

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4064

Appeal PA18-00650

University Health Network

September 9, 2020

Summary: The appellant made a multi-part access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the UHN for records and information relating to the care received by the appellant's late parent (the deceased) at one of the UHN's hospitals and for records contained in a Patient Relations file detailing the UHN's interactions with the deceased's family after their parent's death.

The UHN issued an access decision. The appellant appealed the UHN's decision to withhold portions of the Patient Relations file on the basis of section 19 (solicitor-client privilege) and claimed that the UHN had not conducted a reasonable search for a particular record. During mediation, the UHN affirmed its section 19 claim but undertook further searches that yielded an additional record, which was provided to the appellant in a supplementary access decision.

After reviewing the additional record, the appellant remained of the view that additional records ought to exist and the matter was transferred to the adjudication stage of the appeal process.

In this order, the adjudicator partially upholds the UHN's decision to withhold portions of the Patient Relations file on the basis of section 49(a) (discretion to refuse one's own personal information) in conjunction with section 19 and upholds the search as reasonable. The adjudicator observes that in consideration of the nature of the records and the request, the *Personal Health Information Protection Act (PHIPA)* may have applied to the request, but she decides that it is not necessary to determine this issue in this appeal because in the circumstances of this appeal the analysis and result are the same whether the operative statute is the *Act* or *PHIPA*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 49(a) and 19, *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched. A

Orders Considered: PHIPA Decision 101.

OVERVIEW:

[1] The appellant made a multi-part access request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* to the University Health Network (the UHN) for records and information relating to the care of his late parent (the deceased) as a patient at one of the UHN's hospitals as well as records relating to his and his family's interactions with the UHN.

[2] The following three parts of the 10-part request are relevant to this appeal (numbering added):

1. The message(s) sent through UHN message system from Nurse [specified name] or other nursing staff on 14th floor concerning the condition of [the deceased on a specific date] and the reply from the Hospitalist team or other GIM on call?
2. Provide a copy of the communication log between care providers on Floor 14 on [specified dates] including morning of [specified date] concerning [the deceased]?
3. Provide a copy of the patient relations file related to [the deceased's] family from [specified date] (TWH) to present at TGH.

[3] The UHN responded to the request by providing the appellant with records and information. Relating to parts 1 and 2, above, the UHN stated, "With respect to internal messaging from nursing staff to/from the Hospitalist team, we were unable to locate any additional records."

[4] Regarding part 3, above, the UHN provided access to the Patient Relations file but withheld portions due to the discretionary exemption in section 19 (solicitor-client privilege) of *FIPPA*.

[5] The appellant appealed the UHN's decision and claimed that additional responsive records ought to exist.

[6] During mediation, the UHN confirmed its position that portions of the Patient Relations file are exempt under section 19. The UHN also conducted a further search for internal messages between staff involved in the deceased's care and located one additional record.

[7] The UHN issued a supplementary access decision to the appellant, granting him partial access to the additional record. After reviewing the record, the appellant confirmed that he did not wish to pursue access to the withheld information in the additional record.

[8] However, the appellant remained of the view that additional internal messages between hospital staff ought to exist – specifically a message from the attending nurse for the deceased on a specified date – and he provided his reasons why, which the mediator

shared with UHN. The UHN provided a response, which the mediator shared with the appellant.

[9] The appellant confirmed his interest in obtaining access to the information withheld from the Patient Relations file and remained steadfast in his belief that additional responsive records ought to exist; specifically, that there should exist records of internal messages between a nurse and the clinical team about the deceased on a specified date.

[10] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeal process, where the adjudicator initially assigned to the appeal decided to conduct an inquiry.

[11] The adjudicator identified that the Patient Relations file appeared to contain personal information of the appellant and of the deceased and accordingly raised the possible application of section 49(a) of the *Act* (discretion to refuse access to one's own personal information), in conjunction with section 19. The parties were invited to and made representations that were shared in accordance with the IPC's *Code of Procedure* and Practice Direction 7.

[12] In this order, I partially uphold the UHN's decision to withhold portions of the Patient Relations file on the basis of section 49(a) in conjunction with section 19 and I uphold the search as reasonable.

[13] I also observe that in consideration of the nature of the records and the request, the *Personal Health Information Protection Act (PHIPA)* may apply to the request, but I decide that it is not necessary to determine this issue in this appeal because whether the operative statute is *FIPPA* or *PHIPA*, the analysis of the privilege and search issues would be the same.

