

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4257

Appeal PA20-00104

Hamilton Health Sciences

April 29, 2022

Summary: The requester sought access to records related to the decision to decommission Hamilton Health Sciences' (HHS) Forensic Pathology Unit (the Unit) in order to centralize forensic pathology services.

HHS granted access to the responsive records in part, relying on the exemptions in sections 13(1) (advice or recommendations), 18(1) (economic and other interests) and 21(1) (personal privacy) and the exclusion in section 65(6)3 (labour relations and employment records) of the *Freedom of Information and Protection of Privacy Act* to deny access to the withheld information. HHS also claimed that certain information was non-responsive to the request. The appellant claimed the application of the public interest override in section 23.

In this order, the adjudicator partially upholds HHS' decision that the withheld portions of records are excluded by reason of section 65(6)3, exempt by reason of sections 13(1) and 21(1) or are not responsive to the appellant's request. She does not uphold the section 18(1) exemption. She finds that some of the information marked as non-responsive is responsive to the request and orders HHS to issue another access decision for this information to the appellant. She finds that section 23 does not apply to require disclosure of the information she found exempt under sections 13(1) and 21(1).

The adjudicator also orders HHS to conduct another search for records responsive to five parts of the appellant's request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1) (definition of "personal information"), 13(1), 18(1)(c), 21(1), 21(3)(g), 23, 24, and 65(6)3.

Orders Considered: Orders PO-3642 and PO-3893-I.

OVERVIEW:

[1] This order determines the issues around access to records related to the decision to decommission (or close) Hamilton Health Sciences' (HHS) Forensic Pathology Unit (the Unit) in order to centralize Hamilton Region's forensic pathology services in Toronto.

[2] Hamilton Health Sciences received a multi-part access request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)*, for the following records:

1. Funding or service contract (or contractual agreement) between Hamilton FPU [Forensic Pathology Unit (the Unit)] and OFPS [Ontario Forensic Pathology Service] or Ministry [of the Solicitor General] for the last fiscal year;
2. Summary of annual transfer payments (grants) and payments of professional and facilities fees received by [the Unit] starting from January 1, 2016;
3. Ministry's CFP's [Chief Forensic Pathologist] and/or OFPS's ruling or decision not to renew or [to] suspend the funding or service contract between [the Unit] and OFPS or Ministry in 2018 and 2019;
4. Any records pertaining to termination, non-renewal or suspension of funding contract of contractual agreement between [the Unit] and OFPS or Ministry in 2018 and 2019, including correspondence and minutes of talks with the Ministry [of the Solicitor General],¹ CFP, OFPS, Chief Coroner for Ontario, HHS and/or McMaster University [McMaster] and HHS's in-house records;
5. Ministry's CFP's and/or OFPS's ruling(s) or decision(s) to close (decommission) [the Unit] in 2018 or 2019 presented to HHS;
6. Any records pertaining to closure (decommissioning) of [the Unit], including correspondence and minutes of talks with the Ministry, CFP, OFPS, Chief Coroner for Ontario, HHS and/or McMaster University and HHS's in-house records;
7. Any records pertaining to quality of service and backlog situation of [the Unit] in 2018 and 2019, including correspondence and minutes of talks with the Ministry, CFP, OFPS, Chief Coroner for Ontario, HHS and/or McMaster University and HHS's in-house records;
8. Agreements between Ministry, CFP, OFPS and/or Chief Coroner for Ontario on the one side and HHS and/or HHS and/or McMaster University on the other side regarding closure (decommissioning) of [the Unit] and any correspondence minutes or other records relevant to this agreement;

¹ Referred to as the ministry in this order, with the exception that the term SOLGEN is used in the index of records table, below.

9. Legal opinion or advice obtained/received by HHS (whether in-house or otherwise) in regards to closure (decommissioning) of [the Unit].

[3] HHS notified affected parties of the request, seeking their views on disclosure. HHS also issued an interim access and fee decision and disclosed some of the records responsive to parts 2 and most of the records responsive to parts 4, 6, and 7 of the request. HHS advised that for the remaining records, the following exemptions might apply: sections 13(1) (advice or recommendations), 18(1) (economic and other interests), 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.

[4] HHS advised that it did not have records responsive to parts 3, 5, 8, and 9 of the request. HHS provided the requester with an index of records asking for confirmation of what records or classes of records that the requester was not seeking access to.

[5] The requester then advised HHS which records in the index of records she was not seeking access to. She also narrowed her request to exclude emails to or from her, copied to her or forwarded to her.²

[6] After hearing back from the affected parties with their views on disclosure of the records, HHS subsequently issued an access decision to the requester to disclose the responsive records in part, citing sections 13(1), 18(1), 21(1) of the *Act* to deny access to the information it decided to withhold. HHS also claimed the application of the exclusion in section 65(6)3 (labour relations and employment records) of the *Act* to some of the records at issue and advised that, in the alternative, section 18(1) of the *Act* would apply to those records. As the affected parties did not oppose disclosure of the records they had been notified about, the HHS dropped its reliance on section 17(1).

[7] The requester, now the appellant, appealed HHS's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to try to resolve the issues in this appeal.

[8] During mediation, the appellant confirmed that she was not seeking access to some of the personal information severed under the mandatory personal privacy exemption in section 21(1) of the *Act* such as email addresses, cellphone numbers and certain personal information about some employees, but was seeking access to the remaining personal information claimed to be exempt under section 21(1) of the *Act*.

[9] The appellant confirmed that although she does not seek access to some redacted sections marked as non-responsive (such as page numbers and the name of the person who printed the emails), she takes issue with the ministry's claim regarding some of the information marked as non-responsive. Accordingly, the responsiveness of certain portions of the records is at issue in this appeal.

² According to HHS, in its index, the requester also removed letters to and from the Death Investigation Oversight Council (DIOC) from the scope of the request.

[10] The appellant also confirmed that she takes issue with the application of the discretionary exemptions in sections 13(1) and 18(1) and the exclusion in section 65(6)3 of the *Act* to the records at issue. HHS maintained its position that these exemptions and the exclusion apply to the records at issue.

[11] The appellant is of the view that disclosure of the records is in the public interest and, accordingly, the public interest override in section 23 is at issue in this appeal.

[12] During mediation, HHS sent a revised version of the redacted records that identified the redactions with the corresponding exemptions or exclusion. After reviewing this revised index, the appellant advised the mediator that certain pages of the records were no longer at issue in this appeal – for example, she confirmed she does not continue to seek access to the records marked as duplicate.

[13] No further mediation could be conducted and the appellant confirmed with the mediator that she wished to proceed with the appeal to adjudication, where an adjudicator may conduct an inquiry.

[14] I decided to conduct an inquiry and I sought the representations of HHS initially, which I provided to the appellant, except for certain confidential portions regarding section 18(1) that would reveal the contents of certain records. The appellant provided representations in response. I then sought the reply representations of HHS, but HHS did not provide any.

[15] However, I decided that as the appellant's representations raised issues as to whether a reasonable search was conducted for responsive records, I should seek further representations HHS and did so. HHS provided representations on the search in response.

[16] In this order, I partially uphold HHS' decision that the records are either excluded under section 65(6)3 or exempt under sections 13(1) and 21(1). I do not uphold HHS' section 18(1) exemption claim. I find that some of the information marked as non-responsive is responsive to the request, and I order HHS to issue another access decision to the appellant regarding it. I find that section 23 does not apply to override the application of sections 13(1) and 21(1) to the information I found exempt on that basis.

[17] I also order HHS to conduct another search for records responsive to parts 3, 5, 6, 8, and 9 of the appellant's request.

RECORDS:

[18] HHS provided an index of records, which was shared with the appellant, and is reproduced in the Appendix to this order. The records consist of emails, letters and a briefing note and are responsive to parts 4, 6 and 7 of the appellant's request about the decommissioning of the Unit.

ISSUES:

- A. What is the scope of the request? Are the withheld portions of some records responsive to the request?
- B. Does the section 65(6)3 labour relations and employment records exclusion exclude the identified records from the *Act*?
- C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory personal privacy exemption at section 21(1) apply to the personal information at issue?
- E. Does the discretionary advice or recommendations exemption at section 13(1) apply?
- F. Does the discretionary economic and other interests exemption at section 18(1) apply to record 11?
- G. Did HHS exercise its discretion under section 13(1)? If so, should I uphold the exercise of discretion?
- H. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13(1), 18(1) and 21(1) exemptions?
- I. Did HHS conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the request? Are the withheld portions of some records responsive to the request?

[19] HHS has withheld some portions of records 1, 4, 5, 8, 9, 11, 12, 26,³ 33, and 41 on the basis that those portions are not responsive to the request. Determining whether these portions have been properly withheld on this basis requires consideration of section 24 of the *Act*, which imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

³ Two severances in record 26 are marked as non-responsive.

