Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4534

Appeal PA20-00709

The Hospital For Sick Children

July 23, 2024

Summary: The Hospital for Sick Children received a 19-part request under the *Act* for access to a variety of records including invoices, records of payments, emails, communications, and donations made for various specified time periods including prior to 2007. The hospital disclosed some information but denied access to entire records on the basis that they were exempt from the *Act* by section 19 (solicitor-client privilege). It also stated that because of section 69(2) of the *Act,* it was not required to search for records that pre-date January 1, 2007. The appellant appealed the hospital's decision and also claimed that section 69(2) is unconstitutional. In this appeal, the adjudicator upholds the hospital's reliance on section 19 and dismisses the appellant's claim that section 69(2) is unconstitutional.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19 and 69(2); *Canadian Charter of Rights and Freedoms*, Part I of the *Canada Act 1982*, being Schedule B, 1982, (UK) c. 11, sections 2(b), 7 and 12.

Orders and Investigation Reports Considered: Orders MO-2211 and MO-3455.

Cases Considered: *Dagg v. Canada*, [1997] 2 S.C.R. 403; *Ruby v. Canada (Solicitor General); Ruby v. Canada (Royal Canadian Mounted Police)*, [2000] 3 FC 589; *Doré v. Barreau du Québec*, 2012 SCC 12; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

OVERVIEW:

[1] The Hospital for Sick Children (SK or the hospital) received a 19-part request

under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to a variety of records including invoices from a specified law firm and a specified individual, records of payments to a specified law firm and the specified individual, emails, communications, and donations for various specified time periods made to the hospital or to Motherisk, including records from 1986.[1]

[2] During the inquiry, the appellant explained that the access request related to his own experience at the hospital. According to the appellant, as a child he participated in a study conducted at the hospital, by hospital staff with the Motherisk program, a clinical and research program at the hospital.[2] The appellant submits that the study had profoundly negative effects on him. His involvement with this study is what eventually led him to make the access request at issue in this appeal.

[3] The hospital issued five access decisions in relation to the request.

[4] By its fifth and final decision letter, the hospital disclosed records, in full, relating to parts 2, 4, 12-15 of the request. It denied access to records responsive to parts 1, 3, 5, 6, 7, 8, 9, 10 and 11 based on section 19 (solicitor-client privilege) of the *Act*. With respect to parts 16-19 of the request, the hospital stated that it did not search for records and referred to section 69(2) of the *Act* which states that the *Act* does not apply to records that came into its custody or under its control prior to January 1, 2007.

[5] The requester, now the appellant, appealed the hospital's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The appellant indicated in his appeal that he was raising a constitutional question concerning the hospital's reliance on section 69(2).

[6] With respect to parts 16 to 19 of his request, the appellant argues that section 69(2) of the *Act* is not constitutional. The appellant asserts that section 69(2) violates the *Canadian Charter of Rights and Freedoms* (the *Charter*), and he argues that this section should therefore be struck down as a remedy under the *Charter*.

[7] The file was transferred to the adjudication stage and the original adjudicator assigned to this appeal decided to conduct an inquiry into the issues in this appeal. She began the inquiry by inviting the hospital and the appellant to make representations in response to the issues under appeal. The appeal was then transferred to me, and I invited reply representations from the parties. Representations were received and shared in accordance with the IPC's *Code of Procedure*.

[8] The appellant notified the Attorneys General of Ontario and Canada with a Notice of Constitutional Question (NCQ). The Attorney General of Ontario indicated that it would not intervene at this stage of the proceeding. The Attorney General for Canada did not respond.

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[1] See appendix A for the 19-part request.

[2] Motherisk was a clinical and research program at the hospital, established in 1985.

[9] In this appeal, I uphold the hospital's exemption claim under section 19. I also uphold the hospital's decision not to search for records that pre-date January 1, 2007, on the basis of section 69(2). I find that the appellant's rights under the *Charter* have not been infringed as a result of section 69(2).

