Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3861

Appeal PA16-243

The Ottawa Hospital

June 27, 2018

Summary: This appeal deals with records relating to a number of complaints filed by the appellant against a medical resident, the Medical Chief of Staff and several physicians at The Ottawa Hospital (the hospital). The hospital claimed the application of the exclusions in sections 65(6)3 and 65(6)5 (employment or labour relations) of the *Freedom of Information and Protection of Privacy Act* (the *Act*) to most of the records at issue, and section 49(a), in conjunction with section 13(1) (advice or recommendations) of the *Act* to two records. During the inquiry, the adjudicator raised the possible application of the access provisions in the *Personal Health Information Protection Act* (*PHIPA*) to the records.

In this order, the adjudicator finds that while some of the records contain the appellant's personal health information as defined in *PHIPA*, they are not dedicated primarily to personal health information. As no exemptions under *PHIPA* were claimed, the appellant is entitled under section 52(3) of *PHIPA* to only his personal health information contained in the records.

The adjudicator also finds that some of the records which the hospital claims are excluded from the scope of the *Act* under section 65(6)3 fit within the exclusion. She finds that other records are not excluded from the scope of the *Act*, under either section 65(6)3 or 65(6)5. She finds that the records for which the hospital claimed the application of section 49(a) in conjunction with section 13(1) are exempt, in part, and upholds the hospital's exercise of discretion under these provisions. She orders the hospital to disclose certain records, in part, under both *PHIPA* and the *Act*, and to issue a decision letter to the appellant regarding the records that she finds are not excluded from the scope of the *Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2 (definition of personal information), 13(1), 49(a), 65(6)3 and 65(6)5; *Personal Health Information Protection Act*, S.O. 2004, c. 3, sections 4 and 52(3).

Orders and Investigation Reports Considered: Orders MO-3531, PO-3336, PO-3408 and PO-3526, PHIPA Decision 17 and PHIPA Decision 33.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by The Ottawa Hospital (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*), in response to a request for records relating to the requester's complaints made to the hospital, the College of Physicians and Surgeons, and the Faculty of Medicine at the University of Ottawa about his care, and about certain named physicians. He also requested records relating to his interactions with the Patient Advocate, Chief of Staff and CEO.

[2] The hospital notified third parties of the request and subsequently issued a decision, granting the requester partial access to the records. The hospital claimed the application of the discretionary exemption in section 19 (solicitor-client privilege), as well as the exclusion in section 65(6) (employment or labour relations) of the *Act* to the withheld records, or portions thereof. The hospital also claimed the application of section 52(1)(f) of the *Personal Health Information Protection Act* (*PHIPA*) to some of the records by reference to sections 49(a) and 13 (advice or recommendations) of the *Act* to deny access.

[3] The requester, now the appellant, appealed the hospital's decision to this office.

[4] During the mediation of the appeal, the hospital issued a supplementary decision, claiming an additional exemption, namely section 18(1)(j) (evaluation of quality of health care) to deny access to portions of the records. Also during mediation, the appellant advised the mediator that he was not seeking access to those records for which section 19 of the *Act* was claimed, as well as some of the records for which the hospital applied *PHIPA*.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. Representations were sought and received from both the hospital and the appellant. In its representations, the hospital advised that it was no longer relying on the exemption in section 18(1)(j) of the *Act*, and no longer relying on *PHIPA*, but that it was still relying on section 65(6) for most of the records and on section 49(a) in conjunction with section 13(1) for two records.

[6] Also during the inquiry, I sought further representations from the hospital and the appellant regarding the possible application of *PHIPA* to the records at issue. I received representations from the hospital in which it advised that it had re-visited its

position with respect to the records at issue, and would be issuing a revised decision letter to the appellant, disclosing some of the records, in whole or in part, which the hospital did shortly thereafter. I also received representations from the appellant.

[7] For the reasons that follow, I find that while some of the records contain the appellant's personal health information as defined in *PHIPA*, they are not dedicated primarily to personal health information. As the hospital has not claimed any exemptions under *PHIPA*, the appellant is entitled under section 52(3) to only his personal health information contained in those records. The hospital also claimed the application of the exclusions and an exemption under the *Act* to these records.

[8] In that regard, I find that some of the records which the hospital claims are excluded from the scope of the *Act* under section 65(6)3 are excluded, but that other records are not excluded from the scope of the *Act* under either section 65(6)3 or 65(6)5. I find that the records for which the hospital claimed the application of section 49(a) in conjunction with section 13(1) are exempt, in part, and I uphold the hospital's exercise of discretion in choosing to withhold this information. I order the hospital to disclose certain records in part, under both *PHIPA* and the *Act*, and to issue a decision letter to the appellant regarding the records that I find are not excluded from the scope of the *Act*.

RECORDS:

[9] There are numerous pages of records consisting of correspondence and emails. I note that there is extensive duplication of content in the records, and that some of the pages are blank.

ISSUES:

A. Do the records contain "personal health information" as defined in section 4(1) of *PHIPA*?

B. If the records contain "personal health information", are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of *PHIPA*?

C. Do sections 65(6)3 or 65(6)5 exclude the records from the *Act*?

D. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

E. Does the discretionary exemption at section 49(a) in conjunction with the section 13(1) exemption in the *Act* apply to the information at issue? Did the hospital

exercise its discretion under section 49(a) of the *Act*? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[10] The hospital states that the appellant, a former patient, made complaints to the hospital regarding a number of physicians, the Medical Chief of Staff, and a medical resident. The complaints were investigated by the Medical Chief of Staff, and subsequently by the Chair of the Board of Governors of the hospital. The appellant also filed complaints with the College of Physicians and Surgeons of Ontario (CPSO) and the University of Ottawa's Faculty of Medicine in regard to the medical resident. The hospital states that the records were prepared in relation to the appellant's complaints and relate to the investigation of these complaints, and would not have been created but for the appellant's complaints.[1]

Preliminary Issue

[11] Section 52 of *PHIPA* grants an individual a right of access to a record of their own personal health information that is in the custody or under the control of a health information custodian, subject to limited exceptions and exclusions.

[12] The *Act* grants an individual a right of access to records of general information under Part II and to their own personal information under Part III which is in the custody or under the control of an institution, subject to certain exemptions and exclusions. Under section 8(4) of *PHIPA*, a person may still have a right of access under the *Act* to information in a record of personal health information, if that health information can be reasonably severed from the record.