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[20] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁴

[21] To be considered responsive to the request, records must "reasonably relate" to the request.⁵

Representations

[22] HHS states that it reviewed the information in records 1, 4, 5, 8, 9, 11, 12, 26, 33, and 41 marked as non-responsive against the wording of the request and confirmed that the information is not responsive. It describes the non-responsive information as follows:

- record 1 relates to communications and processes developed in response to a discrete matter rather than the quality of the Unit's pathology services or backlog;
- record 4 relates to the management of questions from the media rather than the decommissioning itself;
- record 5 is confirmation by an individual that he will participate in a conference call;
- record 8 (and record 41, which HHS says is a duplicate of record 8) relates to the impact of the decommissioning on pathology training programs;
- record 9 relates to the impact of the decommissioning on pathology training programs;
- record 11 in index states the last sentence of the penultimate paragraph is non-responsive to the requests.
- record 12 relates to the impact of the decommissioning on pathology training programs;

⁴ Orders P-134 and P-880.

⁵ Orders P-880 and PO-2661.

- record 26 consists of URLs for (publicly available) newspaper articles about the retirement of one pathologist and the death of another; and,
- record 33 in index states deleted text non-responsive to requests.

[23] The appellant rejects HHS' position and maintains that the information at issue is responsive to her request, particularly part 6 of her request.

Analysis/Findings

[24] The appellant's request sought information related to the decommissioning of the Hamilton Forensic Pathology Unit. The appellant specifically relies on part 6 of her request in support of her position that most of the remaining information at issue marked non-responsive in the records is in fact responsive to her request. Part 6 reads:

Any records pertaining to closure (decommissioning) of [the Unit], including correspondence and minutes of talks with the Ministry, CFP [Chief Forensic Pathologist], OFPS [Ontario Forensic Pathology Service], Chief Coroner for Ontario, HHS and/or McMaster University and HHS's in-house records...

[25] I find that the information HHS has severed from record 1 on the basis of non-responsiveness is not responsive to the appellant's request. The information at issue in record 1 concerns a totally unrelated matter, and I uphold HHS' decision to withhold the non-responsive information. As this is the only information at issue in this record, this record is no longer at issue in this appeal.

[26] I agree with HHS, and I find, that the information at issue in records 4 and 5 relates to the information about the media and participation in a call, as described by HHS in its representations. It does not relate to the decommissioning of the Unit and is not responsive to the request. As this is the only information at issue in these records, these records are no longer at issue in this appeal.

[27] There are several severances for non-responsiveness made to records 8 and 9 (pages 14 to 16 of the records), which are letters between HHS and the ministry. HHS states that the severed portions of these records are related to the impact of the decommissioning on pathology training programs, but do not fall within the scope of the request. However, all of these severances clearly relate to the larger subject matter of part 6 of the request for any records pertaining to the closure (decommissioning) of the Unit.

[28] HHS' interpretation of scope of the request in regard to the information at issue in records 8 and 9 is not the required liberal interpretation of part 6 of the request.

[29] I find information at issue in records 8 and 9 is responsive to part 6 of the appellant's request. I will order HHS to issue another access decision to the appellant respecting this information.

[30] There is one severance on page 18 of record 11 that HHS has marked as non-responsive. HHS did not provide representations on this severance. Based on my review of this record, which is an email from an HHS staff member to certain HHS and McMaster staff, I find that it is responsive as it relates to part 6 of the request about the decommissioning of the Unit. I will order HHS to issue another access decision regarding this information.

[31] There are multiple severances that HHS claims are for non-responsive text on page 21 of record 12, which is an email from a St. Joseph Healthcare Hamilton staff member to certain HHS and McMaster staff. HHS indicates that this information relates to the impact of the decommissioning on pathology training programs. Based on my review of this record, I find that the severances contain responsive information as they relate to part 6 of the request about the decommissioning of the Unit overall.

[32] Again, HHS' interpretation of scope of the request in regard to the information at issue in record 12 is not the required liberal interpretation of part 6 of the request. I find information at issue in record 12 is responsive to part 6 of the appellant's request. I will order HHS to issue another access decision to the appellant respecting this information.

[33] The remaining severance in record 12 is a cell phone number, which is information the appellant has confirmed she does not seek access to, and I uphold HHS' decision to withhold it as non-responsive.

[34] On pages 37 and 38 of record 26 there are two severances that, as HHS indicates, are links to newspaper articles. These links do not reasonably relate to the decommissioning of the Unit. I find that they are non-responsive to the appellant's request, and I uphold HHS' decision to withhold them on that basis.

[35] Page 53 of record 33 contains an email that is marked as non-responsive. Although HHS did not provide representations on the severances made to this record, I find that the severed information in this record is non-responsive as it does not reasonably relate to the appellant's request. I uphold HHS' decision to withhold this information. As this is the only information at issue in this record, record 33 is no longer at issue in this appeal.

[36] One email on page 64 of record 41 is marked as non-responsive. HHS states that this is a duplicate of record 8. Although it is not a duplicate of record 8, I find that the severed email is not responsive to the appellant's request as it does not relate to the decommissioning of the Unit. As this is the only information at issue in this record, this record is no longer at issue in this appeal.

Conclusion

[37] I have found that the information marked by HHS as non-responsive in records 1, 4, 5, 26, 33, and 41 is non-responsive to the appellant's request, and I uphold HHS' decision to withhold the information on this basis. As only the non-responsive

information was at issue in records 1, 4, 5, 33, and 41, these records are no longer at issue in this appeal.

[38] I will consider below whether the claimed exemptions or exclusion apply to the remaining information at issue in record 26.

[39] I have found that the information marked non-responsive in records 8, 9, 11, and 12 is responsive to the request and I will order HHS to issue another access decision to the appellant regarding these portions of the records.

[40] I have also found that the cell phone number in record 12 is not at issue in this appeal, as the appellant does not want access to it. Therefore, this number will be withheld.

Issue B: Does the section 65(6)3 labour relations and employment records exclusion exclude some of the records from the *Act*?

[41] HHS claims that the exclusion for labour relations and employment records in section 65(6)3 applies to exclude portions of records 6, 16, 17, 18, 19, 23, 24, 26, 28, 30, 31, 34, 35, 40, and 44 from the *Act*. This section 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.

[42] If the exclusion applies, this would mean that the *Act* does not apply to the information and appellant has no right of access to the information under the *Act*.

[43] HHS is claiming the exclusion for only portions of the records identified above. The IPC has consistently taken the position that the exclusions at section 65⁶ are record- and fact-specific. In order to qualify for an exclusion, a record is examined as a whole. The whole-record method of analysis is also described as the “record-by-record” approach.⁷

[44] In Order PO-3642, Adjudicator Jenny Ryu dealt with a claim where an institution attempted to exclude part of a record under section 65(6). She stated that:

[i]n making this claim, it is possible the ministry is implicitly acknowledging that the record, as whole, was not prepared in relation to

⁶ See Orders PO-3893-I, PO-364, M-797, P-1575, PO-2531, PO-2632, MO-1218, and PO-3456-I.

⁷ See Oder PO-3893-I in particular.

discussions about labour relations or employment-related matters within the meaning of section 65(6)3.

[45] Adjudicator Ryu concluded that an exclusion cannot apply to part of a record that is not itself excluded. She reviewed several IPC orders where an institution attempted to exclude only part of a record under section 65(6) and noted that in each case, "the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the *Act*."

[46] Adjudicator Ryu found that this approach was consistent with the language of the exclusions,⁸ which applies to records that meet the relevant criteria and noted that it corresponds with the Legislature's decision not to incorporate a requirement for the severance of excluded records in the *Act*.

[47] Adjudicator Alec Fadel in Order PO-3893-I adopted the approach taken in Order PO-3642 and found that the application of an exclusion must be considered in the context of the whole record for records where an institution claimed the exclusion applied in part. The adjudicator decided to consider the application of the exclusion to the whole record in order to determine the appellant's access rights under the *Act*. In Order PO-3893-I. Adjudicator Fadel, using the record-by-record approach, found that the record was excluded from the *Act* under section 65(6).

[48] Adjudicator Fadel further found that the institution's decision to disclose some of the record was not improper as section 65(6) is an exclusion, not a mandatory exemption. An institution may choose to disclose information outside of the *Act*.

[49] I agree with and adopt this approach in Orders PO-3642 and PO-3893-I, namely, that the application of the section 65(6) exclusion must be considered in the context of the whole record, even though HHS has only applied the exclusion to portions of the records at issue for which it has claimed the application of section 65(6)3.

[50] 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.