RECORDS:

[10] In his representations, the appellant indicated that he no longer seeks access to records relating to parts 5, 6, 8, 9, 10 and 11 of the request.[3] As a result only records responsive to parts 1, 3 and 7 remain in dispute as well as the constitutional question regarding records that predate January 1, 2007, relating to parts 16-19. The remaining relevant parts of the request are as follows:

> 1. Invoices sent to SK/SK Foundation from [specified law firm] or subsidiaries (between Jan 1, 2009 - Jan 1, 2020)
>
> 3. Any and all invoices sent to SK or foundation by [specified individual] (private contractor or from law firm) (between Jan 1, 2009 - Jan 1, 2020)
>
> 7. Duration of and clarification if SK has at any time retained services of [specified law firm] in the role of legal representation and/or mediation services
>
> 16. Donations to HSC/HSC Foundation and/or Motherisk by: [named company] (1986-1996)
>
> 17. Donations to HSC/HSC Foundation and/or Motherisk by: [named company] (1986-1996)
>
> 18. Donations to HSC/HSC Foundation and/or Motherisk by: [name company] (1986-1996)
>
> 19. Donations to HSC/HSC Foundation and/or Motherisk by: [named company] (1986-1996)

[11] During the inquiry, one invoice was partially disclosed to the appellant as responsive to part 3 of the request. This invoice is therefore no longer at issue and I will not address it further in this order.

[3] All parts of the original request are set out in the Appendix to this order.

ISSUES:

A. Does the discretionary exemption for solicitor-client privilege at section 19 apply to the information at issue?

B. Did the hospital exercise its discretion under section 19? If so, should the IPC uphold the exercise of discretion?

C. Is the hospital required to search for records responsive to parts 16 to 19 of the request for the time period of 1986 to 1996? Is section 69(2) unconstitutional or constitutionally inapplicable under section 2(b), 7 and 12 of the *Canadian Charter of Rights and Freedoms*?

DISCUSSION:

Background to the request

[12] In the inquiry the appellant provides the following background. He says that as a child he participated in a study conducted by staff of the Motherisk program at the hospital which involved alcohol consumption. He recalls being 9 or 10 years of age at the time. According to the appellant, the study took place in the department of clinical pharmacology and was conducted by hospital staff with the Motherisk program. The appellant submits that the effects of the study at the time and into adulthood had a profoundly negative effect for him. His involvement with this study is what eventually led him to make the access request.

[13] Motherisk was a clinical and research program at the hospital, established in 1985. Details and criticisms of the scientific efficacy of hair testing by the Motherisk program have been the subject of public scrutiny. The Ontario government established an Independent Review in 2014 headed by Justice Lang. In 2015, Justice Lang issued a report on the program which reviewed the program's methods and child protection cases impacted by the program and made numerous findings and recommendations (the Lang Review and the Lang Report).[4]

[14] In January 2016, in response to the Lang Report, the Ontario government asked Justice Beaman to lead an independent commission to provide support to people affected by the testing. Justice Beaman's Report of the Motherisk Commission was issued in February 2018 (the Beaman Commission and the Beaman Report).[5]

[4] See: http://m-hair.ca/
[5] https://www.ontario.ca/page/harmful-impacts-reliance-hair-testing-child-protection

Issue A: Does the discretionary solicitor-client privilege exemption at section 19 apply to the information at issue?

[15] The hospital claims that the invoices responsive to parts 1 and 3 of the request and the records responsive to part 7 of the request are exempt under section 19 of the *Act*. Of note, the responsive records relating to parts 2 and 4 of the request, already disclosed to the appellant, contained information concerning the total payments made by the hospital to the specified law firm and specified individual named in parts 1 and 3.

[16] Also of note, without specifying the actual dates of services provided, the invoices responsive to parts 1 and 3 of the request are for time periods after the conclusion of the Lang Review. This will become relevant to one of the appellant's arguments discussed further below.

[17] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. The hospital has claimed this exemption for legal invoices in parts 1 and 3 of the request and for information concerning the retainer of a named law firm in part 7 of the request. Section 19 states:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege,
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[18] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up two "branches."

[19] The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. The hospital claims the withheld records fall under this first branch.

Branch 1: common law privilege

[20] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege; and
- litigation privilege.

[21] The rationale for the common law solicitor-client communication privilege is to

ensure that a client may freely confide in their lawyer on a legal matter.[6] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[7] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[8]

[22] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[9]

[23] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[10] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[11]

[24] Legal billing information is presumed to be privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.[12]

Representations

[25] Initially, the hospital did not provide the withheld information to the IPC to review and instead relied on a confidential detailed affidavit describing all of the records in this appeal.[13] During the course of the inquiry, the hospital provided the invoices responsive to part 3 of the request (with some redactions) to the IPC for review.

