

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4454

Appeal PA21-00366

Waypoint Centre for Mental Health Care

October 30, 2023

Summary: Waypoint received a request under the *Act* for access to documents and policies relating to the use of seclusion and restraints. After conducting a search, Waypoint decided to grant partial access to records it located, citing sections 13(1) (advice or recommendations), 18(1)(j) (evaluation of quality of health care by a hospital committee) and 19 (solicitor-client privilege) of the *Act* to withhold certain information. The appellant appealed the decision and also relied on section 23 (public interest override) claiming that it applied to any records found exempt under section 18(1). In this order, the adjudicator upholds Waypoint's decision concerning sections 19 and 18(1)(j) and finds that there is no compelling public interest in disclosure of the information found exempt under section 18(1). The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 18(1)(j), 19 and 23.

OVERVIEW:

[1] Waypoint Centre for Mental Health Care (Waypoint) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for records relating to its use of seclusions and restraints. Following clarification of the request, Waypoint divided the request into two separate requests: 2020-04 and 2020-05. Request 2020-05 is the subject of this appeal, and is for the GRASP and seclusion monitoring records and the records listed in the appellant's clarification letter of Oct. 16, 2020:

1. the policy "Emergency Use Restraint" – Physical, Chemical, Mechanical and Seclusion"
2. the "Six Core Strategies to Reduce Restraint and Seclusion" and policies and documents related to Waypoint's implementation of same
3. policies and documents relating to the "Least Restraint Implementation Committee"
4. policies and documents related to Waypoint's philosophy of recovery which promotes trauma informed care in a culture of least restraint
5. executive compensation policies relating to a reduction in the use of restraints and/or seclusion
6. policies and documents relating to "Patient Safety Support Plans" and post-seclusion restraint debriefs
7. policies and documents relating to "restraint minimization initiatives"
8. policies and documents relating to "Joint Restraint Minimization Committee"
9. policies and documents relating to audits of emergency restraint/seclusion use
10. the "physical/mechanical restraint progress report"
11. the "2017-18 work plan" related to the physical/mechanical restraint progress report"
12. The "Joint Restraint Minimization Committee Strategies to decrease seclusion/restraint and any reports and documents relating to the delay of implementation of same due to "Organizational pressures"
13. documents related to the multi-centre study on restraint minimization Waypoint participated in
14. the Waypoint human rights policy that elaborates on how we view the use of restraints and or seclusion with explicit consideration for Human Rights
15. the "2018-2023 Quality, Risk and Safety Plan"
16. policies and documents related to the restraints continuum (from chemical to physical to seclusion)
17. policies and documents related to monthly seclusion rounds

18. documents related to attempts to obtain funds from the Ministry of Health and Long Term Care for "seclusion relief efforts"
19. policies and documents related to "28 day consults for patients requiring the use of seclusion"
20. policies and documents relating to "ethics consults" being held for patients "requiring the use of seclusion for 60 days or more"
21. policies and documents related to the implementation of a "single source of data based on the new EHR that pulled required fields related to restraint and seclusion use" and
22. documents related to Waypoint's partnership with "an international expert" in a project to "reduce restraint and seclusion use "

[2] Waypoint decided to grant partial access to the 104 records it identified, citing sections 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 18(1)(j) (evaluation of quality health care by hospital committee) of the *Act* to withhold certain information.

[3] The requester, now the appellant, appealed Waypoint's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to explore resolution.

[4] During mediation, the appellant advised that he wished to pursue access to the withheld information, and further, that a public interest in disclosure exists, raising the issue of the possible application of section 23 of the *Act*.

[5] The appeal could not be resolved at mediation and was transferred to the adjudication stage. The original adjudicator assigned to this appeal decided to conduct an inquiry and sought representations from Waypoint and the appellant. At this point, I was assigned as the adjudicator to continue the inquiry. I sought further representations from the parties. As representations were received, they were shared in accordance with the IPC's *Code of Procedure*.

[6] In this order, I uphold Waypoint's reliance on section 19 and 18(1)(j). I also find that there is no compelling public interest in the information withheld under section 18(1)(j) and dismiss the appeal.

RECORDS:

[7] Records 1, 4-38, 41-42, 49, 50-60, 72, 74-75, 77-81 and 87-89 as identified in Waypoint's final index of records, which includes records from its Restraint and Seclusion Working Group, Hospital Wide Quality Safety and Risk Committee, Restraint

and Seclusion Steering Committee, Least Restraint Implementation Committee, Recovery Advisory Committee, Quality Committee, Critical Risk Review Team and Hospital Wide Quality and Risk Committee. These records include gap analyses, committee meeting notes, draft audit criteria and presentations.