[51] 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*.

[52] For the collection, preparation, maintenance or use of a record to be "in relation

⁸ Section 65(6) contains several related exclusions.

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.⁹

[53] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations is not enough to meet the "some connection" standard.¹⁰

[54] 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.¹¹

[55] 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.¹²

[56] 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.¹³

[57] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.¹⁴

[58] 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

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

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

⁹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹⁰ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

¹¹ *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.

¹² Order PO-2157.

¹³ *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.

¹⁴ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

¹⁵ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

2. this collection, preparation, maintenance or use 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.

Representations

[60] HHS claimed the application of the exclusion in section 65(6)3 to records 6, 16, 17,¹⁶ 18, 19, 23, 24, 26,¹⁷ 28, 30, 31, 34, 35, 40, and 44, and has withheld portions of these records on the basis of this exclusion. However, HHS only provided representations specific to records 6, 16, 17 (briefing note), 23, 26, 30, 31, 34, 35, 40, and 44. I will consider the application of section 65(6)3 to all of the records that HHS has claimed that this exclusion applies to.

[61] HHS states that the records for which it has claimed section 65(6)3 are about the impact and implications of the decommissioning of the Unit on the jobs of the Unit staff. It describes the information in certain records as follows:

Record 6 - This record contains a communication about the appropriate participants and protocol for a discussion about the employment of Unit pathologists following decommissioning.

Record 16 - This record contains a communication documenting a discussion with Unit staff about changes to the services to be provided by the Unit, and a discussion among managers about the impact on staff, as well as concerns and action items for HHS HR staff to address the changes.

Record 17 - This record documents consultations and discussions with staff, HHS HR personnel, and external parties about the impact of changes to the Unit's services on staff, completion of work in progress, and the development of a staffing model that addresses the changes. The record also communicates projections about HR-related costs of the decommissioning.

Record 23 - This record is a communication about HR considerations arising out of the changes to services provided by the Unit and the decommissioning. The record discusses affected staff, which positions are unionized, retirement, leaves of absence, provisions of collective agreements (to which the appellant is not a party), HR-related cost

¹⁶ Record 17 consists of an email and a briefing note. However, HHS has only claimed section 13(1) for the email at page 23, not section 65(6)3. I will consider below whether section 13(1) applies to the information at issue on page 23 of record 17.

¹⁷ I determined above that the information marked as non-responsive in record 26 is non-responsive to the appellant's request. I will only be considering the application of section 65(6)3 to the responsive information at issue in record 26.

projections, HHS obligations under employment law, and a human resources transition plan.

Record 26 - This record communicates HHS' plan to notify staff of changes in the Unit's services and the decommissioning.

Record 30 - This record is a discussion of a proposed meeting with named members of the Unit staff to provide them with employment and related information and the training and experience of identified staff members.

Record 31 - This record describes a consultation about the transition of certain Unit staff and discusses public sector recruitment rules and other applicable employment-related considerations.

Record 34 - This record continues the discussion regarding recruitment documented in record 31.

Record 35 - This record discusses the structure of meetings and calls with staff regarding employment and labour-related issues and describes some of those issues.

Record 40 - This record discusses HR considerations relevant to the anticipated impact on the Unit of the decommissioning.

Record 44 - This record discusses projected HR-related costs attributable to the decommissioning and describes pathology services staffing at HHS and the employment status of identified staff.

[62] Regarding parts 1 and 2 of the test for exclusion under section 65(6)3, HHS states that the records were prepared by staff acting within their roles in connection with the Unit. Many of the records identify the individual who prepared them and in some cases, their position or role in connection with the Unit.

[63] Regarding part 3 of the test for exclusion under section 65(6)3, HHS states that the records relate to a job competition, voluntary exit and related options for transitioning Unit staff, workload and working relationships, and other HR considerations arising out of changes to the services provided by the Unit and the decommissioning of the Unit. It states that:

HHS had a significant interest in the matters addressed in the records as they relate to the shutting down of services with all of the concomitant impact, including for staff employed in the Unit, some of whom had been working in the Unit for a number of years, and the financial and reputational consequences for staff and HHS.

[64] The appellant did not make representations on section 65(6)3, other than

submitting that the exceptions to the exclusion in section 65(6)3 apply.¹⁸ I will consider the application of these exceptions below.

Analysis/Findings

Part 1: collected, prepared, maintained or used

[65] Based on my review of the records and HHS representations, I find that the records at issue, which are emails or letters that originated from or were sent to HHS staff, were collected, prepared, maintained or used by HHS, as required for the first part of the test for exclusion under section 65(6)3.

Part 2: meetings, consultations, discussions or communications

[66] Based on my review of the records and HHS representations, I find that the records were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about the decommissioning of HHS' Forensic Pathology Unit and that part 2 of the test under section 65(6)3 is met.

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

[67] In order for the exclusion to apply, the meetings, consultations, discussions or communications must be about labour relations or employment-related matters in which HHS has an interest.

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

- a job competition¹⁹
- an employee's dismissal²⁰
- a grievance under a collective agreement²¹

¹⁸ The exceptions are contained in section 65(7), which states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

¹⁹ Orders M-830 and PO-2123.

²⁰ Order MO-1654-I.

- a “voluntary exit program”²²
- a review of “workload and working relationships”²³

[69] The phrase “labour relations or employment-related matters” has been found *not* to apply in the context of:

- an organizational or operational review²⁴
- litigation in which the institution may be found vicariously liable for the actions of its employee.²⁵

[70] 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.²⁶

[71] 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 employees’ actions.²⁷

[72] The IPC has consistently taken the position that the application of section 65(6)²⁸ is record-specific and fact-specific. As I stated above, this means that when determining whether the exclusion applies, I must examine the record as a whole rather than looking at individual pages, paragraphs, sentences or words. This whole record method of analysis has also been described as the “record by record approach”.²⁹

[73] As noted above, relying on the exclusion in section 65(6)3, HHS has severed portions of records 6, 16, 17, 18, 19, 23, 24, 26, 28, 30, 31, 34, 35, 40, and 44. Because the application of the exclusion must be decided in relation to an entire record, I have examined each record at issue as a whole. I find that each of the records at issue, other than record 26, is about employment-related matters related to the decommissioning of the Unit by HHS for the purpose of part 3 of the test for exclusion under section 65(6)3. I also find that HHS has an interest, as the employer, in the employment-related matters discussed in the records.

[74] I agree with HHS that each record, as a whole, is about employment-related matters such as:

²¹ Orders M-832 and PO-1769.

²² Order M-1074.

²³ Order PO-2057.

²⁴ Orders M-941 and P-1369.

²⁵ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

²⁶ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

²⁷ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

²⁸ And its municipal counterpart in section 52(3) of *MFIPPA*.

²⁹ See, for example, Orders M -352, MO-3798-I, MO-3927, MO-3947, MO-4071, PO-3642 and PO-3893-I.

- the employment of Unit pathologists following decommissioning,
- the impact on staff due to changes to the services to be provided by the Unit,
- the development of a staffing model that addresses the changes to the services to be provided by the Unit,
- projections about HR-related costs and considerations of the decommissioning,
- communication with, and training of, staff about the decommissioning of the Unit, and
- the transition of certain Unit staff and recruitment of other staff.

[75] Based on my review of each record as a whole and HHS' representations, I find that part 3 of the test under section 65(6)3 has been met for these records, except for record 26. The meetings, consultations, discussions or communications in these records at issue are about employment-related matters in which HHS, as the institution, has an interest.

[76] Record 26 is described by HHS as a communication of HHS' plan to notify staff of changes in the Unit's services and the decommissioning. Based on my review of it, record 26 merely discusses the timing and manner of communicating to HHS staff, not details about the actual decommissioning of the Unit or the impact of decommissioning on staff. This record does not contain a connection to employment-related matters that is relevant to section 65(6)3. I find that it is not related to matters in which HHS is acting as an employer, and terms and conditions of employment or human resources questions are at issue. I find that section 65(6)3 does not apply to the responsive information in record 26. However, I will consider below whether section 13(1) applies to this same information in record 26.

[77] Therefore, I find that the records for which the exclusion in section 65(6)3 has been claimed, records 6, 16, 17 (briefing note), 18, 19, 23, 24, 28, 30, 31, 34, 35, 40, and 44, are excluded from the *Act* on that basis, subject to my review of the exceptions in section 65(7).

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

[78] If the records fall within any of the exceptions to section 65(6) that are found in section 65(7), the *Act* applies to them. Section 65(7) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[79] HHS submits that none of the exceptions in section 65(7) apply. The appellant submits that the first and third paragraphs of section 65(7) apply to the records.