[26] The hospital's position is summarized as follows:

> Part 1: These records fall under Branch 1 (solicitor-client communication privilege). The hospital states that it has received legal advice from the named firm and all invoices were issued in that context.

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[6] Orders PO-2441, MO-2166 and MO-1925.
[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[9] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[10] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[11] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[12] *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, 2007 CanLII 65615 (ONSCDC); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).
[13] I note that because the hospital initially did not provide a copy of the records, the original adjudicator requested that it provide a detailed affidavit addressing the records with sufficient detail that a determination can be made regarding the exemption claimed. This request was in keeping with the IPC guidance document, *IPC protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC.*

> Part 3: These records fall under Branch 1 (solicitor-client communication privilege). The hospital states that it has received legal advice from a specified individual (external counsel) on prior occasions and his invoices were issued in that context.
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> Part 7: These records fall under Branch 1 (solicitor-client communication privilege, litigation privilege and/or settlement privilege). The hospital submits that these are records specifically relating to and containing details about legal services provided by the law firm to the hospital referenced under item 1.

[27] The hospital submits that disclosure of the records would reveal what issues it sought legal advice for and what that legal advice was based on, revealing solicitor-client communication privileged information. It refers to Supreme Court of Canada cases in which it confirmed that solicitor-client privilege must be "as close to absolute as possible."[14]

[28] The hospital submits that the records must be withheld in their entirety and refers to the following statement made by the Ontario Divisional Court, in which it held that section 19 is a class privilege and applies to solicitor/client records in their entirety:

> Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.[15]

[29] The appellant requests that the hospital be compelled to provide the records to the IPC for review. He also suggests that at a minimum the hospital should provide a partially redacted version of the withheld information.

[30] The appellant submits that in this appeal there should be an exception to the close to absolute protections of section 19 as public safety is at stake: "correcting past safety issue as well as preventing future harms to public safety." He submits that the purpose of the request is to obtain records that relate to safety of members of the public who had children removed from their homes as a result of the hospital's conduct.

[31] The appellant submits that the parties (the hospital, a specified individual, and law firm) are now working closely together to protect each other's information when their historical role has been that of trusted public steward and that this should not be ignored. He suggests that this is especially the case when the hospital that possesses these documents has a history of unethical abuses that harmed families.

[32] Regarding records relating to part 1 of the request, the appellant notes that the

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[14] *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (CanLII).
[15] *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*), [1997] O.J. No. 1465.

hospital already disclosed the total legal billings paid to the specified law firm in 2018 (disclosed to the appellant in part 2 of the request) so there was no dispute that it paid the law firm for some kind of service. The appellant disputes that all services provided by the law firm are automatically protected and assumed to be a solicitor-client relationship. He notes that the specified law firm was supposed to be representing the public interest as it served as staff to Justice Lang who conducted the Lang Review (2014-2015). The appellant submits that it is more believable that the law firm was paid to clarify some legal principle or aspect or implication of Justice Lang's findings which would not necessarily be covered by Branch 1 and should not be exempt from disclosure due to the public interest.

[33] In its reply representations about part 1 of the request, the hospital notes that the specified law firm was retained by the hospital to provide legal advice in 2018, which post dates the conclusion of the Lang Review, explaining that the Lang Report was issued on December 17, 2015.

[34] In his sur-reply, the appellant disputes the hospital's submissions about the conclusion of the "Motherisk Commission" and says that a final report was issued in late February 2018. Regarding this point, in his sur-reply representations, the appellant refers to the Beaman Report (issued in February 2018) and not the Lang Report (issued in 2015) which he initially referenced. In any event, he argues that the specified individual is mentioned in the Beaman Report hundreds of times and suggests that this gives rise to a perceived conflict of interest and that there is therefore a public interest in the information in dispute.

[35] For records relating to part 3 of the request, the appellant submits that there is a public interest in disclosure of the information because scrutiny is warranted.