[13] There is no dispute that the hospital is an entity that is an institution subject to the *Act* under section 2(1) and is also a health information custodian subject to *PHIPA* under section 3(1). Based on the nature of the request and the content of the responsive records, I find that the appellant is seeking access to his records of personal health information under *PHIPA*, as well as general information of the hospital under the *Act*.

[14] In situations where both *PHIPA* and the *Act* could apply, the approach of this office is to first consider the extent of any right of access under *PHIPA*, and then consider the extent of any right of access under the *Act* to any records or portions of

[1] The hospital also notes that it has disclosed correspondence to and from the appellant, such that the remaining records at issue are those which were not prepared by, or received by, the appellant.

records for which a determination under *PHIPA* has not been made.[2]

Issue A: Do the records contain "personal health information" as defined in section 4(1) of *PHIPA*?

[15] As previously stated, section 52 of *PHIPA* grants an individual a right of access to a record of his or her own personal health information that is in the custody or under the control of a health information custodian, subject to limited exceptions and exclusions.

[16] "Personal health information" is defined in section 4 of *PHIPA* as follows:

> (1) In [*PHIPA*],
>
> "personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,
>
> > (a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
> >
> > (b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,
> >
> > (c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,
> >
> > (d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,
> >
> > (e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,
> >
> > (f) is the individual's health number, or
> >
> > (g) identifies an individual's substitute decision-maker.
>
> (2) In this section,

[2] See PHIPA Decision 73.

> "identifying information" means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.
>
> (3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

[17] Section 4(4) of *PHIPA* sets out an exception to the definition of "personal health information," which is not reproduced here as it is of no relevance in this appeal.

[18] If the records contain the personal health information of the appellant, he has a right of access under section 52 of *PHIPA*.

[19] The hospital submits that, upon further review of the records, some of them contain the appellant's personal health information, including: descriptions and/or summaries from his treating physicians of the care they provided and responses to his statements regarding the care that he received; or summaries by the appellant of his medical condition and/or the care he believes he received or should have received at the hospital.

[20] The hospital lists the following records as containing the appellant's personal health information:

- 1-4, 5-9, 115-116, 118-120, 121-122, 123-124, 136-138, 234-291, 317-320, 324, 338-343, 345-348, 390-457, 504-507, 508-510, 511-514, 515-518, 519-521, 522-525, 526-529, 530-533, 534-537, 538-541, 544-548, 568-573, 577-579, 580-583, 584-586, 587-589, 590-594, 596-597 and 607-608.

[21] The hospital submits that other records or portions thereof contain little, if any, of the appellant's personal health information. These records either contain no personal health information of the appellant, or contain minimal information such as: the medical registration number and nothing more; the appellant's name and the fact that he received care at the hospital; and implicit identification of physicians who provided the appellant with care.

[22] The hospital lists the following records as being in the category of containing no personal health information or minimal personal health information:

- 11-14, 19-21, 27-29, 30-32, 54, 57, 58-59, 60-61, 62, 97, 98, 104-105, 114, 144-146, 147-149, 212, 214, 216-218, 219-222, 224, 226-227, 229, 230, 231, 293-294, 295-296, 297-299, 300-302, 303-305, 306-309, 316, 321, 325-332, 333-334, 335, 336-337, 344, 349, 350, 351, 352, 354-364, 365-380, 458, 549,

550-552, 553-558, 560-567, 574-576, 595, 598, 616-618, 619-621, 648, 649, 650-651, 652-653, 654, 655-656 and 657-658.[3]

[23] The appellant submits that all of the records contain his personal health information because they all relate to the provision of health care to him and were created solely as a result of this health care.[4]

[24] In determining whether the records contain the appellant's personal health information, I note that this office has adopted a "record-by-record" approach where the whole record, as opposed to individual paragraphs, sentences or words are analyzed to determine if the record contains the personal information or the personal health information of an individual.[5]

[25] I have reviewed the records at issue carefully, and I agree with the hospital that the records it claims contain the appellant's personal health information do, indeed, contain his personal health information as defined in section 4(1) of *PHIPA*, because they contain identifying information that relates to the appellant's physical health, which falls within paragraph (a) of the definition of personal health information.

[26] With respect to the records that that the hospital claims either do not contain the appellant's personal health information or little personal health information, I agree on my review of the records that the following records do not contain the appellant's personal health information as defined in section 4(1) of *PHIPA*:

- 114, 218, 229, 230, 231, 316, 321, 334, 335, 336-337, 344, 349, 350, 351, 352, 353, 361-364, 365, 366, 375-380 (duplicate of 361-364), 458, 549, 550-552, 553-558, 560-567, 574-576, 595, 598, 616-618, 619-621 (duplicate of 616-618), 648, 649 and 650-651.

[27] Given that these records do not contain the appellant's personal health information, they are not subject to the application of *PHIPA*. The hospital has also claimed the application of the exclusion in section 65(6) of the *Act* to most of these records and the exemption in section 49(a) of the *Act* to two records, which I consider below.

[28] Conversely, I find that some of the records that the hospital has claimed do not contain the appellant's personal health information actually do contain his personal health information as defined in section 4(1) of *PHIPA*. These records contain identifying information about the appellant relating to his physical health (paragraph (a) of the definition), and relating to the providing of health care to him (paragraph (b) of the definition). I find that the appellant's personal health information is contained in the

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[3] I note that records 11-14, 19-21, 27-29, 30-32 are not at issue in this appeal.
[4] The appellant refers to PHIPA Decisions 17 and 40.
[5] See, for example, Order M-352, adopted in PHIPA Decisions 17, 27 and 30.

following records:

- 54, 57, 58-59 (duplicate of 57), 60-61, 62 (duplicate of 54), 97, 98, 144-146 (duplicated in 147-149) 212, 214 (duplicate of 212), 216-218 (duplicated in 293-294, 295-296, 297-299, 300-302, 303-305 and 306-309) , 219-222 (duplicate of 216-218), 224, 226-227 (duplicate of 224), 325-332 (duplicated in 354-360 and 367-374), 333-334, 652-653, 654 (duplicate of 652-653), 655-656 and 657-658 (duplicate of 655-656).

[29] Having found that the above-listed records contain the appellant's personal health information, I will now determine how the access provisions in section 52 of *PHIPA* apply to them.

