

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4299

Appeal PA20-00373

London Health Sciences Centre

September 12, 2022

Summary: The appellant sought access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to records related to his medical history at London Health Sciences Centre (LHSC) against which he had also commenced a legal proceeding. LHSC located the responsive emails and attachments and denied access to them in part, relying on the discretionary exemption at section 49(a), read with the solicitor-client privilege exemption at section 19, of the *Act*.

The appellant appealed LHSC's decision to the IPC. During the adjudication stage of the appeal, LHSC raised the application of the discretionary exemption at section 49(a), read with the advice or recommendations exemption at section 13(1).

In this order, the adjudicator upholds LHSC's decision under section 49(a) in conjunction with section 19. She also upholds the LHSC's decision under section 49(a) in conjunction with section 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990. c. F.31, as amended, sections 2(1) (definition of personal information), 49(a), 13(1), and 19; *Personal Health Information Protection Act, 2004*, section 52(1)(f)(ii)(A).

OVERVIEW:

[1] The appellant sought access to records related to his medical history at a hospital, a hospital against which he has commenced a legal proceeding.

[2] Specifically, a hospital, London Health Sciences Centre (LHSC), received a

clarified request¹ under *the Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for the following:

I would like all emails, memos or any documents that are not in [the appellant's] medical chart in any level of management or in the hospital including the different areas where [the appellant] had been looked after as he has been on 3 different units, and the searches should include management at the level of the units, directors and all the way up to the CEO².

We wish to have all such documents from January 1, 2020 to the present [May 19, 2020] and anything related to:

1. Any document, emails or writing related to charging him 1,800 dollars a day, non-OHIP rate.
2. Any document, emails or writing to discharge him from the hospital.
3. Any document, emails or writing to move him from private room to semi private room and then to a room shared by four.
4. Any document, emails or writing to change his care plan or try to make him "more independent;" and
5. Any document, emails or writing related to any minutes of meetings related to any of the above.

[3] LHSC's response issued an access decision disclosing 95 pages of responsive records in full to the appellant and withholding 50 pages of emails and attachments exchanged between LHSC's legal counsel, insurer, and employees pursuant to the discretionary solicitor-client privilege exemption in section 19 of the *Act*.

[4] The appellant appealed LHSC's decision to the Information and Privacy Commissioner of Ontario (the IPC), and a mediator was appointed to attempt a resolution of this appeal.

[5] The request to the hospital was made under *FIPPA* and not the *Personal Health Information Protection Act, 2004*.³ In some cases, an institution under *FIPPA* that is also a health information custodian under *PHIPA* must turn its mind to whether *PHIPA* applies to the request, notwithstanding that the requester makes the request under *FIPPA*. In this case, as I explain in my analysis, the result would be the same in this case.

¹ The requester is represented by counsel.

² Chief Executive Officer.

³ S.O. 2004, c.3, Schedule A.

[6] During the course of mediation, LHSC provided the appellant, via the mediator, with an affidavit attaching a chart detailing the records it claims were exempt from disclosure on the basis of solicitor-client privilege. This chart included information about the parties to each record, the date of each record, and the reason section 19 was being claimed for each record.

[7] As no further mediation appeared possible and pursuant to the appellant's request, this appeal was moved to the adjudication stage, where an adjudicator may conduct an inquiry, on the sole issue of section 19 solicitor-client privilege under *FIPPA*.

[8] I decided to conduct an inquiry. In this inquiry, I added the issue of whether section 49(a) (discretion to refuse requester's own information) applies, as I formed the preliminary view that the records may contain the personal information of the appellant. LHSC acknowledged that the records contain the personal information of the appellant.

[9] I sought and received representations from LHSC.⁴ In its representations, LHSC raised for the first time the application of the discretionary exemption in section 49(a), read with section 13(1) (advice or recommendations), to records 13 and 14 (instead of section 19).

[10] Therefore, I added this issue to the appeal, as well as, whether the LHSC should be permitted to rely on this discretionary exemption as it was raised late in the appeal. I sought LHSC's representations on these issues. LHSC provided supplementary representations on these issues.

[11] LHSC's initial and supplementary representations were shared with the appellant. The appellant provided representations in response to LHSC's representations.

[12] At adjudication, the LHSC provided me with a copy of the records at issue in this appeal.