[36] Finally, for records relating to part 7 of his request (duration of and clarification if the hospital has at any time retained services of a specified law firm in the role of legal representation or mediation services), the appellant first notes that the hospital is claiming solicitor-client communication privilege, litigation privilege and/or settlement privilege. He submits that the hospital be compelled to clarify which specific privilege it is claiming. The appellant says that part 7 of his request seeks any documents that will allow the public to know precisely whether or not an actual retainer agreement ever existed between the hospital and this law firm, and if so, what the retainer agreement covered and if it is still in force.

[37] After reviewing the appellant's sur-reply representations, I invited the hospital to clarify its position with regard to the invoices relating to part 3 of the request. The hospital reiterated its position made in its reply representations, and also provided for examination, redacted copies of all of the relevant invoices relating to part 3 of the request, for which it is claiming the section 19 exemption.

Analysis and finding

[38] To recap, the hospital argues that the records at issue are subject to branch 1, solicitor-client communication privilege under section 19(a) of the *Act*. (It also argues that other parts of section 19(a) apply but because of my findings below, I need not consider these.)

[39] I will first address the appellant's argument that it is necessary that I review the records to make my findings in this appeal.[16] As explained above, the hospital provided the IPC with redacted copies of the records at issue for part 3 and relies on an affidavit to describe all of the records at issue. The hospital's affidavit addresses the record for each part of the request at issue. The affidavit describes the nature of each record, a general description of the type of legal advice that was given and explains how solicitor-client privilege was maintained to date. I find that the hospital has provided sufficient detail to enable me to decide the question of whether the section 19 exemption applies, and whether it properly exercised its discretion.

[40] I find that the hospital has established that the information at issue is subject to the section 19(a) exemption. As explained below, I accept that the records at issue were all prepared by or for external legal counsel retained by the hospital for use in giving legal advice.

[41] After reviewing the confidential affidavit and examining the records responsive to part 3 of the request, I accept that the information contained in records responsive to parts 1 and 3 of the request consists of information that would reveal legal advice given to the hospital by a specified law firm and a specified individual. As noted, legal billing information is presumed to be privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.[17] I am satisfied that the information at issue are the details contained in the legal invoices and is not "neutral."[18]

[42] Regarding the records responsive to part 7, I find that these qualify for exemption under section 19(a) as they consist of solicitor-client privileged communications. After considering the hospital's representations, including its confidential affidavit, I find that disclosure of this information would provide details about privileged services provided to the hospital by the specified law firm.

[43] I have considered the appellant's arguments that a retainer agreement could not exist between the specified law firm and the hospital in 2018 because the law firm was

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[16] The hospital provided copies of the records responsive to part 3.

[17] *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, 2007 CanLII 65615 (ONSCDC); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

[18] As noted above, in response to parts 2 and 4 of the request the hospital disclosed to the appellant the payments made to specified law firm.

involved in the "Motherisk Commission." The Lang Report, issued in 2015, states that lawyers from the specified law firm were part of Justice Lang's staff as counsel. The specified individual is named in Justice Lang's 2015 report, however, is not listed as counsel or staff to Justice Lang. The Beaman Report, however, does not list any lawyers from the specified law firm as staff and the specified individual is also not listed as staff.

[44] According to the hospital's representation and set out in its confidential affidavit, the specified law firm provided legal services to it in 2018 (part 1 and 7 of the request), which was after the conclusion of the Lang Review. Additionally, the invoices relating to part 3 of the request are dated between 2017 and 2019. Since the Lang Review concluded with the report in 2015, there does not appear to be a conflict relating to the hospital's retainer with the specified law firm or the specified individual (even if he was staff to Justice Lang).

[45] Also, after reviewing both reports, it is evident that the specified individual was not counsel to either of the Justices and where he is referenced in each report is in relation to his prior work on a different Commission.

[46] As stated in Order MO-2211 where the adjudicator was examining legal billing information, at common law solicitor-client communication privilege is permanent and will outlast the matter for which the advice is sought unless an exception to privilege, such as waiver, is established.

[47] In this circumstance, I am satisfied that the hospital has not waived any privilege in the records at issue.

[48] Therefore, I find that the information contained in the records responsive to parts 1, 3 and 7 is solicitor-client communication privileged information and qualifies for exemption under Branch 1 of section 19.