Issue B: If the records contain "personal health information", are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of *PHIPA*?

[30] To determine the extent of the appellant's right of access to the records under *PHIPA*, I must determine whether the records are "dedicated primarily" to his personal health information. This is because the right of access in *PHIPA* applies either to a whole record under section 52(1) or only to certain portions of a record of personal health information under section 52(3).

[31] Section 52(1) of *PHIPA* states:

> Subject to this Part, and individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,
>
> > (a) the record of information in the record is subject to a legal privilege that restricts disclosure of the record or the information, as the case may be, to the individual;
> >
> > (b) another Act, an Act of Canada or a court order prohibits disclosure to the individual of the record or the information in the record in the circumstances;
> >
> > (c) the information in the record was collected or created primarily in anticipation of or for use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded;
> >
> > (d) the following conditions are met:
> >
> > > (i) the information was collected or created in the course of an inspection, investigation or similar procedure authorized

by law, or undertaken for the purpose of the detection, monitoring or prevention of a person's receiving or attempting to receive a service or benefit, to which the person is not entitled under an Act or a program operated by the Minister, or a payment for such a service or benefit, and

(ii) the inspection, investigation, or similar procedure, together with all proceedings, appeals or processes resulting from them, have not been concluded;

(b) granting the access could reasonably be expected to,

(i) result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person,

(ii) lead to the identification of a person who was required by law to provide information in the record to the custodian, or

(iii) lead to the identification of a person who provided information in the record to the custodian explicitly or implicitly in confidence if the custodian considers it appropriate in the circumstances that the identity of the person be kept confidential; or

(c) the following conditions are met:

(i) the custodian is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or is acting as part of such an institution, and

(ii) the custodian would refuse to grant access to the part of the record,

(A) under clause 49(a), (c) or (e) of the *Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record, or

(B) under clause 38(a) or (c) of the *Municipal Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record.

[32] Section 52(3) of *PHIPA* states:

> Despite subsection (1), if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access.

[33] Under section 52(3) of *PHIPA*, if a record is not dedicated primarily to personal health information about the individual requesting the information, they only have a right to access any personal health information that can be reasonably severed.[6] If the record is dedicated primarily to the personal health information of the individual requesting the information, the right of access applies to the entire record, even if it incidentally contains information about other matters or other individuals.

[34] In addition, sections 8(1) and 8(4) of *PHIPA* preserve the appellant's right of access under section 10 of the *Act* to a record of personal health information if the information constituting the personal health information of an identifiable individual is removed from the record. Consequently, I must first determine the appellant's right of access under *PHIPA*, and then consider the extent of any right of access under the *Act* to any records or portions of record for which a determination under *PHIPA* has not been made.[7]

[35] The hospital submits that this office interpreted the application of section 52(3) in PHIPA Decision 17. In that decision, it argues, this office rejected an interpretation which focused on the quantity of personal health information in the record; instead applying a qualitative analysis which better reflected the purposes of *PHIPA*, taking into consideration the following factors:

- The quantity of personal health information of the requester in the record;
- Whether there is personal health information of other individuals in the record;
- The purpose of the personal health information in the record;
- The reason for the creation of the record;
- Whether the personal health information of the requester is central to the purpose for which the record exists; and
- Whether the record would exist "but for" the personal health information of the requester in it.

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[6] See PHIPA Decision 17.
[7] See PHIPA Decision 73.

[36] The hospital submits that in PHIPA Decisions 17 and 33, this office identified some examples of the types of records that would be dedicated primarily to personal health information. For example, in PHIPA Decision 17, Assistant Commissioner Sherry Liang stated:

> . . . I find that some records at issue in this review are dedicated primarily to the personal health information of the complainant's wife and daughter. These are chart reviews, a nursing review, a letter from a physician concerning the care he provided to the complainant's wife, and a report the hospital describes as containing quality of care information. Also included is a memo from the hospital's chief-of-staff documenting issues raised by the complainant and seeking staff input on addressing these issues, and records containing this memo as an attachment to an email.
>
> Each of these records contains a great deal of personal health information about the complainant's wife and daughter. More significantly, the personal health information in the records is central to the purpose of these records, which is to review the care provided to them during their time in the hospital. Although some of these records may not be contained in their patient file, these records are qualitatively about the clinical experience of the complainant's wife and daughter in the hospital, and are not primarily about other matters. As such, the complainant exercises a right of access, on their behalf, to the records in their entirety under section 52(1), subject to any applicable exemptions. I recognize that information about matters unrelated to his wife and daughter contained in these records may incidentally be accessible to them under section 52(1). Given that any unrelated information is contained in records that are primarily about the complainant's wife and daughter, I find this result is compatible with the purpose of the access regime in *PHIPA*.

[37] Similarly, the hospital argues that in PHIPA Decision 33, Adjudicator Jenny Ryu identified records which were dedicated primarily to personal health information, finding that it was clear from the records' contents that the personal health information in them was central to the purpose of the records, and that they were qualitatively about the clinical experience of the complainant's mother in the hospital, and were not about other matters. In that case, the records contained communications between hospital staff about the reviews conducted in respect of the care provided to the patient, including information about the basis for conducting the reviews and their findings.

[38] Applying the principles stated above, the hospital submits that records 1-4, 5-9, 115-116, 118-120, 136-138 and 338-343 are dedicated primarily to personal health information, and that it is not applying any exemptions to these records. The hospital advised it would issue a revised decision letter to the appellant, disclosing these records in full, and subsequently did so. Consequently, these records are no longer at issue in this appeal.

[39] Conversely, the hospital, also relying on PHIPA Decisions 17 and 33, submits that records containing a requester's personal health information, but whose central purpose is to address other matters, such as discussions of legal strategy, employment-related matters, legal matters, approaches to dealing with complaints, administrative matters or other hospital matters have been found not to be dedicated primarily to personal health information.

[40] As a result, the hospital argues that, applying the qualitative analysis described in PHIPA Decision 17, the balance of the records are not dedicated primarily to the appellant's personal health information, even where they contain his personal health information. The records were created as a result of and in the course of responding to the appellant's complaints to the hospital and the CPSO, and that it is the complaints that are central to the purpose for which the records were created. The hospital advises that it has identified portions of most of these records that can be severed and disclosed to the appellant, including records 121-122, 123-124, 316-320, 324, 344-348, 504-507, 508-510, 511-514, 515-518, 519-521, 522-525, 526-529, 530-533, 534-537, 538-541, 544-548, 568-573, 577-579, 580-583, 584-586, 587-589, 590-594, 596-597 and 607-608.

