

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4308

Appeal PA20-00107

Hamilton Health Sciences

September 28, 2022

Summary: The appellant sought access from Hamilton Health Sciences (HHS) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to records related to the decision to decommission its Forensic Pathology Unit. HHS claimed that some of the information is excluded from the *Act* under the exclusion in section 65(6)3 (labour relations and employment records) of the *Act* and withheld it on that basis. It also relied on the exemption in section 21(1) (personal privacy) to deny access to the withheld information. HHS also claimed that certain information was non-responsive to the request. During the appeal, the appellant claimed the application of the public interest override at section 23.

In this order, the adjudicator upholds HHS' decision that some of the withheld records are excluded from the *Act* by section 65(6)3. He also upholds HHS' decision that the records are exempt under section 21(1), in part, and finds that some of the information is not personal information and orders HHS to disclose it. The adjudicator finds that some of the information identified as not responsive, is responsive to the request and orders HHS to issue a new access decision for this information. Finally, for the limited information found exempt under section 21(1), the adjudicator finds that there is no compelling public interest in its disclosure.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1) (definition of "personal information"), 21(1), 23 and 65(6)3.

OVERVIEW:

[1] Hamilton Health Sciences (HHS) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

Any information related to the wind-down and closure of the Hamilton Forensic Pathology Unit in 2019-20 including:

1. The decision by the applicable official or organization to close the Hamilton Forensic Pathology Unit, including any decision to terminate, not renew or suspend any contracts or funding arrangements pertaining to the Hamilton Forensic Pathology Unit;
2. The decision by the applicable official or organization* to not reconsider or overturn the decision to wind down or close the Hamilton Forensic Pathology Unit;
3. Any documents, records, reports or correspondence related to the decisions described in paragraphs 1 or 2.

The appellant specified that the term "organization" included the following: "Applicable public official or organization" may include the Chief Forensic Pathologist for Ontario, the Chief Coroner for Ontario, the Ministry of Community Safety and Correctional Services, the Ministry of the Solicitor General, the Ministry of Health, the Death Investigation Oversight Council and/or Hamilton Health Sciences.

[2] The request was received from the representative of a union affected by the closure of the Forensic Pathology Unit.

[3] Following a fee estimate, two time extensions, third party notification and the payment of the final fee, HHS provided the requester with partial access to the responsive records. HHS took that position that certain records were excluded from the *Act* by section 65(6)3 (labour relations or employment matters exclusion). It also claimed that portions of records were exempt from disclosure under sections 13(1) (advice or recommendations), 18(1)(c), (e), (f), (g) (economic or other interests) and 21(1) (personal privacy). HHS also stated that some information was withheld as it is not responsive to the request.

[4] The requester, now the appellant, filed an appeal of HHS' decision with the Information and Privacy Commissioner of Ontario (the IPC).

[5] A mediator was assigned to explore the possibility of resolving the appeal. During mediation, HHS clarified its position concerning the information withheld from disclosure. It also identified one duplicate record. The appellant confirmed that it was not seeking access to the duplicate record. Accordingly, record A19 was removed from the scope of the appeal.

[6] The appellant also confirmed that it was not seeking access to the page numbers and the name of the individual who printed the records which is contained on some of the records at issue. As a result, the page numbers and the name of the individual who

printed the document (located at the top left corner of those records) are also not within the scope of this appeal. The appellant advised that, with the exception of the page numbers and name of the individual who printed the document, it is seeking access to the information removed as not responsive and to the information denied pursuant to sections 13(1), 18(1)(c), (e), (f), (g), 21(1) and 65(6)(3) of the *Act*.

[7] Also, during mediation, the appellant raised the possible application of section 23 (public interest override). As these issues could not be resolved at mediation, the file was transferred to the adjudication stage of the appeal procedure. The original adjudicator assigned to this appeal invited representations from HHS and the appellant which were received and shared according to the IPC's *Code of Procedure*. The adjudicator invited HHS to provide reply representations after sharing the appellant's representations, but HHS declined, instead referring to its earlier submission. The file was then assigned to me to continue the adjudication of the appeal. After I reviewed the file, I decided to invite affected parties to provide representations on information HHS claimed as personal information. Some affected parties provided representations on this issue.

