

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3221

Appeal PA12-257

Mackenzie Richmond Hill Hospital

June 24, 2013

Summary: The appellant sought access to hospital board meeting minutes relating to a former hospital employee's resignation. The hospital located responsive records and issued a decision granting partial access to them. The hospital claimed that the withheld records were excluded from the scope of the *Act* under section 65(6). The hospital also claimed that the discretionary exemption in section 18.1(1) (information with respect to closed meetings) and the mandatory exemption in section 21(1) (invasion of privacy) applied to the records. This order finds that the records are excluded from the application of the *Act* by virtue of section 65(6)3.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(6)3.

OVERVIEW:

[1] Mackenzie Richmond Hill Hospital (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to "the circumstances under which [a specified individual] resigned" and "the board meeting minutes where [the specified individual's] resignation was accepted and severance paid."

[2] The hospital clarified with the requester that the request was intended to include any information on internal investigations surrounding the individual's resignation.

[3] The hospital located records responsive to the request, and issued a decision granting partial access to them. The hospital denied access to various "in camera" Board of Trustees and Executive Committee meeting minutes, relying on the mandatory personal privacy exemption in section 21(1), and the discretionary closed meeting exemption in section 18.1(1).¹ The hospital also claimed that the *Act* did not apply to the records in question by virtue of the exclusion in section 65(6)2 of the *Act*.

[4] The requester, now the appellant, appealed the decision.

[5] During mediation, the hospital advised that no internal investigation was conducted and, therefore, no such records exist. The appellant confirmed that he was satisfied with the information disclosed by the hospital on the severance paid to the individual in question, and that he only sought access to the information in the records that relate to the individual's resignation. The appellant also raised the possible application of the "public interest override" in section 23 of the *Act*, asserting that there was a public interest in disclosure of the withheld portions of the minutes to which he sought access.

[6] Mediation did not resolve the issues in this appeal, and the matter was moved to the adjudication stage of the appeals process for an inquiry under the *Act*.

[7] I sought representations from the hospital, the individual identified in the request (the affected party), and the appellant. The hospital and the appellant provided representations which were shared in accordance with *Practice Direction 7* of this office's *Code of Procedure*. The affected party did not provide representations.

[8] In this order, I find that the records at issue are excluded from the scope of the *Act* by virtue of section 65(6)3. As a result of this finding, it is not necessary for me to consider the remaining sections relied on by the hospital to withhold the records at issue. It is also unnecessary for me to consider the public interest override section raised by the appellant as this does not apply to records that fall outside the scope of the *Act*.

RECORDS:

[9] The only records at issue in this appeal are the following:

- Item 7 (April 30, 2009 Board of Trustees Meeting Minutes)

¹ The hospital claimed section 18(1)1 in its decision letter, but subsequently advised that it meant to claim section 18.1(1).

- Item 5 (May 28, 2009 Board of Trustees Meeting Minutes)
- Item 4 (June 18, 2009 Board of Trustees Meeting Minutes)
- Item 2.2 (June 12, 2009 Executive Committee Meeting Minutes)
- Item 3.1 (June 17, 2009 Executive Committee Meeting Minutes)

DISCUSSION:

A. Does section 65(6)3 exclude the records from the *Act*?

Section 65(6)3: matters in which the institution has an interest

[10] Section 65(6)3 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:

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

[11] If section 65(6)3 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*.

[12] For the collection, preparation, maintenance or use of a record to be "in relation to" employment-related matters, it must be reasonable to conclude that there is "some connection" between them.² 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.³

[13] 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.⁴

[14] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

³ Order PO-2157.

⁴ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No 289 (Div. Ct.).

2. this collection, preparation, maintenance or usage 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.

[15] The phrase "labour relations or employment-related matters" has been found to apply in the context of an employee's dismissal.⁵

[16] 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.⁶

Section 65(7): exceptions to section 65(6)

[17] If the records fall within any of the exceptions 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.

The Hospital' Representations

[18] The hospital takes the position that the records at issue are excluded from the application of the *Act* by virtue of section 65(6)3, which relates to employment records. By way of background the hospital explains that:

⁵ Order MO-1654-I.

⁶ *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.

- The affected party is a former employee who held the position of President and Chief Executive Officer (CEO).
- The CEO is appointed by and reports to its Board of Directors, also known as, the Board of Trustees (Board).
- Pursuant to Ontario Regulation 965 made under the *Public Hospitals Act*, the Board is responsible for the management and governance of the hospital, and it is required to establish administrative by-laws relating to the corporation and operations of the hospital.
- Through its corporate by-laws, it has established an Executive Committee comprised of no fewer than three elected Directors. The Board may delegate to the Executive Committee any powers of the Board to make decisions on the Board's behalf.
- The records were prepared by the hospital and are minutes of in camera meetings of the Board of the Executive Committee relating to negotiations involving the CEO and/or discussions about the employment of the CEO in which the hospital has an interest.