RECORDS:

The information at issue consists of the withheld portions of a 149-page Patient Relations file, which consists of emails and records of communications with and about inquiries made by the appellant and his family.

ISSUES:

- A. Does the Patient Relations file contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption (solicitor-client privilege) apply to the withheld information in the Patient Relations file?

- C. Did the institution exercise its discretion under section 49(a), read with section 19? If so, should this office uphold the exercise of discretion?
- D. Did the institution conduct a reasonable search for records?

DISCUSSION:

Preliminary issue

[14] The UHN responded to the access request under the *Act* and not *PHIPA*. The UHN's decision to proceed under the *Act* instead of *PHIPA* was not raised as one of the issues in this appeal.

[15] Based on my review of the records, which appear to contain personal health information of the deceased, and the request, which was for information that would include the deceased's personal health information, I considered whether to seek the parties' views on whether *PHIPA* applies, but have decided that it is not necessary to do so given the nature of the claims made and my findings.

[16] The UHN's claim that the section 49(a) exemption, in conjunction with section 19 (solicitor-client privilege), applies is equivalent to the claim it may have made under section 52(1)(f)(ii)(A) of *PHIPA*. Section 52(1)(f)(ii)(A) permits health information custodians that are also institutions under *FIPPA*, which is the case here, to claim the application of *FIPPA* section 49(a) as a "flow-through" claim, meaning that the solicitor-client privilege issue and analysis are the same whether considered under *FIPPA* or *PHIPA*.

[17] As will be seen, with three exceptions, I uphold the UHN's decision to withhold information on the basis of section 49(a), in conjunction with section 19. Determining whether the applicable statute is *PHIPA* or *FIPPA* would make no difference to the analysis or outcome and accordingly, there is no need to make such a determination.

[18] Regarding the reasonable search component of the appeal, IPC adjudicators have consistently found that the principles outlined in IPC orders addressing reasonable search under *FIPPA* (and its municipal counterpart) are instructive to the review of reasonable search appeals under *PHIPA*.¹ In this case, the parties have made full representations on the issue of reasonable search under *FIPPA*, and conducting the reasonable search analysis under *PHIPA* would have no impact on the outcome of the appeal.

¹ PHIPA Decision 101, PHIPA Decision 18.

Issue A: Does the Patient Relations file contain “personal information” as defined in section 2(1) of *FIPPA* and, if so, to whom does it relate?

[19] Although the UHN submits that it is minimal, the parties agree that the records in the Patient Relations file contain at least some personal information of both the appellant and the deceased.

[20] Based on my review, the records at issue in the Patient Relations file, all of which relate to inquiries made by the appellant and his family about the deceased’s care, contain personal information of either the appellant, the deceased or both. This means that the UHN’s section 19 claims must be assessed under section 49(a).

Issue B: Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the withheld information?

[21] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(a) reads (emphasis added):

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information.

[22] When the individual is deceased, an estate trustee may exercise the rights of the individual in some circumstances.² Regarding the request that led to this appeal, the hospital has treated the appellant as both a person acting in his own capacity and as the estate trustee for the deceased.

[23] Section 49(a) of the *Act* recognizes the special nature of requests for one’s own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.³

[24] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[25] As noted, the UHN relies on section 19 in conjunction with section 49(a) to withhold parts of the Patient Relations file. Section 19 of the *Act* states as follows (emphasis added):

A head may refuse to disclose a record,

² Section 66(a) of the *Act*.

³ Order M-352.

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

(b) ...

(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.

[26] 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 for use in giving legal advice or in contemplation of or for use in litigation") is a statutory privilege.

Representations

[27] The UHN submits that both section 19(a) and (c) apply, meaning that it argues that both Branch 1 and Branch 2 apply although it does not use this language. It says that solicitor-client privilege is crucial to employees of the UHN and enables them to freely seek legal advice.

[28] The UHN grouped its claims for privileged information into the following categories:

- Requests for legal advice concerning regulatory college complaints and responses to the requests (withheld information on pages 65, 76, 78, 95-97, 104, 105, 109-111)
- Requests for legal advice concerning a quality of care review and responses to requests (withheld information on pages 124, 125, 136)
- Requests for legal advice concerning responses to the appellant and responses to the requests (withheld information on pages 128, 129, 141, 142, 146, 147)
- Requests for information and documentation to be provided to the hospital's insurer and responses to those requests (withheld information on pages 67-73, 75, 133, 134, 135)

[29] The UHN made no representations about the withheld information on pages 32, 33, 43, 88, 94 and 140.