[8] In this order, I uphold HHS' decision that certain records are excluded from the *Act* by section 65(6)3. I partially uphold HHS' decision under section 21(1). I find that some of the information marked as non-responsive is responsive to the request, and I order HHS to issue another access decision to the appellant regarding it. I find that section 23 does not apply to override the application of section 21(1) to the information I found exempt on that basis.

RECORDS:

[9] HHS provided an index of records, which was shared with the appellant, and is reproduced in the Appendix to this order. There are 26 records at issue in this appeal which were all partially withheld from the appellant, consisting of emails, letters, minutes and briefing notes.

ISSUES:

- A. Does section 65(6)3 exclude some of the records from the *Act*?
- B. What is the scope of the request? What records are responsive to the request?
- C. Does the records for which HHS claims that section 21(1) applies contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory exemption at section 21(1) apply to the information at issue?

- E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

Issue A: Does section 65(6)3 labour relations and employment records exclusion exclude some of the records from the *Act*?

[10] HHS claims that the exclusion for labour relations and employment records in section 65(6)3 applies to exclude the withheld portions of records A3, A4, A10, A13-A18, B3, B4 and B8 from the *Act*. This section states:

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.

[11] If the exclusion applies, this would mean that the *Act* does not apply to the information and the appellant has no right of access to the information under the *Act*.

[12] 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*.

[13] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is “some connection” between them.¹

[14] The “some connection” standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution’s expenditures on legal and other services in collective bargaining negotiations is not enough to meet the “some connection” standard.²

[15] The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of “labour relations” is not

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

² Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

restricted to employer-employee relationships.³

[16] The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁴

[17] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁵

[18] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.⁶

[19] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees’ actions.⁷

[20] For section 65(6)3 to apply, HHS 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 the institution has an interest.

Representations

[21] HHS submits that the records to which it applied section 65(6)(3) relate to matters about its employees, including terms and conditions of employment, more particularly:

Record A3 is a briefing note entitled “Impact to Forensic Pathology Unit: HR Considerations” prepared by HHS’ employee & labour relations lead

³ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

⁴ Order PO-2157.

⁵ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁷ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

Record A4 is an email from the executive director of the Hamilton Regional Laboratory Medicine Program ("Program") concerning timing of the notification to affected staff about the winding down of the unit

Record A10 consists of minutes prepared by HHS of a meeting of senior staff and leadership of the unit, including the employee & labour relations lead, documenting discussions of human resources issues including notification, notice and other communications to staff and other transition related issues

Record A13 consists of correspondence between the HHS employee and labour relations lead and the executive director of the program addressing the next steps in relation to staff who would be impacted by the unit's decommissioning

Record A14 consists of minutes prepared by HHS of a meeting of senior staff and leadership of the unit, including the employee & labour relations lead, documenting human resources issues including notice given to staff of the unit, the notice requirement for unionized and non-unionized staff, and transition planning, staffing and professional staff impacts

Record A15 consists of notes prepared by HHS of a meeting of the unit pathologists, unit leadership and the employee and labour relations lead with the chief forensic pathologist for Ontario about employment opportunities for staff, workload, and related issues

Record A16 consists of minutes prepared by HHS of a meeting of senior staff and leadership of the unit, including HR staff, documenting human resources and labor relations issues, including notification and obtaining and relaying information about job opportunities for staff

Record A17 consists of minutes prepared by HHS of a meeting of senior staff, leadership, pathologists and other staff members to gauge staff welfare after the announcement of the decommissioning of the unit, and to discuss the timeline, workload, severance, retirement and staff compensation

Record A18 consists of correspondence between HHS staff regarding a communications strategy that includes notification and the initiation of the HR related processes arising out of the winding down and decommissioning