[41] Lastly, with respect to the remaining records at issue, the hospital states:

> The balance of the records still in issue which are not specifically identified above either contain no personal health information, or are not dedicated primarily to the personal health information of the Appellant. . . [T]hey are records arising out of the Appellant's various complaints – to the Hospital, the CPSO, and the Board. They may in some cases incidentally contain the Appellant's personal health information, but that information would, if severed, comprise only disconnected and meaningless snippets of personal information. These records therefore cannot be severed and disclosed, even where they contain the Appellant's personal information.

[42] The appellant states that *PHIPA* is remedial legislation intended by the Legislature to provide the broadest possible access to personal health information, allowing only very limited exceptions as provided in the legislation. The appellant further submits that the application of section 52(3) restricting access unless a record is dedicated primarily to the personal health information about the individual requesting access is dependent upon the definition of "personal health information" in section 4(1)(b). The appellant argues that there are no qualifiers, conditions or limitations on the word "relate" in section 4(1)(b),[8] such that if a record relates to the provision of health care "in any way, to any degree, however peripherally or indirectly, however many steps removed, then it is personal health information."

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[8] Section 4(1)(b) refers to personal health information means identifying information about an individual if it "relates" to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual.

[43] With respect to the possible application of section 52(3), contrary to the hospital's position, the appellant argues that the records are dedicated primarily to his personal information, in that the acts of responding to and investigating complaints about the health care that was provided relates to that health care and is, therefore dedicated primarily to his personal health information.

[44] As previously stated, I have reviewed the remaining records at issue containing the appellant's personal health information, and I find that they are not dedicated primarily to the appellant's personal health information. Applying the qualitative analysis set out in PHIPA Decisions 17 (set out above) and 33, I find that the central purpose of the records at issue was to discuss approaches as to how to respond to the appellant's various complaints, and that the personal health information in the records is not central to the purpose of the records. Having found that the records are not dedicated primarily to the appellant's personal health information, section 52(3) of *PHIPA* applies, which means that the appellant has a right of access to only his personal health information that can be reasonably severed from the record. I also note that the hospital has not claimed any exemptions listed in section 52(1) of *PHIPA*.

[45] Consequently, applying section 52(3), and upon my review of the records, I am satisfied that the hospital properly severed the appellant's personal health information from records 121, 123, 324, 504, 508, 512, 516, 519, 523, 527, 531, 535, 539, 545, 569, 577, 580, 584, 587, 590, 596 and 607. I note that the hospital disclosed this personal health information to the appellant in its revised access decision, which was issued during this inquiry. Similarly, I find that the hospital properly severed and disclosed the appellant's personal health information from records 144-146 and 147-149 at the time of the access request.

[46] I also find that the appellant's personal health information can be severed from records 57, 60, 212, 327, 328, 329, 330, 331, 652, 653, 655 and 656. I will order the hospital to disclose the appellant's personal health information contained in these records to him. I note that some of the personal health information in these records is duplicated in other records. In my view, there is no useful purpose in ordering the hospital to disclose duplicate personal health information to the appellant, and therefore, order provision three will be limited to the records listed above.

[47] Lastly, I find appellant's personal health information, contained in records 224 and 226-227 (which are not dedicated primarily to the appellant's personal health information) cannot be reasonably severed from these records, as severing this personal health information would result in disconnected meaningless snippets being disclosed to the appellant. Therefore, I uphold the hospital's decision to not disclose them to the appellant.

[48] In sum, under *PHIPA*, I order the hospital to disclose the appellant's personal health information to him that can be severed from records 57, 60, 212, 327, 328, 329, 330, 331, 652, 653, 655 and 656. Having made these findings regarding the appellant's

right of access under *PHIPA*, I now turn to the question of whether the appellant has a right of access under the *Act* to the records or portions of records for which I have made no determination under *PHIPA*. The hospital is claiming the application of the exclusion in 65(6) of the *Act* to all of the records at issue except two records, for which the hospital is claiming the exemption in section 49(a), in conjunction with section 13(1) of the *Act*, all of which I consider below.

Issue C: Do sections 65(6)3 or 65(6)5 exclude the records from the *Act*?

[49] The hospital submits that all of the remaining records at issue, except two records at pages 144-149 are excluded from the *Act* under section 65(6). The hospital advises that the records which are subject to section 65(6) fall into four categories, as follows:

- Communications relating to the service and/or quality of care provided by residents and physicians with hospital privileges;
- Communications to and from the Medical Chief of Staff relating to his investigation on behalf of the hospital into the service and/or quality of care provided to the appellant;
- Records relating to a complaint filed with the CPSO about the quality of care and conduct of residents/physicians with hospital privileges, and correspondence about the complaint; and
- Records relating to the enquiry by the Board of Governors into the complaints.

Section 65(6)3 – the Medical Chief of Staff and the medical resident

[50] The hospital submits that the records relating to the Medical Chief of Staff and the resident fall under section 65(6)3. It argues that it is well established that medical residents are employees of the hospital,[9] and that they are evaluated on their performance, conduct and competence during their employment with the hospital. The continued viability of the employment relationship is inextricably linked to the quality of their clinical work and the care provided to patients. Complaints about the conduct of residents or the quality of care they provide may be subject to investigation, which may have consequences up to and including the termination of employment for reasons of conduct, performance or competence. In this case, the Medical Chief of Staff was responsible for the investigation into the complaint filed by the appellant against the medical resident, and this investigation has the potential to have a direct impact on the employment of that resident, including consideration in the performance appraisal or potential termination of employment.

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[9] See Orders PO-3358, PO-3363, PO-3389 and PO-3346.

[51] The hospital further submits that the Medical Chief of Staff is a physician, but is also an employee of the hospital, and that records relating to the conduct of the Medical Chief of Staff, and to matters where the employment of the Medical Chief of Staff is at issue, are excluded from the *Act* by virtue of section 65(6)3. According to the hospital, once the Medical Chief of Staff's investigation was complete, the appellant subsequently filed a complaint with the hospital's Board of Governors regarding not only the resident, but also the performance and competence of the Medical Chief of Staff in investigating and responding to his previous complaint. The hospital argues that the Board of Governors has the ultimate responsibility of oversight of physician performance, including supervising the performance, conduct and competence of the Medical Chief of Staff. The Board of Governors can terminate the Medical Chief of Staff's employment and/or revoke his appointment.