[30] The UHN states that it has not waived its privilege and sums up its position as follows,

The records concerning regulatory college complaints, quality [of] care and the hospital's insurer contain little personal information about the appellant and the deceased. The records consist of requests for legal advice by hospital staff and requests for advice and documentation pending possible legal action.

[31] In response, the appellant provides information about the role that the Patient Relations department plays or ought to play in a hospital. He asserts that because the Patient Relations department does not become involved with legal issues, there is no valid solicitor-client privilege claim for communications between the patient relations department and the legal department or the insurers.

[32] The appellant also submits that any privilege that may exist was waived. He has three alternative arguments about waiver. First, he says that the disclosed portions of the Patients Relations file reveal that the "physicians, pharmacists, nurses and dieticians involved are collaborating with the hospital." Giving this submission a broad reading, I understand the appellant to be arguing that because the privileged information of the hospital was shared with the named medical professionals, the UHN waived its privileged.

[33] Second, the appellant states that the UHN waived any privilege that it may have been able to claim when it disclosed to him the portions of the Patient Relations file that it did.

[34] With specific reference to pages 128, 129, 141, 146 and 147, the appellant says,

The staff physician for [the deceased] became aware that the son was a lawyer on Aug 24, 2017. The hospital in the patient relations file at a few instances refers to the legal background. The son is a non-practising lawyer. I forwarded several letters to [a particular person] (who was a former Patient Ombudsman and Patient Relations Director for UHN) who is now working in [a different area]. [The particular person] told [her successor] that [she] would take over the file along with [another person] of Patient relations. The patients relations [department] stated that litigation is reasonably contemplated by the hospital since we first were engaged in the patient relations experience in the fall of 2017. Then pages 128, 129, 141, 146 and 147 should be released.

[35] As I understand the appellant's argument here, which relates to the pages that the UHN claims were regarding legal advice about responses to requests from the appellant, he is asserting that there was a belief or basis to believe that litigation was contemplated since at least Fall 2017, so there is no specific basis to single out pages 128, 129, 141, 146 and 147, which post-date May 2018, as the UHN has done. I understand the appellant's argument on this point to be further to his representations about waiver – that any privilege that the UHN had was waived when it disclosed the records that it has disclosed to the appellant.

[36] Third, the appellant states that the UHN waived any privilege that it may have had when it disclosed the Patient Relations file to the Ontario Patient Ombudsman.

[37] In addition to his representations about privilege, the appellant submits that there is a public policy ground for disclosure of information about the deceased's care while at the UHN hospital.

[38] In his representations, the appellant makes requests for additional records that are beyond the scope of the original request, including records that he has discovered exist because they are referenced in the Patient Relations file. These requests are outside the scope of the present appeal and if the appellant maintains an interest in accessing these records, he may make another request to the UHN.

[39] Some of the appellant's representations relate to his concerns about the care the hospital provided to the deceased. These representations are not summarized here because they are not relevant to the issues before me.

[40] In reply, the UHN maintained its position.

Requirements of section 19

[41] As described above, section 19 contains two branches. To claim the section 19 exemption, the UHN must establish that either or both branches apply.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[43] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.⁴ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁵ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁶

[44] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁷

[45] Confidentiality is an essential component of the privilege. Therefore, an institution must demonstrate that the communication was made in confidence, either expressly or by

⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁵ Orders PO-2441, MO-2166 and MO-1925.

⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁷ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

implication.⁸ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁹

Litigation privilege

[46] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.¹⁰ Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.¹¹ 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.¹² The litigation must be ongoing or reasonably contemplated.¹³

Loss of privilege

Waiver

[47] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.¹⁴

[48] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.¹⁵

[49] Generally, voluntary disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁶ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁷

⁸ *General Accident Assurance Co. v. Chrusz* (1999) (“Chrusz”), 45 O.R. (3d) 321 (C.A.); Order MO- 2936.

⁹ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

¹⁰ *Blank v. Canada (Minister of Justice)* (2006) (“Blank”), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

¹¹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) (“*Ontario (A.G.) v. Ontario (IPC)*”).

¹² *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC) (“*Goodis*”).

¹³ Order MO-1337-I and *Chrusz*, cited above; see also *Blank*, cited above.

¹⁴ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹⁵ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁶ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.) (“*Big Canoe*”).

¹⁷ *Chrusz*, cited above; Orders MO-1678 and PO-3167.