Record B3 consists of an email from the executive director of the Program to HHS HR staff and others regarding notice of the decision to wind down and decommission the unit and the HR implications for HHS

Record B4 consists of a briefing note prepared by HHS on a meeting with the chief forensic pathologist for Ontario, which includes a discussion of HR matters including workload, recruitment and performance

Record B18 consists of emails between HHS staff regarding the employees who would be impacted by the decommissioning, including a description of the status (full time, part time, on leave) of named staff members and related administrative and financial issues

[22] HHS submits that part 1 of the test is met because it prepared and maintained the records claimed to be excluded.

[23] It also submits that parts 2 and 3 of the test are met because the information was prepared, maintained and used in relation to: internal meetings; meetings with applicable public officials; internal consultations; as well as discussions and communications about the impact on staff and HHS of the decision to wind down and decommission the unit. The HHS submits that the records include: the number and names of affected staff members; communications with staff; discussions regarding employment opportunities for staff; advice regarding the obligations of HHS under employment legislation; and associated impacts on HHS of the decommissioning.

[24] HHS submits that the information is about employee and labour relations matters in which it has an interest, including a financial interest and an interest relating to the impact on its reputation and relations with staff. It submits that the winding down and decommissioning of the unit had profound implications for HHS, including the loss of respected and significant functions and services to the community. It submits that HHS HR personnel had a key role in planning for the wind down and decommissioning which included providing advice on the human resources, corporate culture and cost implications for HHS.

[25] The appellant submits that in assessing the basis for the section 65(6) exclusion (as well as the section 13 exemption, which HHS claimed in the alternative), the IPC should consider the extent to which the appellant, being the union, is entitled to the information of this nature under the relevant collective agreement. I do not have the authority to assess that matter in the appeal before me, which addresses access rights under the *Act*. Any rights pursuant to the collective agreement are for another forum.

[26] I will now address whether the records are excluded from the *Act* under section 65(6)3.

Analysis and finding

Part 1: collected, prepared, maintained or used

[27] Based on my review of the records and HHS' representations, I find that the records at issue, which are briefing notes, minutes, correspondence, notes, and emails,

were collected, prepared, maintained or used by HHS. As a result, the first part of the test for exclusion under section 65(6)3 is met.

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

[28] In order for the exclusion to apply, the record must be in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which HHS has an interest.

[29] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition⁸
- an employee's dismissal⁹
- a grievance under a collective agreement¹⁰
- a "voluntary exit program"¹¹
- a review of "workload and working relationships"¹²

[30] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review¹³
- litigation in which the institution may be found vicariously liable for the actions of its employee.¹⁴

[31] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.¹⁵

[32] The records collected, prepared maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to

⁸ Orders M-830 and PO-2123.

⁹ Order MO-1654-I.

¹⁰ Orders M-832 and PO-1769.

¹¹ Order M-1074.

¹² Order PO-2057.

¹³ Orders M-941 and P-1369.

¹⁴ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

¹⁵ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

employees' actions.¹⁶

[33] The IPC has consistently taken the position that the application of section 65(6)¹⁷ is record-specific and fact-specific. This means that when determining whether the exclusion applies, I must examine the record as a whole rather than looking at individual pages, paragraphs, sentences or words. This whole record method of analysis has also been described as the "record by record approach".¹⁸

[34] As noted above, relying on the exclusion in section 65(6)3, HHS has severed portions of records A3, A4, A10, A13-18, B3, B4 and B18. Because the application of the exclusion must be decided in relation to an entire record, I have examined each record at issue as a whole. I find that each of the records at issue is about employment-related matters related to the decommissioning of the unit by HHS for the purpose of part 3 of the test for exclusion under section 65(6)3. I also find that HHS has an interest, as the employer, in the employment-related matters discussed in the records.

