

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-4052

Appeals PA16-555, PA17-538, PA17-552, PA17-553, PA17-554, PA17-555,  
PA17-567 and PA18-22

Unity Health Toronto

July 22, 2020

**Summary:** A member of the media made a request to the hospital under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an auditor's draft and final reports following an internal investigation concerning allegations of misconduct and procurement irregularities during a major hospital redevelopment project. The hospital located responsive records. It claimed that any draft reports were exempt pursuant to the discretionary exemption at section 19 of the *Act* (solicitor-client privilege). The hospital decided to withhold access to the draft reports but to grant partial access to the final report, subject to severances made under the mandatory personal privacy exemption in section 21. Both the requester and some affected parties appealed the hospital's decision, and the affected parties raised the exclusion in section 65(6) (labour relations and employment records). In this order, the adjudicator finds that the reports are excluded from the *Act* by section 65(6).

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

**Orders Considered:** Order MO-3664.

**Cases Considered:** *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.); *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

### OVERVIEW:

[1] In 2012, Unity Health Toronto (UHN or the hospital)<sup>1</sup> announced that it would be

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<sup>1</sup> At the time of the request and the decision under appeal, this institution was known as Providence St.

undertaking a major redevelopment and revitalization project. The project, in partnership with Infrastructure Ontario (IO), was to involve a major expansion and renovation of one of its hospitals. The contract was subject to IO's bid process. The hospital issued a Request for Quotations (RFQ), which resulted in the shortlisting of three consortiums led by three construction contractors to be considered for the project. In 2013, the hospital invited the three shortlisted companies – Bidder 1, Bidder 2, and Bidder 3 – to submit bids in response to a Request for Proposal (RFP).<sup>2</sup>

[2] An evaluation committee was set up that was tasked with evaluating the proponents that submitted responses to the RFQ, and with evaluating the bids submitted by the three shortlisted bidders in response to the RFP.

[3] During the RFP process, an allegation emerged that Bidder 3's confidential bidding information had been improperly provided to Bidder 1. An anonymous tip to the hospital alleged that a hospital employee had been involved in the leak.

[4] The hospital retained the services of legal counsel who hired auditors (the auditors or investigators) to investigate what happened.

[5] The auditors determined that the employee was not responsible for the leak of confidential information during the RFP process.<sup>3</sup> However, additional information emerged during their investigation that prompted an expansion of the investigation to include inquiries about the employee's connections with the bidders.

[6] After the investigation ended, the employee continued his duties at the hospital. However, fresh allegations emerged about him which were published in major newspaper articles. As it received inquiries about these new allegations, and about the employee's role in the revitalization project, the hospital again retained legal counsel who retained a second set of auditors to investigate. Following this (second) investigation, the hospital terminated the employee's employment.

[7] The employee commenced an action against the hospital for wrongful dismissal and defamation. He also brought a defamation claim against a newspaper that published stories about him.<sup>4</sup>

[8] The requester, a journalist, made a request to the hospital for access to the (first) auditors' final report of their investigation, as well as for access to their draft reports. More particularly, the request was for:<sup>5</sup>

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Joseph's and St. Michael's Hospital. This institution has since been renamed Unity Health Toronto and is referred to as UHN or the hospital throughout this decision.

<sup>2</sup> These bidders are set out in the order in which they are identified in the request.

<sup>3</sup> There is no dispute that Bidder 3's confidential information was sent to Bidder 1 by an IO error.

<sup>4</sup> These claims are described in the employee's representations that were shared among the parties. The employee also provided a copy of a Statement of Claim with his representations.

<sup>5</sup> The request was part of a four-part request for access to records. Only the records responsive to this request, and described in further detail under the heading "Records" are the subject of these appeals.

2016-G-0003 – All reports and/or draft reports created as a result of the 2014 internal investigation at St. Michael's conducted by [auditors] and/or [auditors] into:

A) The release of confidential bid information during the St. Michael's RFP; and

B) Interactions between then St. Michael's [employee title and name] and officials from [named Bidder 1, named Bidder 2 and/or named Bidder 3].