ISSUES:

- A. Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the records at issue?
- B. Does the discretionary exemption at section 18(1)(j) for evaluation of quality of care information apply to the records at issue?
- C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1)(j) exemption?

DISCUSSION:

Issue A: Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the records at issue?

[8] Section 19 of the *Act* states:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (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.

[9] 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 institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[11] Common-law solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.¹ The rationale for this privilege is to ensure that a client may freely confide in their lawyer on a legal matter.² The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.³

[12] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁴

[13] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁵ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁶

[14] Under the common law, a client may waive solicitor-client privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.⁷

[15] There may also be an implied waiver of solicitor-client privilege where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.⁸

[16] Generally, disclosure to outsiders of privileged information is a waiver of privilege.⁹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁰

[17] Common law litigation privilege generally comes to an end with the termination of litigation.¹¹

¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

² Orders PO-2441, MO-2166 and MO-1925.

³ *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.

⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁸ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

⁹ 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.).

¹⁰ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

¹¹ *Blank v. Canada (Minister of Justice)*, cited above.

Branch 2: statutory privilege

[18] The branch 2 exemption is a statutory privilege that applies where the records were “prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.” The statutory and common law privileges, although not identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[19] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

Statutory litigation privilege

[20] This privilege applies to records prepared by or for Crown counsel or counsel employed or retained by a hospital or educational institution “in contemplation of or for use in litigation.” It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.¹²

[21] The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.¹³

[22] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.¹⁴

Representations

[23] Only portions of the parties’ submissions on this issue were shared due to confidentiality concerns. Each party provided considerable confidential representations on the issue, including affidavit evidence, and, although considered, particulars are not set out in this order.

[24] Waypoint submits that records 1, 4, 5, 8, 9, 10, 49 and 72 are subject to litigation and solicitor-client communication privilege under sections 19(a) and (c) of the *Act*. It submits that these records were prepared by or for its retained counsel for use in giving legal advice or in contemplation of or for use in litigation. In the confidential portions of its submissions, Waypoint explains which documents it is claiming as solicitor-client privileged communications and statutory litigation privilege.

[25] Waypoint refers to a coroner’s inquiry report concerning one of its patients who

¹² See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

¹³ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

¹⁴ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

passed away following the administration of a chemical restraint. The verdict of the coroner's inquest included a number of recommendations regarding to Waypoint's use of restraints. Waypoint also explains that the estate of the deceased patient commenced a civil law suit against it, as well as a proceeding before the Human Rights Tribunal of Ontario (HRTO). It notes that the Ontario Human Rights Commission was an intervenor in these proceedings and entered into a partial settlement with Waypoint (the OHRT settlement). Waypoint submits that the OHRT settlement included a number of public interest remedies to be completed over a period of time.

[26] Waypoint explains that it retained legal counsel following the death of the specified patient and legal counsel represented it in connection with the coroner's inquest, as well as the civil law suit and proceedings before the HRTO. In its representations, including the confidential affidavit, Waypoint addresses each record it claims exempt, explaining the substance and other details of the record, which consist of:

Record 1: Briefing Note OHRC Report

Record 4: Briefing Note OHRC Data Submission

Record 5: Quality Improvement Tracking

Record 8: Six Core Strategies for Reducing Seclusion and Restraint Gap Analysis

Record 9: Six Core Strategies Gap Analysis Briefing Note, Updated

Record 10: Six Core Strategies, Final

Record 49: Human Rights Resolution pathway 2018

Record 72: Restraint and Seclusion: Patient Characteristics Presentation.

[27] Waypoint submits that the records remain subject to privilege which has not been lost or waived. It submits that all of the records were prepared within an expected "zone of privacy," with the expectation that the records would remain privileged and confidential. Waypoint submits that the records were created by or for, or communicated with, its legal counsel. It further submits that it was Waypoint's expectation that the privilege attaching to the records would not be lost, as there is no termination at common law (or under *FIPPA*) to solicitor-client privileged records. Waypoint specifically states that the quality improvement tracking tool was created for counsel retained by it for use in giving legal advice or in contemplation of or for use in litigation.

[28] Waypoint states that none of the records have been disclosed by it to outside parties, except in the context of a common interest as between Waypoint and the other

party.

[29] The appellant submits that section 19(a) and 19(c) do not apply to the records as neither common law solicitor-client communication privilege, nor statutory solicitor-client privilege applies to them. The appellant refers to documents in his possession, which he attached as exhibits to a confidential affidavit, concerning the implementation of a settlement agreement between Waypoint and two specified parties (the settlement). The appellant notes that these documents in his possession were not kept confidential.