[80] Paragraphs 1 and 3 of section 65(7), which are relied upon by the appellant, refer to agreements (as does paragraph 2). None of the records are agreements. Nor are any of the records expense accounts as referred to in the fourth paragraph of section 65(7). I find that none of the exceptions apply in this appeal.

[81] Accordingly, I find that records 6, 16 (briefing note), 17, 18, 19, 23, 24, 28, 30, 31, 34, 35, 40, and 44 are excluded from the *Act* by reason of section 65(6)3. It follows that the appellant has no right of access under the *Act* to the portions of these records that HHS withheld under section 65(6)3. HHS has disclosed portions of these records outside of the scheme of the *Act*, which it is entitled to do, but since the records are excluded from the *Act*, I have no authority to order the HHS to disclosure further information in them.

Issue C: Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[82] HHS claims that portions of records 2, 7, 10, 11, 27, and 37 are exempt under the personal privacy exemption in section 21(1) as they contain the personal information of individuals other than the appellant.

[83] As section 21(1) can only apply to records that contain personal information, I need to determine whether the records 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;

[84] 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.³⁰

[85] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.³¹

[86] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³²

[87] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³³

Representations

[88] HHS did not address any specific paragraphs in the definition in section 2(1) apply to the information at issue.

[89] HHS states that the winding down and decommissioning of the Unit required

³⁰ Order 11.

³¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³² Orders P-1409, R-980015, PO-2225 and MO-2344.

³³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

consultation and discussions about impacted individual staff members. It states that the records contain confidential information of individuals in their personal capacity.

[90] HHS states that the information at issue includes individuals' employment history and opportunities, retirement plans, leaves of absence, entitlements based on years of service, and performance, along with opinions of staff members and other individuals.

[91] The appellant did not directly address whether the records contain personal information.

Analysis/Findings

[92] The information that HHS claims is personal information is found in records 2, 7, 10, 11, 27, and 37. Record 7 is a letter and the remaining records are emails. None of this information is about the appellant.

[93] Other than what is contained in its index of records, HHS did not make representations on each individual record. I have reviewed the information at issue in these records and my findings follow.

[94] Record 2 contains a tally of the number of open autopsy cases per pathologist and whether these cases have been concluded by each pathologist within the required timeframe. This information reveals personal information of identifiable individuals, the pathologists' job performance, in accordance with paragraph (h) of the definition of personal information in section 2(1). An individuals' job performance has been found to be "personal information."³⁴

[95] Record 7 contains personal information in accordance with paragraph (g) of the definition of personal information in section 2(1) because it contains the views or opinions of one individual about other individuals named in this record, and it therefore the personal information of the latter individuals. Even though this information relates to these individuals in a professional capacity, it qualifies as their personal information as it reveals something of a personal nature about them.³⁵

[96] Record 10 does not contain the personal information of identifiable individuals.

[97] Record 11 contains the opinions of identifiable individuals about the decommissioning of the Unit. While the opinions or views of an individual can fall under paragraph (e) of the definition of personal information, I am satisfied they were expressed by the individuals in a professional capacity, and that that these opinions do not reveal something of a personal nature about the individuals.³⁶ Accordingly, I find that this information is not personal information.

³⁴ Previous decisions of the IPC have found that information relating to an individual's professional or official capacity can take on a more personal nature if it relates to that individual's performance or conduct (See, for example, Orders P-721, PO-1772, PO-2477 and PO-2976).

³⁵ Order PO-2225.

³⁶ See Order PO-2225.

[98] Record 27 does not contain personal information of identifiable individuals. It appears to me to contain information about individuals in their business capacity and does not reveal something of a personal nature about them.

[99] Record 37 is a three-page email chain, with one severance on each page. I find that only the severance found on the third page (page 62) contains personal information of identifiable individuals other than the appellant. This information contains the views or opinions of an individual about the other individuals named in this record, and is the personal information of the latter individuals' accordance with paragraph (g) of the definition of personal information in section 2(1). Even though this information relates to these individuals in a professional capacity, I find that it qualifies as personal information as it reveals something of a personal nature about them.

[100] The remaining two severances (on pages 60 and 61) of record 37 are contained in emails that are separate and distinct from the email on page 62. The severances on pages 60 and 61 do not contain any personal information of identifiable individuals.

Conclusion

[101] I have found that the information at issue in records 2, and 7 and on page 62 of record 37 is the personal information of individuals other than the appellant. As the records do not contain the appellant's personal information, the relevant personal privacy exemption is the mandatory one in section 21(1), and I will consider under Issue D whether it applies to this information.

[102] I have found that the information at issue in records 10, 11, and 27 and on pages 60 and 61 of record 37 is not personal information. As this information is not personal information, section 21(1) cannot apply to it.

[103] No other exemptions have been claimed for record 27, and no other mandatory exemptions apply. I will order this record disclosed to the appellant.

[104] I will consider below whether the exemptions at sections 13(1) and/or 18(1) apply to the information at issue in records 10, 11, and pages 60 and 61 of record 37, as HHS has claimed in the alternative.

Issue D: Does the mandatory personal privacy exemption at section 21(1) apply to the personal information at issue?

[105] In view of my finding, above, I must now review HHS' claim that section 21(1) applies to the personal information at issue in records 2, 7, and 37. Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[106] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of

personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[107] If the information fits within any of paragraphs (a) to (e) of section 21(1) or paragraphs (a) to (d) of section 21(4), it is not exempt from disclosure under section 21. The personal information at issue in records 2, 7, and 37 does not fit within these paragraphs of section 21(1) or 21(4).

[108] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[109] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[110] HHS did not provide record-specific representations on section 21(1), but it submits, generally, that the presumptions against disclosure in sections 21(3)(d) (employment history), 21(3)(f) (finances) and 21(3)(g) (personal recommendations) apply. These sections read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(d) relates to employment or educational history;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations.

[111] Regarding the application of the presumptions in this appeal, HHS states:

21(3)(d): employment or educational history. The redacted information includes but is not limited to information which reveals number of years of service and eligibility for retirement.

21(3)(f): finances. Financial information (annual income) can be derived from the numbers relating to severance costs for classes of staff members and the number of members per class.

21(3)(g): personal recommendations. The redacted information includes assessments according to measurable standards of the work of identified staff members.

[112] The appellant states that HHS has failed to explain adequately how naming the individuals who were involved in the decommissioning of the Unit would violate their

privacy.

Analysis/Findings

[113] Portions of three records are at issue, records 2, 7, and 37 (page 62). I found that the information in record 2 contains job performance information of individuals and that the information at issue in records 7, and 37 contains the views or opinions of an individual about the other individuals named in this record in accordance with paragraphs (g) and (h) of the definition of personal information in section 2(1).

[114] I find that the presumption in section 21(3)(g) for personal recommendations applies to records 2, 7, and 37. The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations by that individual. As the personal information at issue in records 2, 7, and 37 consists of personal evaluations or recommendations about the named individuals, I find the presumption applies.

[115] However, I find that neither sections 21(3)(d) or (f) apply as the information at issue in records 2, 7, and 37 does not reveal either employment history or financial information about the identified individuals within the meaning of that section.

[116] As I have found that paragraph (g) of section 21(3) applies to the information at issue in records 2, 7, and 37, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1)(f). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.³⁷

[117] As indicated above, section 21(4) does not apply. I find, therefore, that these records are exempt under section 21(1). I will consider below whether the public interest override in section 23 applies to the exempt personal information in records 2, 7, and 37.

Issue E: Does the discretionary advice or recommendations exemption at section 13(1) apply?

[118] HHS claims that section 13(1) applies to the withheld portions of records 10, 17 (email at page 23), 26, 36, and 37 (pages 60 and 61). 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.

[119] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions (such as HHS) are able to freely and frankly advise and make recommendations within the deliberative process of

³⁷ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

government decision-making and policy-making.³⁸

[120] "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.

[121] "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.³⁹

[122] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁴⁰

[124] 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.⁴¹

[125] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).⁴²

[126] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

³⁸ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

³⁹ See above at paras. 26 and 47.

⁴⁰ 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.

⁴¹ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

⁴² *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

- factual or background information⁴³
- a supervisor's direction to staff on how to conduct an investigation⁴⁴
- information prepared for public dissemination.⁴⁵

Representations

[127] HHS provided the following representations on the records at issue:

Record 10: the disclosure of the redacted information would permit the drawing of accurate inferences as to the nature of advice provided by a staff member regarding HHS' position on the decommissioning.

Record 17 (email at page 23): the redacted information is the advice of staff members about workload and timelines and would permit the drawing of inferences about another staff member's advice in response.

Record 26: the redacted information is the advice of HHS personnel about the staging of the rollout of communications about the decommissioning, and a recommendation for communication with the media.