[9] The hospital conducted a search and identified a report (the final report) as responsive to the request. The hospital refused to confirm or deny the existence of draft reports, saying that if any did exist, they would be exempt pursuant to the discretionary exemption in section 19 of the *Act* because they were solicitor-client privileged. Upon completion of its search, the hospital determined that all of the responsive records were exempt from disclosure under section 19 and issued a decision to this effect.

[10] The requester appealed the hospital's decision to this office. That appeal (regarding access to the final and draft investigative reports) is the subject of file PA16-555.

[11] Mediation was not successful and the matter proceeded to the adjudication stage of the appeal process on the basis of the hospital's claim that the records were solicitor-client privileged and therefore exempt from disclosure under section 19.

[12] The IPC issued Notices of Inquiry that raised a number of issues.<sup>6</sup> In response, the requester made representations in which he argued that the hospital's section 19 privilege claim did not apply to the final report because that report had been included in the hospital's Affidavit of Documents produced in the wrongful dismissal action.

[13] The hospital then issued a revised decision to disclose the final report, with severances of personal information. The hospital did not alter its position regarding any draft reports.<sup>7</sup>

[14] Because of its contents, however, the hospital decided that it would disclose the final report with some severances pursuant to the mandatory personal privacy exemptions in section 21 of the *Act*.<sup>8</sup> The hospital notified parties whose interests might be affected by the disclosure of the report, in accordance with section 28 of the *Act*. Although it initially refused to provide the records to this office, the hospital provided the IPC with a

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<sup>6</sup> The issues in this Notice of Inquiry included the hospital's refusal at that time to produce to the IPC the records subject to the solicitor-client privilege claim as well as the question of whether the discretionary section 19 exemption applied to the records at issue.

<sup>7</sup> As noted below, although the hospital never formally abandoned its position to refuse to confirm or deny the existence of draft reports, it made submissions on the application of the exclusion and exemptions to draft reports.

<sup>8</sup> Section 21(1) of the *Act* requires a head to refuse to disclose personal information to any person other than the individual to whom the information relates, except in certain enumerated circumstances.

copy of the final report during the course of the inquiry.

[15] After they were notified, seven affected parties appealed the hospital's decision to disclose the final report. Mediation took place in each of the new appeals. No mediated resolution was reached and the affected party appeals moved forward to the adjudication stage of the appeal process, in which the affected parties, the requester and the hospital participated in a written inquiry.

[16] Five of the affected party appellants, while opposing disclosure of any portion of the final report, raised the application of the mandatory personal privacy exemption in section 21 and argue that, if the final report were to be disclosed, additional personal information should be severed from it. These appeals are numbered PA17-553, PA17-554, PA17-555, PA17-567, and PA18-22.

[17] An employee of the hospital and Bidder 1 also appealed the hospital's decision. These are appeals PA17-538 and PA17-552, respectively.

[18] In addition to raising the mandatory personal privacy exemption in section 21, the employee opposes disclosure of both the final report and any drafts on the grounds that they are solicitor-client privileged and therefore exempt pursuant to the discretionary exemption in section 19 (solicitor-client privilege).<sup>9</sup> However, the employee has also raised as a preliminary issue the exclusion in section 65(6), which excludes certain labour relations and employment-related records from the *Act*. Specifically, he argues that the final and draft reports are excluded from the application of the *Act* pursuant to paragraphs 1 and 3 of section 65(6) (labour relations and employment records).

[19] Bidder 1 argues that the records are exempt under section 21 and that the mandatory third party information exemption in section 17 applies.<sup>10</sup> Bidder 1 also argues, however, that the section 65(6) exclusion applies in relation to the employee.

[20] Because section 65(6) of the *Act* was raised, I invited the hospital and each appellant (including the original requester) to make representations on the application of section 65(6) as a preliminary issue in addition to the specific issues raised in their respective appeals. As noted below, the hospital now maintains that the section 65(6) exclusion applies but that it intends to disclose a redacted version of the final report outside of the access regime in the *Act*.

[21] In this order, I find that the records are excluded from the *Act* under section 65(6).