Branch 2: statutory privilege

[50] Branch 2 is a statutory privilege that would apply in this case where the records were prepared by or for counsel employed by the hospital “for use in giving legal advice or in contemplation of or for use in litigation.” The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[51] The statutory communication privilege applies to records prepared by or for counsel for use in giving legal advice and requires consideration of many of the same principles outlined above in relation to the common law solicitor-client communication privilege.

[52] The statutory litigation privilege applies to records prepared by or for counsel employed or retained by a hospital “in contemplation of or for use in litigation.” 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.¹⁸ The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.¹⁹

[53] Statutory litigation privilege may also be lost through waiver.²⁰ In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.²¹

Analysis and Findings

[54] I have carefully reviewed the withheld information and the arguments made by the parties.

[55] Mindful of the categories identified by the UHN, I first considered whether any of the withheld information consisted of internal communications from or to UHN legal counsel that qualified as communications for the purpose of giving or obtaining legal advice. Such information would qualify as solicitor-client communication privilege under Branch 1 and Branch 2, outlined above.

[56] Although not every communication between a hospital’s legal counsel and its staff (or other professionals) will automatically qualify as solicitor-client privilege communications, I am satisfied that the information on the following pages does so qualify: 65, 78, 94-97, 104, 105, 109-111, 124-125, 135, 136, 140-142, 146, 147. Based on my review of the records, the withheld information on these pages consists of communications

¹⁸ See *Big Canoe*, cited above; *Goodis*, cited above.

¹⁹ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

²⁰ See discussion above under Branch 1, “Loss of Privilege.” Also, see Order PO-3627 and *Big Canoe*, cited above.

²¹ *Ontario (A.G.) v. Ontario (IPC)*, cited above.

whose purpose is seeking or providing legal advice in relation to a variety of issues, including regulatory college complaints and other ongoing external reviews.

[57] The withheld information on the bottom of page 75 and top of page 76 and on pages 128-129 qualifies as branch 1 and 2 litigation privilege – the withheld portions are communications intended to occur within the zone of privacy referred to above, for the purpose of reasonably contemplated litigation. I do not need to decide whether they also qualify for the solicitor-client communication privilege.

[58] This leaves pages 67-73 and the top of page 75, which the UHN says are requests for information and documentation to be provided to the hospital's insurer and responses to those requests. This is a fair characterization of the records and I also observe that these requests are being coordinated by a person in the legal department. In my view, these are records of communications that occurred within the zone of privacy necessary to prepare for and investigate reasonably contemplated litigation and they are covered by branch 1 and 2 litigation privilege.²²

[59] As I noted above, the statutory (Branch 2) litigation privilege does not end when the litigation ends.

[60] Based on my review, no reasonable claim for solicitor-client privilege may be made for the information on pages 32, 33 and 88. The withheld information consists of the title and contact information for an individual in their professional capacity.²³ It does not appear in the context of a solicitor-client communication nor in a communication prepared for the dominant purpose of reasonably contemplated litigation. I will order the UHN to disclose this information.

Waiver of privilege

[61] One of the appellant's main arguments is that privilege over the withheld information has been waived.

[62] I first considered the appellant's arguments that the UHN was "collaborating" with medical professionals which, as I explained above, I understand to be an argument that the UHN had disclosed the information at issue to parties who do not have a common interest with the hospital. In my view, there is no merit to this argument. The emails that remain at issue are internal emails among UHN's staff of medical professionals. There is no evidence in the Patient Relations file that any of the communications for which solicitor-

²² Order MO-1571 is an example where reports prepared for an insurer were found to be subject to litigation privilege.

²³ It is not personal information that might qualify for exemption from disclosure under the personal privacy exemptions at sections 21 or 49(b): See the definition of "personal information" in sections 2(1) and 2(3). See also Order PO-2225.

client communication privilege applies were shared externally with any party, only with UHN staff or medical professionals.

[63] I then considered the appellant's argument that the UHN's decision to disclose some of the records to him constituted a waiver of any privilege that it may claim, including his submissions about when UHN officials became aware of the risk of litigation. Indeed, based on my own review of the entire Patient Relations file, I observe that that UHN has disclosed some information to the appellant that arguably could reveal solicitor-client privilege communications. However, for the following reasons, I find that the UHN's disclosure of some arguably privileged information contained in the Patient Relations file to the appellant did not constitute a waiver of all of its privilege claims.