Record 37 (pages 60 and 61): the redacted information is the advice of medical staff about issues to be addressed with the Deputy Solicitor General regarding the decommissioning.

[128] HHS did not provide representations on the information at issue in record 36, which is an internal HHS email chain.

[129] The appellant states that section 13(1) does not apply as HHS is a private corporation and a registered charity and does not provide advice to the government. The appellant also states that HHS has refused to disclose certain records on the pretense that the redacted information falls within section 13(1), rather than their true nature, which is not advice or recommendations but rather statements reflecting HHS' actual decisions.

Analysis/Findings

[130] Addressing the appellant's first concern about the status of HHS, and her assertion that it is a private corporation and a registered charity, I note that HHS is a hospital and is an institution under *FIPPA* by reason of paragraph (a.2) of the definition of an institution in section 2(1). Therefore, in accordance with section 13(1), I will consider whether disclosure of the portions of the records at issue would reveal advice

⁴³ Order PO-3315.

⁴⁴ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

⁴⁵ Order PO-2677.

or recommendations of a person employed by HHS or a consultant retained by HHS as an institution under the *Act*.

[131] The redacted information in records 10, 17, 26, 36, and 37 is at issue. Specifically:

- Record 10 is an internal HHS email discussing an email from a St. Joseph Healthcare Hamilton (SJJH) staff member. The email from this staff member reveals advice as to what should be HHS' position in an upcoming meeting regarding the decommissioning of the Unit. The redacted text in the email chain contains advice and opinions/suggestions rather than statements reflecting decisions of HHS, as submitted by the appellant.
- Record 17 (email at page 23 from the Executive Director of HHS) reveals the recommendation given to the Executive Director by a HHS staff member about workload amounts based on volumes of cases.⁴⁶
- Record 26 is a draft HHS communications strategy memorandum with a covering email. The memorandum contains advice from a HHS staff member to other HHS staff members about the staging of the rollout of communications about the decommissioning, and a recommendation for communication with the media. The information at issue concerns when and how the media and others will be notified of the decision to decommission the Unit. It is a draft memorandum and does not contain the final communications strategy about this issue, and I am satisfied it forms part of the deliberative process leading to a final decision.
- Record 36 is an email chain containing advice from a HHS staff member to other HHS staff members about HHS' correspondence with the DIOC. The severed information concerns the process for review of the issue in that correspondence.
- Record 37 (pages 60 and 61) are email chains of HHS staff about issues to be addressed with the Deputy Solicitor General regarding the decommissioning.

[132] I agree with HHS that the redacted information in records 10, 17 (email at page 23), 26, and 36 reveals the advice and recommendations related to the procedure for the decommissioning of the Unit, including workload, as well as HHS' communications strategy regarding the decommissioning.

[133] Therefore, I find that section 13(1) applies to the information for which HHS has claimed it in records 10, 17 (email at page 23), 26, and 36. The information does not fall into any of the exceptions in section 13(2) or (3). Therefore, I find that the information at issue in records 10, 17, 26, and 36 is exempt under section 13(1), subject to my review of HHS' exercise of discretion and the application of the public interest override in section 23.

⁴⁶ I found above that the briefing note attached to this email was excluded by reason of section 65(6)3.

[134] On the other hand, I find that the severances on pages 60 and 61 of record 37 do not qualify as advice or recommendations within the meaning of section 13(1) as claimed by HHS. Rather, I find that these particular severed portions consist of factual background information that has already been disclosed in other portions of the records. It is not an evaluative analysis of information by HHS staff. Therefore, I will order the information at issue on pages 60 and 61 of record 37 disclosed to the appellant because neither of the claimed exemptions, sections 13(1) and 21(1), apply to this information, and no other mandatory exemption applies to it.

Issue G: Does the discretionary economic and other interests exemption at section 18(1)(c) apply?

[135] In its index of records, the ministry also relies on section 18(1)(c) to deny access to the withheld portion(s) of record 11, the last record at issue, which I found above was not exempt under section 21(1). Section 18(1)(c) reads:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[136] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.⁴⁷

Representations

[137] HHS states that the disclosure of the redacted information in record 11 could reasonably be expected to prejudice the economic interests of HHS because of the motivation it attributes to the government for deciding to decommission the Unit.

[138] The appellant states that section 18(1)(c) does not apply as HHS made pledges to be open and transparent in financial matters, but has instead done everything to conceal relevant information from the public.

Analysis/Findings

[139] For section 18(1)(c) to apply, HHS was required to provide detailed evidence about the potential for harm. HHS must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the

⁴⁷ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.

type of issue and seriousness of the consequences.⁴⁸

[140] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁴⁹

[141] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁵⁰

[142] HHS's position is that the redacted responsive information in record 11⁵¹ is exempt under section 18(1)(c) because of the motivation it attributes to the government for deciding to decommission the Unit.

[143] There are four severances made to record 11 that HHS claims are subject to section 18(1)(c). However, HHS has not sufficiently explained how these severances reveal the motivation of the government for deciding to decommission the Unit and, based on my review of this record, I cannot ascertain how the severed portions could reveal this information.

[144] As well, HHS has not explained how knowledge of the motivation behind the decommissioning of the Unit could reasonably be expected to prejudice its economic interests or competitive position for the purpose of section 18(1)(c) of the *Act*.

[145] I am not convinced by the HHS' arguments about the potential for harm with disclosure of the information at issue in record 11. Based on my review of record 11 and the parties' representations, I find that disclosure of the information at issue could not reasonably be expected to prejudice HHS' economic interests or its competitive position. Therefore, I find that section 18(1)(c) does not apply to exempt the responsive information at issue in record 11 and I will order this information to be disclosed to the appellant.

Issue G: Did HHS exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

[146] The only discretionary exemption claim by HHS that I have upheld is section

⁴⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁴⁹ Order MO-2363.

⁵⁰ Orders P-1190 and MO-2233.

⁵¹ I found above that the one severance marked as non-responsive in record 11 is responsive to the request.

13(1). As a discretionary exemption, section 13(1) permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[147] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[148] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁵² The IPC may not, however, substitute its own discretion for that of the institution.⁵³

[149] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁵⁴

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

⁵² Order MO-1573.

⁵³ Section 54(2).

⁵⁴ Orders P-344 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[150] HHS states that, in exercising its discretion, it considered the purposes of the *Act*, as well as the following factors:

1. The fact that the appellant has no compelling need to receive the redacted information or withheld records; and,
2. The decommissioning of the Unit was the subject of reports in the media.

[151] The appellant did not provide representations on this issue.

Analysis/Findings

[152] I found above that section 13(1) applies to the information at issue in records 10, 17 (email at page 23), 26, and 36. I find that in denying access to this information, HHS exercised its discretion under section 13(1) in a proper manner. I find that HHS considered the purposes of the *Act*.

[153] I am satisfied that HHS applied the section 13(1) exemption in a limited and specific manner in order 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. For these reasons, I uphold HHS' exercise of discretion.

[154] I will now consider whether the public interest override in section 23 applies to require disclosure of this information.

Issue H: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) and 21(1) exemptions?

[155] I found above that the mandatory personal privacy exemption in section 21(1) applies to the information at issue in records 2, 7, and 37 (page 62). I also found above that the discretionary advice or recommendations exemption in section 13(1) applies to the responsive information at issue in records 10, 17 (email at page 23), 26 and 36.

[156] I will now consider whether the public interest override in section 23 applies to override the application of the relevant exemptions to these records. Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in

the disclosure of the record clearly outweighs the purpose of the exemption.

[157] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[158] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.⁵⁵

Representations

[159] HHS states that there is no compelling public interest in the disclosure of the records and that disclosure is not necessary to satisfy the public interest in the decommissioning of the Unit. It states that even were that not the case, any public interest in disclosure does not clearly outweigh the purpose of the sections 13(1) and 21(1) exemptions. It states that the purpose of these sections is being served in this case by:

- ensuring a hospital can obtain unfettered advice and recommendations in regard to its management of significant events;
- the privacy rights of the affected individuals;
- the interest in encouraging the unfettered sharing of advice and recommendations of staff, consultants and others to HHS in relation to significant events affecting its operations; and
- the interest in minimizing harm to those operations and thereby supporting HHS's delivery of health care.

[160] HHS states that disclosure is not required to realize the *Act's* central purpose of shedding light on the operations of government, as information informing and enlightening the citizenry about the activities of HHS in relation to the Unit's decommissioning is publicly available. It further states that disclosure would not advance the effective use of means of expressing public opinion or the making of political choices.

[161] HHS states that there is a public interest in the non-disclosure of the information, namely protecting personal privacy and preventing or limiting additional harm to stakeholders that was caused by the decommissioning.

⁵⁵ Order P-244.

