

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3336

Appeal PA13-6

Trillium Health Partners

April 28, 2014

Summary: The appellant, a physician with hospital privileges, sought access to records relating to complaints made about him to an identified hospital. The hospital denied access to the records on the basis that they were excluded from the operation of the *Act* under section 65(6)5, which excludes records relating to individuals with hospital privileges. In this order, the hospital's decision is upheld as the information relates to the appellant's hospital privileges.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(6)5.

Orders and Investigation Reports Considered: Order MO-2589.

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

OVERVIEW:

[1] Trillium Health Partners (the hospital) received a three-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to complaints made against the appellant. Each part of the request was processed separately since the request fees were paid for each individually. The request which resulted in the appeal before me reads as follows:

From January 1, 2007 to the present (Dec. 3/12):

- a copy of all complaints (and corresponding complaint files which include but are not limited to internal correspondence regarding the complaints) made regarding [named requester] (for example, Board Chair, CEO office, VPs, and in particular, [five named professionals])

[2] The hospital located responsive records and provided the appellant with a \$360.00 fee estimate, advising that a \$180.00 deposit was required prior to proceeding with the request. The hospital further advised the appellant that it is likely that all of the requested information would fall within the ambit of the exclusion at section 65(6)5 of the *Act*. It also advised the appellant that no final access decision had been made at that time.

[3] Upon its receipt of the deposit of \$180.00, the hospital issued a decision advising that "all of the information is exempt from disclosure in accordance with the credentialing and privileging exclusion at section 65(6)(5) of the Act". The hospital also decided to waive the remaining \$180.00 fee associated with the request. The appellant appealed the hospital's decision.

[4] During mediation, the hospital provided the appellant with a redacted version of the index prepared for this office, removing the initials of those individuals involved in the email correspondence. In a subsequent discussion with the mediator, the appellant indicated that he is not pursuing access to any patients' names, file numbers or health information which may be contained in the records at issue. As a result, the information which may fall within the ambit of the exemption in section 21(1) of the *Act* or is excluded from the *Act* under section 8 of the *Personal Health Information Protection Act (PHIPA)* is no longer at issue in this appeal. The appellant wishes to pursue access to the remaining information contained in the records as he maintains that they are required to protect his professional reputation. As a result, the sole issue to be determined in this appeal is whether the responsive records are excluded from the *Act* as a result of the operation of section 65(6)5.

[5] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the hospital and the appellant.

[6] In this decision, I uphold the hospital's decision that the responsive records are excluded from the operation of the *Act* by virtue of section 65(6)5.

RECORDS:

[7] The records remaining at issue consist of those portions of 36 emails which do not contain information relating to patients' names, file numbers or other personal health information.

DISCUSSION:

RECORDS RELATING TO PERSONS HAVING HOSPITAL PRIVILEGES

[8] The sole issue for determination in this appeal is whether the responsive records are excluded from the operation of the *Act* under section 65(6)5, which reads:

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:

5. Meetings, consultations, discussions or communications about applications for hospital privileges, the appointments or privileges of personal who have hospital privileges, and anything that forms part of personnel file of those persons.

[9] 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*.

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

Section 65(6)5: records pertaining to individuals having hospital privileges

[11] For section 65(6)5 to apply, the hospital 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 usage was in relation to meetings, consultations, discussions or communications; and

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

3. these meetings, consultations, discussions or communications are about applications for hospital privileges, the appointments or privileges of persons who have hospital privileges or anything that forms part of the personnel file of those persons.

Part 1: collected, prepared, maintained or used

[12] The hospital submits that all of the records “were present on the Hospital’s computer network, sent to and from hospital-issued email accounts, and were accessible only to those Hospital employees and privileged staff named in the emails. These facts make it clear that the records were maintained by the hospital.”

[13] I have reviewed each of the emails which comprise the records at issue in this appeal and agree with the position of the hospital. The records were sent to and from hospital employees or privileged staff, in positions similar to that of the appellant, on hospital-issued email accounts that are present on its internal computer network. As a result, I find that the records were maintained by the hospital and the first part of the test under section 65(6)5 has been satisfied.