[13] In this order, I uphold LHSC's decision under section 49(a), in conjunction with section 19. I also uphold the LHSC's application of section 49(a), read with section 13(1), to two other records.

RECORDS:

[14] At issue are 41 records: specifically emails and some attachments. The attachments include briefing notes and draft correspondence.

[15] LHSC claims records 1 to 12 and 18 to 44 are exempt by reason of section 49(a), read with section 19, and records 13 and 14 are exempt by reason of section 49(a),

⁴ At this time, LHSC also decided to disclose records 15 to 17 to the appellant. Therefore, these records are no longer at issue.

read with section 13(1).⁵

ISSUES:

- A. Do the records 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) (discretion to refuse access to requester’s own personal information) in conjunction with the solicitor-client privilege section 19 exemption apply to records 1 to 12, and 18 to 44?
- C. Should I consider the LHSC’s claim that the discretionary exemption for advice or recommendations at section 49(a), read with section 13(1) applies to records 13 and 14?
- D. Does the discretionary exemption at section 49(a) (discretion to refuse access to the requester’s own personal information) with the advice or recommendations section 13(1) exemption apply to records 13 and 14?
- E. Did LHSC exercise its discretion under section 49(a) read with sections 13(1) or 19? If so, should this office uphold the exercise of discretion?

PRELIMINARY ISSUE:

Does *PHIPA* or *FIPPA*, or both, apply in the circumstances of this appeal?

[16] The appellant submitted his request to LHSC under *FIPPA*. He did not submit his request under the *Personal Health Information Protection Act, 2004 (PHIPA)*. There is no dispute that LHSC is a body that is both a health information custodian within the meaning of section 3(1), and subject to *PHIPA*, and an institution within the meaning of the definition in section 2(1), and subject to *FIPPA*. It is, therefore, necessary to briefly address whether the *PHIPA* has any application to the circumstances of the appeal.

[17] *PHIPA* (Part V) grants an individual a right of access to records of their own personal health information that are in the custody or under the control of a health information custodian, subject to limited exceptions. *FIPPA* grants an individual a right of access to records of general information (Part II) and to an individual’s own personal information (Part III) in the custody or under the control of an institution, subject to certain exceptions.

[18] In circumstances such as this, where an institution or custodian is subject to both *PHIPA* and *FIPPA*, when it receives a request for access to information, it may be required to decide whether *PHIPA* or *FIPPA*, or both, apply to the request.

⁵ LHSC has disclosed records 15 to 17 to the appellant.

[19] In making this decision, LHSC must consider the nature of the request (i.e., whether the request is for personal health information, for information that is not personal health information, or both); the contents of the records responsive to the request (i.e., whether the responsive records(s) contain personal health information, or information that is not personal health information); and, in the case of a request for personal health information, whether the requester is a person authorized under *PHIPA* to exercise a right of access to that information.⁶

[20] LHSC acknowledged in its representations that the records refer to the appellant's medical history, as well as the fact that the appellant has commenced a legal action against LHSC.

[21] LHSC acknowledges that the appellant is a person authorized under *PHIPA* to exercise a right of access to that information under *PHIPA*. LHSC has nevertheless responded to the request under *FIPPA*. In the inquiry before me, it explained its view that an access request under *PHIPA* would lead to the same result because of the exemptions claimed require consideration of similar principles under both statutes. LHSC point to exemptions set out in sections 52(1)(a), (c), and (f) of *PHIPA*. These sections read:

Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

(a) the record or the information in the record is subject to a legal privilege that restricts disclosure of the record or the information, as the case may be, to the individual;

(c) the information in the record was collected or created primarily in anticipation of or for use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded;

... or ...

(f) the following conditions are met:

(i) the custodian is an institution within the meaning of the Freedom of Information and Protection of Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act or is acting as part of such an institution, and

(ii) the custodian would refuse to grant access to the part of the record,

⁶ See *PHIPA* Decisions 17, 27, 73, 96 and 107 and Order MO-3644.

(A) under clause 49 (a), (c) or (e) of the Freedom of Information and Protection of Privacy Act, if the request were made under that Act and that Act applied to the record, ...

[22] The appellant did not respond to LHSC's representations as to whether *PHIPA* applies in his representations.

Findings

[23] I agree with the LHSC that its claims that the section 49(a) exemption, in conjunction with sections 13(1) or 19, are similar to the claim LHSC 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*.

