

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.

. . .

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

[11] For section 65(6)1 to apply, the hospital must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[12] Concerning part three of the test, the proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se – that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the institution is sued by a third party in relation to actions taken by government employees.¹

[13] For section 65(6)3 to apply, the hospital 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.

[14] With respect to part three of the test, the records collected, prepared, maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.²

[15] In its representations, the hospital has advised that as a result of its investigation into financial irregularities in its facilities and planning department, it has commenced civil litigation against a number of parties, including former employees. Based on the hospital's representations, as well as its description of the records, it is not clear to me that part three of the test in sections 65(6)1 and 3 applies and my preliminary view is that the records are not excluded from the application of the *Act*, although I am unable to make a final determination without having the records at issue before me. However, due to my finding below, I will not review this issue further.

Issue A. Does the discretionary exemption in section 19 apply to the records?

[16] Section 19 of the *Act* states, in part:

A head may refuse to disclose a record,

¹ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

² *Ibid.*

(a) that is subject to solicitor-client privilege;

...

(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.

[17] Section 19 contains two branches. Branch 1 (subject to solicitor-client privilege) is based on the common law. Branch 2 (prepared by or for counsel employed or retained by a hospital) is a statutory privilege. The institution must establish that one or the other or both branches apply.

[18] At common law, solicitor-client privilege encompasses solicitor-client communication privilege and litigation privilege.

[19] Litigation privilege under branch 1 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.³ Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.⁴ 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.⁵ The litigation must be ongoing or reasonably contemplated.⁶ Common law litigation privilege generally comes to an end with the termination of litigation.⁷

[20] Branch 2 is a statutory privilege and although not identical to the common law privilege, exists for similar reasons. The statutory litigation privilege applies to records prepared by or for counsel employed or retained by a hospital for use in giving legal advice or in contemplation or for use in litigation. In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.⁸

[21] Under the common law, solicitor-client privilege may be waived and occurs where the holder of the privilege knows of its existence and voluntarily demonstrates an intention to waive the privilege.⁹

[22] The hospital provided affidavit evidence to support its position that section 19 applies to exempt the records from disclosure. The affiant is the hospital's General

³ *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).

⁴ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

⁵ *Ontario (Ministry of Correctional Services) v. Goodis*, cited in note 1.

⁶ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)*, cited in note 3.

⁷ *Blank v. Canada (Minister of Justice)*, cited in note 3.

⁸ See note 4.

⁹ *R. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

Counsel who acts as in-house counsel to the hospital, which is the General Counsel's client. The affiant provided background information, as well as a description of the records. She advised that in the summer of 2015, certain irregularities in the hospital's planning and facilities department were identified through the hospital's internal monitoring processes. The hospital sought advice from the affiant, who determined that it would be necessary to conduct an investigation in order for her to provide legal advice. She subsequently sought the assistance of external legal counsel to perform an investigation under the hospital's direction and supervision. The affiant states:

From the outset of the investigation, the Hospital contemplated that litigation would be required as a result of the irregularities, either to recover losses or to otherwise mitigate the risks which it anticipated would arise from the irregularities. The Investigation was therefore conducted throughout with a view to litigation, and all reports which were prepared in the course of the investigation were prepared in contemplation of litigation.

[23] The affiant goes on to state she and external legal counsel provided the results of the investigation and the legal advice to the hospital through the records at issue, which she describes as including:

- Verbal briefings and written memoranda to senior management at the hospital; and
- Verbal briefings and written reports to the hospital's board, either provided directly by the affiant and/or external legal counsel, or provided to the board by senior management on the basis of legal advice provided by the affiant or external legal counsel.

[24] Lastly, the affiant states that as a result of the investigation, the hospital commenced a civil claim against a number of parties, including former employees, vendors and principals, in the Superior Court of Justice.¹⁰

[25] The hospital submits that the records at issue are subject to solicitor-client privilege and litigation privilege at common law under section 19(a) and under the statutory privilege in section 19(c) of the *Act*. Concerning the protection afforded under section 19(c), the hospital argues that it extends to records which are collected by or provided to counsel in preparation for litigation.¹¹ This also includes records which are *related to the fact finding and investigation process undertaken by counsel* in preparation for litigation, as well as those collected or gathered as part of the same process in order to provide legal advice.¹²

[26] The hospital goes on to argue that this office has accepted that section 19

¹⁰ The hospital provided this office with a copy of the Statement of Claim.

¹¹ *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Liquor Control Board) v. Magnotta Winery Corp.* 2010 ONCA 681, [2010] OJ No 4453 (C.A.).