[49] The appellant's representations address a public interest in the information withheld under section 19. While section 23 of the *Act* permits some exemptions to be overridden by a compelling public interest, section 19 is not one of those exemptions. Instead, I will address any public interest issues when examining the hospital's exercise of discretion.

Issue B: Should the IPC uphold the hospital's exercise of its discretion under section 19?

[50] The section 19 exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[51] 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; or
- it fails to take into account relevant considerations.

[52] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] The IPC cannot, however, substitute its own discretion for that of the institution.[20]

Representations

[53] The hospital refers to the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, where it was held that the exercise of discretion in the context of a section 19 exemption is substantially different than for other discretionary exemptions because solicitor-client privilege "must be as close to absolute as possible to ensure public confidence and retain relevance."[21]

[54] In addressing the records in its confidential affidavit, the hospital addressed its exercise of discretion relating to its decision not to disclose the information at issue.

[55] The appellant submits that the hospital exercised its discretion improperly and in bad faith. He suggests that the only consideration given was whether or not the exemption benefited the hospital and claiming one of the branches for privilege while providing minimal context or information to the IPC.

[56] The appellant submits that the hospital did not consider the public's right to transparency and only considered its own interests and those of people they paid when it exercised its discretion. He states that the "public has a compelling need to get a better sense of what these specific documents include because the law firm and the specified individual that provided them did so after 'switching sides' in some very high-profile matters of public interest." The appellant also submits that the public safety is at issue and the information in the records should be disclosed on that basis.

Finding

[57] I have considered the parties' representations, and I uphold the hospital's exercise of discretion.

[58] I find that the hospital exercised its discretion under section 19(a) appropriately. I find that the hospital considered relevant factors in exercising its discretion, including

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[19] Order MO-1573.
[20] Section 54(2).
[21] 2010 SCC 23.

the need to allow for the giving and receiving of confidential legal advice and whether disclosure to the appellant would result in waiving solicitor-client privilege over confidential communications between client and counsel.

[59] Given that many records were partially disclosed, including payments made to the specified law firm and the specified individual reflected in the withheld information, I am satisfied that the hospital considered whether it was possible to disclose some information to the appellant without waiving privilege. Finally, I find that the hospital did not exercise its discretion in bad faith or for an improper purpose, or that it relied on irrelevant considerations.

[60] Regarding the appellant's submissions about the public's right to transparency and the public safety, after considering the information set out in the parties' representations, I am unconvinced that there exists a public safety issue with regard to this information. Also, after considering the hospital's confidential affidavit, it is apparent that it considered whether the information would contribute to public transparency when it disclosed some information and withheld the information in dispute under the section 19 exemption.

[61] As a result, I uphold the hospital's exercise of discretion and, therefore, its decision to deny access to the records relating to parts 1, 3 and 7 of the request under section 19(a).

Issue C: Is the hospital required to search for records responsive to parts 16 to 19 of the request for the time period of 1986 to 1996? Is section 69(2) unconstitutional or constitutionally inapplicable under section 2(b), 7 and 12 of the *Canadian Charter of Rights and Freedoms*?

[62] As noted in the background to the request, the appellant recalls participating in a study conducted by staff of the Motherisk program when he was a child. He submits that the effects of the study at the time and into adulthood had a profoundly negative effect for him. He details the day that he participated in the study by recalling events which he sets out in an affidavit attached to his Notice of Constitutional Question (NCQ). His involvement with this study is what eventually led him to make the access request at issue in this appeal.

[63] The appellant contends that the hospital should be required to search for records that pre-date January 1, 2007, and that section 69(2) which sets out that the *Act* only applies to records in a hospital's custody or control after January 1, 2007, is unconstitutional.

[64] Section 69 of the *Act* provides:

> (1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force.

> (2) Despite subsection (1), this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007.

[65] The appellant challenges the constitutional validity of section 69(2) of the *Act* and asserts that this section violates section 2(b) of the *Charter*. The appellant served the IPC and the Attorneys General (Canada and Ontario) with a Notice of Constitutional Question in which he sets out in detail the grounds upon which he is asserting that section 69(2) of the *Act* is unconstitutional under section 2(b), 7 and 12 of the *Charter* by limiting his ability to obtain documents that came into a hospital's possession prior to 2007.