[162] The appellant provided details of press coverage about the decommissioning of the Unit, involvement (or rather lack thereof) of the Death Investigation Oversight Council (DIOC), actions of the chief forensic pathologist and the chief coroner, complaints to DIOC about the chiefs of pathology, the judicial review matters that resulted, and other related issues.

[163] The appellant states that no comprehensive information has been made available to the public and the press about the decommissioning of the Unit.⁵⁶ The appellant states that the press have lamented the lack of information and contradicting statements provided by the Ontario Forensic Pathology Service, the Office of the Chief Coroner, and the ministry.

[164] The appellant refers to a 2019 Auditor General report that noted secrecy and the lack of transparency concerning the Unit closure. The appellant states that in the press, the chief forensic pathologist and the Ministry of the Solicitor General kept citing one another as the decision-makers in decommissioning the Unit and gave contradictory reasons and timelines.

Analysis/Findings

Compelling public interest

[165] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government.⁵⁷ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.⁵⁸

[166] A public interest does not exist where the interests being advanced are essentially private in nature.⁵⁹ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.⁶⁰

[167] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.⁶¹

[168] Any public interest in *non*-disclosure that may exist also must be considered.⁶² A public interest in the non-disclosure of the record may bring the public interest in

⁵⁶ The appellant provided news articles in support of this submission.

⁵⁷ Orders P-984 and PO-2607.

⁵⁸ Orders P-984 and PO-2556.

⁵⁹ Orders P-12, P-347 and P-1439.

⁶⁰ Order MO-1564.

⁶¹ Order P-984.

⁶² *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

disclosure below the threshold of "compelling".⁶³

[169] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation⁶⁴
- the integrity of the criminal justice system has been called into question⁶⁵
- public safety issues relating to the operation of nuclear facilities have been raised⁶⁶
- disclosure would shed light on the safe operation of petrochemical facilities⁶⁷ or the province's ability to prepare for a nuclear emergency⁶⁸
- the records contain information about contributions to municipal election campaigns⁶⁹

[170] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations⁷⁰
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations⁷¹
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding⁷²
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter⁷³
- the records do not respond to the applicable public interest raised by appellant⁷⁴

[171] Above, I found that the mandatory personal privacy exemption in section 21(1)

⁶³ Orders PO-2072-F, PO-2098-R and PO-3197.

⁶⁴ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

⁶⁵ Order PO-1779.

⁶⁶ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

⁶⁷ Order P-1175.

⁶⁸ Order P-901.

⁶⁹ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

⁷⁰ Orders P-123/124, P-391 and M-539.

⁷¹ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁷² Orders M-249 and M-317.

⁷³ Order P-613.

⁷⁴ Orders MO-1994 and PO-2607.

applies to the information at issue in records 2, 7, and 37 (page 62) and the discretionary advice or recommendations exemption in section 13(1) applies to records 10, 17 (email at page 23), 26, and 36.

[172] It appears to me, based on my review of the appellant's representations, that the appellant's position is that disclosure of the information at issue in the records would shed light on the particular reasons why the Unit was decommissioned and why the timeline for this decommissioning was followed. Her position is that disclosure will clarify the contradictory information regarding the decommissioning of the Unit that has been placed in the public sphere.

[173] The information in the records 10, 17 (email at page 23), 26, and 36 to which I have found section 13(1) applies, in my view, is not connected to the public interest identified by the appellant. The exempt information in these records is about other matters, other than why the Unit was decommissioned and the timeline about this decommissioning. Specifically:

- Record 10 contains advice and personal opinions/suggestions rather than statements reflecting HHS' decisions.
- Record 17 (email at page 23) reveals advice provided by the Executive Director of the Hamilton Regional Laboratory Medicine Program about the proposed budget of the Unit based on volumes of cases.
- Record 26 is a draft communications strategy memorandum containing suggested recommendations as to when the media and others could be notified of the decision to decommission the Unit.
- Record 36 is an email chain containing advice about who should be consulted about an issue discussed in that correspondence.

[174] I find that there is not a compelling public interest in disclosure of the information in records 10, 17 (email at page 23), 26, and 36 that I found exempt under the advice or recommendations exemption in section 13(1). I find that this information does not reveal information about why the Unit was decommissioned and why the timeline for this decommissioning was followed, which is what the appellant claims should be subject to the public interest override. As the portions of the records I found exempt under section 13(1) do not address the public interest identified by the appellant, I find that the first part of the test for section 23 to apply is not met.

[175] The records that contain information that I have found is exempt under the mandatory personal privacy exemption in section 21(1) are:

- record 2, which contains some overall data on the size of the autopsy report backlog of individual pathologists, and

- records 7 and 37 (last severance found on page 62), which both contain personal recommendations about the individuals named in the record.

[176] I find that there is not a compelling public interest in disclosure of the personal information in records 2, 7, and 37 that I found exempt under the personal privacy exemption in section 21(1). These records contain personal information relating to the performance of individual pathologists and does not, in my view, shed light on the reasons or timeline for the decommissioning of the Unit. In this regard, I find the first part of the test under section 23 is not met for the exempt personal information.

[177] Accordingly, I find that there is not a compelling public interest in disclosure of the information that I found subject to the section 13(1) advice or recommendations exemption or the section 21(1) personal privacy exemption, as the records do not respond to the applicable public interest raised by appellant.⁷⁵

[178] As I have found that there is no compelling public interest in disclosure of the exempt information, I find that section 23 does not apply. Accordingly, I do not need to consider whether any compelling public interest clearly outweighs the purpose of the advice or recommendations exemption in section 13(1) or the personal privacy exemption in section 21(1) in the circumstances of this appeal.

[179] As the public interest override in section 23 does not apply, the mandatory personal privacy exemption in section 21(1) applies to the information at issue in records 2, 7, and 37 (page 62) and the discretionary advice or recommendations exemption in section 13(1) applies to records 10, 17 (email at page 23), 26, and 36. I will uphold the ministry's decision to withhold this information.

Issue G: Did HHS conduct a reasonable search for records?

[180] Although the issue of HHS' search for responsive records was not initially an issue at adjudication, the appellant in her representations specifically claimed that HHS had not conducted a reasonable search for records responsive to parts 3, 5, 6, 8, and 9 of her request. Other than part 6, these were parts of the request for which HHS had stated that no responsive records exist.

[181] Parts 3, 5, 6, 8, and 9 of the appellant's request sought the following records:

3. Ministry's CFP's [Chief Forensic Pathologist] and/or OFPS's OFPS [Ontario Forensic Pathology Service] ruling or decision not to renew or suspend the funding or service contract between [the Unit] and OFPS or Ministry in 2018 and 2019;
5. Ministry's CFP's and/or OFPS's ruling(s) or decision(s) to close (decommission) [the Unit] in 2018 or 2019 presented to HHS;

⁷⁵ Orders MO-1994 and PO-2607.

6. Any records pertaining to closure (decommissioning) of [the Unit], including correspondence and minutes of talks with the Ministry, CFP, OFPS, Chief Coroner for Ontario, HHS and/or McMaster University and HHS's in-house records.

8. Agreements between Ministry, CFP, OFPS and/or Chief Coroner for Ontario on the one side and HHS and/or HHS and/or McMaster University on the other side regarding closure (decommissioning) of [the Unit] and any correspondence minutes or other records relevant to this agreement;

9. Legal opinion or advice obtained/received by HHS (whether in-house or otherwise) in regards to closure (decommissioning) of [the Unit].

[182] The appellant submits that she had no means of verifying whether HHS did have records responsive to parts 3 and 5, but claims that she knew "for sure" that HHS had the materials relevant to part 8 and she was convinced that there should also be records responsive to part 9. In her representations she also refers to part 6 of the request. She states:

On Friday, June 14, 2019, three representatives: [name], Chief of Forensic Pathology for Ontario; [name], Deputy Chief; and [name], Chief Coroner, came to meet with [four names].

All forensic pathologists were excluded from the meeting. HHS did not include the minutes contrary to my request in any form, redacted or unredacted.⁷⁶

...HHS also noted that it had "redacted information uniquely relating to the academic programs in pathology at McMaster [University]. HHS does not understand your request to include that information." I could not find an exemption where an institution could redact information only because they did not understand why I requested the materials.⁷⁷

McMaster was involved in the discussions about decommissioning of the [the Unit] and its impact on the residency program, and HHS should disclose any relevant information under [parts] 6 and 8 of my request.

As for [part] 9, I can hardly believe that HHS, a large corporation with legal resources, did not seek legal advice. If HHS did not seek legal advice in such an important matter as decommissioning of the HRFPU [the Unit], it begs a question why.