[35] I agree with HHS that each record, as a whole, is about employment-related matters, such as:

- the notification and timing to affected staff about the decommissioning
- the next steps in relation to staff who would be impacted by the decommissioning
- the welfare of staff following the announcement and discussion of timeline, workload, severance, retirement and staff compensation
- a communication strategy, including notification and the initiation of HR related process arising out of the decommissioning
- the employment of affected staff who would be impacted by the decommissioning
- the transition of some staff and recruitment of other staff
- other communications and transition-related issues affecting staff concerning the decommissioning

[36] Based on my review of the records as a whole and the HHS' representations, I find that they were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about the staff implications of the decommissioning of HHS' Forensic Pathology Unit. In my view, these communications are about matters in which HHS has an interest as employer. Therefore, I find that the

¹⁶ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

¹⁷ And its municipal counterpart in section 52(3) of *MFIPPA*.

¹⁸ See, for example, Orders M -352, MO-3798-I, MO-3927, MO-3947, MO-4071, PO-3642 and PO-3893-I.

records that HHS claims to be excluded from the *Act* are excluded under section 65(6)3, subject to my review of the exceptions in section 65(7).

[37] If the records fall within any of the exceptions to section 65(6) that are found in section 65(7), the *Act* applies to them. Section 65(7) states:

This *Act* applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[38] The parties do not address section 65(7) specifically in their representations. However, paragraphs 1 to 3 of section 65(7) refer to agreements. None of the records are agreements. Nor are any of the records expense accounts as referred to in the fourth paragraph of section 65(7). I find that none of the exceptions apply in this appeal.

[39] As noted, the appellant submits that in assessing the basis for the exclusion, I should consider the extent to which it is entitled to information of this nature pursuant to the relevant collective agreement. In my view, that is not a proper consideration when assessing the application of the exclusion under the *Act*. If the appellant is of the view that it is entitled to the information under its collective agreement with HHS, then it should exercise that right outside of the access to information scheme of the *Act*.

[40] Accordingly, I find that records A3, A4, A10, A13-18, B3, B4 and B18 are excluded from the *Act* under section 65(6)3. As a result, the appellant has no right of access under the *Act* to the portions of these records that HHS withheld under section 65(6)3. HHS has disclosed portions of these records outside of the scheme of the *Act*, which it is entitled to do, but since the records are excluded from the *Act*, I have no authority to order the HHS to disclose further information in them. Since I have found that this exclusion applies, I do not need to assess HHS's claims in the alternative that the exemptions in sections 13(1) and section 18(1) apply.

Issue B: What is the scope of the request? What records are responsive to the request?

[41] HHS has withheld records or parts of records on the basis that they are not responsive to the request. Following my finding on the application of the exclusion, the following records remain at issue: A1, A2, B1, B2, B6, B7, B11, B16 and B17. Section 24 of the *Act*, which imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records states, in part:

1. A person seeking access to a record shall,
 - a. make a request in writing to the institution that the person believes has custody or control of the record;
 - b. provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

. . .
2. If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[42] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹⁹

[43] To be considered responsive to the request, records must "reasonably relate" to the request.²⁰

Representations

[44] HHS submits that certain portions of the records are not responsive to the request, more particularly, records relating to the impact of the closure of the unit on the academic programs in pathology at HHS and McMaster University. It submits that it confirmed its understanding of the request with the appellant by correspondence where it stated:

HHS does not interpret the scope of the Records to include records relating solely to academic programs in pathology at McMaster or the impact of the decision to decommission the Unit on those programs. HHS also does not agree that the Records include documents relating to the

¹⁹ Orders P-134 and P-880.

²⁰ Orders P-880 and PO-2661.

personal views of individual HHS employees on the decision. As indicated on the index, the Records consist of correspondence on behalf of HHS and McMaster with public officials and organizations having authority over forensic pathology services in Ontario and documents evidencing the decision to decommission the Unit as well as attempts by HHS and McMaster to have that decision reconsidered and reversed. HHS has not included as Records emails merely used to deliver or forward Records.