Part 2: meetings, consultations, discussions or communications

[14] The hospital submits that the 36 emails at issue in this appeal “were created over the course of resolving six complaints” involving the appellant. It goes on to add that some of the records reflect summaries of meetings which were shared with staff who were unable to attend, as well as the actual communications that passed between those who initiated the complaints and the hospital in furtherance of a resolution of these matters.

[15] Again, I agree with the position of the hospital that the records were collected, prepared, maintained and used in relation to various meetings, consultations, discussions and communications about the subjects described in them. Accordingly, I conclude that the second part of the test under section 65(6)5 has been met.

Part 3: applications for hospital privileges, the appointments or privileges of persons who have hospital privileges or anything that forms part of the personnel file of those persons

[16] To begin, I find that the appellant is a physician who has hospital privileges with the institution in this appeal. This is not disputed by the appellant.

[17] The hospital argues that the records contain information “about the privileges of a person who has hospital privileges” for the purposes of the third part of the test under section 65(6)5. In addition, the hospital argues that many of the records were

located in the personnel files relating to the appellant that are maintained by either the Department Chief or the Medical Administration Office.

[18] The hospital argues that the information in the records relates directly not only to the appellant, but also to his continued hospital privileges. It argues that the complaints which were the subject of the records were investigated under the hospital's Professional Staff Code of Conduct Policy (the Code) and relate to his ability to maintain his hospital privileges, which may be revoked under the Code.

[19] The hospital goes on to suggest that the words "in relation to" in section 65(6)5 ought to be accorded "the broadest possible meaning requiring only 'some connection'" between the records and the items listed in the exclusion. The hospital relies on the decision of the Divisional Court in *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner* (referred to above) and the decisions in Orders MO-2024-I, MO-2537 and MO-2049. It states that "the records at issue were created for the purpose of dealing with the conduct of a [hospital] privileged physician, in accordance with the [Code], which has a direct and real impact on the conditions under which the physician can maintain privileges at the hospital." The hospital concludes by submitting that the connection between the content of the records and the continuation of the appellant's hospital privileges is "real and meaningful", as is required under the tests articulated by the Court in *Toronto Star*.

[20] The appellant's arguments focus on his need for transparency in the manner in which complaints about him were handled by the hospital. He is seeking access to the records in order to ascertain whether the complaints outlined in the records had any validity and were treated in an appropriate way by the hospital. Essentially, the appellant has concerns about the way the complaints were processed and he seeks access to the records in order to address those concerns. He does not, however, focus his representations on the application of the exclusion in section 65(6)5.

Findings and conclusion

[21] I find that the hospital has established that the subject matter of the records at issue are about the appellant's hospital privileges in the sense that they pertain to his activities as a physician at the hospital and their ramifications, as reflected in the records. The appellant's conduct in the context of his work at the hospital form the basis for the complaints described in the records. I find that the examination of the complaints that are reflected in the records, including a determination respecting his privileges at the hospital, demonstrates a sufficiently strong and significant connection between the contents of the records and the continuation of the appellant's hospital privileges, as contemplated by *Toronto Star*. In other words, I find that the subject matter of the records, complaints about the appellant's actions, is substantially connected to the continuation of the appellant's privileges. The records are, accordingly, about the appellant's privileges for the purposes of the third part of the

test under section 65(6)5. As all three parts of the test have been met, I find that section 65(6)5 operates to exclude the records from the operation of the *Act*.

[22] Although the hospital also argues that many of the records form part of the appellant's personnel files, it is unnecessary for me to make a determination about which records may be excluded specifically on that basis.

[23] While I recognize that the appellant will be disappointed that he is unable to obtain access to the records through a request under the *Act*, he may have some recourse in obtaining information about the complaints through the provisions of the Professional Staff Code of Conduct.

ORDER:

I uphold the hospital's decision and dismiss the appeal.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 28, 2014