[24] As will be seen, I uphold the LHSC's decision to withhold information on the basis of section 49(a), in conjunction with sections 13(1) or 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. I will, therefore, proceed to adjudicate the appeal under *FIPPA*.

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[25] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. "Personal information" is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[26] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.⁷

[27] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.⁸

[28] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁹

[29] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁰

Representations

[30] LHSC acknowledges that the records contain the appellant's personal information. It states that the information is about the appellant in a personal capacity and includes his name, details about his medical history, and information about the medical care he received at LHSC.

[31] The appellant did not address this issue in his representations.

⁷ Order 11.

⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁹ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁰ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Findings

[32] I find that all of the records contain the personal information of the appellant as he requested records about himself.

[33] The personal information of the appellant in the records includes his medical and psychological history, date of birth, and opinions or views about the appellant, in accordance with paragraphs (b), (g), and (h) of the definition of personal information in section 2(1) of the *Act*.

[34] Therefore, as the records contain the personal information of the appellant, it is necessary to consider whether section 49(a) (discretion to refuse access to requester's own personal information), read with section 13(1)¹¹ or 19 as the case may be, applies to the records.

Issue B: Does the discretionary exemption at section 49(a) (discretion to refuse access to requester's own personal information) in conjunction with the solicitor-client privilege section 19 exemption apply to records 1 to 12, and 18 to 44?

[35] 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.

[36] Section 49(a) reads:

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.

[37] Section 49(a) of the *Act* (a head "may" refuse) 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.¹²

[38] In this case, LHSC relies on sections 19(a) and (c), which read:

A head may refuse to disclose a record,

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

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

¹¹ Subject to my determination as to whether LHSC can raise section 13(1) at this late stage of the appeal.

¹² Order M-352.

[39] 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 an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Representations

[40] In support of its representations, LHSC provided an affidavit from its Chief Nurse Executive and Executive Vice President for Clinical Programs (the Chief Nurse), whose responsibilities include executive oversight of all clinical programs and services at LHSC, including the medical program.

[41] The Chief Nurse also had a major role in overseeing issues relating to the appellant's care as a patient at LHSC and in providing professional support to other LHSC leaders and staff members involved in his care.

[42] The Chief Nurse identifies the following lawyers who provided assistance with the handling of the appellant's legal claims against the hospital and other matters relating to his care at LHSC:

- LHSC's Executive Vice President and General Counsel (the internal counsel).
- A lawyer at a named law firm that provided external legal advice to LHSC (the external counsel).

[43] The Chief Nurse states in her affidavit that the records at issue are emails exchanged amongst her, other LHSC directors and staff, and LHSC's internal and external legal counsel. She states that the emails are the primary source of legal advice concerning the appellant's care at LHSC and his related complaints. She states:

All email communications between LHSC directors, staff, and internal or external counsel were treated as confidential and intended only to be shared internally. Internal emails where we shared legal advice that had been provided to us or communicated for the purpose of sharing information so that legal advice could be sought were also treated as confidential.

[44] In its representations, LHSC categorizes the records as solicitor-client communication privileged records, as follows:

- Records 2, 3, 4, 5, 7, 8, 9, 18, 19, 20, 21, 22, 26, 27, 28, 30, 33, 34, 37, 38, 43 and 44 are communications between and among LHSC's internal and external counsel and LHSC's employees (i.e., the client), made for the purpose of obtaining or giving professional legal advice regarding LHSC's dealings with the appellant, particularly relating to the legal claims made against LHSC by the appellant.

- Records 1, 12 and 23 include communication between LHSC's internal and external counsel and key employees involved in the appellant's care at LHSC regarding updates that are relevant to the appellant's ongoing legal claims. These records contain information passed between LHSC's counsel and LHSC employees aimed at keeping all parties informed so that legal advice may be sought and given as required and fall within the continuum of communications.
- Records 24 and 25 contain briefings prepared by an LHSC employee for LHSC's internal legal counsel to assist counsel in advising LHSC in responding to the appellant's counsel's assertions and questions. This communication is part of the continuum of communications contain information prepared by LHSC employees for LHSC's legal counsel to assist counsel in preparing an informed and accurate response to the appellant's counsel's assertions and questions.
- Records 24, 25, 26, 27, 28, 30, 43 and 44 were created for the dominant purpose of preparing for ongoing litigation with the appellant [a specific lawsuit]. These records include a briefing prepared by an LHSC employee for LHSC's internal legal counsel to assist in preparing a response to the appellant's counsel's assertions; discussions of draft correspondence with the appellant's counsel to address issues raised in the litigation; and communication about jurisprudence relevant to the litigation. But for the ongoing litigation, these records would not have been created. In addition to being exempt from disclosure under solicitor-client communication privilege, they are also exempt from disclosure under litigation privilege.
- Records 6, 10, 11, 29, 31, 32, 35, 36, 39, 40, 41 and 42 are repetitions of records that are included elsewhere in the withheld records, due to their inclusion in subsequent email threads.
- Records 18, 19, 43 and 44 are privileged records that involve communication with LHSC's insurer. LHSC and the insurer have a common interest in responding to the legal claims brought by the appellant against LHSC. These two parties stand alongside each other in "selfsame interest" and together, they receive legal advice from LHSC's external counsel. The common interest principle extends privilege to these communications which involve the insurer.