[45] HHS submits that it gave the appellant the opportunity to clarify the scope of its request and made clear its understanding of the request, which, it submits, was not refuted by the appellant.

[46] The appellant submits that HHS' description of the scope of its request is unduly narrow. The appellant submits that it clarified, in its correspondence following HHS' disclosure of the information, that the request sought "any information related to the wind-down and closure of the Hamilton Forensic Pathology Unit in 2019-2020," which it submits is a broad request and could not reasonably be taken to exclude information concerning the impact of the closure of the Hamilton FPU on academic pathology programs at McMaster. The appellant also submits that given its request it also could not reasonably be taken to exclude the "personal views of HHS employees" to the extent that HHS is referring to statements made by individuals in a business, professional or official capacity as opposed to a private context.

[47] As noted, HHS declined to provide reply representations when invited.

Analysis and finding

[48] The appellant's request sought "any information related to the wind-down and closure of the Hamilton Forensic Pathology Unit." The appellant relies on its request and the letter sent after receiving HHS' response where HHS disclosed records and explained why it withheld specific information as not responsive. After reviewing the appellant's letter, it is clear that the appellant sought information that HHS believed was outside of the scope of the request. The appellant clarified in its letter to HHS that the scope of the request was broad and cannot reasonably be taken to exclude information concerning the impact of the closure of the unit on academic programs at McMaster. The appellant also clarified in the letter to HHS that the request also includes "personal views of HHS employees" to the extent that the statement is made by individuals in a business, professional or official capacity.

[49] I find that the information HHS has severed from records A1, parts of A2 and B12 on the basis of non-responsiveness is not actually responsive to the appellant's request. The information at issue in record A1 is not related to the wind-down of the unit, some of the information at issue in record A2 relates to scheduling and the information at issue in record B12 is acknowledging receipt of an email.

[50] There are five excerpts in record A2 that HHS claims in not responsive to the request. After reviewing this information, I agree that the first, fourth and fifth excerpts relate to scheduling and are not responsive to the request. The second and third excerpt, however, relate to training and the closure of the unit and is responsive to the request. I will order HHS to issue another access decision regarding this information.

[51] In my review of the withheld information in records A2, B1, B2, B6, B7, B11, B16 and B17, I find that the information is responsive to the request because although they relate to training, they are also related to the closing of the unit. I find that HHS' interpretation of the scope of the request in regard to this information was unduly narrow and I will order HHS to issue another access decision regarding this information.

Issue C: Do the records for which HHS claims that section 21(1) applies contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[52] Many of the records that HHS claims exempt under the mandatory personal privacy exemption in section 21(1), I have found to be excluded under the *Act* by section 65(6)3. The remaining records at issue are records A1, A2, A5, A11, B8 and B16.

[53] As section 21(1) can only apply to records that contain personal information, I need to determine whether the records contain "personal information" and, if so, to whom it relates. That term 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;

[54] 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.²¹

[55] 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.²²

[56] 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.²³

[57] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²⁴

Representations

[58] HHS submits that the winding down and subsequent decommissioning of the unit raised a number of HR issues, consultations and discussions which required the compiling and exchange of personal information relating to: the employment history of staff members; the personal opinions of staff members; unit leadership and senior staff; and performance and other employment-related information about staff including disability leaves. HHS submits that staff members are identified by name in some of the records. It submits that the information withheld pursuant to the mandatory exemption in section 21(1) explicitly "reveals something of a personal nature about the individuals to whom it relates." HHS submits that this information is not the type of information that it makes public, but rather information that it protects as personal information, as

²¹ Order 11.

²² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

²³ Orders P-1409, R-980015, PO-2225 and MO-2344.

²⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

outlined in its internal policies.

[59] The appellant asks that I consider whether the records truly contain “personal information,” in the sense of being information about an identifiable individual made in their personal capacity. It submits that the written or oral statements made by individuals in their professional, official or business capacity are not personal opinions and do not reveal “personal information” within the meaning of section 21(1).