[52] The hospital states:

> There is no question that records relating to the investigation of complaints about an employee received from a third party, and which may lead to employment-related consequences, are excluded from the *Act* by operation of section 65(6)3.

[53] The hospital further argues that the records relating to the complaint to the CPSO are also excluded, as the complaint has a direct impact on the employment of the resident with the hospital. In order for a resident to be employed by the hospital, it submits, they must be a member in good standing of the CPSO. The loss of a license to practice (as a result of actions taken by the CPSO) may lead to the termination of the resident's employment. The hospital goes on the argue that similar to an internal complaint from a patient, a complaint to the CPSO about a resident is inextricably linked to employment-related matters in which the hospital has an interest.

[54] 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:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[55] 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 institution has an interest.

[56] The hospital submits that the three-part test articulated above has been met because:

- all of the records were collected, prepared, maintained or used by it or on its behalf;
- the records were in relation to meetings, discussions and consultations and communications. In most cases, the records constitute communications; and
- the communications were about employment-related matters in which it has an interest.

[57] The hospital further submits that the records have "some connection" to the performance, conduct or competence of the resident and the Medical Chief of Staff, as these issues have a direct impact on their appointments/employment with the hospital.

[58] The hospital states that none of the exceptions to section 65(6)3 found in section 65(7) apply.

[59] Lastly, the hospital argues that should section 65(6)3 or 65(6)5 not apply, it reserves the right to make further representations with respect to the possible application of section 49(a), in conjunction with section 13(1) to the records.

[60] The appellant acknowledges that the Medical Chief of Staff and the medical resident are employees of the hospital. However, his position is that section 65(6)3 does not apply because the records do not deal with the terms and conditions of their employment or with employment-related issues. He argues that employment-related matters are separate and distinct from matters related to employees' actions. In support of this argument, the appellant relies on *Ontario (Correctional Services) v. Goodis.*[10]

[61] The appellant goes on to refer to the following specific types of records, and submits that they are not related to employment-related issues:

- communications between a physician and the medical resident – these are not communications to or from anyone in the hospital's administration;
- communications between the Medical Chief of Staff and the medical resident – these are related to the resident's actions;

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[10] 2008 CanLII 2603 (Div. Ct.) (*Goodis*).

- communications between the hospital's Privacy Officer and a physician and/or the medical resident regarding the appellant's withdrawal of consent for access to his hospital records – these are not related to employment-related issues;

- a communication from the Medical Chief of Staff to "whom it may concern" as it does not apply to a specific physician;

- the records relating to the CPSO complaint about the medical resident – these relate to the resident's actions.

[62] The appellant submits that the hospital has applied the exclusion in section 65(6)3 too broadly, stating:

> I submit that FIPPA is remedial legislation intended by the Legislature to provide the broadest possible access to information held by government and public institutions such as hospitals for the overall societal good, allowing only limited exceptions as explicitly provided for in the legislation.
>
> . . .
>
> The consequences of interpreting FIPPA in a way which reduces access to information, contrary to Section 64(1) of the *Legislation Act 2006*, can be disastrous to an individual such as me. Allowing hospitals to hide the details of the investigation of complaints, whether or not those investigations are genuine, from injured and sexually abused patients and from surviving family members is an important public health and safety issue with very serious consequences for society.
>
> . . .
>
> There is an urgent and compelling public interest in broadly interpreting FIPPA for the benefit of the applicant in accordance with the principles applicable to remedial legislation in general . . . Doing so would make the hospital complaints process discoverable under FIPPA. It would force hospitals to carry out genuine investigations in response to serious complaints and then to take appropriate action. It would stop, almost overnight, the cover-up by Ontario hospitals of incompetence, negligence, professional misconduct and sexual abuse and assault.

[63] In reply, the hospital argues that by the time *Goodis* was heard, it was already well established in the jurisprudence that an institution's investigation into complaints against its staff are "employment-related matters," because they may result in the imposition of discipline. In addition, the hospital argues that the appellant has misinterpreted the finding in *Goodis* as his position is that the records are about the actions of the hospital's employees. The hospital submits that in *Goodis*, the Court recognized that investigations into complaints which may result in discipline may be

employment-related. It goes on to argue that this office has on numerous occasions reached the same conclusion, accepting that section 65(6) applies to exclude records relating to internal investigations of complaints regarding the conduct of employees.[11]

Analysis and findings

[64] 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 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[12]

[65] 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.[13] 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.[14] 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.[15]

[66] 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.[16]

[67] As previously stated, the two employees to whom the section 65(6)3 exclusion may relate, are the Medical Chief of Staff and the medical resident. Both parties agree that these individuals are employees for the purposes of section 65(6)3, and I agree. I also note that, regarding whether the records relate to an employment-related matter, the question of whether medical residents are engaged in employment within the meaning of the section was canvassed in considerable detail by Adjudicator Stephanie Haly in Order PO-3408. In that order, she concluded that a medical resident was an employee of the hospital.

[68] As previously stated, the records relate to complaints the appellant made to the hospital, the CPSO and the University of Ottawa about the medical resident, as well as a

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[11] See, for example, Orders MO-2428, PO-2625-I, PO-2748, PO-2809 and PO-3715.
[12] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Toronto Star*).
[13] Order PO-2157.
[14] *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.
[15] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[16] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

complaint the appellant made to the Board of Governors about the Medical Chief of Staff's investigation into the complaints about the medical resident and other physicians. These records consist of discussions regarding complaints made by the appellant about them, including their proposed responses to the complaints. Most of these records relate to the medical resident, including the following:

- email discussions and chains between the medical resident, the Medical Chief of Staff and other physicians regarding the appellant's complaints, which were made to the hospital, the CPSO and the University of Ottawa (faculty of Medicine). Much of the content of these emails is duplicated in the records;

- handwritten notes made by the medical resident in response to the appellant's complaint to the hospital and to the CPSO;

- letters written by the medical resident in response to the appellant's complaints, including various draft versions of these letters; and

- emails between the medical resident and the hospital's Chief Privacy Officer, which relate not to the appellant's withdrawal of consent, despite their subject line, but to the complaints made about the medical resident.