¹² *Ontario (Ministry of Correctional Services) v. Goodis*, cited in note 1.

permits an institution to withhold records relating to investigations conducted by counsel in contemplation of litigation,¹³ or to assist in providing legal advice.¹⁴ Further, the hospital submits that because the records were prepared by or for legal counsel for use in giving legal advice or in contemplation of litigation they are exempt under section 19, whether they contain statements of legal advice, a blend of fact and legal advice, or other material.

[27] Finally, the hospital states that there has been no waiver of privilege and that it has, at all times, asserted privilege over the entirety of the investigation, including the resulting records that are at issue in this appeal.

[28] The appellant submits that the hospital took a broad view of solicitor-client privilege, in that it:

- claimed the application of section 19 within two weeks of the access request to over 15,000 pages of record;
- made no attempt to sever any of the records; and
- never had any intention of disclosing any records.

[29] I find that the records at issue are exempt under branch 2, which is the statutory privilege that is available in section 19(c) in the context of counsel employed or retained by a hospital for use in giving legal advice or in contemplation of, or for use in, litigation.

[30] To begin, I note that the only records at issue in this appeal are the eight reports previously described. 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.¹⁵ The question of whether litigation is reasonably contemplated, is a question of fact that must be decided in the specific circumstances of each case.¹⁶

[31] In the specific circumstances of this appeal, based on the affidavit evidence provided by the hospital, I am satisfied that the hospital's General Counsel, with the assistance of external legal counsel, conducted a fact-finding investigation into irregularities within its planning and facilities department. I am also satisfied that the purpose of this investigation was to gather information in order to provide the hospital's senior management and board with legal advice, and to use the information that was gathered in commencing and conducting litigation. I further find, in these circumstances, that litigation was reasonably contemplated, and that there was more than a vague or general apprehension of litigation between the hospital and the subjects of the investigation.

¹³ See Orders PO-2818, PO-2733 and PO-3348.

¹⁴ See Orders MO-2781 and MO-2195.

¹⁵ See Order PO-2323.

¹⁶ See Order PO-3059-R.

[32] I also accept the hospital's evidence that the records at issue are directly related to the fact-finding and investigation process undertaken by the hospital's General Counsel and external counsel, and that they were used to provide legal advice and/or in contemplation of litigation. I note that the request was specifically for records relating to the investigation, and that the investigation was conducted by counsel (both internal and external) for the hospital.

[33] Accordingly, I find that the records at issue are subject to the statutory privilege in branch 2, that there is no waiver or loss of this privilege, and that the records are exempt from disclosure under section 19(c), subject to my findings regarding the hospital's exercise of discretion.

[34] I note that the appellant has raised the possible application of the public interest override in section 23. The appellant's position is that the records relate to a scheme in which public funds were allegedly misappropriated, and that disclosure of the records would assist in informing the public of the activities of a public body, namely the hospital.

[35] 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' Association*,¹⁷ an institution must consider the public interest in the disclosure of the information when exercising its discretion under section 19, which I consider below.

[36] 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 other exemptions claimed by the hospital also apply.

Issue B. Did the hospital exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[37] 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.

[38] 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.

[39] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ This office may not, however,

¹⁷ [2010] 1 S.R.R. 815, 2010 SCC 23.

¹⁸ Order MO-1573.

substitute its own discretion for that of the institution.¹⁹

[40] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- 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;
- 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.

[41] The hospital argues that it properly exercised its discretion in withholding the records in their entirety. It submits that it considered relevant factors, did not consider irrelevant or improper factors, acted in good faith and considered whether the records could be severed. In addition, the hospital states that it considered the appellant's interest in receiving the records and the public interest in transparency. However, the hospital states that it also considered the need for confidentiality in light of active litigation and that disclosing the records may constitute a waiver of privilege, with serious consequences to its ability to obtain confidential legal advice.

[42] The appellant submits that the hospital did not exercise its discretion properly in that it failed to consider, or gave insufficient weight to the general purposes of the *Act* as set out in section 1, as well as the legislature's intent that public institutions should make information available to the public.

[43] 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.²⁰ 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.²¹ In addition, as previously stated, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,²² the Supreme Court of

¹⁹ Section 54(2).

²⁰ Order MO-1287-I.

²¹ Order 58.

²² Cited in note 17.

Canada stated that an institution must consider the public interest in the disclosure of the information when exercising its discretion under section 19.

[44] Based on the hospital'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 litigation 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 hospital did not consider irrelevant factors. Consequently, I uphold the hospital's exercise of discretion under section 19.

ORDER:

I find that the records are exempt from disclosure under section 19(c). I uphold the hospital's decision and dismiss the appeal.

Original Signed By: _____
Cathy Hamilton
Adjudicator

November 2, 2016