[30] The appellant submits that the documents attached as exhibits to his affidavit show that the settlement was finalized on a specified date and, therefore, argues that any documentation created on this subject following that date is likely related to settlement implementation.¹⁵ The appellant submits that records following the specified settlement date were created for the purpose of monitoring settlement implementation which, he says, suggests that they were not created with an expectation of confidentiality

[31] The appellant submits that common law litigation privilege, as contemplated in section 19(a) of the *Act*, generally ends upon the termination of litigation and since the settlement agreement was finalized, and there is no record of further expected litigation pertaining to the settlement update documents, common law litigation does not apply to Records 1, 4, 5, 8, 9, 10, 49, and 72.

[32] The appellant also submits that statutory litigation privilege does not extend protection to these same records. He acknowledges that statutory litigation privilege, as set out in section 19(c) of the *Act*, does not conclude upon the termination of litigation. However, he submits it has no application here for similar reasons cited in regard to solicitor-client privilege. He also submits that the withheld information does not meet statutory litigation privilege because:

- at the time of document creation, dissemination, discussion, etc., there must be more than a vague or general apprehension of litigation
- the records' "dominant purpose" must be that of litigation
- litigation privilege in section 19(c) does not terminate at the end of litigation, however, the *Act* specifies that a given record must be "for use in giving legal advice" and/or "in contemplation of or for use in litigation."

[33] The appellant submits that each of the specified records withheld by Waypoint, when compared to the exhibits attached to his affidavit, appear to have been created for implementation of settlement purposes and should not be found to be exempt under

¹⁵ The appellant notes that records 1, 4, 9, 10 and 49 are all dated after the settlement date and the other records are undated.

section 19(a) or (c).

Analysis and finding

[34] As noted, Waypoint's position is that records 1, 4, 5, 8, 9, 10, 49 and 72 are subject to litigation and solicitor-client communication privilege under sections 19(a) and 19(c) of the *Act*. I will first determine if the records are exempt under section 19(c), the statutory privilege created by the *Act*. Waypoint claims the common law and statutory communication privilege for most of the records and statutory litigation privilege for others.

[35] Waypoint provided a detailed affidavit with its representations, describing all of the records in this appeal, in confidence.¹⁶ The appellant also provided representations on this issue, including a confidential affidavit. Although I have considered these confidential submissions, they will not be set out in this order to protect the confidentiality concerns raised by the parties.

[36] In her affidavit, external counsel to Waypoint sets out the background for her firm being retained by Waypoint and remaining corporate counsel for many years. She refers to a specified coroner's inquest that resulted in 46 recommendations many of which were applicable to Waypoint. The counsel affirmed that Waypoint retained external legal counsel in connection with the inquest who also represented it in connection with a civil law suit and proceedings before the HRTO. As explained by Waypoint, the Human Rights Commission was an intervenor in the civil proceeding and at the HRTO and entered into a partial settlement with Waypoint, the OHRT settlement.

[37] The affidavit provided by Waypoint addresses each record at issue. The affidavit describes the creator of each record, a general description of the type of legal advice that was given and explains how solicitor-client privilege was maintained to date. I find that Waypoint has provided sufficient detail to enable me to decide the question of whether or not the section 19 exemption applies, and whether it properly exercised its discretion.

[38] I find that Waypoint has established that the withheld information at issue is subject to the section 19(c) exemption. I accept that the records at issue were all prepared by or for external legal counsel retained by the hospital for use in giving legal advice and, in some cases in contemplation of or for litigation.

[39] I am satisfied that most of the records were prepared by counsel in order to provide confidential legal advice within the solicitor-client relationship. On this basis, I

¹⁶ I note that because Waypoint did not provide a copy of the records, the original adjudicator requested that it provide a detailed affidavit addressing the records with sufficient detail that a determination can be made regarding the exemption claimed. This request was in keeping with the IPC guidance document, *IPC protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC*.

find that records 1, 4, 5, 49 and 72 are exempt under the statutory solicitor-client communication privilege.

[40] Regarding the remaining records, I find that they are protected by statutory litigation privilege and occurred within the requisite zone of privacy. I make this finding after considering the appellant's assertion that records created after a specified settlement were not created with the expectation of confidentiality. I have reached this conclusion because I am satisfied that they were prepared by or for counsel in contemplation of or for use in litigation and were prepared with the expectation of confidentiality as further described in Waypoint's confidential representations.

