Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3862

Appeal PA17-153

Health Sciences North

June 29, 2018

Summary: The appellant seeks access to records held by Health Sciences North (HSN) relating to patients requesting an assisted death under the *Medical Assistance in Dying Act*. HSN refused to confirm or deny the existence of responsive records on the basis that disclosure of the very existence of responsive records, if they exist, would be subject to law enforcement exemptions (section 14(3)) or would consist of an unjustified invasion of personal privacy (section 21(5)) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator does not uphold HSN's decision to refuse to confirm or deny the existence of records under either of the grounds claimed. She orders HSN to issue an access decision under the *Act* for any responsive records, if they exist.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of personal information), 14(1)(e) and (i), 14(3), 21(5) and 65(11); *Medical Assistance in Dying Statute Law Amendment Act, 2017,* S.O. 2017, c. 7, section 3.

Cases Considered: *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue),* [1997] 1 S.C.R. 271; *Dell Computer Corp. v. Union des consommateurs,* 2007 SCC 344; *Ford v. Quebec (Attorney General),* [1988] 2 S.C.R. 712.

OVERVIEW:

[1] A requester sought access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records held by Health Sciences North (HSN or

the hospital):

> All records relating to patients who requested an assisted death under the *Medical Assistance in Dying Act*, including the hospital's response to the request. Any names or other identifying information for patients should be excluded.

[2] HSN issued a decision, refusing to confirm or deny the existence of responsive records citing sections 14(3) (law enforcement) and 21(5) (personal privacy) of the *Act* as the basis for its decision.

[3] The requester (now the appellant) appealed the decision to this office.

[4] As a mediated resolution could not be reached, the appeal was moved to the adjudication stage for an inquiry. The adjudicator assigned to the file sent a Notice of Inquiry setting out the facts and issues on appeal to HSN, initially.

[5] HSN submitted representations but took the position that due to the confidential nature of its representations they should be withheld, in their entirety, from the appellant. Since procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties, the adjudicator prepared a summary of HSN's representations which complied with the sharing criteria outlined in *IPC Practice Direction Number 7*. HSN was given a specific date by which to provide its consent or object to the summary prepared by the adjudicator but provided no response.

[6] A copy of the Notice of Inquiry was then provided to the appellant, together with the summary of HSN's position prepared by the adjudicator. The appellant provided representations in response. The appeal was then transferred to me to continue the adjudication stage.

[7] In this order, I do not uphold HSN's decision to refuse to confirm or deny the existence of responsive records, because I do not accept that the disclosure of the very fact that records exist or do not exist would convey information that ought to be withheld under the *Act*. Accordingly, I order HSN to issue an access decision under the *Act* that does not refuse to confirm or deny the existence of responsive records.

PRELIMINARY ISSUE:

[8] On May 10, 2017, Ontario's *Medical Assistance in Dying Statute Law Amendment Act, 2017*,[1] came into force upon Royal Assent. It amends various statutes addressing matters of provincial jurisdiction, including legislation relating to access to information, to clarify how they intersect with matters relating to medical assistance in dying.

[9] Section 3 of the *Medical Assistance in Dying Statute Law Amendment Act*, 2017 amends section 65 of the *Act* by adding an exclusion for information relating to medical

[1] S.O 2017, c. 7, Bill 84.

assistance in dying at section 65(11) of the *Act*. The exclusions at section 65 of the *Act*, including section 65(11), speak directly to the jurisdiction of this office. If an exclusion applies, the records are not subject to the *Act*.

[10] Section 3 of the *Medical Assistance in Dying Statute Law Amendment Act, 2017* states:

> Section 65 of the *Freedom of Information and Protection of Privacy Act* is amended by adding the following subsections:
>
> **Non-application of Act**
>
> (11) This Act does not apply to identifying information in a record relating to medical assistance in dying.
>
> **Interpretation**
>
> (1) In subsection (11),
>
> "identifying information" means information,
>
> (a) that relates to medical assistance in dying, and
>
> (b) that identified an individual or facility, or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual or facility; ("renseignements identificatories")
>
> "medical assistance in dying" means medical assistance in dying within the meaning of section 241.1 of the *Criminal Code* (Canada).[2]

[11] The new exclusion in section 65(11) contains the wording "relating to" which has been interpreted in past orders about other exclusions. For example, section 65(5.2) addresses records related to a prosecution and states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[12] In that context, the words "relating to" have been found to require some connection between "a record" and "a prosecution." The words "in respect of" require

[2] R.S., c. C-34, s. 1. Medical Assistance in Dying. Section 241.1 Definitions: "The following definitions apply in this section and in sections 241.2 to 241.4. **medical assistance in dying** means (a) the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or (b) the prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death. (aide médicale à mourir)

some connection between "a proceeding" and "a prosecution."[3]

[13] The Notice of Inquiry invited the parties to provide their views on the possible impact, if any, of the new exclusion on the appeal.

[14] HSN did not specifically state that section 65(11) should apply to the request at issue. However, it submits that although section 65(11) was not in force when it received and responded to the request, it was already well aware of the protections that were going to be put in place by that amendment.

[15] The appellant stated that as 65(11) came into force after his request and appeal, it cannot apply. The appellant's freedom of information request for records relating to medical assistance in dying was received by HSN on February 13, 2017.

