

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4089

Appeal PA17-539

University Health Network

November 23, 2020

Summary: University Health Network (UHN) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of records that had been exchanged between certain individuals, regarding a specified doctor. UHN denied access to the responsive records it had located on the basis of a number of exclusions and exemptions, including the exclusion at section 65(6)5 (hospital privileges) of the *Act*. The requester appealed. The issue of whether UHN conducted a reasonable search, under section 24 of the *Act*, was raised. In this order, the adjudicator upholds UHN's access decision, finding that the records are excluded from the scope of the *Act* under section 65(6)5, upholds UHN's search as reasonable, and dismisses the appeal.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 , as amended, sections 65(6)5 and 24 .

OVERVIEW:

[1] A lawyer made a request to the University Health Network (UHN) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of:

all records, materials, documents, notes, information and/or communications (paper or electronic), including deleted electronic correspondence, relating to [a named doctor], which were exchanged between [a number of specified individuals] over various time periods.

[2] UHN contacted the requester to seek clarification about the request, and communicated with the requester about the status of various individuals named in the

request, as well as the applicable time period that it would conduct searches for.¹

[3] UHN located responsive records and issued an access decision denying access to all responsive records on the basis of the exclusion at section 65(6) (employment or labour relations) (citing paragraphs 1, 3, and 5 of the exclusion), and the exemptions at sections 19 (solicitor-client privilege) and 21 (personal privacy). In its decision letter, UHN also provided certain details about its search.

[4] The requester, now the appellant, appealed UHN's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] During the mediation stage of the appeal process, UHN provided the appellant and this office with an index of the five responsive records it had located, to supplement its decision letter. The appellant questioned the thoroughness of UHN's search, as he believed that additional records responsive to the request ought to exist. As a result, the reasonableness of UHN's search was added as an issue in this appeal.

[6] Since mediation did not resolve the appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[7] The adjudicator originally assigned to this appeal sought clarification from the parties about certain matters, including clarification on the relationship of the lawyer who filed the request with the doctor named in it. Since the lawyer confirmed that he represents the doctor to whom the requested records relate, the adjudicator advised the parties that she would refer to the doctor and to her lawyer interchangeably as the "appellant" in this appeal. The adjudicator then sent UHN a Notice of Inquiry (NOI), setting out the facts and issues on appeal, and asked UHN for written representations in response. UHN's representations that it filed in response amended its position on certain issues, and the NOI sent to the appellant reflected that. The adjudicator asked the appellant for representations in response to the NOI and UHN's representations. UHN then filed reply representations in response to the appellant's representations. The appeal was then transferred to me to continue its adjudication.

[8] For the reasons that follow, I uphold UHN's access decision to withhold the records because I find that they are excluded from the scope of the *Act* under section 65(6)5, and I uphold UHN's search as reasonable, and dismiss the appeal.

¹ UHN noted to the requester that under section 69(2), the *Act* only applies to records in the custody or under the control of UHN where records came into its custody or control on or after January 1, 2007. Therefore, although the request specified varying timeframes, UHN stated that it could only conduct searches for responsive records from January 1, 2007. In response, the requester asked UHN to search for responsive records from January 1, 2007 passing between any of the individuals named in the request who are or were associated with UHN from 2007.

RECORDS:

[9] Five records are at issue, consisting of emails and letters (11 pages, in total). UHN provided the following description of the records in its index of records, in the table below. I have omitted dates, names, and the exemptions and exclusions claimed (which were all claimed for each record).

Record number	Type of record	Number of pages	Description
1	Email	3	Discussion re: faculty appointment
2	Letter	2	Re-appointment recommendation
3	Letter	2	Re-appointment recommendation
4	Letter	1	Current appointment status
5	Email	3	Change of appointment status

ISSUES:

- A. Does section 65(6)5 exclude the records from the *Act*?
- B. Did UHN conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: Does section 65(6)5 exclude the records from the *Act*?

[10] UHN's position is that each of the records is excluded from the application of the *Act* under section 65(6)5, and for the reasons that follow, I agree. In light of this, it is not necessary to address any of the other exclusions or exemptions claimed.

