

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4597-I

Appeals PA24-00536, PA24-00537, PA24-00538

Hamilton Health Sciences

January 28, 2025

Summary: The appellant made three access requests for records relating to the deaths of two pediatric patients in May or June 2024. The hospital denied access to all records in all requests under the discretionary exemption for economic and other interests (section 18(1)). The appellant appealed the hospital's decision to the IPC. The hospital refused to provide records to the IPC so that it may resolve the appeal. In this decision, the Registrar orders the hospital to produce the records at issue in the appeal to the IPC.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 18(1)(j), 52(4), 55. (1), (2), 61(1)(d).

OVERVIEW:

[1] This order addresses Hamilton Health Sciences (the hospital) refusal to provide the Information and Privacy Commissioner of Ontario (the IPC) with the records at issue in appeals PA24-00536, PA24-00537 and PA24-00538. In this decision, I order the hospital to provide the IPC with a copy of the records.

[2] The hospital received three access requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*), dated August 2, 2024. The following three requests made by the requester, now the appellant, are at issue in these appeals:

Request FOI 21-24/Appeal PA24-00536

Please provide the names of the individuals and or company/agency/organization who/which will be conducting the external independent review into the deaths of two pediatric adenoid and/or tonsil patients at McMaster Children's Hospital in May/June 2024. Please redact/remove the names of patients as required under privacy/FIPPA laws.

Request FOI 22-24/Appeal PA24-00537

Please provide the results of any internal reviews (report, memos, email, etc.) that was completed into the deaths of either or both pediatric patients after discharge from McMaster Children's Hospital from adenoid and/or tonsil surgery around May/June 2024. Please redact/remove the names of patients as required under privacy/FIPPA laws.

Request FOI 23-24/Appeal PA24-00538

Please provide the name(s) of the lead physician(s) who performed the tonsil and/or adenoid surgical procedures at McMaster Children's Hospital which resulted in the death of two pediatric patients after discharge around May/June 2024. If either physician has been the source of previous investigations and/or internal/external inquiries/reviews and/or discipline while with HHS in any capacity – please indicate whom and what the nature of the concern was (in the last 10 years). Please redact/remove the names of patients as required under privacy/FIPPA laws.

[3] The hospital denied access to the records responsive to each of the three requests on the basis of the discretionary exemption in section 18(1)(j) of the *Act*. In its decision letters,¹ the hospital provided the following explanations for its denials of access:

A decision has been made to deny access to the information requested on the basis that it is information subject to FIPPA sections 18(1)(j) and included in records prepared to assess or evaluate the quality of health care and directly related to programs and services provided by a hospital.

[4] The requester, now the appellant, appealed the hospital's decisions to the IPC.

[5] In order to address the appeals and as contemplated by the IPC's *Code of Procedure*, the Registrar of the IPC sought from the hospital a copy of all documentation including the records at issue. The hospital refused to provide copies of the records, stating that "due to the high sensitivity of these files, HHS would prefer not to provide

¹ Hospital's decision letters dated September 13, 2024, provided to the IPC.

the responsive records at this stage.”

[6] As the Registrar I have determined that it is necessary for the hospital to provide a copy of the responsive records to the IPC in order that the IPC may resolve the appeals. Accordingly, given the lack of any substantial explanation by the hospital as to why it would not provide the records to the IPC, I have decided to order the hospital to now provide all records relating to the three appeals to the IPC.

DISCUSSION:

[7] Under section 52(4) of the *Act*, the Commissioner may require the production of any record. Specifically, section 52(4) states:

In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

[8] Under sections 55(1) and (2) of the *Act*, the Commissioner and the Commissioner’s staff are required to maintain the confidentiality of information coming to their knowledge in the performance of their powers, duties and functions under the Act, including records provided by an institution in the course of an appeal, and they are not compellable to give evidence in respect of any such information. Sections 55(1) and (2) state:

(1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

(2) The Commissioner or any person acting on behalf of or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act.

[9] Under section 61(1)(d) of the *Act*, no person shall wilfully obstruct the Commissioner in the performance of her functions under the *Act*. This includes a demand for the production of any records for the purposes of conducting an inquiry. Section 61(1)(d) states:

No person shall,

Wilfully obstruct the Commissioner in the performance of his or her functions under this Act;

[10] Section 11.01 of the IPC's *Code of Procedure* sets out the procedure for providing records to the IPC. It states:

Where records are at issue, the IPC requires copies of the records and may require an Index of Records to process an Appeal. In such cases, the IPC will send to the Institution a written request for the records and/or an Index of Records to be produced to the IPC and the date by which the records and/or the Index of Records are to be received.

[11] As contemplated by section 11.01, the IPC requested the records from the hospital. As set out above, the hospital refused to provide these.

[12] Sections 5.04 and 11.02 of the IPC's *Code of Procedure* set out the procedure for ordering the production of records by the IPC. They state:

5.04 In accordance with section 11 and the statutory authority contained in the *Act*, the Registrar may request, and if necessary, order, that copies of the records at issue and/or an Index of Records be produced to the IPC.

11.02 Where an Institution fails to provide the records at issue, or any of them within the specified time, the IPC may issue an Order requiring the Institution to produce the records to the IPC.

[13] While the hospital takes the position that the information in the records is "sensitive" in nature, this does not amount to a valid explanation as to why the records can not be provided to the IPC. In the course of access appeals under the *Act*, the IPC routinely receives records from institutions containing information which may be characterized as highly sensitive. In accordance with section 55(1), the IPC maintains the confidentiality of all such information through the conclusion of the appeal process and thereafter. The hospital has cited no principle of law that would relieve it of its obligation to provide the IPC with a copy of the responsive records.

[14] The hospital has applied section 18(1)(j) to deny access of the responsive records to the appellant. Section 18(1)(j) states the following:

A head may refuse to disclose a record that contains,

information provided in confidence to, or records prepared with the expectation of confidentiality by, a hospital committee to assess or evaluate the quality of health care and directly related programs and services provided by a hospital, if the assessment or evaluation is for the purpose of improving that care and the programs and services.

[15] An example of the application of this exemption is found in Order PO-4454, where the adjudicator was able to determine that section 18(1)(j) applied to certain records

after having the opportunity to review those records during the inquiry.²

[16] Given the hospital's claim that section 18(1)(j) applies, IPC staff will require the records at issue to mediate the appeal and endeavour to effect a settlement. Should mediation prove unsuccessful, the IPC would then be in a position to adjudicate the appeal, if so advised, and dispose of the issues raised based a complete understanding of the facts.

[17] In conclusion, I find the hospital has not established any grounds upon which it should be relieved of the obligation to provide the records at issue to the IPC.

ORDER:

In accordance with section 52(4) of the *Act*, I order the hospital to provide a copy of the records at issue in Appeals PA24-00536, PA24-00537 and PA24-00538 to the IPC by **February 11, 2025**.

Original Signed by: _____

Lorne Swartz
Registrar

January 28, 2025

² Order PO-4454, at paras. 65-67.