[41] I also find that Waypoint has not waived its privilege in the records. Waypoint submits that none of the records have been disclosed by it to outside parties, except in the context of a common interest as between Waypoint and another party. After considering its confidential representations addressing this issue, I accept that the existing solicitor-client privilege was not waived.

[42] The section 19 exemption is discretionary, meaning that an institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether it failed to do so.

[43] The IPC may find that the institution erred in its exercise of discretion where, for example, it does so in bad faith or an improper purpose, takes into account irrelevant considerations, or fails to take into account relevant ones.

[44] The appellant submits that given the purpose of the *Act*, Waypoint's exercise of discretion should not be upheld given the presumption that information should be available to the public, and the exemptions applied cannot be deemed necessary, limited, or specific.

[45] There is no reasonable basis for me to conclude that Waypoint failed to exercise its discretion under section 19. Based on the material before me, I find that, in exercising its discretion under section 19, Waypoint took into account relevant considerations regarding the purpose of solicitor-client privilege.

[46] I find that Waypoint did not take into account irrelevant considerations in exercising its discretion, and that the factors it did consider were relevant in the circumstances. Accordingly, I uphold Waypoint's reliance on section 19 to exempt records 1, 4, 5, 8, 9, 10, 49 and 72 from disclosure. Further, I find that Waypoint exercised its discretion appropriately, especially considering the importance of solicitor-client privilege. After considering its submissions and reviewing the affidavit, I find that it exercised its discretion in good faith and did not act in bad faith or for an improper purpose.

[47] Since I have found that records 1, 4, 5, 8, 9, 10, 49 and 72 are exempt from disclosure by section 19(c), I will not determine if these records are also exempt under

the advice or recommendation exemption at section 13(1) or the section 18(1)(j) exemption, discussed below.

Issue B: Does the discretionary exemption at section 18(1)(j) for evaluation of quality of care information apply to the records at issue?

[48] Section 18(1)(j) is a hospital-specific exemption for certain quality of care information.

[49] Section 18(1)(j) states:

A head may refuse to disclose a record that contains,

(j) information provided in confidence to, or records prepared with the expectation of confidentiality by, a hospital committee to assess or evaluate the quality of health care and directly related programs and services provided by a hospital, if the assessment or evaluation is for the purpose of improving that care and the programs and services.

Representations

[50] Waypoint submits that all of the remaining records (records 6, 7, 11-38, 41-42, 50-60, 74-75, 77-81 and 87-89), are exempt from disclosure under section 18(1)(j).

[51] Waypoint notes that section 18(1)(j) has not yet been considered in a prior IPC order and submits that the quality of healthcare referenced in the exemption, is similar, but not identical, to the definition of "quality care information" contained in the *Quality of Care Information Protection Act*¹⁷ (*QCIPA*), which states:

"quality of care information" means information that,

(a) is collected or prepared by or for a quality of care committee for the sole or primary purpose of assisting the committee in carrying out its quality of care functions,

(b) relates to the discussions and deliberations of a quality of care committee in carrying out its quality of care functions, or

(c) relates solely or primarily to any activity that a quality of care committee carries on as part of its quality of care functions, including information contained in records that a quality of care committee creates or maintains related to its quality of care functions.

[52] Waypoint notes that section 3 of *QCIPA* provides that *FIPPA* does not apply to quality of care information and submits that therefore section 18(1)(j) must cast a

¹⁷ 2016, S.O. 2016, c. 6, Sched. 2.

wider net than the definition of quality of care, or section 18(1)(j) would be superfluous. Waypoint submits that the section 18(1)(j) exemption applies to information provided in confidence to, or created by, any hospital committee, whether or not such committee meets the definition of a "quality of care committee" within the meaning of the *QCIPA*, provided the requirements in section 18(1)(j) are met.

[53] Waypoint references comments made by the Minister of Health and Long Term Care in the Legislature¹⁸ when subsection 18(1)(j) of the *Act* was added and submits that it is evident from these comments that the exemption was included in *FIPPA* to encourage open and frank conversations within hospitals about quality improvement, with the ultimate goal of improving the care, programs and services that the hospital provides. Waypoint submits that section 18(1)(j) must be interpreted with a view to achieving these goals.