[66] Section 2(b) of the Charter states:

> Everyone has the following fundamental freedoms:
>
> > freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[67] Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[68] Section 12 of the *Charter* states:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Analysis and finding

[69] Before turning to the analysis, I note that in the inquiry the appellant alleged that the IPC is biased because when the Minister of Health addressed 69(2) in the Legislature, she stated that the Commissioner was "very pleased" to be supporting the amendment. I addressed the appellant's concern in a letter[22] in which I found that there was no basis for concluding that a reasonable apprehension of bias exists with respect to my adjudication of the appellant's Charter rights based on the comment made by the Minister.

[70] The appellant claims section 69(2) is in breach of his *Charter* rights under sections 2(b) (freedom of expression), 7 (liberty and security of the person) and 12 (cruel and unusual punishment) by failing to extend his right of access to hospital records predating January 1, 2007.

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[22] Letter dated November 29, 2022.

[71] The appellant's arguments can be summarized as follows:

Section 2(b) – Freedom of Expression

> The appellant claims that section 69(2) of the *Act* has infringed on his rights to investigate, explore, express, and share details of his own personal history related to a study he was enrolled in, that took place inside a public hospital, that was absent of informed consent, and which was likely being funded by a major alcohol company or else self-funded by the hospital.

Section 7 – Liberty and Security of the Person

> The appellant submits that harms, injuries, and deprivations of many kinds in life may and often do result from being an unwitting participant in child studies as he was and/or being a survivor of institutionalized abuses as many fellow citizens have endured. … [S]ection 69(2) prevents people from recovering from past abuse and may even exacerbate effects of childhood abuse. One example of how this may come about is that 69(2) permits hospital institutions that were involved in maltreatment to ignore certain requests for information from the children they mistreated.

Section 12 – Cruel and Unusual Punishment

> The appellant submits that in his case, he experienced unusual treatment by being enrolled in an alcohol consumption study as a young child and section 69(2) is directly preventing him from learning of important aspect of his own childhood. He suggests it also protects public hospitals from being discovered as complicit in the maltreatment of Canadians that were forced into residential schools.

[72] Under parts 16-19 of the request, the appellant seeks access to records of donations made to the hospital, its foundation or to Motherisk from various alcohol and drug companies. As I understand it, the appellant is interested in these records because of a connection he has drawn between the studies in which he participated at the hospital and possible corporate interests in these studies. There is no argument or suggestion these donation records, if any, contain the appellant's personal information.

[73] The hospital submits that the *Act* is a provincial statute, and it is up to the provincial legislature to define its scope. It submits that there is no right to access to information in the *Charter* or Canadian constitution. The hospital notes that section 69(2) was passed by the provincial legislature, debated in the Legislature, and even received input from relevant parties such as the IPC. It submits that it is a valid law and there is no constitutional right or element at issue.

The post-2007 limitation of the right of access in relation to hospitals

[74] As noted by the appellant, the *Act* was amended by the *Broader Public Sector Accountability Act*, *2010*[23] resulting in extending the *Act* to include hospitals as institutions. At the time, section 69(2) was added confirming that the *Act* applied to records that came into a hospital's custody or control on or after January 1, 2007. The appellant submits that limiting hospitals to only searching for records that came within their custody or control in 2007 is a breach of his Charter rights.

Neither liberty and security of the person under section 7 nor cruel and unusual punishment under section 12 are engaged in this appeal

[75] I will first address the appellant's suggestion that section 7 and 12 of the *Charter* are relevant in this appeal.

[76] I agree with the hospital that the right of access to information has never been held to be a facet of liberty or security of the person nor has a statutory limitation on the right of access been found to infringe the *Charter*. The closest the courts have come to so holding is in articulating the derivative right of access to information under section 2(b) of the *Charter* in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (*CLA*)*,* which I will discuss below in the context of section 2(b). [24]

[77] It has previously been held that the right to "control" one's own personal information can be a facet of the right of privacy (*Dagg. v. Canada*)[25] and that, in certain circumstances, the right of privacy, as a facet of section 7 liberty, may entail the right of access to, and correction of, personal information (*Ruby v. Canada (Solicitor General); Ruby v. Canada (Royal Canadian Mounted Police)*, ("*Ruby*").[26] However, the Court in *Ruby* found that the right did not apply in the circumstances of that case; and no other case law has followed *Ruby* to find that such a right, in fact, exists in a given case. In any event, as noted above, the donation information the appellant seeks can in no way be characterized as his personal information and the Court's reasoning in *Ruby* would therefore not apply.