[64] Waiver can arise when an institution discloses part of a legal opinion in summary form or in a public statement.²⁴ Even in that situation, however, this office has in previous orders found that disclosure of some of a legal opinion, or its "bottom line", does not amount to waiver of privilege over the remainder.²⁵

[65] In any event, the records and issues in this appeal require a different analysis, although informed by the above principles. The communications contained in the Patient Relations file are a series of discrete communications about unique topics relating to the appellant and his family, such as the hospital's obligations in responding to different professional regulatory complaints or possible litigation. I find that the UHN's decision to disclose to the appellant some information that it could arguably have claimed was subject to solicitor-client privilege was an exercise of its discretion to disclose some but not all privileged information. The UHN's exercise of discretion to disclose some privileged information does not have the effect of waiving privilege over all discrete communications for which it could claim privilege.²⁶

[66] I then considered the appellant's argument the UHN disclosed the Patient Relations file to the Ontario Patient Ombudsman and that this disclosure constituted a waiver of privilege over the entire record. The totality of the appellant's submissions on this issue is: "In a further alternative, the contents of the patient relations file has been shared with the patient ombudsman for the province and any privilege has been waived or lost." The UHN did not specifically respond to this aspect of the appellant's response, although it has maintained throughout that it did not waive its privilege.

²⁴ Order MO-3373.

²⁵ See Orders MO-1172, PO-3804-I, MO-2945-I,

²⁶ See the discussion in *Stevens v. Canada (Prime Minister)* (1998), 1998 CanLII 9075 (FCA), which is referred to in Order PO-3804-I at para 44.

[67] While the party claiming privilege has the onus to establish that privilege applies, a party claiming that the privilege has been waived has a duty to establish that the waiver occurred – a *prima facie* case of waiver.²⁷

[68] Based on my review of the legislation that establishes the Ontario Patient Ombudsman²⁸, the UHN may be *required* to disclose information to the Patient Ombudsman pursuant to that Act, which is a factor that would need to be taken into account in assessing any claim of waiver.²⁹

[69] In my view, the appellant's representations are not sufficient to establish the *prima facie* case of waiver. I do not have any information about why the appellant believes that the Patient Relations file was disclosed to the Ontario Patient Ombudsman, including the dates or the reasons why. The appellant's argument is, essentially, a bare allegation of waiver which is insufficient to establish a *prima facie* case of waiver.

[70] In summary, I find that except for the withheld information on pages 32, 33 and 88, the remaining excerpts are eligible for exemption on the basis of section 49(a) in conjunction with section 19. I must now consider whether the hospital exercised its discretion in accordance with the *Act*.

Issue C: Did the institution exercise its discretion under section 49(a), read with section 19? If so, should this office uphold the exercise of discretion?

[71] The section 49(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[72] 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.

²⁷ Orders MO-1923-R, MO-2462 and PO-3261.

²⁸ *Excellent Care for All Act, 2010*, S.O. 2010, c. 14.

²⁹ *Big Canoe*, cited above (see also *Ontario (Attorney General) v. Holly Big Canoe* (2006), 80 O.R. (3d) 761 (Div. Ct.)).

[73] This office may send the matter back to the institution for an exercise of discretion based on proper considerations³⁰ but it may substitute its own discretion for that of the institution.³¹

Relevant considerations

[74] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³²

- the purposes of the *Act*, including the principles that:
 - information should be available to the public;
 - individuals should have a right of access to their own personal information;
 - exemptions from the right of access should be limited and specific;
 - the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- 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;
- the age of the information; or,
- the historic practice of the institution with respect to similar information.

Representations

[75] The UHN says that it considered a number of factors when exercising its discretion, including the purposes of the *Act* and the exemption and its view that disclosure will have no

³⁰ Order MO-1573.

³¹ Section 54(2) of the

³² Orders P-344 and MO-1573.

impact on public confidence in the UHN. The UHN says that it considered whether there was a sympathetic or compelling need to disclose the withheld information but decided that there was not because, it says, the withheld information pertains to the UHN's "working processes and contains little if any personal information of either the appellant or the deceased." The UHN states that it believes that any personal information that may be contained in the file was already disclosed to the appellant.

[76] The appellant states that the IPC should not uphold the exercise of discretion. As noted above, the appellant asserts in general that it is in the interests of good public policy to disclose the withheld information to enable appropriate public scrutiny to come to bear on the hospital.

[77] The appellant also points to the fact that the Patient Relations file contains references to and attachments of records that have not been disclosed to him. As indicated above, should the appellant seek these records, which are outside the scope of the present request, he may do so by making another access request.