[54] Waypoint submits that all of the records at issue are documents that are internal to it and none have been shared publicly. In addition, it submits that they were all created for or by a Waypoint committee established to improve the quality of care at Waypoint. Waypoint explains the quality improvement committee structure with Waypoint's senior leadership team and how medical leadership is accountable to the Board of Directors for quality, which is a strategic priority for the Board. Waypoint notes that under the *Excellent Care for All Act*, public hospitals in Ontario must establish a "quality committee," which is advisory to each hospital's board and which monitors and reports to the Board on quality issues and the overall quality of services provided by the hospital. Waypoint confirms that its quality committee of the board, and its quality and integrated risk committee operate under a terms of reference that explicitly address the issue of privilege and confidentiality. It states that for information provided in confidence by the quality committee for the purpose of assessing or evaluating the quality of health care is prepared with the expectation of confidentiality. In addition, information provided or prepared by the quality and integrated risk committee is confidential, as set out in its terms of reference.

[55] Waypoint submits that over time a number of purpose-specific committees were created to address quality initiatives such as restraint and seclusion. It submits that each of these committees reported to the quality and integrated risk committee and/or the senior leadership team and any relevant records would have been provided in

¹⁸ Waypoint notes that this was at this time that public hospitals became subject to *FIPPA* and the Minister stated: "We are at a very important time in our health care system because we are now starting to turn our attention to quality improvement. I think the member opposite understands how important it is that we take a good hard look at quality in our hospitals throughout our health care sector. Part of the process of improving quality requires that, within hospitals, they're able to have very open and frank conversations about where quality was not what it should have been. After consultation with the hospital sector, we have made this change that will allow improvements in quality to continue. ... I think it's important that people understand that we are talking patient safety. We are talking life and death. We know we can reduce deaths by focusing on quality. I want the hospitals to be able to do that in the way they know how. I want to encourage the work on quality improvement." (Ontario, Legislative Assembly, *Hansard*, 39th Parl. 2nd Sess, Apr. 6, 2011, at 1110.)

confidence to these committees and records that were prepared by these committees were with an expectation of confidentiality.

[56] Waypoint submits that it uses a document management system called SharePoint to manage administrative records. It submits that each committee has its own folder on SharePoint that is password protected and the information is only accessible to authorized users which includes committee members and their support staff.

[57] Waypoint submits that each record was prepared in confidence or with the expectation of confidence (if prepared by a hospital committee) or communicated to a hospital committee confidentially (or both, in some instances). It submits that the records are not shared outside the committee structure; for example, they are not available to other Waypoint staff.

[58] Waypoint submits that none of the records at issue pertain to product or environmental testing and, therefore, section 18(2) is not relevant in this appeal.

[59] The appellant refers to Order P-1190 and submits that the IPC has held that section 18 is meant to provide the government with the same protection over certain informational assets that a non-government institution would enjoy over trade secrets and similar commercial information. The appellant submits that given the lack of case law on section 18(1)(j), this holistic understanding should guide my consideration of the exemption.

[60] The appellant submits that Waypoint is an institution of public interest, as it serves a function under both the *Criminal Code* and the *Mental Health Act*.¹⁹ He submits that section 18(1)(j) expands section 18 to consider quality of health care assessments and evaluation, however, these public interest functions should be considered when reviewing the information that Waypoint seeks to protect from disclosure. The appellant submits that use of seclusion and restraint within the institution cannot neatly be analogized to "trade secrets" or "commercial information" given that privileges, autonomies, and Charter protected rights, are at stake.

[61] The appellant submits that in Order PO-3448 the Commissioner held that institutions "should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*." As such, the appellant submits that Waypoint, in claiming the section 18(1)(j) exemption applies, must establish that the information at issue was 1) provided in confidence or prepared with the expectation of confidentiality, 2) by a hospital committee, 3) to assess or evaluate

¹⁹ The appellant submits that the Minister of Health has designated Waypoint as a hospital under Part XX.1, section 672.1 of the *Criminal Code of Canada* and therefore provides for the "custody, treatment or assessment" of its patients. He also notes that as a "psychiatric facility" under section 1(1) of the *Mental Health Act*, Waypoint has a statutory duty to provide for the "observation, care and treatment of persons suffering from mental disorder."

the quality of health care and directly related programs and services provided by the hospital, and 4) the assessment or evaluation was done for the purpose of improving hospital care, programs and services.

[62] In relation to the requirement that the information being exempt was provided in confidence, or prepared with the expectation of confidentiality, the appellant submits that this is denied, on the same basis that solicitor-client and litigation privileges does not apply under sections 19(a) and 19(c).

Analysis and finding

[63] As noted, section 18(1)(j) states:

A head may refuse to disclose a record that contains,

...

(j) information provided in confidence to, or records prepared with the expectation of confidentiality by, a hospital committee to assess or evaluate the quality of health care and directly related programs and services provided by a hospital, if the assessment or evaluation is for the purpose of improving that care and the programs and services.