[183] HHS had not provided a reply to these representations of the appellant, even though I sought its reply representations earlier in the inquiry. Therefore, it had not responded to the appellant's concerns about its search for responsive records. I

⁷⁶ I advised HHS that minutes are mentioned in parts 4, 6, 7, and 8 of the request.

⁷⁷ I advised HHS that many parts of the request mention McMaster University.

determined that HHS should be given another opportunity to specifically respond to the appellant's submission on its search as it pertained to parts 3, 5, 6, 8, and 9 of the appellant's request.

[184] Therefore, I shared the appellant's submissions on HHS' search for records responsive to parts 3, 5, 6, 8, and 9 of the appellant's request. I asked HHS to take into account and respond to the following:

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.⁷⁸ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁷⁹ To be responsive, a record must be "reasonably related" to the request.⁸⁰

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁸¹

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁸²

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁸³

A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.⁸⁴

[185] HHS was also asked to provide a written summary of all steps taken in response to the request. In particular, HHS was asked:

⁷⁸ Orders P-85, P-221 and PO-1954-I.

⁷⁹ Orders P-624 and PO-2559.

⁸⁰ Order PO-2554.

⁸¹ Orders M-909, PO-2469 and PO-2592.

⁸² Order MO-2185.

⁸³ Order MO-2246.

⁸⁴ Order MO-2213.

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

Representations of HHS

[186] HHS states that it had advised the appellant in its decision letter that it does not have records responsive to parts 3, 5, 8 and 9 of the request. HHS also states that it advised the appellant in its decision letter that it had redacted information uniquely relating to the academic programs in pathology at McMaster University.

[187] Regarding the searches it undertook, HHS states that the records were prepared by staff and professional staff acting within their roles in connection with the Unit. Many of the records identify the individual who prepared them and in some cases, their position or role in connection with the Unit, as follows:

- Executive Vice President, Academic & Chief Medical Executive
- Vice President, Clinical Support Services & Community Surgery and was previously the Interim VP, Diagnostic Imaging and Laboratory Medicine
- Executive Director, Hamilton Regional Laboratory Medicine Program

- Interim Chief and Interim Medical Director, Hamilton Regional Laboratory Medicine Program
- Manager, Financial Reporting

[188] HHS states:

The search for responsive records was initiated by the Privacy and Freedom of Information Office's Legal Counsel, when she reached out to senior staff (all those listed above) in order to begin searching their databases for the information noted in the request. A search of department emails, electronic files and paper files was conducted by all of the individuals listed above. Subject matter experts conducted multiple extensive searches to identify and locate all of the records within the hospital's custody and control. Following the exhaustive searches by the above mentioned subject matter experts, the Privacy and Freedom of Information Office's Legal Counsel and the Executive Director, Hamilton Regional Laboratory Medicine Program completed multiple reviews of the documents prior to issuing a disclosure decision to the appellant.

...I have no reason to believe that any further responsive records exist.

...Based on consultations with the subject matter experts, I have no reason to believe that any responsive records exist outside of the institution's possession.

[189] The appellant was given an opportunity to respond to HHS' representations, but indicated that she relies on her original representations.

Findings

[190] The appellant's request was for specific records about the decommissioning of HHS' pathology unit (the Unit). In this order, I am determining whether HHS conducted a reasonable search for the specific records sought in parts 3, 5, 6, 8 and 9 of the appellant's request. These are the parts of the request that the appellant submits that HHS did not conduct a reasonable search for responsive records.

[191] HHS states that it had advised the appellant in its decision letter that it did not have records responsive to parts 3, 5, 8 and 9 of the request.

[192] I asked HHS to respond to the appellant's representations specifically on parts 3, 5, 8, and 9 of the request, as set out above. All of these parts of the request are about the decommissioning or the closing of the Unit. These parts of the request can be summarized as follows:

- Part 3 seeks information about the non-renewal or suspension of the funding or the service contract for the Unit.

- Part 5 is about the ministry's CFP's and/or OFPS's rulings regarding the closing of the Unit that were sent to HHS.
- Part 8 is about agreements with HHS, and related documents, regarding the closing of the Unit.
- Part 9 is about legal advice given to HHS about the closing of the Unit.

[193] Although HHS provided representations on its search, I find that these are general representations and do not specifically address the appellant's submissions about why she believes that responsive records regarding parts 3, 5, 8, and 9 of her request should exist.

[194] I find that the appellant has provided a reasonable basis for me to conclude that records responsive to parts 3, 5, 8, and 9 of the request may exist, but have not yet been located by the searches conducted by HHS.

[195] For parts 3, 5, 8, and 9 of the request, the appellant has asked for records related to the decision of the Province of Ontario not to fund the Unit or to contract with the Unit for its services. HHS and the appellant provided many news articles about the decommissioning of the Unit and HHS' response to that decision. One news article provided by both parties reads:

In a statement, the hospital [HHS] noted that the decommissioning of the unit was "solely a provincial decision and was appealed by Hamilton Health Sciences and McMaster University."⁸⁵

[196] From my review of the numerous news articles from several sources provided by both HHS and the appellant about the decommissioning of the Unit, it is clear to me that HHS was in communication with the Province of Ontario about various aspects of the decommissioning of the Unit. I find that this communication would have generated records responsive to parts 3, 5, and 8 of the appellant's request related to the decisions, rulings, and agreements related to the decommissioning, as set out in these parts of the request.

[197] As well, in responding to and in appealing the decision to decommission the Unit, as set out in the news article referred to above, I agree with the appellant that HHS would most likely have sought legal advice about the decommissioning. Therefore, there is a reasonable basis for me to conclude that records responsive to part 9 of the request exist.

[198] HHS, in its initial representations, generally describes the records that it has located and that are subject to the exemptions and exclusion reviewed above as:

⁸⁵ <https://www.thespec.com/news/hamilton-region/2020/03/06/hamilton-forensic-pathology-unit-to-close-end-of-march.html>

...records about the impact of the decommissioning on jobs for Unit staff and the implications for staff and HHS of those jobs being terminated due to the decommissioning, including through retirement and resignations.

[199] I find that the records located thus far by HHS, as evidenced by HHS' index of records in the Appendix to this order and by HHS' representations, appear to be related to job losses as a result of the decommissioning of the Unit. These records do not appear to me to fully address the records sought by the appellant in parts 3, 5, 8, and 9 of the request that concern communications HHS had with other organizations about the decommissioning of the Unit.

[200] Specifically, parts 3, 5, 8, and 9 of the request concern the province's decision to decommission the Unit and HHS' response to this decision including its interaction with provincial officials, specifically mentioning those at the Ministry of the Solicitor General, the Chief Forensic Pathologist, the Ontario Forensic Pathology Service and the Chief Coroner.

[201] In support of her belief that additional responsive records exist, the appellant describes a meeting between HHS and several of these provincial officials and submits that there should be minutes responsive to parts 6 and 8 of the request.

[202] Based on my review of the parties' representations, including the news articles about the decommissioning provided by both parties, I find that HHS has not satisfied me that it conducted a reasonable search for records responsive to parts 3, 5, 8, and 9 of the appellant's request. Therefore, I will order HHS to conduct another search for records responsive to parts 3, 5, 8, and 9 of the request.

[203] Of the requests at issue, parts 3, 5, 6, 8, and 9, only parts 6 and 8 refer to McMaster University.

[204] The appellant believes that records exist in response to part 8 of her request and that additional records exist regarding parts 6 of her request, as McMaster University was involved in the discussions about decommissioning of the Unit and its impact on the residency program. Parts 6 and 8 of the request seek:

6. Any records pertaining to closure (decommissioning) of [the Unit], including correspondence and minutes of talks with the Ministry, CFP, OFPS, Chief Coroner for Ontario, HHS and/or McMaster University and HHS's in-house records.

8. Agreements between Ministry, CFP, OFPS and/or Chief Coroner for Ontario on the one side and HHS and/or HHS and/or McMaster University on the other side regarding closure (decommissioning) of [the Unit] and any correspondence minutes or other records relevant to this agreement;

[205] I have determined above that HHS should conduct a search for records responsive to part 8 of the appellant's request. HHS has located records responsive to

part 6 of the request, as outlined in the index that is an appendix to this order.

[206] HHS' position on records about McMaster University's academic programs in pathology, is that information uniquely relating to these programs is not responsive to the request. I agree with this, except as it relates to records about the impact of the decommissioning of the Unit on McMaster University's academic programs in pathology.

[207] Part 6 of the request seeks records that include correspondence and minutes of meetings with several parties, including McMaster University. The located records for part 6 of the request do not include minutes of meetings,⁸⁶ nor any other responsive records besides emails, briefing notes, and letters.