[11] It is worth noting that the effect of an exclusion is different from the effect of an exemption. If a record is found to be excluded under the *Act*, that means that the *Act* does not apply to the record. However, the institution can still disclose information outside of the *Act* if the exclusion is found to apply.

[12] In its representations, UHN addressed the exclusions at sections 65(6)3 and 65(6)5.

[13] Sections 65(6)3 and 65(6)5 say:

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:

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

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

[14] 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*.

[15] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in this section, it must be reasonable to conclude that there is "some connection" between them.²

Section 65(6)3

[16] For section 65(6)3 to apply, the institution (in this case, UHN) 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 use 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 UHN has an interest.

[17] UHN submits that the records were collected, prepared, maintained or used by UHN, and that this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications. It also submits that these meetings, consultations, discussions or communications are about labour relations or employment related matters in which UHN has an interest.

[18] The appellant's representations did not address the possible application of section 65(6)3. Rather, she only addressed section 65(6)5. In resolving this appeal, I

² Order MO-2589; see also *Ontario (Attorney General) v. Toronto Star*, cited above.

decided to first consider whether the provision addressed by the appellant applied. Given my finding that it does, it is not necessary to consider whether section 65(6)3 would also apply.

Section 65(6)5

[19] For section 65(6)5 to apply, UHN 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 use was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about applications for hospital privileges, the appointments or privileges of persons who have hospital privileges or anything that forms part of the personnel file of those persons.

UHN's representations

[20] As mentioned under the discussion about section 65(6)3, UHN submits that the records at issue were collected, prepared, maintained or used by UHN, and that this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications.

[21] UHN submits that the records also "clearly" meet the third part of the test because they are "communications. . . about an application for reappointment for a person who has hospital privileges."

The appellant's representations

[22] The appellant submits that section 65(6)5 does not apply to the records.

[23] She states that she "cannot respond to the specific content of the responsive records."

[24] However, she submits that

. . . . there was a hearing before the Health Professional Appeal Review Board [(HPARB)] in which full production was required to be made by UHN relating to the [appellant's] privileges, application for same, and all materials touching on this issue and the responsive records were not produced in this proceeding, which means UHN maintained a position at the time of the hearing before HPARB that the records were not related to the applicant's privileges or re-appointment of same.

[25] The appellant's representations do not state anything further about the possible application of section 65(6)5.

Analysis and findings

[26] UHN submits that the records at issue were collected, prepared, maintained or used by UHN, and that this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications. Based on my review of the records, which are emails and letters, I accept that UHN has established that the records meet both parts one and two of the test.

[27] The third part of the test is that these meetings, consultations, discussions or communications must relate to applications for hospital privileges, the appointments or privileges of persons who have hospital privileges or anything that forms part of the personnel file of those persons.

[28] In considering whether UHN has established that part three of the test applies, it is useful to set out UHN's description of the records:

- Record 1 is a request for a review of [the doctor's] file with respect to requests for faculty appointments.
- Records 2 and 3 are correspondence providing background and a recommendation concerning [the doctor's] reappointment.
- Record 4 is correspondence confirming [the doctor's] appointment status.
- Record 5 is a chain of email correspondence discussing [the doctor's] appointment history.

[29] To be clear, although UHN did not refer to Record 1 in the above description as an email in its representations (but did in the index of records), based on my review of Record 1, I confirm that it is an email.

[30] Considering the records and the parties' representations, I am satisfied that the records at issue relate to the reappointment of a person who has hospital privileges. I have reviewed the records and can confirm that the discussions or communications in the records relate to the matters described under paragraph three of section 65(6)5. Therefore, I find that the records meet part three of the test. In coming to my conclusion, I have taken into account the appellant's representations, including her argument that these records were not produced before the HPARB as documents relating to hospital privileges. While I cannot comment on what was or was not produced at that hearing, I am satisfied from my review of the records themselves that they relate to the matters described in section 65(6)5. The appellant did not dispute that she was a person who had hospital privileges.