Analysis and finding

[60] From my review of the withheld information that HHS claims is personal information in the records, I find that some portions of all of the records contain the personal information of affected parties. The affected parties’ names (in some instances) and other information about them falls within the ambit of paragraphs (a), (b), (d), (e) and (h) of the definition of personal information set out in section 2(1) of the *Act*. However, for some of the information claimed as personal, I find that it is information associated with an individual in their professional capacity, for the following reasons.

[61] Information associated with an individual in their professional capacity is not normally considered to be their personal information under the *Act*. In Order PO-2225, the adjudicator set out the following two-step test for distinguishing between personal and professional information:

[T]he first question to ask ... is: “in what context do the names of the individuals appear”? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? ...

The analysis does not end here. I must go on to ask: “is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual”? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[62] This two-step test has been consistently adopted and applied in IPC jurisprudence and I agree with the test and adopt it here.²⁵

[63] HHS has identified four excerpts in record A1 marking them as personal information. It is apparent that the first excerpt contains the personal information of an affected party because although it appears in a business context, disclosure would reveal something of a personal nature about the individual. However, the remaining three excerpts in this record are not personal information as this information is

²⁵ See, for example, Orders PO-3617, PO-3960-R, and MO-3449-I. See also *Ontario Medical Association v. (Ontario) Information and Privacy Commissioner*, 2018 ONCA 673.

associated with an individual, or individuals, in their professional capacity and disclosure would not reveal something of a personal nature about the individual(s). I find this information does not qualify as personal information of an individual.

[64] HHS has identified 2 excerpts in records A2 as containing the personal information of affected parties. However, in my review of the first excerpt, I do not agree that this is personal information because it is not inherently personal to the affected party and it appears in a professional context. I find this information does not qualify as personal information of an individual. The second identified excerpt contains a personal phone number of an affected party and I agree that it is this individual's personal information.

[65] I agree that the two charts that appear in record A5 contain personal information of affected parties as they refer to the employment history of affected parties and disclosure would reveal something of a personal nature about these individuals.

[66] HHS had identified some contact information relating to a news reporter as personal information in record A11. This affected party provided representations in this appeal, consenting to the release of any of her personal information, although, she questions if the record would contain any. In my review of the information severed from record A11, I find that the information is not personal because it appears in a business context. I find this information does not qualify as personal information of an individual.

[67] In record B8, HHS has severed the names of recipients of an email that was disclosed to the appellant. It submits that the names are personal information but does not specifically address this severance in its representations. In my review of this information, it appears that most of the recipients in this email are employees of HHS who have been contacted in this appeal process and invited to provide representations concerning whether the records contain their personal information. Although most of these individuals did not provide representations, in this instance the names appear in a professional context and disclosure would not reveal anything that is inherently personal. I find that these names, as they appear in the record, do not qualify as personal information of an individual.

[68] As noted, HHS disclosed most of this email (record B8) to the appellant, however, there are six severances, in the body of the email, that HHS has claimed contain the personal information of affected parties. In reviewing these severances, I do not agree that the first three consist of personal information as HHS submits. The name of the person who the email is addressed to is an employee at HHS and the email relates to the subject matter of the request. This individual was contacted and invited to provide representations in this appeal, but did not do so. In my view, this letter relating to the closure of the unit, concerns a professional matter and disclosing the affected party's name will not reveal something of a personal nature about her. I also find the next two severances in this record (the remaining severances on the first page

of the record) are not personal information. The first of these severances names who was at a meeting and HHS has not specifically explained how this constitutes personal information. I find that these names appear in a professional context and disclosure would not reveal anything that is inherently personal. The second of these two severances is also information that appears in a professional context and in my view would not reveal anything that is inherently personal. I find this information does not qualify as personal information of an individual.