[208] The appellant referred to a specific meeting between HHS and several of the provincial officials that are mentioned in parts 6 and 8 of her request. In addition, the records referred to in HHS' index of records include records about meetings between HHS and other officials named in the request. Despite this, no minutes of meetings have been located by HHS related to these meetings.

[209] Although the appellant has sought minutes of meetings in several parts of her request, none of the responsive records include minutes of meetings. I agree with the appellant that minutes of meetings are responsive to her request. I have ordered HHS to conduct another search for records responsive to part 8 of the appellant's request. This would encompass minutes of meetings about the decommissioning of the Unit.

[210] I agree with the appellant that, as McMaster University was involved in the discussions about decommissioning of the Unit and its impact on McMaster University's academic programs in pathology, HHS should disclose, subject to any applicable exclusions or exemptions, any information about these discussions that is responsive to parts 6 and 8 of the request.

[211] As HHS has not located minutes of meetings nor has it provided records about the impact of the decommissioning of the Unit on McMaster University's academic programs in pathology, I will order HHS to conduct another search for records responsive to part 6 of the appellant's request.

[212] In conclusion, I will order HHS to conduct another search for records responsive to parts 3, 5, 6, 8, and 9 of the request.

ORDER:

1. I order HHS to issue another access decision to the appellant on the information in records 8, 9, 11, and 12 that I found to be responsive to the appellant's request, treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act*.

⁸⁶ Referred to as minutes of talks in the appellant's request.

2. I order HHS to disclose the non-exempt information at issue in records 11, 27, and 37 (pages 60 and 61) to the appellant by **May 31, 2022**.
3. I uphold HHS' decision to deny access to the remaining information at issue in the records.
4. I order HHS to conduct another search for records responsive to parts 3, 5, 6, 8, and 9 of the appellant's request and to issue an access decision on these records, treating the date of this order as the date of the request for the purpose of the procedural requirements of the *Act*.

Original Signed by: _____
Diane Smith
Adjudicator

_____ April 29, 2022

APPENDIX

Record No.	Record's Page(s) No.	Description of record	Applicable Exemption/Exclusion
Correspondence with the Forensic Pathologist for the Province of Ontario (Requests 4, 6 & 7)			
1.	1-2	12/11/18 - Letter from HRLMP [Hamilton Regional Laboratory Medicine Program] regarding "pathway forward"	Redacted text is non-responsive to the requests
2.	3	06/29/19 – Email regarding backlog, attaching letter regarding 07/03/91 meeting	s. 21 - redacted text is the personal information of the pathologists. s. 18(1)(c) – it is reasonably likely that HHS's relationship with its employees and staff would be compromised were it to disclose information that could be interpreted as reflective of their performance. The only information not redacted is information about the requester. HHS would otherwise have redacted the information.
4.	4-8	07/04/19–07/05/19 - Emails confirming information attributed by reporter to a doctor's office and to HHS	Redacted text is non-responsive to the requests.
5.	9	07/09/19 – Email regarding contribution to 07/12/19 Forensics Meeting	Redacted text is non-responsive to the requests.
6.	10-11	07/23/19 - E-mails regarding meeting of 07/23/19 (advising individual employment opportunities would not be discussed)	s. 65(6)3 - the redacted text sets out HHS's process for the management of individual employment opportunities. If it were not excluded from the application of FIPPA, s. 18(1)(f) would apply to the redacted text.
Correspondence with Ministry of the Solicitor General [SOLGEN] (Request 6)			
7.	12-13	08/16/19 – Letter from SOLGEN to HHS re:	s. 21 The redacted text reflects personal opinions/suggestions

		correspondence with DIOC [Death Investigation Oversight Council]	made to SOLGEN.
8.	14	08/26/19 - Letter from HHS to SOLGEN	Redacted text non-responsive to the requests.
9.	15-16	09/04/19 - Response from SOLGEN	Redacted text non-responsive to the requests.
Correspondence with McMaster University/St. Joseph Healthcare Hamilton (SJJH) (Request 4)			
10.	17	06/15/19 - Emails re: response to decision to decommission	s. 13, s. 18(1)(c), s. 21 The redacted text contains advice and personal opinions/suggestions rather than statements reflecting decisions of HHS.
General Correspondence (Requests 4, 6 & 7)			
11.	18-19	06/14/19 - HHS emails about the June 14 notice of the decision to decommission the Unit	s. 18(1)(c), s. 21 The redacted text constitutes personal opinions rather than statements reflecting decisions of HHS. The text redacted from the last sentence of the penultimate paragraph is non-responsive to the requests.
12	20-21	06/16/19 - HHS emails regarding recommended actions in response to decision, attaching letters to DIOC of 06/17/19 and [named doctor] of 05/17/19	The redacted text is non-responsive to the requests. s. 21 - applies to the redacted cell phone number. The letters have been removed at the requester's instructions.
16.	22	06/18/19 - Email to various regarding HR [human resources] implications of decommissioning	s. 65(6)3 - the redacted text sets out HHS's proposed process for the management of individual employment opportunities. The redacted text at the bottom of the page duplicates part of record 11. If it were not excluded from the application of <i>FIPPA</i> , s. 18(1)(f) would apply to the redacted text
17.	23-28	06/21/19 - Email attaching Briefing Note	s. 13 (email), s. 65(6)3 (briefing note) The redacted text in the briefing note is either non-responsive or contains projections about employment-related matters in

			which HHS has an interest which if not excluded, would be redacted under s. 18(1)(f).
18.	29	06/21/19 – Emails asking for clarification of certain information in Briefing Note	As above, s. 13, s. 65(6)3/ 18(1)(f) The redacted text consists of advice and a discussion of employment-related matters in record 17. The redacted text is a duplicate.
19.	30	06/21/19 to 06/25/19 – Emails regarding clarification of certain information in Briefing Note	As above, s. 13, s. 65(6)3/ 18(1)(f)
23.	31-34	06/26/19 – Email attaching HR Briefing Note of 06/24/19	s. 13, s. 65(6)3 The redacted text consists of advice and a discussion of the employment-related matters in which HHS has an interest which if not excluded, would be redacted under s. 18(1)(f).
24.	35	06/27/19 – Email regarding DIOC response	s. 13, s. 65(6)3 The redacted text consists of advice and a discussion of employment-related matters in which HHS has an interest.
26.	35-38	07/04/19 – Emails regarding 07/03/19 “Communication Strategy - Hamilton Regional Forensic Pathology Unit”	s. 13, s. 65(6)3 The redacted text consists of advice and a discussion of employment-related matters in which HHS has an interest. There is also text that is non responsive to the requests (last
			lines on page 1 of the Strategy, first three lines on page 2).
27.	39	07/05/19 – E-mails re: media article and HHS approach	Redactions in remaining 4 mails based on s. 21.
28.	40	07/09/19 – Emails regarding HR issues	s. 65(6)3 The redacted text consists of a discussion of employment-related matters in which HHS has an interest.
30.	41-45	07/22/19 to 07/23/19 – Emails regarding meeting on 07/23/19 including re: HR issues	Remaining emails – s. 13, s. 21, s. 65(6)3 and if not excluded, the redacted text regarding employment-related matters would

			be subject to s. 18(1)(c), (e), (f) & (g).
31.	46-52	07/26/19 to 07/29/19 – Emails regarding HR issues and advice on letter to DIOC ⁸⁷	s. 13, s. 65(6)3
33.	53	07/30/19 – Email in response to media article	Redacted text non-responsive to requests.
34.	54-55	07/31/19 – Emails regarding HR issues	s. 13, s. 65(6)3 The redacted text consists of advice and a discussion of employment-related matters in which HHS has an interest. If the employment-related discussions were not excluded, they would be redacted under sections 18(1)(c), (e), (f), (g).
35.	56-57	08/02/19 - E-mails regarding HR issues and advice on backlog	As above, s. 13, s. 65(6)3/ s. 18
36.	58-59	08/13/19 - Emails regarding correspondence with DIOC/SOLGEN and strategy	s. 13 Letters to and from DIOC removed at requester's instructions.
37.	60-62	08/13/19 to 08/14/19 - Emails regarding setting up a call with SOLGEN and agenda for call	s. 13, s. 21
40.	63	08/21/19 – Emails regarding Briefing Notes	s. 65(6)3 - The redacted text consists of information about employment-related matters in which HHS has an interest.
41.	64	08/27/19 – Covering email sending 08/26/19 letter from HHS to SOLGEN)	Redacted text is a duplicate of record 8.
44.	65-67	09/17/19 – Emails re: HR matters – 3 pages	s. 65(6)3 - If not excluded, redacted text would be subject to s. 21 as the emails contain information about identified employees, and s. 18(1)(e),(f),(g).

⁸⁷ Draft letters to DIOC removed from the scope of the appeal as per the appellant's instructions.