[45] The appellant submits that the records form a part of his health care records and are not protected by any privilege. He states that LHSC's internal and external counsel are not acting as solicitors, they are acting as the lead decision makers and influencers of his health provider team influencing his access to care, his access to my patient rights, his security of the person, his ability to consent, and his supports to live. He states:

LHSC's internal and external counsel are influencing how I am treated, what access to information I have about my treatment, what staff does to me, and determining my treatment and care access. I have rights as a patient to be fully informed of all decisions made about my treatment and

care and access, who is involved, and why all involved in those decisions acted or advised each other how to treat me. LHSC's internal and external counsel are also interfering with the elements required for my consenting to treatment by instructing staff to not fully inform me regarding who is making decisions about my treatment, why, and prohibiting my knowledge of all options...

Further, the method of solicitors determining and influencing my treatment and access to care violates my rights under the Health Care Consent Act. LHSC's solicitors have a conflict of interest to not provide me with proper treatment so that I am unable to advocate for myself and unable to carry out my legal actions. LHSC's internal and external counsel also have a conflict of interest to exploit me by way of abuse, discrimination and neglect to coerce their desired outcome for me to benefit themselves and their clients.

Findings

[46] I will consider first whether the common law solicitor-client communication privilege ("subject to solicitor-client privilege") in branch 1 applies.

[47] If branch 1 common law solicitor-client communication privilege applies, it is unnecessary for me to also consider whether branch 1 litigation privilege or branch 2 also apply. This is because to establish that information is exempt under section 19, it is only necessary to establish one type of privilege.

[48] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.¹³ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.¹⁴ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.¹⁵

[49] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹⁶ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.¹⁷

[50] As referred to in LHSC's representations, the appellant initiated a court action against LHSC seeking damages related to his care as a patient at LHSC. All of the

¹³ Orders PO-2441, MO-2166 and MO-1925.

¹⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

¹⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

records at issue post-date the initiation of the court action and reveal legal advice being sought from internal and external counsel by LHSC staff related to this litigation and the appellant's care at LHSC as it relates to the litigation.

[51] I have considered the appellant's arguments about the role or function being carried out by the LHSC's legal counsel. I find that they are acting in a solicitor role on behalf of LHSC and are providing legal advice to LHSC staff.

[52] I find that all of the records at issue are subject to branch 1 solicitor-client communication privilege as they consist of legal advice being sought or given resulting from the appellant's court action against LHSC. These emails and attachments were exchanged between LHSC's staff and its external or internal legal counsel or are internal LHSC emails that contain information that, if disclosed, would reveal the legal advice sought or provided by the external or internal counsel to LHSC staff.

[53] Although all the records for which section 19 has been claimed contain information about the appellant's health care at LHSC, they are all subject to section 19 as they all contain solicitor-client communication privileged information within the meaning of section 19(a).

[54] All of the records at issue are direct communications of a confidential nature between a lawyer employed or retained by LHSC, internal or external counsel, and their client, the LHSC staff, made for the purpose of obtaining or giving legal advice. They are solicitor-client communication privileged (branch 1) communications and are, therefore, subject to section 19.

[55] Considering the evidence provided by the LHSC about the identity of the recipients of the emails, I have no reasonable basis to conclude that privilege has been lost through waiver. I have reached this conclusion as well in relation to a sub-set of records that involve the LHSC's insurer: records 18, 19, 43 and 44.