[69] However, the remaining information severed in this record (the three severances on the second page), consists of information that qualifies as the personal information of the affected parties. After reviewing this information, although it appears in a professional context, I find that if disclosed it would reveal something of a personal nature about an identifiable individual. The final severance on this page is the affected party's personal cell number and is the personal information of an affected party.

[70] Finally, HHS has severed information as exempt under section 21(1) in record B16. However, after reviewing this information, although I agree that what is severed, in all three instances, is an opinion, it appears in a professional context and disclosure of any of this information would not reveal something of a personal nature about an affected party. I find this information does not qualify as personal information of an individual.

[71] For all the withheld information that I have found not to qualify as the personal information of an identifiable individual, I will order HHS to disclose this information as no other mandatory exemptions would apply to it and no discretionary exemptions were claimed for this information.

Issue D: Does the mandatory exemption at section 21(1) apply to the information at issue?

[72] Given my finding, above, I must now review HHS' claim that section 21(1) applies to the personal information at issue in records A1 (first excerpt only), A2 (second excerpt), A5 and B8 (page 2 only). Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[73] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[74] If the information fits within any of paragraphs (a) to (e) of section 21(1) or paragraphs (a) to (d) of section 21(4), it is not exempt from disclosure under section 21. The personal information at issue in records A1 (first excerpt only), A2 (second

excerpt), A5 and B8 (page 2 only) does not fit within these paragraphs of section 21(1) or 21(4).

[75] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[76] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[77] HHS did not provide record-specific representations on section 21(1), but it submits, generally, that the presumptions against disclosure in sections 21(3)(d) (employment history) and 21(3)(g) (personal recommendations) apply. These sections read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(d) relates to employment or educational history;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations.

[78] Regarding the application of the presumptions in this appeal, HHS states:

21(3)(d): employment or educational history. The redacted information includes but is not limited to information which reveals years of service, work status (full-time, part-time on leave) as well as individual's rights and entitlement under employment legislation and contracts.

21(3)(g): personal recommendations. There is performance related and other information that directly or by inference speaks to the evaluation of identified staff members.

[79] The appellant's representations concerning personal information were limited to challenging if the information qualified as personal information.

Analysis and finding

[80] For the severed information in record A5, I find that the presumption at section 21(3)(d) applies. As noted, this record contains personal information of affected parties, referring specifically to their employment history with HHS. Based on my review, I find that disclosure of the withheld information is presumed to constitute an invasion of the affected party's personal privacy.

[81] After reviewing the remaining withheld personal information, I find that section

21(3)(d) and (g) presumptions do not apply to the affected party's personal view (record A1 and B8) and a personal cell phone number (record A2 and B8). In its representations, HHS submits that a number of factors under section 21(2) apply to the withheld personal information. The appellant did not address any factors that support disclosure of the information and in my review of the information, I find that none of the factors favouring disclosure applies to the withheld information. However, given the withheld information in these two records, I find that section 21(2)(h) (supplied in confidence) applies.

[82] As I have found that section 21(3)(d) applies to the information at issue in record A5, disclosure of the information is presumed to be an unjustified invasion of personal privacy and thus this information is exempt under section 21(1). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.²⁶

[83] I have also found that that the factor at section 21(2)(h) applies to the withheld information in records A1, A2 and B8 and that no factors apply supporting disclosure of this information. Therefore, I find that the personal information is exempt under section 21(1). I will consider below whether the public interest override in section 23 applies to the exempt personal information in records A1 (first excerpt only), A2 (second excerpt), A5 and B8 (page 2 only).

Issue H: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

[84] I found above that the mandatory personal privacy exemption in section 21(1) applies to the information at issue in records A1 (first excerpt only), A2 (second excerpt), A5 and B8 (page 2 only).