[64] The issue for me to decide is whether the various committees where the records exist are the type of committees contemplated by section 18(1)(j) and then whether the information was either provided to that committee for those purposes or prepared by it.

[65] I have reviewed the information in the remaining records and, for the following reasons, I find that the exemption at section 18(1)(j) exemption applies to it.

[66] As outlined above, Waypoint submits that the records in dispute were created by a committee that would qualify for the exemption at section 18(1)(j). The various committees where the records originate include a Restraint and Seclusions Working Group, the Hospital Wide Quality Safety and Risk Committee, the Restraint and Seclusion Steering Committee, the Least Restraint Implementation Committee, the Recovery Advisory Committee, the Quality Committee, the Clinical Risk Review Team and the Hospital Wide Quality and Risk Committee. After my review of the records I agree that they are from a specific committee with specific quality improvement purposes. Below I discuss each record in more detail:

- Records 6, 7, 11-17, 74, 75, 77, 78 and 79 are from the Hospital Restraints and Seclusion Steering Committee, a committee whose terms of reference are "to develop, coordinate and monitor an ongoing portfolio of work that supports quality patient experiences and reduces the use of restraints and seclusions in an environment optimizes safety for patients and staff."

- Records 18-38, 41 and 42 are from the Least Restraint Implementation Committee, a committee whose terms of reference are "to promote the further development of an organizational-wide culture that supports patient and staff safety and supports a quality patient experience in a least restraint environment, and to ensure the existence of appropriate policies, processes, knowledge translation, training, evaluation and continuous quality improvement utilizing the principles of recovery and trauma informed care."
- Records 50-60 are from the Recovery Advisory Committee, a committee whose terms of reference include "to facilitate the integration of recovery principles and praxis to enhance Waypoint's delivery of care."
- Records 72, 87-89 are from the Quality Committee whose role includes monitoring and reporting to the board on quality issues and on the overall quality of services provided by Waypoint.
- Record 80 is from the Clinical Risk Review Team which is meant to improve practice, increase safety awareness, reduce risk and develop strategies to reduce risk.
- Record 81 is committee minutes from the Hospital Wide Quality and Risk Committee which supports hospital level strategic directions related to quality, risk and safety.

[67] In addition, after my review of the records it is evident that the focus throughout them is to improve the quality of care, specifically in the use of restraints and seclusion at the facility. I also observe that the records consist of organizational information concerning planning, goals, objectives, and generalized meeting notes concerning restraints and seclusion practices.

[68] It is apparent from Waypoint's submissions, that it has taken measures to ensure that the information resulting from the committees described above is kept confidential. The information is kept on a hard drive that is only available to committee members or their staff and are not available to other Waypoint staff.

[69] After reviewing Order P-1190 referenced by the appellant, I do not agree that it is helpful in the context of this appeal. In that order the adjudicator examined section 18(1)(c), which specifically applies to information that could reasonably be expected to prejudice the economic interests or the competitive position of an institution. The same requirement is not set out in section 18(1)(j).

[70] In my view, the conditions of the section 18(1)(j) exemption are met and I uphold Waypoint's decision regarding the withheld information.

[71] The section 18(1)(j) exemption is discretionary, meaning that an institution can decide to disclose information even if the information qualifies for exemption. An

institution must exercise its discretion. On appeal, the IPC may determine whether it failed to do so.

[72] The IPC may find that the institution erred in its exercise of discretion where, for example, it does so in bad faith or an improper purpose, takes into account irrelevant considerations, or fails to take into account relevant ones.

[73] The appellant submits that given the purpose of the *Act*, Waypoint's exercise of discretion should not be upheld given the presumption that information should be available to the public, and the exemptions applied cannot be deemed necessary, limited, or specific.

[74] There is no evidence before me that Waypoint failed to exercise its discretion under section 18(1)(j). Based on the material before me, I find that, in exercising its discretion under section 18(1)(j), Waypoint took into account relevant considerations regarding the purpose of exemption.

[75] I find that Waypoint did not take into account irrelevant considerations in exercising its discretion, and that the factors it did consider were relevant in the circumstances. Accordingly, I uphold Waypoint's reliance on section 18(1)(j) to exempt records 6, 7, 11-38, 41-42, 50-60, 74-75, 77-81 and 87-89 from disclosure. Further, after considering the lengths Waypoint has taken to keep this information confidential, even from its own staff, I find that the institution properly exercised its discretion when it relied on this exemption to deny access to the information.

[76] Accordingly, I uphold Waypoint's exercise of discretion in denying access to the withheld information.

Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1)(j) exemption?