## **RECORDS:**

The records in issue are an investigative report (the final report) and any draft reports

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<sup>9</sup> The employee relies on sections 19 and 21 in the alternative, in the event that section 65(6) does not apply.

<sup>10</sup> Specifically, Bidder 1 argues that the records are exempt under section 17 because they contain commercial information that was supplied to the hospital in confidence and the disclosure of which would lead to certain specified harms.

created as a result of the hospital's 2014 internal investigation.

## **DISCUSSION:**

[22] The preliminary issue to be decided in these appeals is whether the *Act* applies to the records at issue. Pursuant to section 65 of the *Act*, the *Act* does not apply to certain classes of records. A finding that the *Act* does not apply to the records at issue in these appeals ends the matters before me because it leaves the Commissioner without the jurisdiction to determine whether the hospital properly applied exemptions to deny access to the records, and to order disclosure of records in the event the hospital's decision was wrong. It is worth stressing, however, that an institution may still exercise its discretion to disclose records outside of the access regime in the *Act*.<sup>11</sup> In this regard, I note that the hospital now takes the position that both the final and draft reports are excluded from the *Act*, but that it intends to disclose the final report, with redactions, outside of the *Act*'s access regime (although not the drafts over which it continues to claim solicitor- client privilege).

[23] Records concerning certain employment-related matters are one class of records excluded by section 65(6). Section 65(6) states, in part:

Subject to section (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to 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.

[24] 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*.

[25] Below, I address section 65(6)3 first. Given the conclusion I have reached regarding paragraph 3 of section 65(6), it is not necessary for me to address section 65(6)1.

## **Representations**

[26] As noted above, only the hospital, the requester, the employee and Bidder 1 made representations regarding the exclusion in section 65(6). All except for the requester

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<sup>11</sup> See, for example, Orders PO-2639 and PO-3549.

argue that both paragraphs 65(6)1 and 65(6)3 apply to the reports.<sup>12</sup>

### ***The hospital's representations***

[27] The hospital submits that it has already decided to disclose a redacted version of the final report after the resolution of these appeals. Although the hospital did not formally abandon its refusal to confirm or deny the existence of draft reports, it submits in its representations that section 65(6) applies to exclude the draft reports. Given its position to disclose a redacted version of the final report, its representations focus on the drafts, but also conclude that the exclusion applies to both the drafts and final report for the same reasons.

[28] The hospital says that the purpose of retaining the auditors and the creation of the reports was to assist the hospital's legal counsel in investigating an employee and advising the hospital on how to proceed in relation to that employee.

[29] The hospital argues that investigations into possible wrongdoing by an employee fall squarely under section 65(6) and that this would include not only the final report, but also any draft reports.

[30] The hospital states that the records are excluded from the application of the *Act* because:

- they were specifically prepared for the hospital's legal counsel at its request on behalf of the hospital;
- they were prepared specifically to facilitate consultations, discussions and/or communications about the investigation and ultimate decision making process; and,
- the entire focus of the records is related to employment: the investigation of potential wrongdoing by an employee.

### ***The employee's representations***

[31] The employee submits that the record arose out of a targeted workplace investigation about an employee's involvement in an RFP process. He submits that the hospital had an interest in the integrity of its conflict of interest policies, especially where the hospital was involved in a significant public procurement project.

[32] He contends that the final report was collected, prepared, maintained or used "in relation to" anticipated proceedings before a court, tribunal or other entity. Specifically, he says that a determination of wrongdoing by the auditors would have resulted in possible termination, which would, in turn, have resulted in legal action against the hospital. Therefore, he says, the final report was prepared in relation to, or in anticipation of, a potential claim because the investigation had been expanded to go beyond a simple examination of an electronic leak of bidder information and into the employee's actions.

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<sup>12</sup> In the alternative, the employee also relies on the mandatory personal privacy exemption in section 21 of the *Act*. Because I have found that section 65(6) applies to exclude the records from the *Act*, I make no findings on the exemptions relied on by the employee or any other of the affected party appellants.