[85] I will now consider whether the public interest override in section 23 applies to override the application of the relevant exemptions to these records. Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[86] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[87] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of

²⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.²⁷

Representations

[88] The appellant submits that in assessing the nature and extent of the public interest in this case, it is important to consider the context for the request. The records at issue pertain to the closure of the Hamilton Forensic Pathology Unit ("FPU") and the transfer of its functions to Toronto. The appellant submits that the closure has had an impact on forensic pathology services in Hamilton and surrounding regions, with consequences for the criminal justice system and victims' families. The appellant submits that the timing of the decision, coming on the heels of complaints against the chief forensic pathologist and chief coroner from the former director of the Hamilton FPU, raised concerns about the integrity of the decision-making process. The appellant notes that it has spoken publicly about these concerns, and together with the NDP, has called for a full independent inquiry. Thus, the appellant submits, there is no doubt as to the public interest dimension of the request.

Finding

[89] The remaining information at issue to which the public interest override could apply are the records that contain the personal information of affected parties at records A1 (first excerpt only), A2 (second excerpt), A5 and B8 (page 2 only). As noted, this personal information contains a personal opinion of one affected party, two personal phone numbers and employment information concerning affected parties that worked for the unit. Given the limited information remaining at issue I find that there is no compelling public interest in the disclosure of the remaining personal information that would clearly outweigh the purpose of the exemption.

ORDER:

1. I uphold HHS' claim that certain records are excluded from the *Act* by section 65(6)3.
2. I order HHS to issue another access decision to the appellant on the information in records B1, B2, B6, B7, B11, B16 and B17 and for the highlighted information in record A2 that I found to be responsive to the appellant's request, treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act*.

²⁷ Order P-244.

3. I order HHS to disclose the non-exempt information at issue in records A11 and B16, and the highlighted portions of records A1, A2 and B8 to the appellant by **October 31, 2022**.
4. I uphold HHS' decision to deny access to the remaining information at issue in the records.

Original Signed by: _____

September 28, 2022

Alec Fadel
Adjudicator

APPENDIX

Record number	Description	Exclusion, exemption or other claims
A1	Email – 06/14/19	Section 21(1) and non-responsive
A2	Email – 06/16/19	Section 21(1) and non-responsive
A3	Briefing note – 06/24/19	Sections 65(6)3, 21(1), 18(1)
A4	Email 06/27/19	Sections 65(6)3, 13(1)
A5	Email 06/29/19	Sections 21(1) ²⁸
A6	Letter 07/02/19	Non-responsive
A10	Minutes 07/04/19	Sections 65(6)3, 13(1), non-responsive
A11	Email 07/05/19	Section 21(1)
A13	Email 07/09/19	Sections 65(6)3, 21(1)
A14	Minutes 07/12/19	Sections 65(6)3, 13(1), 18(1), non-responsive
A15	Notes 07/23/19	Sections 65(6)3, 13(1), 18(1)
A16	Minutes 07/26/19	Sections 65(6)3, 13(1), 18(1), non-responsive
A17	Minutes 07/30/19	Sections 65(6)3, 13(1), 18(1), 21(1)
A18	Emails 07/04/19	Sections 65(6)3, 13(1), non-responsive
B1	Letter (HHS) 06/17/19	Non-responsive (partial)
B2	Letter (McMaster) 06/17/19	Non-responsive (partial)
B3	Email 06/18/19	Sections 65(6)3, 18(1) (and duplicates part of A1)

²⁸ HHS marked the severances on this record as exempt under section 21(1) and 18(1)(c) but during the inquiry confirmed with the adjudicator that it is only claiming section 21(1) for this record.

B4	Briefing note 06/21/19	Sections 65(6)3, 21(1), 18(1)(c), (e), (f), (g), non-responsive
B6	Letter (McMaster) 06/26/19	Non-responsive
B7	Letter 07/17/19	Non-responsive
B8	Email 07/19/19	Section 21(1)
B11	Letter 08/26/19	Non-responsive
B12	Emails 08/12/19	Non-responsive
B16	Emails 08/30/19	Section 21(1), non-responsive
B17	Letter 09/04/19	Non-responsive
B18	Emails 09/17/19	Sections 65(6)3, 13(1), 18(1), 21(1)