[31] For these reasons, I find that each record meets the three-part test for section

65(6)5 and is excluded under the *Act*. Based on my review of the records, I also find that none of the records fall within any of the exceptions in section 65(7)³ of the *Act* because none of the records are agreements or expense accounts.

[32] Since UHN has demonstrated that the records are excluded from the application of the *Act* under section 65(6)5, each record as a whole is removed from the scope of the *Act*. In light of this, it is not necessary for me to address whether any other exclusion or exemption claimed by UHN applies.

Issue B: Did UHN conduct a reasonable search for records?

[33] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.⁴ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches. Although the appellant takes the position that additional responsive records should exist, as I will explain below, I find that UHN conducted a reasonable search for responsive records and that the appellant has not established a basis for believing that further responsive records exist.

[34] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁵ To be responsive, a record must be "reasonably related" to the request.⁶

[35] 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.⁷

[36] 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.⁸

[37] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable

³ Section 65(7) says that the *Act* applies to three specified types of agreements (listed at paragraphs 1, 2, and 3 of section 67(7)), as well as to an expense account (as described in paragraph 4 of section 67(7)).

⁴ Orders P-85, P-221 and PO-1954-I.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

⁷ Orders M-909, PO-2469 and PO-2592.

⁸ Order MO-2185.

basis for concluding that such records exist.⁹

[38] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.¹⁰

UHN's evidence

[39] UHN submits that the search for responsive records was reasonable, and for the reasons that follow, I find that it was.

[40] In support of its position that it conducted a reasonable search, UHN provided affidavit evidence from an employee who is both the manager of Privacy and Access Operations and the Freedom of Information coordinator (the FOIC), who attests to having personal knowledge of the contents of his affidavit.

[41] The FOIC attests to working in UHN's privacy unit since 2011, which was about six years at the time of the request. He attests to being knowledgeable of UHN's record-keeping practices due to his role in coordinating and preparing responses to access to information requests, patient complaints and inquiries. I find that this evidence establishes that it was reasonable for UHN to call on the FOIC to coordinate UHN's search efforts, and that he is an experienced employee for the purposes of this search.

[42] In his affidavit, the FOIC sets out the wording that was repeated in the request and the fact that these records were to be "between 8 named individuals and 4 - 16 other individuals." He also states that twenty-nine individuals were named.

[43] The FOIC then explains the steps he took to search for responsive records in his affidavit, which I summarize below:

- he checked UHN's online directory to locate these individuals, but could not find any information on the majority of the individuals named;
- he asked the appellant to clarify whether eight individuals named in the request were previously employed by UHN (in response, the appellant stated that they did not appear to be);
- he then asked staff of UHN's Human Resources Department to review the staff files for the information, and learned that only four of the individuals named were current employees of UHN (discussed further below);

⁹ Order MO-2246.

¹⁰ Order MO-2213.

- he contacted each of the four individuals who were named in the request and were current employees of UHN, and asked each to review their files for responsive records; and
- he reviewed the files (which had been collected in UHN's legal department) to determine which were responsive.

[44] I find that these were reasonable steps to take in order to search for the responsive records, as I explain further below.

[45] Given the wording of the request, involving twenty-nine named individuals, I find that it was reasonable for the FOIC to identify these individuals as ones whom he should consult in the search for responsive records, and to check UHN's online directory to try to locate them. While it was reasonable to attempt to seek clarity from the appellant regarding eight of the individuals named after receiving the request, in the end, the FOIC took what I find to be the reasonable step of consulting UHN's human resources department about all of the individuals named. From the human resources department, he learned, as he attests, that twenty of the twenty-nine individuals named in the request did not have an employee file at UHN. Of the remaining nine, three had terminated before 2007 (the year that the *Act* began to apply to UHN), and an additional two terminated in 2009 and 2015. Since the request was made years later, in 2017, and five records were identified as responsive, it is also relevant to note that the FOIC attests that "[n]o electronic files exist for these individuals as an employee's email account and electronic files are deleted at the end of 120 days."