[33] The employee also submits that, in order to carry out and consider the findings made in the final report, there would have been meetings, consultations, discussions or communications. He says that the hiring of a private external law firm to retain a third party investigator, while customary when investigating employee conduct that may lead to disciplinary action or termination, would have involved communications flowing back and forth between the hospital and its lawyers and the lawyers and investigators.

[34] He also submits that the records relate to employment-related matters because the hospital was required to ensure that its RFP process was managed without controversy, in accordance with IO's procurement policies, and to ensure that rules, regulations and policies, including conflict of interest policies, were adhered to. He says that policies which governed employee activities, and which he says (as in this case) led to internal policy recommendations, are employment-related matters in which the hospital had an interest.

### ***Bidder 1's representations***

[35] Bidder 1 submits that the section 65(6) exclusion applies in relation to the employee.

[36] Bidder 1 argues that the report was collected by the hospital for the hospital's own use because it was prepared by a firm engaged by the hospital to investigate alleged impropriety during the procurement process for the revitalization project. In this regard, Bidder 1 argues that the records were collected by the hospital for its own use.

[37] Bidder 1 argues that the records relate to employment or disciplinary action that Bidder 1 speculates was "likely taken," so that there is no doubt that the records directly relate to the hospital's interests as an employer and are therefore excluded. Bidder 1 also submits that the hospital collected, prepared, maintained or used the final report in relation to proceedings before a court in respect of the eventual action brought by the employee after the hospital terminated his employment, and they are therefore excluded under section 65(6)1.<sup>13</sup>

[38] With respect to the third part of the section 65(6) test, Bidder 1 submits that the hospital appears to have an interest in the contents of the records because they relate to information that the employee may have provided to the hospital as employer.

### ***The requester's representations***

[39] The requester submits that the report was commissioned to investigate irregularities in the procurement process and is therefore not related to either labour relations or employment-related matters.

[40] He submits that the applicability of section 65(6) boils down to the following question: Was the report ordered and produced with a view to potential labour relations

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<sup>13</sup> There is no dispute that the employee was dismissed after the second investigation, which cited the first investigation in the grounds for termination. The employee has described and referred to his Statement of Claim in his representations.

and/or employment matters? Or was it ordered and produced as a fact finding mission into alleged breaches of the procurement process? He argues that information already available in the public record strongly suggests that it is more the latter than the former.

[41] He argues that the employee's and Bidder 1's submission that the hospital "collected, prepared, maintained or used the requested records in relation to proceedings before a court...in respect of the eventual wrongful dismissal action commenced" by the employee is somewhat misleading, because at the time the information was collected, it was only a theoretical possibility that the report might be used in some sort of future legal proceeding, but there was no such step taken in the immediate aftermath of the investigation. He says that, when the hospital commissioned the report in 2014, there was no active proceeding and the report did not spark or prompt any sort of proceeding after it was completed. The investigation took place, the report was produced, and the employee's employment continued.<sup>14</sup>

[42] As to whether the report was prepared as part of "employment-related matters," the requester submits that the report was not used as part of a job competition, grievance, disciplinary proceeding or workload review, as has been cited in prior IPC orders.

### **Analysis and findings**

[43] For me to find that section 65(6) applies, I must be satisfied that:

1. the records were collected, prepared, maintained or used by the hospital or on its behalf;
2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and,
3. these meetings, consultations, discussions or communications were about labour relations or employment-related matters in which the hospital has an interest.

### ***Part 1: collected, prepared, maintained or used by the hospital by or on its behalf***

[44] There is no dispute that the hospital hired legal counsel who, in turn, hired the auditors to conduct an investigation on the hospital's behalf. Based on my review of the final report and the materials before me, the purpose of the investigation was to investigate irregularities in the procurement process in which a hospital employee had been implicated.

[45] I find that the final report was prepared for and used by the hospital in determining what irregularities, if any, had occurred during the procurement process and whether the allegation against the employee was supported. I therefore accept the hospital's submission that the records were collected, prepared, maintained or used by the hospital or on its behalf.

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<sup>14</sup> Until a second investigation took place, about which there is no dispute and which is described in the Statement of Claim submitted by the employee with his representations.