[56] Records 18, 19, 43 and 44 are emails that include LHC's external and internal counsel and LHSC's insurer. Generally, disclosure to outsiders of privileged information is a waiver of privilege.¹⁸ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁹

[57] I agree with LHSC that LHSC and its insurer have a common interest in responding to the legal claims brought by the appellant against LHSC. I find that the privilege in records 18, 19, 43, and 44 has not been lost through waiver as the insurer has a common interest with LHSC. Together, in these emails, LHSC and the insurer receive legal advice from LHSC's external counsel. I agree with LHSC that the common interest principle extends privilege to these communications which involve the insurer and that these records are also privileged under the branch 1 common law solicitor-

¹⁸ 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.).

¹⁹ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

client communication privilege.

[58] Therefore, I find that all of the emails and attachments at issue are exempt under section 49(a), read with section 19, as they contain confidential solicitor-client communication privileged information. I will consider the LHSC's exercise of discretion below under Issue E.

Issue C: Should I consider the LHSC's claim that the discretionary exemption for advice or recommendations at section 49(a), read with section 13(1) applies to records 13 and 14?

[59] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[60] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.²⁰

[61] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.²¹ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.²²

[62] The parties were asked to consider the following:

1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions. If so, how? If not, why not?

²⁰ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); see also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

²¹ Order PO-1832.

²² Orders PO-2113 and PO-2331.

2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal. If so, how? If not, why not?
3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process be compromised in any way? If so, how? If not, why not?

Representations

[63] Only LHSC provided representations on whether it should be allowed to raise section 13(1) late to records 13 and 14 which are emails contained in a single page of records.

[64] LHSC states that, as the appellant had not yet been invited to provide representations at the time it raised section 13(1), raising an additional discretionary exemption at this stage in the inquiry will not necessitate seeking additional representations from LHSC or the appellant, beyond what has now been provided or would have otherwise been provided.

[65] LHSC submits that the late raising of the discretionary exemption will not prejudice the appellant by delaying the issuance of the order in this matter.

Findings

[66] Based on my review of records 13 and 14 and LHSC's representations, I have decided to consider LHSC's claim that section 49(a), in conjunction with section 13(1), applies to records 13 and 14. Each of these records contain one short email.

[67] I find that the appellant has not been prejudiced by the late raising of this discretionary exemption. He was aware already that these two emails had been subject to an exemption claim (sections 49(a) with 19), and in this inquiry he had an opportunity to provide representations in response to the section 49(a), read with section 13(1), claim at the same time he provided representations on the remaining issues in this appeal.

[68] I find that LHSC will be prejudiced in not being allowed to the claim the section 49(a), read with section 13(1), discretionary exemption in the circumstances of this appeal. I note that LHSC has withdrawn its claim of section 49(a), read with section 19, to records 13 and 14, and if not allowed to make this late claim of section 13(1), these two records would have to be disclosed without a consideration of whether they are exempt.

[69] In conclusion, I find that the integrity of the appeals process will not be compromised in any way by the late raising of section 13(1). I will, therefore, consider the application of section 13(1), (with section 49(a), as records 13 and 14 contain the appellant's personal information).

Issue D: Does the discretionary exemption at section 49(a) (discretion to refuse access to the requester's own personal information) with the advice or recommendations section 13(1) exemption apply to records 13 and 14?

[70] As set out above, section 49(a) reads:

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.

[71] As discussed above, LHSC asserts that section 13 applies to records 13 and 14. Section 13(1) reads:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[72] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²³

[73] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[74] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²⁴

[75] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[76] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

²³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

²⁴ See above at paras. 26 and 47.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.²⁵

[77] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.²⁶

[78] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information²⁷
- a supervisor's direction to staff on how to conduct an investigation²⁸
- information prepared for public dissemination.²⁹

[79] Section 13(2) sets out certain exceptions to section 13(1), which I will describe further below.

Representations

[80] LHSC submits that portions of records 13 and 14 contain the recommendation of a public servant employed by LHSC, as well as information that would reveal the recommendation.

[81] It states that records 13 and 14 contain a recommendation from LHSC's Director of Communications, who recommends a particular course of action to be taken by the hospital, and seeks input from a colleague on the proposal, showing that they were engaged in a deliberative process.

[82] The appellant did not provide representations on section 13(1).

Findings

[83] As indicated, records 13 and 14 each consist of one short email. Record 13 is an

²⁵ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

²⁶ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

²⁷ Order PO-3315.

