

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3207

Appeal PA12-382

The Hospital for Sick Children

May 30, 2013

Summary: The hospital received a request under the *Act* for access to the total amount of legal fees, listed by the total amount paid to each individual law firm or other entity for legal work completed on behalf of the hospital for a specified period. After conducting third party notifications, the hospital issued a decision advising of its decision to grant full access to the affected parties' names and total amount paid to the affected parties during the requested period. One of the affected parties, the principal of a named law practice, appealed the hospital's decision, claiming that the information constituted his personal information and was exempt under section 21(1) of the *Act*. The order finds that the appellant's law practice name and amount paid to it by the hospital for legal work is not the appellant's personal information within the definition of that term in section 2(1). Further, even if the information at issue was found to be the appellant's personal information, the order finds that the information would not be exempt under section 21(1) of the *Act*. The order also rejects a submission that the *Act* is *ultra vires*. The hospital's decision is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 21(1) and 69

Orders and Investigation Reports Considered: PO-2225, PO-2435, PO-2568 and MO-2363

OVERVIEW:

[1] The Hospital for Sick Children (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

The total amount of legal fees, listed by the total amount paid to each individual law firm or other entity in Canada or elsewhere for legal work completed on behalf of Sick Kids for the period Jan. 1, 2007 to April 30, 2012.

[2] After conducting third party notifications in accordance with section 28(1) of the *Act*, the hospital issued a decision to the affected parties and the requester, advising of its decision to grant full access to the affected parties' company names and total amount paid to the affected parties during the requested period.

[3] An affected party, the principal of a named law practice, appealed the hospital's decision to this office.

[4] During mediation, the mediator held discussions with the appellant, the hospital and the original requester. The hospital confirmed that, with the exception of the information relating to the appellant, the requested information has been disclosed to the requester.

[5] The appellant confirmed his position that the information that relates to him should not be disclosed to the requester. The appellant also submits that "section 69 of the *Act*, to the extent it applies to information that came into the possession or control of the institution prior to the date the *Act* was made applicable to the institution (e.g. before January 1, 2012) is *ultra vires* and should not be enforced." In addition, the appellant takes the position that the information should be withheld pursuant to section 21 (personal privacy) of the *Act*.

[6] The requester confirmed that he continues to seek access to this information.

[7] As further mediation was not possible, the matter then moved to the adjudication stage of the process, where an adjudicator conducts an inquiry. I provided the appellant with the opportunity to provide representations on the issues. I then sought and received representations from the requester and the institution, and only the requester provided representations. On my review of those representations, I decided it was unnecessary to seek a reply from the appellant as no issues were raised in those representations that required his response.

RECORDS:

[8] The record is a one-page list titled "External Legal Fees: January 1, 2007 to April 30, 2012". Under the column "Vendor Name" is a list of law firms, including some names of individual lawyers. Under the column "Total Amount" is the breakdown of the amounts billed by each law firm/lawyer for the specified period, as well as a "Grand Total" showing the total amount billed by all law firms/lawyers.

[9] It should be noted that although the institution withheld the name of the appellant's law practice and the amount paid to it, the result of the disclosure of the amounts paid to all other firms as well as a grand total is that the amount paid to the appellant can be calculated.

DISCUSSION:

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

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. 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;

[11] 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 [Order 11].

[12] Sections 2(3) and (4) also relate to the definition of personal information. Those sections state:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[13] 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.¹

[14] 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.²

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

Representations

[15] The appellant submits that the information in the record relates to “financial transactions” in which he has been involved, within the definition of personal information. He states that he carries on his profession in his personal capacity and not through a partnership, limited liability partnership, corporation or other separate entity. All income, he submits, is reported for tax purposes as his personal income. He states, therefore, that the information requested constitutes personal information for the purposes of the *Act*.

[16] Although the hospital did not make representations, in its decision to the appellant, it referred to prior decisions of this office discussing the distinction between personal and professional information. The hospital stated that as a general rule, information associated with an individual in a professional, official or business capacity will not be considered “about” the individual. The hospital agreed with this analysis and took the position that the fees paid to the appellant’s company were for work completed by the company in a business, not personal, capacity. Thus, it stated that neither the company name nor the total amount paid to the company qualifies as personal information.