[69] I find for the following reasons that only some of these records were collected, prepared, maintained or used by the hospital in relation to meetings and discussions related to employment or employment-related matters in which the hospital has an interest as contemplated by the exclusion in section 65(6)3. I note that where I find that the exclusion applies, it means that the records are excluded from the scope of the *Act*, removing them from the right of access under the *Act*, even if the records contain the appellant's personal information.

[70] A number of previous orders of this office have addressed whether records related to complaints about employees, including medical residents, are excluded under section 65(6)3 and this office has found that they were excluded from the scope of the *Act*,[17] where the three-part test has been met.

[71] I accept that all of the records were prepared, maintained and used by the hospital or on its behalf as contemplated by part one of the three-part test. From the records themselves, it is evident that consultations, discussions and communications took place involving the medical resident, the Medical Chief of staff and the hospital regarding the complaints made by the appellant to the hospital, the CPSO and the Board of Governors. Therefore, I find that part two of the test has been met with respect to all of the records.

[72] To establish part three of section 65(6)3, the hospital was required to provide

[17] See, for example, Orders PO-3257, PO-3363, PO-3389 and PO-3689.

evidence to demonstrate that the consultations, discussions or communications that took place were about employment-related matters in which the hospital has an interest. Past orders of this office have found that where records relate to an institution's own workforce, the institution's interest in them, for the purpose of part three of the test in section 65(6)3, amounts to "more than a mere curiosity or concern."[18]

[73] I find that part three of the test has been met with respect to only the records located at pages 60-61, 326-332 (duplicated in 354-360 and 367-374), and 361-363 (duplicated in 375-380). I find that the consultations, discussions or communications that are reflected in these records relate to an employment-related matter in which the hospital has an interest. In particular, these records contain information that has some connection to the overall performance appraisal of the medical resident by the supervising physician, as well as detailing the overall responsibilities of the position of the medical resident as an employee of the hospital.

[74] The above-listed records relate to the complaints filed by the appellant against the medical resident, but also relate to the medical resident's overall performance in their position as a resident. I find that because the hospital is the employer of the medical resident, it has an interest in the records, and that this interest is "more than a mere curiosity or concern." As a result, I am satisfied that the hospital has the requisite interest in the employment-related matters which are the subject of these records as required for part three of the test to be met. Consequently, I find that part three of the section 65(6)3 test has been met with respect to the records located at pages 60-61, 326-332 (duplicated in 354-360 and 367-374), and 361-363 (duplicated in 375-380). I also find that none of the exceptions in section 65(7) are relevant, and, therefore, the *Act* does not apply to these records.

[75] The remaining records for which the hospital has claimed the application of section 65(6)3 relate to the appellant's complaints against both the medical resident and the Medical Chief of Staff. In my view, the hospital has applied the exclusion too broadly with respect to these records, and I find that they are not excluded from the scope of the *Act*, because they do not meet the third part of the three-part test in section 65(6)3. In particular, I find that these records relate to the appellant's complaints and involve discussions surrounding the existence of the complaints, how to gather information to respond to the complaints, how to respond to the CPSO, and how to respond to the appellant in response to the complaints. In my view, the records were created in order to respond to the complaints made by the appellant, and were not created in order to enable the hospital to determine whether to take disciplinary or other workplace action against either the medical resident or the Medical Chief of Staff.

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[18] See, for example, Order PO-2426.

[76] In the *Goodis*[19] case, the Divisional Court found that a file documenting the investigation of a complaint against a police officer was employment-related because of the potential for disciplinary action against the police officer. Notably, in making that finding, the Court also stated at para. 29:

> However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the Act, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document.

[77] Examples of records that this office found to be excluded from the scope of the *Act* can be found in PHIPA Decision 17, in which the relevant records were hospital communications with physicians about personnel matters arising from its review of care provided to certain patients. Another example is Order MO-3531, in which this office found that records forming part of the institution's disciplinary program in place for EMS employees were excluded from the municipal equivalent of the *Act*.

[78] In this case, upon reviewing the records, I find that they are not "employment-related." Instead, I find that they are related to addressing complaints made by a patient regarding his care while at the hospital. Consequently, I find that the third part of the three-part test has not been met, section 65(6)3 does not apply to these records, and they are not excluded from the scope of the *Act*.

Section 65(6)5 – the other physicians

[79] The hospital submits that section 65(6)5 applies to the records relating to the other physicians the appellant complained about, who are not employees of the hospital, but rather independent contractors of the hospital. It advises that before physicians can treat patients, they must be granted hospital privileges, typically done through the medical staff appointments process, set out in the hospital's Medical By-Law (the by-law), although the Medical Chief of Staff in consultation with the Board of Governors may grant temporary privileges to physicians. Privileges granted in accordance with the by-law may be subject to limits or conditions.

[80] The hospital goes on to state that the by-law sets out a process for initial appointment to the medical staff, and annual reappointment through the medical staff performance appraisal process. Appointments and reappointments are determined by the Board of Governors, on recommendation of the Medical Advisory Committee. During the appointment process, all of a physician's credentials, including practice experience, are reviewed. If the Board of Governors is not satisfied with the appropriateness of the appointment, privileges may be denied. The by-law also provides for the modification of privileges granted, for voluntary relinquishment, and for revocation by the Board of

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[19] Cited in note 10.

Governors.

[81] Privileges may be revoked, the hospital advises, on the recommendation of the Medical Chief of Staff for reasons of conduct, performance or competence. Where a complaint is made by a patient about a physician, the complaint may be investigated, and the investigation may lead to a recommendation to revoke the privileges of the physician in question.

[82] Section 65(6)5 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:
>
> > 5. Meetings, consultations, discussions or communications about applications for hospital privileges, the appointments or privileges of persons who have hospital privileges, and anything that forms part of personnel file of those persons.

[83] 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

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.

[84] The hospital submits that the three-part test has been met in that all of the records were collected, prepared, maintained or used by it or on its behalf in relation to meetings, discussions and consultations and communications about the appointment or privileges of persons having hospital privileges.