²⁸ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

²⁹ Order PO-2677.

email that responds to record 14.

[84] Record 14 contains a recommendation relating to a suggested course of action that will ultimately be accepted or rejected from LHSC's Director of Communications to a LHSC staff member. Record 13 contains advice on the recommendation in record 14 to another LHSC staff member. The communications in records 13 and 14 are, on their face, a recommendation and advice of the nature contemplated by section 13(1).

[85] I find, therefore, that both records 13 and 14 contain advice or recommendations given by a public servant, LHSC staff members to other LHSC staff members.

[86] In reaching this conclusion, I determined that none of the exceptions in section 13(2) apply. In making this finding, I have particularly considered the exception that has relevance to the present appeal is 13(2)(a), factual material. Based on my review of the content of the emails at issue, I find they do not consist of factual material that could reasonably be severed from the advice or recommendations described above.

[87] For the above reasons, I find that section 49(a), read with section 13(1), applies to both records 13 and 14 and these records are exempt. I will consider the LHSC's exercise of discretion below.

Issue E: Did LHSC exercise its discretion under section 49(a) with sections 13(1) and 19? If so, should I uphold the exercise of discretion?

[88] The section 49(a) exemption, read with sections 13(1) or 19, 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, I may determine whether the institution failed to do so.

[89] In addition, I 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
- it fails to take into account relevant considerations.

[90] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁰ I may not, however, substitute its own discretion for that of the institution.³¹

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

³⁰ Order MO-1573.

³¹ Section 54(2).

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
- the historic practice of the institution with respect to similar information.

Representations

[92] LHSC states that it is aware that the fundamental purposes of the *Act* are that information should be available to the public, and individuals should have a right of access to their own personal information – with exemptions from the foregoing being limited and specific.

[93] LHSC states that in invoking the discretionary exemption available under section 49(a), LHSC considered the purposes of the *Act*, and also the nature of the information and the extent to which it is significant and/or sensitive to the institution or to the appellant. It states:

As noted above, the records at issue relate to legal proceedings initiated by the appellant against LHSC. ...LHSC's reliance on section 49(a) in

³² Orders P-344 and MO-1573.

conjunction with section 19 is fully consistent with the interests that the exemption seeks to protect.

The broad rationale for solicitor-client communication privilege is to ensure that a client may confide in their lawyer on a legal matter without reservation...

In this case, disclosure of privileged information to the appellant would likely restrict candid and frank communication between LHSC and its counsel moving forward and would prejudice LHSC's legal position in ongoing litigation.

...LHSC's reliance on section 13(1) is consistent with the interests that the exemption seeks to protect. The rationale for that exemption is to create space in which LHSC personnel can freely advise and make recommendations within the deliberative process of decision-making.

LHSC also considered whether disclosure of the records would increase public confidence in the operation of the hospital and concluded that it would not, particularly given the broad public media coverage of the ongoing litigation.

LHSC is committed to providing individuals, including the appellant, with access to their sensitive personal information. The 95 pages of documents that were disclosed to the appellant are responsive to the appellant's compelling need to access information relating to charges he incurred while at LHSC, discussions of his discharge from the hospital, his move from a private to a semi-private room, and discussions surrounding his care plan.

LHSC has made good faith efforts to sever information exempted from disclosure in a reasonable way so that the records that are responsive to the Appellant's request and which do not contain privileged information or other exempt information have been disclosed to the appellant.

[94] The appellant did not provide representations on LHSC's exercise of discretion; instead, as noted above, he focuses on how he was treated at LHSC.

Findings

[95] Based on my review of LHSC's representations and the information that I have found to be exempt under section 49(a), read with sections 13(1) or 19(1), I find that LHSC exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[96] I am satisfied that LHSC balanced the appellant's interests in the disclosure of the records with the importance of the solicitor-client privilege and the advice or

recommendations exemptions. I also note that LHSC disclosed numerous records to the appellant and considered that the appellant has not, in my view, provided a sympathetic or compelling need to receive the information at issue, which are either emails and attachments exchanged between LHSC and its legal counsel or emails that contain advice or recommendations.

[97] Accordingly, I uphold the LHSC's exercise of discretion. Therefore, as all of the records at issue are exempt, I dismiss the appeal.

ORDER:

I uphold LHSC's decision to deny access to the records at issue.

Original Signed By: _____

Diane Smith
Adjudicator

September, 12, 2022 _____