Analysis

[17] In Order PO-2225, former Assistant Commissioner Tom Mitchinson discussed this office’s approach to the definition of personal information when an individual is engaged in a business activity. In that appeal, the information at issue was a list of non-corporate landlords owing a debt to the Ontario Rental Housing Tribunal. The former Assistant Commissioner stated:

Previous decisions of this office have drawn a distinction between an individual’s personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be “about the individual” within the meaning of the section 2(1) definition of “personal information” (Orders P-257, P-427, P-1412, P-1621). While many of these orders deal with individuals acting as employees or representatives of organizations (Orders 80, P-257, P-427, P-1412), other orders have described the distinction more generally as one between individuals acting in a personal or business capacity...

Based on the principles expressed in these orders, the first question to ask in a case such as this 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? In my view, when someone rents premises to a tenant

in return for payment of rent, that person is operating in a business arena. The landlord has made a business arrangement for the purpose of realizing income and/or capital appreciation in real estate that he/she owns. Income and expenses incurred by a landlord are accounted for under specific provisions of the *Income Tax Act* and, in my view, the time, effort and resources invested by an individual in this context fall outside the personal sphere and within the scope of profit-motivated business activity.

I recognize that in some cases a landlord's business is no more sophisticated than, for example, an individual homeowner renting out a basement apartment, and I accept that there are differences between the individual homeowner and a large corporation that owns a number of apartment buildings. However, fundamentally, both the large corporation and the individual homeowner can be said to be operating in the same "business arena", albeit on a different scale. In this regard, I concur with the appellant's interpretation of Order PO-1562 that the distinction between a personal and a business capacity does not depend on the size of a particular undertaking. It is also significant to note that the *TPA* requires all landlords, large and small, to follow essentially the same set of rules. In my view, it is reasonable to characterize even small-scale, individual landlords as people who have made a conscious decision to enter into a business realm. As such, it necessarily follows that a landlord renting premises to a tenant is operating in a context that is inherently of a business nature and not personal.

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?

In my view, there is nothing present here that would allow the information to "cross over" into the "personal information" realm. The fact that an individual is a landlord speaks to a business not a personal arrangement. As far as the second point is concerned, the information at issue does not reveal precisely why the individual owes money to the Tribunal, and the mere fact that the individual may be personally liable for the debt is not, in my view, personal, since the debt arises in a business, non-personal context. The fact that monies owed have not been fully paid is also, in my view, not sufficient to bring what is essentially a business debt into the personal realm, nor is the fact that a landlord may be prohibited by statute from commencing an application under the *TPA*.

[18] I find the reasoning in the above order to be applicable to the circumstances before me. The information at issue arises out of the appellant's professional activities as a lawyer. If the appellant had chosen to incorporate his law practice and the legal fees were paid to the corporation, there is no question the amount of those fees would not be personal information. The same would apply if the appellant had entered into a partnership that received the fees. The appellant states that he carries on his profession in his "personal capacity" but it is more accurate to describe his choice of business structure as a sole proprietorship, in which payments to the appellant are made in the name of his sole proprietorship.

[19] The fact that the appellant carries out his law practice through a sole proprietorship, instead of through another business framework, does not alter the nature of his activities. In all cases, it is the same professional services as a lawyer that gives rise to the fees paid.

[20] In answer to the first question posed in Order PO-2225 (in what context does the name of the individual appear), therefore, the appellant's name (or, to be more precise, the eponymous name of the appellant's law practice) appears in a business or professional context.

[21] The second question is whether there is something about the information at issue that, if disclosed, would reveal something of a personal nature about the appellant. Here, the appellant suggests that the information would disclose information about his personal income.

[22] I do not agree. There may be differences in the income distribution resulting from the payment of legal fees depending on the nature of the business structure, but whether the fees are paid to a corporation or to the appellant directly, there is no direct correlation between those fees and the amount of net personal income the appellant ultimately derives from those fees. Again, if the legal fees were paid to a corporation or a partnership in which the appellant has a stake, the fact that the appellant may ultimately receive some personal income attributable in some part to those fees does not reveal anything personal about the appellant. The same holds true for the legal fees paid to the appellant's law practice some portion of which, and it is not clear how much, may result in net personal income.