Section 12

[78] The right sought to be protected under the *Charter* must have some direct bearing on the conduct that is being impugned as a breach of the *Charter*.

[79] The right not to be subject to cruel and unusual punishment is primarily considered to arise in a criminal law or quasi-criminal context. In the case of this appeal, the alleged abuse the appellant sustained – even if it could be considered cruel

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[23] SO 2010, C 25.
[24] 2010 SCC 23.
[25] [1997] 2 S.C.R. 403, per LaForest at para. 67.
[26] [2000] 3 FC 589.

and unusual – cannot be considered a form of punishment in the context of a penal system of law.

[80] It is equally significant that any connection between a right of access to corporate donor information and the alleged abuse the appellant sustained is simply too remote. Moreover, there is no existing case law that suggests access to information is a judicially recognized remedy for a breach of the appellant's section 12 rights.

Section 2(b) of the Charter

[81] In *Doré v. Barreau du Québec* (*Doré),*[27] the Supreme Court of Canada stated that in assessing claims under the *Charter*, an administrative law decision-maker ". . . balances the Charter values with the statutory objectives. In effecting this balancing, the decision- maker should first consider the statutory objectives." The Court cites the approach taken to section 2(b) claims under the *Act* in its earlier decision in *CLA*,[28] as an application of the "administrative law" approach, which *Doré* adopts as an alternative to more traditional *Charter* analysis in the administrative law context. In *Doré,* the Court noted:

> Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in ... *Criminal Lawyers' Association* ...[29]

[82] I will follow the approach advocated in *Doré.*

[83] According to the Supreme Court of Canada in Doré, to be successful the appellant would be required to bring his Charter challenge within the parameters of the derivative right of access under freedom of expression at section 2(b) of the Charter, as articulated by the Court in CLA.

[84] Doré confirms that CLA provides the framework for assessing possible breaches of section 2(b) of the Charter in the context of the Act. In CLA, the Court considered whether the public interest override at section 23 of the Act was constitutionally underinclusive, based on section 2(b) of the Charter, because it omitted to provide for the possible override of the exemptions found in sections 14 (law enforcement) and 19 (solicitor-client privilege). In upholding an order of this office finding that section 23 is not constitutionally underinclusive on that basis, the Court articulated the following criteria for finding that section 2(b) of the Charter has been breached in relation to an access-to-information request:

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[27] 2012, SCC 12.
[28] Cited above.
[29] Para. 32 of *Doré*.

We conclude that the scope of the s. 2(b) protection includes a right to access documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints.[30] . . .

. . .

To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a prima facie case for the production of the documents in question. But even if this prima facie case is established, the claim may be defeated by factors that remove s. 2(b) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged. The only remaining question is whether the government action infringes that protection.[31]

. . .

To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest [32]

In sum, there is a prima facie case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded [33]

If this necessity is established, a prima facie case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.[34]

. . .

The first question is whether any access to documents that might result from applying the s. 23 public interest override in this case would enhance s. 2(b) expression. This is only established if the access is necessary to

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[30] at para. 31.
[31] at para. 33.
[32] at para. 36.
[33] at para. 37.
[34] at para. 38.

> permit meaningful debate and discussion on a matter of public interest. If not, then s. 2(b) is not engaged.[35]
>
> If necessity were established, the CLA, under the framework set out above (para. 33) would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions.[36] . . .

[85] From this, it can be seen that in order to establish that section 2(b) of the *Charter* has been breached in relation to a request under the *Act*, the following two requirements must be satisfied: (1) access to the information must be necessary for the meaningful exercise of free expression on matters of public or political interest; and (2) if requirement 1 is met, it must also be the case that there are no countervailing considerations inconsistent with disclosure, such as privileges, and/or evidence that disclosure would impair the proper functioning of the hospital.

The derivative right of access is not engaged in this appeal

[86] The appellant seeks to exercise "his right to access his own personal information, or information that would assist him …" However, the pertinent aspect of his appeal is limited to items relating to parts 16-19 of the request which concern donations made to the hospital and/or Motherisk by named companies from 1986-1996. It is difficult to see how external corporate donations could comprise the appellant's personal information.