***Part 2 and 3: in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the hospital has an interest***

[46] The remaining parts of the test require a determination of whether the records were prepared for and used by the hospital in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the hospital has an interest.

[47] I find that the final report was prepared for and used by the hospital "in relation to meetings, consultations, discussions or communications" about matters arising from allegations involving the employee, whose duties included overseeing a significant hospital expansion, as a subject of the investigation. There is no dispute that the employee was interviewed as part of the investigation, that his work-related interactions were examined, and that the results of the investigation were communicated to the hospital for it to use in making employment-related decisions following the investigation. I am satisfied that an investigation into allegations of misconduct by a hospital employee tasked with oversight of a major hospital project is an employment-related matter in which the hospital has an interest. I explain these conclusions about Parts 2 and 3 of the section 65(6)3 test, below.

[48] The term "in relation to" in the context of section 65 has been the subject of some judicial interpretation. In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*,<sup>15</sup> the Divisional Court considered the meaning of "relating to." That case dealt with the exclusion at section 65(5.2), which provides that the *Act* does not apply to a record "relating to" a prosecution if all proceedings in respect of the prosecution have not been completed. The court rejected an interpretation that would require there to be a "substantial connection" between the records and the prosecution, instead finding that the words "relating to" in section 65(5.2) require only "some connection" between a record and a prosecution.

[49] Orders of this office have applied this reasoning in the context of the exclusion found at section 65(6), holding that for the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1, 2 or 3 of section 65(6), it must be reasonable to conclude that there is "some connection" between them.<sup>16</sup> Therefore, as is the case here, for paragraph 65(6)3 to apply there need be "some connection" between "a record" and "meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest."<sup>17</sup> In addition, this office recently held in Order MO-3664 that a "tangential" connection between them is not sufficient. Although I note that Order MO-3664 is the subject of a judicial review application and that the Divisional Court's decision is pending, I am nevertheless satisfied that the connection in this case is well above the level of a merely tangential connection.

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<sup>15</sup> 2010 ONSC 991 (Div. Ct.).

<sup>16</sup> See, for example, Orders PO-2639 and PO-3549.

<sup>17</sup> See Orders MO-2537 and MO-2589.

[50] I find that any decisions by the hospital relating to the employee would only be taken after meetings, consultations, discussions or communications on the hospital's part. I also find that these meetings, consultations, discussions or communications were about employment-related matters in which the hospital has an interest because they involved an allegation regarding the integrity of the procurement process for the hospital's redevelopment project and the conduct of a senior hospital executive who oversaw the project.

[51] The term "employment-related matters" (as opposed to labour relations matters, which are not at issue in these appeals) has been held to refer 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.<sup>18</sup> Examples in which the phrase "labour relations or employment-related matters" in section 65(6) has been found to apply include a job competition,<sup>19</sup> an employee's dismissal,<sup>20</sup> and disciplinary proceedings under the *Police Services Act*.<sup>21</sup>

[52] Because, as I have noted above, the investigation was concerned with an allegation regarding the redevelopment project RFP and specifically with the conduct of a hospital employee involved with overseeing the project, I find that the final report was created in connection with an employment matter in which the hospital had an interest.

[53] The requester relies on the Divisional Court's decision in *Ontario (Ministry of Correctional Services) v. Goodis*<sup>22</sup> to argue that, even if the record focused exclusively on the employee's actions, the section 65(6) exclusion does not apply because in *Goodis*, the court found that "employment matters are separate and distinct from matters related to employees' actions." The requester submits that the report would, as a matter of course, touch on the employee's conduct, but that that is not sufficient to exclude it under section 65(6), because it was commissioned as result of concerns about the sanctity of the RFP process, and not as a review of the employee in particular.

[54] In *Goodis*, a request was made to the Ministry of Correctional Services for records related to allegations of misconduct or sexual, physical or other abuse by certain individuals in a particular ministry office. At the time of the request, there was past, ongoing and anticipated litigation against the Crown and some of its employees and former employees regarding these allegations. In each case, the Crown was alleged to be vicariously liable for torts committed by its employees in the course of their employment. The ministry claimed that the requested records were employment-related records that fell outside the scope of the *Act* pursuant to section 65(6). The requester appealed to the IPC, which rejected the ministry's interpretation and found that the records were not excluded under section 65(6).