[19] In respect of the three part test under section 65(6)3, the hospital submits that the records were prepared on behalf of its Executive Committee and Board, and are maintained as part of its corporate records. Therefore, the hospital argues they satisfy the first part of the test.

[20] Regarding the second part of the test, the hospital states that the records relate to meetings, consultations, discussions and communications of its Executive Committee and Board for the purpose of reviewing the circumstances surrounding the affected party's employment as the CEO. The hospital asserts that these meetings and discussions relate to "employment-related matters" arising out of the employee/employer relationship. The hospital adds that its Board has an interest in the ongoing performance and evaluation of the CEO.

[21] The hospital submits that Order PO-1969-F stands for the proposition that records made concerning an employee's performance in general, and in response to allegations of inappropriate behaviour or misconduct in particular, are about an employment-related matter. The hospital asserts that the context of the records is employment-related as it directly deals with the employment and subsequent resignation of the affected party. The hospital further submits that Order PO-2106 recognized that records relating to appointments, promotions, transfers and resignations, as is the case in this appeal, are employment related.

[22] With respect to the third part of the test, the hospital states that the records contain the meeting minutes of its Executive Committee and Board, which are the bodies responsible for overseeing the performance of the CEO and have a direct interest in the affected party's employment. The hospital states that the minutes reflect consultations, discussion and updates about the issues and concerns surrounding the status of the affected party's employment.

[23] The hospital concludes by asserting that all of the requirements of section 65(6)3 are satisfied, and none of the exceptions contained in section 65(7) applies; accordingly it submits that the records are excluded from the application of the *Act*.

The Appellant's Representations

[24] The appellant does not address this issue in his representations. Instead, he describes his concerns about what he believes is the "real reason" for the affected party's exit which he asserts was a dismissal rather than a resignation. The appellant also describes his personal reasons for pursuing access to the records at issue. Finally, the appellant makes a number of allegations about the hospital's conduct towards him and his spouse, and argues that the hospital was not transparent or honest with him.

Analysis and Findings

[25] Having carefully reviewed the representations of the parties and the records at issue, I find that the records relate to a matter in which the hospital was acting as the affected party's employer, and that the terms and conditions of the affected party's employment and a related human resource question were at issue. Turning to the three parts of the test under section 65(6)3, I am satisfied that the hospital has established all three as set out below.

Requirement 1: Were the records collected, prepared, maintained or used by the hospital or on its behalf?

[26] The records at issue consist solely of minutes of in camera meetings of the hospital's Board and Executive Committee, which the hospital creates and maintains. Therefore, I accept that the records were collected, prepared, maintained or used by the hospital as contemplated by the first requirement of the exclusion.

Requirement 2: Were the records collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications?

[27] The meeting minutes were prepared, maintained and used by the hospital's Board and Executive Committee in relation to various meetings, discussions and communications that took place internally, and externally with the affected party and his legal counsel, all regarding the end of the affected party's employment with the

hospital. I conclude that the second part of the test under section 65(6)3 has also been met

Requirement 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the hospital has an interest?

[28] The minutes are about the Board and Executive Committee's meetings, consultations, discussions and communications about the affected party's resignation and the end of his employment with the hospital as its CEO. The minutes also relate to the hospital's human resources discussions and decisions in filling the vacant position of the affected party.

[29] Previous orders of this office have established that records relating to the termination of an individual's employment relationship with an institution⁷ qualify as an employment-related matter, as do records relating to an employee's resignation.⁸ Therefore, whether the affected party's employment with the hospital ended by resignation or by dismissal, as alleged by the appellant, the records at issue relate to an employment-related matter in which the hospital has an interest, thus satisfying the third requirement of the test under section 65(6)3.

[30] Furthermore, I have considered whether the records fall within any of the exceptions in section 65(7), and I find that they do not.

[31] As I have found that all three requirements of section 65(6)3 have been met above, and none of the exceptions in section 65(7) applies, I find that the records at issue are excluded from the scope of the *Act* by virtue of section 65(6)3.

ORDER:

I uphold the decision of the hospital that the records are excluded from the application of the *Act* by section 65(6)3 and I dismiss the appeal.

Original signed by: _____
Stella Ball
Adjudicator

June 24, 2013

⁷ Orders MO-1622 and MO-1654-I.

⁸ Orders PO-2106 and PO-2952.