Analysis and Finding

[78] I find that the UHN has exercised its discretion and I will uphold it. I form this view in consideration of the fact that the UHN has disclosed most of the Patient Relations file, including certain parts for which it could have claimed solicitor-client privilege. I also agree with the UHN's characterization that the withheld information contains very little personal information of the appellant or the deceased.

[79] I find that the UHN's approach to disclosure in relation to the Patient Relations file demonstrates that it acted with regard for the fact that the appellant was requesting his own or the deceased's personal information and applied due consideration to that factor.

Issue D: Did the institution conduct a reasonable search for records?

[80] The remaining issue in this appeal is whether UHN conducted a reasonable search for particular messages about the deceased from a particular nurse to other hospital staff on a particular date and time.

[81] Where a requester claims that additional records exist beyond those identified by a custodian, the issue to be decided is whether the custodian has conducted a reasonable search for records as required by sections 53 and 54 of *PHIPA*.³³

[82] *FIPPA* 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

³³ PHIPA Decision 101.

it has made a reasonable effort to identify and locate responsive records.³⁴ To be responsive, a record must be "reasonably related" to the request.³⁵

[83] 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.³⁶

[84] 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.³⁷

[85] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.³⁸

Representations

[86] UHN submits that its search was reasonable. In support of its position, UHN provided an affidavit setting out the steps taken to locate records relating to a particular code call made by a nurse attending to the deceased on the date specified by the appellant. The UHN also relies on the references in the disclosed portions of the Patient Relations file describing the steps taken to search for records.

[87] The affidavit given by the UHN's Freedom of Information Coordinator describes the steps that he took to search specifically for such records, acknowledges his understanding of the appellant's basis for his belief why the additional records should exist and his position that no additional records exist. He attempted to provide an explanation to the appellant about why the records he seeks do not exist.

[88] The appellant disputes that the UHN conducted a reasonable search and maintains his view that records of a particular call for help should exist. He disputes the explanation offered by UHN and states that the Freedom of Information Coordinator focused on the wrong information to refine the search. The appellant also raises concerns about the validity and lawfulness of the affidavit, noting that the commissioner for taking oaths did not indicate their law society number on the affidavit.

[89] The appellant says that the nurse and the other medical professionals in attendance should be asked to provide affidavit evidence and that the clinical message software program should be searched.

³⁴ Orders P-624 and PO-2559.

³⁵ Order PO-2554.

³⁶ Orders M-909, PO-2469 and PO-2592.

³⁷ Order MO-2185.

³⁸ Order MO-2246.

Analysis and Finding

[90] I have carefully reviewed the Patient Relations file and the affidavit. I have also considered that during the mediation additional searches were undertaken that yielded an additional record that was disclosed to the appellant in a supplementary access decision. The Patient Relations file contains some evidence to illustrate in more detail the steps that were undertaken by the UHN to locate records. I give no weight to the appellant's concerns about the legality of the affidavit; the information contained in the affidavit is consistent with the UHN's response throughout this appeal.

[91] Having carefully considered the appellant's representations and, as contained in the Patient Relations file, some of his correspondence with UHN, I understand the basis for the appellant's belief that additional records should exist. I also understand the basis for the UHN's position and in particular that it has addressed and provided a credible explanation, in my view, for why there are no additional records.

[92] In my view, the UHN has conducted a reasonable search. An institution is not required to prove with absolute that additional responsive records do not exist. Rather, institutions are required to demonstrate that they have made a reasonable effort to locate records. I have formed this view because I accept that the UHN understood the request and conducted appropriate searches for such records, including additional searches in the mediation of this appeal. I uphold the reasonableness of the UHN's search.

ORDER:

1. I uphold the UHN's decision to withhold access to the information on pages 65, 67-73, 75, 76, 78, 94-97, 104, 105, 109-111, 124-125, 128-129, 135, 136, 140-142, 146, 147 pursuant to section 49(a) in conjunction with section 19 of the *Act*.
2. I do not uphold the UHN's decision to withhold access to the information on pages 32, 33 and 88 and order it to disclose this information to the appellant by providing him a copy of it by **October 15, 2020**.
3. I uphold the UHN's search as reasonable.
4. In order to verify compliance with order provision 2, I reserve the right to require the UHN to provide me copies of the records it discloses to the appellant.
5. The timelines in order provision 3 may be extended if UHN is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by: _____

Valerie Jepson
Adjudicator

September 9, 2020 _____