[55] The ministry applied for judicial review. In dismissing the ministry's application on

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<sup>18</sup> Order PO-2157.

<sup>19</sup> Orders M-830 and PO-2123.

<sup>20</sup> Order MO-1654-I.

<sup>21</sup> Order MO-1433-F.

<sup>22</sup> (2008), CanLII 2603 (ON SCDC), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct).

this point, Justice Swinton, on behalf of the Divisional Court, wrote:

In my view, the language used in section 65(6) does not reach so far as the Ministry argues. Subclause 1 of section 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings “relating to labour relations or to the employment of a person by the institution.” 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 Ministry is sued by a third party in relation to actions taken by government employees. **[emphasis added]**

[56] The Divisional Court’s reasoning has been adopted and applied in many subsequent IPC orders. 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.<sup>23</sup> The IPC has previously held that records relating to investigations into possible wrongdoing by an employee fall squarely under section 65(6).<sup>24</sup>

[57] As I mentioned above, the hospital provided the final report to this office. I have reviewed this record and find that it was concerned with investigating an employee. Notwithstanding the fact that the investigation did not result in any disciplinary action or dismissal of the employee after it was completed, there is agreement among the hospital, the employee and Bidder 1 that the employee was a focus of the investigation. Describing the investigation’s mandate in greater detail would mean disclosing the contents of the final report. I acknowledge that, while part of the final report concerned itself with irregularities in the procurement process, that and the employment-related purpose are not mutually exclusive. Having reviewed the final report, I accept the hospital’s submission that the retainer of the auditors and the creation of the report were intended to assist the hospital’s legal counsel in investigating an employee who was involved in evaluation and oversight of the RFP and to advise the hospital how to proceed in relation to that employee. I am satisfied that the hospital has an interest as employer in the records at issue.

[58] For these reasons, I am satisfied that the records meet each of the requirements in section 65(6)3 because:

- they are records that were prepared for the hospital’s legal counsel at its request on behalf of the hospital in order to investigate an allegation of impropriety and irregularities in the procurement process associated with a major hospital project
- the final report was prepared to facilitate consultations, discussions and/or communication about the investigation to the hospital and consultations and/or discussions about the

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<sup>23</sup> *Goodis*, supra, and Order PO-3549.

<sup>24</sup> See, for example, Order MO-3504.

- hospital's ultimate decision after the results of the investigation were communicated to it the focus of the investigation was an allegation of potential wrongdoing by a hospital employee in the context of his duties relating to the revitalization project and the RFP, and was therefore an employment-related matter in which the hospital had an interest as employer.

[59] I find that there is no meaningful distinction to be made between the final and draft reports for the purposes of the application of the section 65(6) exclusion. I am satisfied that, as is the case with the final report, any draft reports are also excluded under section 65(6).

[60] Finally, I have considered whether any of the exceptions in section 65(7) apply, and I find that none of them do in the circumstances.

### **Conclusion**

[61] For the reasons set out above, I find that the responsive records, namely the final investigative report and drafts, are excluded from the *Act* pursuant to section 65(6).

[62] As previously noted, the fact that the *Act* does not apply to the final investigative report or drafts does not preclude the hospital from exercising its discretion to disclose them in whole or in part, outside of the access regime set out in the *Act*. Indeed, the hospital has indicated that it intends to exercise its discretion to disclose a redacted version of the final report (subject to what it has decided is the personal information of the affected parties), although it continues to claim solicitor-client privilege<sup>25</sup> over the draft reports shared between the investigators and the hospital's lawyers.

### **ORDER:**

I find that section 65(6)3 of the *Act* applies to exclude the records from the *Act*.

Original signed by \_\_\_\_\_  
Jessica Kowalski  
Adjudicator

July 22, 2020  
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<sup>25</sup> Solicitor-client privilege is a common-law doctrine available to an institution outside of the *Act*. The privilege may be waived.