[46] I also find that it was reasonable for the FOIC to contact each of the four individuals named in the request who were still at UHN. He attests that one individual advised him that he did not have any correspondence relating to the appellant. Another individual advised him that the only records he had were given to UHN's legal counsel and were in relation to this individual in his capacity as former chair of UHN's Medical Affairs Committee. Similarly, the other two individuals also stated that they had either provided records to legal counsel or the records were part of the Medical Affairs Committee file, which had been given to counsel. In light of these responses, I find that it was reasonable for the FOIC to then review the records with UHN's general counsel to determine which records were responsive to the request.

[47] The FOIC attests that the "majority of the records reviewed detail the appointment and/or reappointment process of the requestor's client and do not consist of communications between individuals named in the request."

[48] The FOIC further attests that the record review identified five records that are responsive to the request, "in that they consist of communications to/ from individuals named in the request," and that these records concern the appointment and/or reappointment process of the appellant and dated during a specified time period. He also attests that the records were reviewed a second time before the index of records was prepared. I find that this was another reasonable effort to identify responsive

records.

[49] The FOIC also attests that it was determined that no other records were responsive to the request, and that he “[has] not been led to believe nor [has he] been given any reason to believe, that any of the care providers requested to conduct a search did not perform such a search to the best of their ability.”

[50] The adjudicator initially assigned to this appeal flagged possible responsiveness issues regarding two records that had initially been sent to this office, which did not match the index of records. She sought clarification on this, and in my view, UHN provided it.

[51] One record was an unsigned, incomplete draft of a record at issue, so UHN did not identify it as a responsive request (though it was forwarded to counsel with related records). In light of this description of the record, as a draft of a record at issue, I find that even if it should have been identified as a responsive record, it would be excluded under section 65(6)5 of the *Act* for the same reasons that its corresponding record (record 2) was found to be excluded. Therefore, it would serve no useful purpose to not uphold UHN’s search as reasonable and to order a further search for this record.

[52] With respect to the other record, UHN explains that it was not considered responsive because it was forwarded from an external law firm (not named in the request) to a doctor named in the request. Recalling that each part of the request is for records between a named individual and other named individuals, I accept that this other record initially flagged as possibly responsive was not, in fact, responsive. Given my finding, it is not necessary to consider the university’s submission that even if this record is responsive, it would still be excluded under the *Act* by section 65(6) or exempt under sections 19 (solicitor-client privilege) and 21 (personal privacy).

The appellant’s position

[53] 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.¹¹ In this case, I find that the appellant has not done so.

[54] The appellant states that she is “understandably incredulous with UHN[’s] position that all responsive documents in existence have been identified.” Specifically, she disputes that there could only be five responsive records relating to her as a physician who practiced at UHN for many years. She further submits that:

¹¹ Order MO-2246.

[t]he limited number of records is not credible, and is further contradicted by the reference in [UHN'S] submissions that the applicant's entire personnel file was provided to UHN's counsel. Despite the 'complete Medical Affairs File' was forwarded means that it was preserved, and that the 5 identified records do not constitute all the records.

[55] While I appreciate the appellant's position that the number of years she worked at the hospital should be a sign that a search that yielded five records was not reasonable, I am not persuaded to accept this as a reasonable basis for concluding that additional records exist, in the circumstances. The appellant's argument does not establish that UHN did not have an experienced employee knowledgeable in the subject matter of the request conduct a search, and that this employee's efforts were not reasonable in trying to locate records that are reasonably related to the request. The appellant has not identified employees, locations, or search criteria that were unreasonable for UHN to employ in conducting a search. In addition, I note that to the extent that any additional records relating to the appellant's appointments or privileges exist or would have been part of her personnel file, and therefore excluded under section 65(6)5 of the *Act*, it would serve no useful purpose to order UHN to conduct a further search for them.

[56] For these reasons, I uphold the reasonableness of UHN's search.

ORDER:

I uphold UHN's access decision and the reasonableness of its search, and I dismiss the appeal.

Original Signed by: _____
Marian Sami
Adjudicator

November 23, 2020 _____