[77] Section 23 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

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

[78] In this appeal, it is only possible that section 23 could override the section 18(1) exemption, so I will not consider the information I have found to be exempt under section 19. For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[79] The *Act* does not state who bears the onus to show that section 23 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.²⁰

Representations

The appellant's representations

[80] The appellant submits that disclosure of documents relating to practices at Waypoint would reveal government activities regarding both its healthcare and criminal law functions in the fulfilment of section 672.1 of the *Criminal Code* and section 1(1) of the *Mental Health Act*.²¹ The appellant submits that the public interest in disclosure of the records is not a private matter, but one that would enlighten the citizenry about the activities of their government, in relation to involuntary psychiatric patients, some of society's most vulnerable individuals.

[81] The appellant cites certain articles²² which he submits illuminate the public concerns surrounding the treatment of the mentally ill in Canada and show that mental health treatment is a topic of rigorous public debate.

[82] The appellant also refers to other publications, and suggests they highlight the ability for the withheld information to "ensure bureaucratic accountability." He refers to an article in *Law Times*, where the President of the London Criminal Lawyers' Association, and Vice President of the Criminal lawyers' Association is quoted concerning that the "power [which] hospitals have over NCR²³ accused feels almost limitless to those in their care." The appellant submits that in the *Law Times* article, this individual raised the concern that without transparency and accountability "hospitals are able to effectively detain their patients with very little repercussion."

[83] The appellant suggests that given the relationship between the withheld information and the central purpose of the *Act*, as well as the ability of the withheld information to aid the citizenry in making effective political choice and expressing public

²⁰ Order P-244.

²¹ See footnote 27.

²² The appellant submits that news coverage of the 2021 federal election underscores the analogous features of this appeal with that in Order P-1190. In September 2021, *The Toronto Star* published an article contextualizing mental health within the pandemic, stating that "in an election with very different visions for this country's future, one thing that has united leaders from major political parties is that addressing mental health is more important now than ever before." Similarly, *Addictions and Mental Health Ontario* wrote that "there has never been a more important time to ensure these conversations take place at the national stage, giving leaders from all political stripes an opportunity to outline their plan to improve access to mental health and addiction care for all Canadians. *The Globe and Mail* quoted the CEO of the Canadian Psychological Association as saying, "this election has seen 'an explicit recognition of the importance of investing in mental-health care'..."

²³ Not criminally responsible due to mental disorder.

opinion, there is a significant public interest in the disclosure of the information.

[84] Given the current discourse both within news publications and academic texts, surrounding mental health, double stigmatization among individuals deemed NCR or unfit to stand trial, and treatment for those deemed NCR or unfit, the appellant submits that it is clear there is a compelling interest in the withheld information.

Waypoint's reply representations

[85] Waypoint submits that there is no relationship between the withheld information and the central purpose of the *Act*, to "shed light on the operations of government."²⁴ Waypoint provides submissions concerning its position as a hospital corporation operated independently from government, it submits that since the withheld information is strictly operational in nature and internal to Waypoint, disclosure would not contribute in any meaningful way to the public's understanding of the activities of government.

[86] Waypoint submits that the withheld information does not relate to the implementation of any governmental objective, function or program, or to its statutory obligations under the *Criminal Code* or *Mental Health Act*. It also submits that the information does not relate to the public delivery of mental health and addiction services generally, or Waypoint's interaction with the criminal justice system.

[87] Waypoint references the appellant's comments concerning how disclosure of the withheld information would enlighten the citizenry about the activities of government and submits that the information at issue does not respond to the applicable public interest. It points out that the information at issue consists of quality of care documents that relate to Waypoint's internal practices and not to government operations or policy, and add nothing to the public discourse or debate.

[88] Waypoint continues by addressing whether there is a "compelling" interest in the information which I will partially set out here. It notes that compelling has been defined as "rousing strong interest or attention."²⁵ Waypoint does not dispute whether there is a public interest in the issues raised by the appellant, however, it submits that the withheld information does not respond to these issues.

[89] Waypoint submits that the same principles apply in this appeal as in previous IPC decisions where a compelling public interest was found not to exist, including:

- A significant amount of information has already been disclosed.²⁶ Waypoint submits that the appellant has received a significant amount of information

²⁴ Order P-68.

²⁵ Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Inquiry Officer), 1999 CarswellOnt 650 (CA), leave to appeal refused [1999] SCCA No 134.

²⁶ Citing Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

relating to Waypoint's practices, including copies of Waypoint's policies and procedures (from pre-divestment²⁷ until present) and supporting documents relating to restraint and seclusion. Waypoint also submits that it provides public access to information relating to its programs and services, quality improvement plans, clinical services plans, and other documents to promote openness and transparency.