[23] My conclusions on this are consistent with other decisions of this office in which information about the amounts paid to consultants for professional services was found not to be the personal information of those consultants: see Orders PO-2435, MO-2363. Also, in Order PO-2568, the adjudicator rejected the submission that the amount of legal fees paid to a lawyer's firm on account of work done by a lawyer was the personal information of either the lawyer or the client.

[24] In sum, I find that the information at issue is not the personal information of the appellant.

Issue B: Does the personal privacy exemption in section 21(1) apply?

[25] As I have found that the information is not personal information, it is not exempt from disclosure under the personal privacy exemption in section 21(1). However, even if I had found the information to constitute the personal information of the appellant, I am satisfied the exemption would not apply.

[26] In Orders PO-2435 and MO-2363 the adjudicator (in that case, the Assistant Commissioner) found in the alternative that even if similar information was the personal information of the consultants, it would not be exempt from disclosure because of section 21(4)(b), which states:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (b) discloses financial or other details of a contract for personal services between an individual and an institution...

[27] In this appeal, the appellant submits that the above provision does not apply because "any contract or implied contract between myself and SickKids does not include as a component the amounts to be paid to me over any specific period of time."

[28] In Order MO-2363, the records included invoices containing the number of days for which a consultant billed the institution, and the per diem charged for those days. The Assistant Commissioner found that the records

...disclose financial or other details which clearly derive from a contract for personal services between the affected party and the City, and therefore fall squarely within the parameters of section 14(4)(b) [the municipal equivalent to section 21(4)(b)].

[29] I see no distinction between the circumstances in Order MO-2363 and those before me. Further, regardless of whether any contract between the hospital and the appellant includes specified amounts to be paid over a specified period, it is implicit that the amount actually paid, as reflected in the record, must have been based in a contractual arrangement. I am satisfied (assuming here that the information is personal) that the information therefore discloses "financial or other details of a contract for personal services".

[30] As a result, even if the information qualifies as personal information, the record is not exempt from disclosure because of section 21(4).

Issue C: Retroactive Application of the *Act*

[31] Section 69 of the *Act* states:

- (1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force.
- (2) Despite subsection (1), this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007.

[32] The appellant submits that the bulk of the information sought relates to financial information concerning the period prior to the application of the *Act* to hospitals (January 1, 2012). He states that at the time those financial transactions took place, he had an expectation that such information would not be disclosed to the public. He submits that the effect of section 69 of the *Act* is to retroactively take away privacy rights that applied to the period covered by the record, and that

[s]uch retroactive abridgement of privacy rights is contrary to PIPEDA [*Personal Information and Protection of Electronic Documents Act*, S.C. 200, c.5] and consequently ultra vires the constitutional jurisdiction of the Ontario legislature.

[33] I do not accept the appellant's submission. First, there is no issue of retroactivity. It is of course true that the enactment of the *Act*, and the extension of the *Act* to cover hospitals in 2012, altered existing rights. That is true of most legislation. The fact that the *Act* provided for a new right of access to pre-existing records is not a retroactive application of legislation; the right of access applied prospectively.

[34] Second, if the appellant is arguing that there is a conflict between a provision of the *Act* and a provision of the PIPEDA, he has not referred me to the part of the PIPEDA that could create such a conflict and I am not aware of any. In Canadian constitutional law, the doctrine of paramountcy dictates that where there is a conflict between valid provincial and federal laws, the federal law will prevail and the provincial law will be inoperative to the extent that it conflicts with the federal law. The fundamental test for establishing paramountcy was articulated by the Supreme Court of Canada in *Multiple Access v. McCutcheon* 1982 CanLII 1705 (SCC), [1982] 2 S.C.R. 161 and was recently followed in *Canadian Western Bank v. Alberta* 2007 SCC 22 (CanLII),

[2007] 2 S.C.R. 3. In *Multiple Access* it was established that paramountcy can only be invoked when the compliance with one law means the breach of another.³

[35] Here, I have no basis on which to make any finding of conflict between PIPEDA and the *Act*.

[36] I therefore reject the appellant's argument to the extent he submits the *Act* should not apply to this request.

[37] In conclusion, I uphold the decision of the hospital and I will order the record to be disclosed in its entirety.

ORDER:

I uphold the decision of the hospital and order it to disclose the record by sending it to the requester by **July 5, 2013** but not before **June 28, 2013**.

Original signed by: _____
Sherry Liang
Senior Adjudicator

_____ May 30, 2013

³ Order PO-2877