[85] In support of its position, the hospital refers to Orders PO-3336 and PO-3526, as well as PHIPA Decision 17. The hospital argues that the records at issue in Order PO-3336 were nearly identical to the records at issue in this appeal, as they were emails related to the conduct, competence and performance of a physician who had privileges at a hospital. In that order, Adjudicator Donald Hale found that there was a substantial connection between a complaint that had been made about the physician and the physician's hospital privileges. In Order PO-3526, Adjudicator Stella Ball found that there was no requirement that some action was taken in respect of the physician's appointment or privileges in order for the exclusion to apply. The hospital also submits

that PHIPA Decision 17 concluded that records which consisted of hospital communications with physicians about personnel-related matters arising from its review of care provided to a patient were excluded from the *Act* under section 65(6)5.

[86] The hospital also submits that none of the exceptions in section 65(7) apply. Lastly, the hospital argues that should I find that the records are not excluded under section 65(6)5, it reserves the right to provide further representations with respect to the possible application of section 49(a), in conjunction with section 13(1) to these records.

[87] The appellant submits that none of the records at issue relate to hospital privileges, and that no proof has been provided that any of the records forms part of the personnel file of the physicians at issue. The appellant goes on to refer to the following specific types of records, and submits that they are not related to hospital privileges:

- communications between a physician and the medical resident – these are not communications to or from anyone in the hospital's administration;
- communications between the hospital's Privacy Officer and a physician and/or the medical resident regarding the appellant's withdrawal of consent for access to his hospital records – these are not related to hospital privileges;
- a communication from the Medical Chief of Staff to "whom it may concern" as it does not apply to a specific physician;
- the records relating to the CPSO complaint are not about applications for hospital appointments or the appointments or privileges of persons who have hospital privileges, nor do they form part of the personnel file of those physicians.

[88] The appellant also argues that the *Act* is remedial legislation intended by the Legislature to provide the broadest possible access to information held by government and public institutions such as hospitals, for the greater good, allowing only limited exceptions. He submits that section 64(1) of the *Legislation Act 2006* mandates that "an Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects." He further submits that Orders PO-3336 and PO-3526 have broadened the grounds upon which an institution can claim an exclusion, and that this is not what the *Legislation Act 2006* mandates, and that the effect of these orders is to thwart public access to information, defeating the purpose of the *Act* as set out in section 1 of the *Act*.

[89] In reply, the hospital argues that the findings in Orders PO-3336 and PO-3526 are consistent with the interpretation of section 65(6)3 accepted by this office and the Courts, as well the Legislature's intent in enacting section 65(6)5, which was to exclude matters relating to the relationship between a hospital and its medical staff, while recognizing that the nature of the relationship is distinct from the relationship between

the hospital and its employees.

Analysis and findings

[90] 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.[20]

[91] The records for which the exclusion in section 65(6)5 has been claimed relate to the appellant's complaints he made to the hospital, the University of Ottawa, the CPSO and the hospital's Board of Governors regarding a number of physicians who have privileges at the hospital. These records consist of emails discussing the complaints, consulting about the complaints, discussing what materials to review in order to respond to the complaints, and providing responses to the complaints, both in draft and final form. I also note that there is extensive duplication of the content in the email chains, and that some of the pages are blank.

[92] I find for the following reasons that none of these records were collected, prepared, maintained or used by the hospital or on its behalf in relation to consultations, discussions and communications related to several physicians' hospital privileges as contemplated by the exclusion in section 65(6)5.

[93] With respect to part one of the test in section 65(6)5, I have reviewed each of the records, and I find that they were prepared, maintained and used by the hospital, meeting the first part of the test. Concerning the second part of the test, I find that the records, which are emails, consist of consultations, discussions and communications, meeting the second part of the test.

[94] However, I find that the third part of the three-part test has not been met. In making this finding, I note that two previous decisions of this office, which the hospital is relying on, are instructive. In Order PO-3336, Adjudicator Donald Hale dealt with records relating to a complaint made about a physician with hospital privileges.[21] In Adjudicator Hale's analysis of the third part of the test in section 65(6)5, he stated:

> 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

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[20] Order MO-2589; see also *Toronto Star*, cited in note 5
[21] In that appeal, the appellant was the physician.

> strong and significant connection between the content 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]
>
> [emphasis added]

[95] Similarly, in Order PO-3526, the appellant was a physician with hospital privileges seeking access to an investigation report relating to complaints made about him to a hospital. In that Order, Adjudicator Stella Ball noted that in applying the exclusions under section 65(6), this office has adopted the definition of "relating to" made by the Divisional Court in *Toronto Star*. The Court found that there must be "some connection" between the records and the subject matter of the section. Adjudicator Ball found that the subject matter of the record at issue, which was an investigation of complaints made about the appellant, had some connection to the appellant's hospital appointment and privileges. As part of her findings, she also stated the following:

> In respect of the appellant's concluding argument that if I were to accept LHSC's representations the exclusion would seriously curtail the right to access hospital records relating to physicians, I note that it is not my acceptance of LHSC's arguments that results in the denial of access, but the wording of the exclusion that demands it. The exclusion specifically dictates that the *Act* does not apply to any record collected, prepared, maintained or used by or on behalf of an institution that has some connection to meetings, consultations, discussions or communications **about the appointments or privileges of persons who have hospital privileges and anything that forms part of the personnel file of those persons. .** .
>
> [emphasis added]

[96] The appellant's position is that Orders PO-3336 and PO-3526 were wrongly decided and ought not to be followed. I disagree, but find that in the circumstances of this appeal, these orders can be distinguished. In those cases, the adjudicators were able to find "some connection" between the records and the physicians' hospital privileges. In this case, I find that the records for which this exclusion was claimed do

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[22] The *Toronto Star* case referred to in Order PO-3336 is cited in note 5.

not have "some connection" to applications for hospital appointments, the appointments or privileges of persons who have hospital privileges and anything that forms part of the personnel file. Instead, I find that these discussions relate to how to respond to the appellant's complaints. Applying the approach taken by the Divisional Court in *Goodis*, which, in my view, is equally applicable to section 65(6)5, the determination of whether the exclusion applies takes into account and nature and content of the records themselves. I find that the nature of these records is that they have some connection, not to hospital privileges, but to a patient's complaint about the care he received in the hospital. In my view, the hospital has applied the exclusion in section 65(6)5 too broadly in applying it to these records.

[97] Consequently, I find that the third part of the three-part test has not been met, and these records are not excluded from the scope of the *Act* under section 65(6)5.

