

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3363

Appeal PA12-193

Children's Hospital of Eastern Ontario

July 22, 2014

Summary: The appellant made a request to the hospital for information about his academic performance when he was a medical resident. The hospital withheld information in two records on the basis that some of the information was excluded from the scope of the *Act* under the employment and labour relations exclusion in section 65(6) and some information was exempt under the solicitor-client privilege exemption in section 19. The adjudicator upholds the hospital's decision that the information is excluded under 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] The appellant made a request to the Ottawa Hospital under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to his academic performance while he was a medical resident. Specifically, his request was for the following:

All copies of all correspondence memoranda associate[d] (including emails) with respect to me generally and my academic performance at the Civic Hospital, the General Hospital and the Children's Hospital of Eastern Ontario from [specified date] to date. I expect the majority of my materials will be found in the offices of the division of General Surgery,

the office of [named doctor], the office of the VP Medical Affairs [named doctor], the office of the Vascular Program Director [named doctor], the office of the Chair of Surgery [named doctor], the office of the program director in the division of Pediatric Surgery at the CHEO [named doctor], the account of general surgery resident [named doctor] and other offices.

[2] The Ottawa Hospital transferred the appellant's request, under section 25 of the *Act*, to the Children's Hospital of Eastern Ontario (the hospital) as some of the requested information may be in the custody or control of that institution. Order PO-3346 deals with the appeal relating to the decision of the Ottawa Hospital and this order deals with that part of the appellant's request relating to the Children's Hospital of Eastern Ontario.

[3] The hospital located responsive records and granted partial access to them, withholding information on the basis of the discretionary exemption in section 19 (solicitor-client privilege). The hospital also submits that some of the information is excluded from the scope of the *Act* on the basis of section 65(6), the employment and labour relations exclusion.

[4] During my inquiry into this appeal, I sought representations from the appellant, the hospital and PAIRO¹, the organization representing medical residents. I received representations from the hospital and PAIRO only. Also, during my inquiry, I raised the issue of the possible application of the discretionary exemption in section 49(a), in conjunction with section 19, as the records appear to relate to the appellant.

[5] In this order, I uphold the hospital's decision.

RECORDS:

[6] The records at issue consist of two emails.

DISCUSSION:

[7] In its representations, the hospital submits that while it claimed that one of the records was exempt under section 19, it considers both records to be excluded from the scope of the *Act* under section 65(6)3 which 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:

¹ Now known as PARO – Professional Association of Residents of Ontario.

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

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

[9] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.³

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

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

[12] For section 65(6)3 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
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the

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

⁴ Order PO-2157.

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

⁶ *Ministry of Correctional Services*, cited above.

institution has an interest.

[13] Based on my review of the records, it is evident that the records were prepared and used for the purpose of consultations and discussions about the appellant. My consideration on the application of the exclusion will focus on part 3 of the test only.

Part 3: labour relations or employment-related matters in which the institution has an interest

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

- a job competition⁷
- an employee's dismissal⁸
- a grievance under a collective agreement⁹
- disciplinary proceedings under the *Police Services Act*¹⁰
- a "voluntary exit program"¹¹
- a review of "workload and working relationships"¹²
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*¹³

[15] 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.¹⁴

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

⁷Orders M-830 and PO-2123.

⁸ Order MO-1654-I.

⁹ Orders M-832 and PO-1769.

¹⁰ Order MO-1433-F.

¹¹ Order M-1074.

¹² Order PO-2057.

¹³ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

¹⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

employees' actions.¹⁵

[17] The hospital submits that the appellant, while he was a medical resident, was an employee of the hospital. As a result, the hospital submits that it has an interest in the record as it was the appellant's employer. The hospital submits:

- PAIRO, the bargaining agent for medical residents, views the residents as employees of the hospital and characterizes the relationship between the hospital and the resident as one of employment.
- The terms and conditions of employment for residents are incorporated in a collective agreement which is negotiated through a process of collective bargaining between PAIRO and the Council of Academic Hospitals of Ontario (CAHO), the employer organization representing the hospital and other academic hospitals in Ontario.
- The hospital is partnered with the University of Ottawa (the university) for the purpose of post-graduate medical education. As a result, medical residents employed by the hospital also have the status as post-graduate medical students with the university. This dual status is recognized in an affiliation agreement between the hospital (and other academic hospitals) and the university.

[18] The hospital submits that it has an interest in the record as it relates to the appellant's employment, including his performance of his duties and the working conditions at the hospital. The hospital states:

The training and evaluation of medical residents is inextricably linked to their clinical service role...Residents who successfully advance are given more challenging clinical work. Residents who do not advance may be placed on closer supervision and oversight, in the form of remediation or probation. They may ultimately see their employment with the hospital terminated as a result of unsuccessful evaluations.

Residents' evaluations are directly tied to their ability to continue in their clinical work as an employee of the hospital, to the nature of work they receive, and to their ultimate success or failure in both their learning and their employment. Evaluation is both academic and clinical, and the hospital has an interest regardless of whether the actual evaluation is framed as a hospital evaluation or a university evaluation.

¹⁵ *Ministry of Correctional Services*, cited above.

[19] PAIRO also submits that medical residents are employees of the hospital and provides the relevant portions of the agreement between itself and the Council of Academic Teaching Hospitals.

[20] As stated above, the phrase "in which the institution has an interest" has been interpreted to refer to matters involving an institution's own workforce. Based on the hospital's representations and the records before me, I find that the appellant was an employee of the hospital for the purposes of section 65(6) and, as such, the hospital has an interest in the records because they relate to its employee, the appellant.

[21] I further find that the information in the records relate to employment related matters including the evaluation of the appellant's work and the appellant's ability to complete his residency. I find that this employment related matter is a matter in which the hospital would have an interest because of its employment relationship with the appellant.

[22] Accordingly, I find the records were prepared and used for meetings, discussions and consultations about employment-related matters in which the hospital has an interest, and are therefore excluded from the application of the *Act* under section 65(6)3.

ORDER:

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

Original Signed By: _____
Stephanie Haly
Adjudicator

_____ July 22, 2014