[87] The appellant's other principal concern is the potential use of section 69(2) to shield hospitals and others from being investigated or criticized for being associated with alleged mistreatment of children predating 2007. He submits that section 69(2) "allows institutions, specifically hospitals and by extension their private/protected partners, to act with impunity after violating peoples' liberties." It appears from this and other statements that the appellant's interest in the donation information is to confirm his suspicion that the Motherisk program "was likely being funded by a major alcohol company or else self- funded by the hospital."

[88] Applying the Court's approach in *CLA,* which it confirmed in *Doré,* I must consider whether the limitation in section 69(2) – and therefore the limitation on the appellant's right of access – impacts the appellant's meaningful exercise of free expression. Considering the information sought (donation information pre-dating 2007), I am unable to conclude that the statutory limitation in section 69(2) is impacting the appellant's ability to engage in meaningful expression about his personal experiences with the Motherisk program. It is difficult to see how the appellant's wish to engage in expression concerning the possibility that corporate donations to the hospital were used to support the Motherisk program is a matter of public or political interest, particularly

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[35] at para. 58.
[36] at para. 60.

in light of the considerable amount of information about the program already in the public domain.[37]

[89] Accepting the conclusion that the first requirement of the derivative right of access test is not met, it is unnecessary to consider whether countervailing confidentiality considerations would prevail over a *prima facie* right of free expression.

[90] In conclusion, there is no basis in law or in fact for finding that the denial of access to the records the appellant seeks by reasons of section 69(2) of the *Act* constitutes a breach of sections 2(b), 7 or 12 of the *Charter* or that the *Charter* would otherwise provide the appellant with the remedy he seeks.

ORDER:

The appeal is dismissed.

Original Signed by:	July 23, 2024
Alec Fadel Adjudicator	

[37] In particular, the Lang Report and the Beaman Report.

APPENDIX

The appellant requested access to the following:

> [1] Invoices sent to SK/SK Foundation from [named law firm] or subsidiaries (between Jan 1, 2009 - Jan 1, 2020)
>
> [2] Records of payments by the hospital and/or foundation made to or in relation to [named law firm] or subsidiaries (between Jan 1, 2009 - Jan 1, 2020)
>
> [3] Any and all invoices sent to SK or foundation by [named person] (private contractor or from law firm) (between Jan 1, 2009 - Jan 1, 2020)
>
> [4] Record of payments made by hospital to [named person] (between Jan 1, 2009 - Jan 1, 2020)
>
> [5] All emails between [named person] and [named person] or surrogate staff (between Jan 1, 2015 - present)
>
> [6] All emails between [named person] and [named person] referencing last name [requester's last name] and/or first name [requester's first name]
>
> [7] Duration of and clarification if SK has at any time retained services of [named law firm] in the role of legal representation and/or mediation services
>
> [8] Emails exchanged between [name person] and: [named person] (between Jan 1, 2007 - Jan 1, 2020)
>
> [9] Emails exchanged between [named person] and: [named person] (between Jan 1, 2007 - Jan 1, 2020)
>
> [10] Emails exchanged between [named person] and: [named person] (between Jan 1 2007 - Jan 1, 2020)
>
> [11] Emails exchanged between [named person] and: [named person] (between Jan 1, 2007 - Jan 1, 2020)
>
> [12] Copy of external partnership agreements with KPDSB and SK (between Jan 1, 2007 - Jan 1, 2020)
>
> [13] Communications sent to Motherisk FAS Clinic patients regarding closure of clinic (between Jan 1, 2007- Jan 1, 2020)

[14] Communication sent by [named person] to Transitions classroom families (between Jan 1, 2007 -Jan 1, 2020)

[15] [Named person] expense reimbursement/reports between 2011-2014

[16] Donations to HSC/HSC Foundation and /or Motherisk by: [named company] (1986 -1996)

[17] Donations to HSC/HSC Foundation and/or Motherisk by: [named company] (1986- 1996)

[18] Donations to HSC/HSC Foundation and /or Motherisk by: [name company] (1986-1996)

[19] Donations to HSC/HSC Foundation and /or Motherisk by: [named company] (1986-1996)