[98] With respect to all of the records that I have found not to be excluded under either section 65(6)3 or 65(6)5, I note that the hospital submits that it reserves the right to provide further representations on the possible application of section 49(a), in conjunction with section 13(1).

Issue D: Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[99] The remaining records at issue are located at pages 144-149. These records contain personal health information as defined in section 4(1) of *PHIPA*. As previously stated, I found that these records were not dedicated primarily to personal health information and, therefore, the appellant's access rights under *PHIPA* were limited to only his personal health information, which the hospital disclosed to him at the time of the request. I made no determination under *PHIPA* regarding the remainder of the information contained in these records. Accordingly, the appellant may have a right of access to this information under the *Act*.

[100] In order to determine which sections of the *Act* may apply to these records, it is necessary to determine whether they contain "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;

[101] 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.[23]

[102] The hospital acknowledges that the records contain the personal information of the appellant, and the appellant agrees.

[103] I find that records 144-149 contain the personal information of the appellant, namely the appellant's name along with other personal information relating to him, falling within paragraph (h) of the definition of personal information. I also find that some portions of these pages contain the personal information of a physician, as they reveal something of a personal nature about him.[24]

Issue E: Does the discretionary exemption at section 49(a) in conjunction with the section 13(1) exemption in the *Act* apply to the information at issue? Did the hospital exercise its discretion under section 49(a) of the *Act*? If so, should this office uphold the exercise of discretion?

[104] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from

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[23] Order 11.

[24] Staff of this office contacted the appellant, who confirmed that he is not seeking access to the personal information of the physician contained in these records. Consequently, this information is not at issue and will not be disclosed to the appellant.

this right.

[105] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[106] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[25]

[107] In this case, the hospital relies on section 49(a) in conjunction with section 13(1) to deny access to portions of records identified in the index of records. Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[108] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[26]

[109] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[110] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [27] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[111] Advice or recommendations may be revealed in two ways:

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[25] Order M-352.
[26] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[27] See above at paras. 26 and 47.

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[28]

[112] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[29]

[113] Concerning the records at pages 144-149, the hospital submits that it is clear from the exchange of information in these records that its Privacy Officer is providing advice on how to interpret and implement the withdrawal of the appellant's consent to access his personal health information. It further submits that it has only withheld the portion of the records that relate to the advice or to information that would permit drawing of accurate inferences as to the actual advice. Lastly, the hospital submits that none of the exceptions in section 13(2) apply.

[114] The appellant submits that the records at issue do not contain advice or recommendations, but rather consist of either requests for advice or the providing of instructions.

[115] I have reviewed the withheld portions of pages 144-149, which are two emails. I note that the withheld information is located at pages 147-148, and is duplicated in pages 144-145. Pages 146 and 149 have already been disclosed. I find that there are portions of these pages that were properly withheld under section 13(1), subject to my findings regarding the hospital's exercise of discretion, as they contains explicit advice from the hospital's Privacy Officer. However, other portions of these records that were withheld do not contain advice or recommendations, but rather document the seeking of advice, general commentary, the names and contact information of the sender and recipients of the emails and the subject line of the emails, none of which qualifies for exemption under section 13(1), as they do not contain advice or recommendations, or permit the drawing of accurate inferences regarding the advice that the Privacy Officer provided. As no other exemptions have been claimed for these records, I will order the hospital to disclose the portions of these two emails that I have found not to be exempt under section 13(1).

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[28] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[29] *John Doe v. Ontario (Finance)*, cited above, at para. 51.

[116] The section 49(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[117] The hospital submits that it properly exercised its discretion, and considered only relevant factors and did not consider irrelevant or improper factors. It goes on to state that it balanced the competing objectives of permitting access by an individual to his own personal information with protecting the confidentiality of frank advice and recommendations from health care professionals regarding the investigation of and response to the appellant's complaints. Finally, the hospital submits that it determined it was necessary to withhold the records in order to preserve its ability to seek frank and unfiltered advice from its employees.

[118] The appellant's representations do not address this issue.

[119] I have carefully considered the hospital's representations. I find that the hospital took into account relevant factors in weighing both for and against the disclosure of the information at issue, and did not take into account irrelevant considerations. In my view, the hospital's representations reveal that they considered the appellant's position and circumstances and balanced it against the ability of staff to provide free and frank advice to decision makers. Under all the circumstances, therefore, I am satisfied that the hospital has appropriately exercised its discretion with respect to the information which I have found to be exempt from disclosure under section 49(a) of the *Act*, and I uphold its exercise of discretion.

[120] In sum, I find that while some of the records contain the appellant's personal health information as defined in *PHIPA*, they are not dedicated primarily to personal health information. As no exemption under *PHIPA* were claimed, the appellant is entitled under section 52(3) of *PHIPA* to only his personal health information contained in those records.

[121] I also find that some of the records which the hospital claims are excluded from the scope of the *Act* under sections 65(6)3 are excluded, but that others are not excluded from the scope of the *Act* under either section 65(6)3 or 65(6)5. I find that the records for which the hospital claimed the application of section 49(a) in conjunction with section 13(1) are exempt, in part, and I uphold the hospital's exercise of discretion in withholding that information under section 13(1). I order the hospital to disclose certain records in part, under both *PHIPA* and the *Act* and to issue a decision letter to the appellant regarding the records I have found are not excluded from the scope of the *Act* under either section 65(6)3 or 65(6)5.

ORDER:

1. Under the *Act*, I order the hospital to disclose pages 144-145 and 147-148, in part to the appellant by **August 1, 2018** but not before **July 27, 2018**. I have included copies of these pages with this order being sent to the hospital and have highlighted the portions that are not to be disclosed to the appellant. The remaining portions of these records are to be disclosed to the appellant.

2. Under *PHIPA*, I order the hospital to disclose records 57, 60, 212, 327, 328, 329, 330, 331, 652, 653, 655 and 656, in part to the appellant by **August 1, 2018** but not before **July 27, 2018**. I have included copies of these pages with this order being sent to the hospital and have highlighted the portions that are to be disclosed to the appellant.

3. I find that some of the records are excluded under section 65(6), but that others are not. I order the hospital to issue a decision to the appellant regarding the records that I have found not to be excluded from the scope of the *Act* under either section 65(6)3 or 65(6)5.

4. I reserve the right to require the hospital to provide this office with copies of the records it discloses to the appellant.

Original Signed by: June 27, 2018

Cathy Hamilton
Adjudicator