- The withheld information does not relate to the public interest issues raised by the appellant as they relate to quality of care activities internal to Waypoint.²⁸

[90] Waypoint also addresses the purpose of the section 18(1)(j) exemption, which, it submits, enables a hospital, within its committee structure, to confidentially review and assess quality of care in a frank and open manner, in order to be able to improve the quality of that care, its services and programs. It submits that these are matters of public policy that ought to be sedulously fostered.

Appellant's sur-reply representations

[91] In the appellant's sur-reply representations, he submits that since he was unable to review the records to determine if there was a public interest there cannot be an absolute onus on the appellant under section 23 and the records need to be examined to determine if there is a compelling public interest that warrants disclosure. The appellant submits that because of Waypoint's delay in responding to the underlying request, the use of the records in the specified court action is significantly limited. He confirms that the appeal is being litigated primarily due to the significant public interest at issue – some of which is underscored by the evidence filed in relation to the civil matter.

[92] The appellant also states that beyond the court action there is significant interest in the records at issue from current and former Waypoint patients, their family members, legal counsel representing Waypoint patients before the Ontario Review Board, journalists, and members of the public at large in the use of seclusion and restraints at Waypoint.

[93] The appellant points to the importance of ensuring there is sufficient public disclosure of Waypoint documents to enable meaningful public scrutiny. He refers to an affidavit of a former Waypoint clinical employee who deposes that after the commencement of the civil matter Waypoint has taken steps changing how the use of seclusion and restraints are recorded in patient records. He also refers to a substitute decision maker who describes significant concerns about the lack of transparency on the part of Waypoint regarding the use of seclusion and restraints.

²⁷ Waypoint explains that it was operated directly by the province of Ontario until December 15, 2008, at which time it was divested to a new public hospital corporation which became responsible for the governance and operations of the hospital.

²⁸ Citing Orders MO-1994 and PO-2607.

Analysis and finding

[94] I have considered the representations of the parties and have reviewed the records at issue. In my view, and for the following reasons, I find that there is no compelling public interest in the disclosure of the withheld information in these records that would outweigh the purpose of the exemption at section 18(1)(j).

[95] In considering whether there is a “public interest,” the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government.²⁹ In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.³⁰

[96] In his representations, the appellant submits that there is a public interest in the withheld information that would override the section 18(1)(j) exemption. The appellant provided supporting information to support his submission that there is a public interest in:

- i. mental health and mental health treatment, including as it relates to the lack of available mental health services and human resources challenges relating to the pandemic
- ii. the issue of double stigmatization of NCR patients, and
- iii. information about the use of seclusion and restraint in the treatment of those deemed NCR or unfit to stand trial.

[97] I agree with the appellant, who has shown that a public interest exists in the area of mental health and its treatment, and on the issues of double stigmatization and the use of seclusion and restraints in the treatment of those deemed NCR or unfit to stand trial. This is evidenced in the number of news, professional and government publications set out in the appellant’s affidavit. I also note that Waypoint agrees that a public interest exists in this sort of information.

[98] However, I find that the withheld information does not respond to the public interest identified by the appellant. Without revealing the contents of the records, I do not find that they contain information that would address a public interest. They do not contain information concerning allegations made by Waypoint’s former staff and included in the appellant’s representations nor do they address past or current use of seclusions and restraints that would satisfy a public interest identified by the families of

²⁹ Orders P-984 and PO-2607.

³⁰ Orders P-984 and PO-2556.

past or current patients. As referenced in the issue above, the records relate to Waypoint's initiative to improve its quality of care and after my own review, I confirm that they contain organizational information concerning planning, goals, objectives, and generalized meeting notes concerning restraints and seclusion practices.

[99] Further, even if there was a public interest in disclosure of the withheld information, which I find that there is not, I am not convinced that it would be a compelling public interest that would override the purpose of the section 18(1)(j) exemption. The appellant has received a significant amount of information relating to Waypoint's practices, including copies of Waypoint's policies and procedures (from pre- divestment until present) and supporting documents relating to restraint and seclusion. Waypoint also submits that it provides public access to information relating to its programs and services, quality improvement plans, clinical services plans, and other documents to promote openness and transparency. As noted, a compelling public interest has been found not to exist when a significant amount of information has already been disclosed that adequately addresses any public interest considerations.³¹

[100] In conclusion, I find that there is no public interest in disclosure of the withheld information and section 23 does not apply in this appeal.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ October 30, 2023

³¹ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.