[16] There is a strong presumption that legislation is not intended to have retroactive or retrospective application unless the legislation contains language clearly indicating that it, or some part of it, is meant to apply retroactively or retrospectively or unless the presumption is rebutted by necessary implication.[4] The fundamental question is whether the legislature intended the provision to have retroactive or retrospective application.[5]

[17] In the current appeal, there is insufficient evidence before me to suggest that the legislature intended the amendment to the *Act* at section 65(11) to have retroactive or retrospective application. There is nothing expressly set out in the legislation indicating that the legislature intended it to be applied in that way, nor do I accept that the evidence suggests that the amendment should be applied retroactively or retrospectively by necessary implication.

[18] The request in this appeal was submitted to HSN approximately three months prior to the date that the *Act* was amended to include the exclusion at section 65(11). There is no evidence to support a conclusion that the legislature intended the provision to have retroactive or retrospective application. Therefore, the exclusion at section 65(11) is not relevant to this appeal.

ISSUES:

A. Would the records, if they exist, contain "personal information" as defined in section 2(1)?

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[3] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.); see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

[4] *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue),* [1997] 1 S.C.R. 271, at parag.15 (*Gustavson Drilling*).

[5] *Campbell v. Campbell,* [1995] M.J. No. 466 (Man C.A.), citing *Acme (Village) School District NO. 2296 v. Steele-Smith,* [1993] S.C.R. 47.

B. Has the hospital properly applied the refuse to confirm or deny provision at section 21(5) of the *Act*?

C. Has the hospital properly applied the refuse to confirm or deny provision at section 14(3) of the *Act*?

DISCUSSION:

A. Would the records, if they exist, contain "personal information" as defined in section 2(1)?

[19] HSN has refused to confirm or deny the existence of records responsive to the request on the basis that section 21(5) of the *Act* applies because their disclosure would constitute an unjustified invasion of personal privacy. In order for section 21(5) to apply, it is necessary to first decide whether the response records, if they exist, would contain "personal information" and, if so, to whom it relates.

[20] The term "personal information" is defined in section 2(1) of the *Act* 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;

[21] 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.[6]

[22] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[23] 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.[7]

[24] 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.[8] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[9]

Representations

[25] Since the request specifically excludes patient names or other patient identifying information from its scope, HSN was asked to address this issue by providing

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[6] Order 11.
[7] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[8] Orders P-1409, R-980015, PO-2225 and MO-2344.
[9] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

submissions on what might constitute "identifying information" about patients in any responsive records that might exist. It was also asked to comment on whether any responsive records, if they exist, might contain "identifying information" that relates to employees or other non-patients.

[26] In its representations, HSN advises that any records responsive to the request, if they exist, would contain "personal information" within the definition of the *Act*. It explains that in addition to the personal information of patients, which it understands is not sought by the requester, it interpreted "personal information" to also include the personal information of any employees who might have been involved in medically assisted deaths at HSN. It submits that staff members named in any responsive records, if they exist, may rightfully or wrongfully be assumed by the reader to be in favour of assisting patients in medically assisted deaths. It submits that disclosing the names of employees in this context would be to disclose their personal information.

[27] The appellant states in his representations that he is not requesting "the personal information of patients, hospital staff or anyone else, so [he does not] see how this section would apply."

Analysis and finding

[28] As set out previously, the appellant specifies that he does not seek access to personal information of patients, hospital staff or anyone else. However, as section 21(5) can only apply if the records (if they exist) contain personal information, I will consider whether, based on the evidence before me, any existing responsive records would contain information that can be defined as "personal information."

[29] Having considered the types of records that would be responsive to the request, if they exist, and the information that they might contain, I accept that they would contain the personal information of identifiable individuals. I find that they would contain the personal information of the patients who have requested medical assistance in dying, as well as information about HSN staff that might be considered to be their personal information as that term is defined in section 2(1) of the *Act* and discussed in prior orders issued by this office.

[30] Therefore, I am satisfied that any responsive records, if they exist, would contain the "personal information" of identifiable individuals, as defined in section 2(1) of the *Act*.

B. Has the hospital properly applied the refuse to confirm or deny provision at section 21(5) of the *Act*?

[31] Section 21(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[32] Section 21(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[33] A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 21(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[10]

[34] Before an institution may exercise its discretion to invoke section 21(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[35] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[11]

Representations

[36] In support of its position that it appropriately applied section 21(5) to refuse to confirm or deny the existence of any records responsive to the request, HSN commented generally on the implication of the disclosure of records, if any exist, within the relatively small community that is Sudbury.

[37] The appellant submits that as he is not requesting the personal information of patients, hospital staff or anyone else, he does not see how section 21(5) could apply. He submits that with all personal information severed from any responsive records that might exist, their disclosure could not reasonably be expected to constitute an unjustified invasion of personal privacy.

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[10] Order P-339.

[11] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

Analysis

[38] I do not accept that HSN is entitled to apply section 21(5) to refuse to confirm of deny the existence of records responsive to the request.

Part one: Would disclosure of the record (if it exists) be an unjustified invasion of personal privacy?

[39] An unjustified invasion of personal privacy can only result from the disclosure of personal information. As the appellant indicates that he does not seek the personal information of any identifiable individuals, I find that the disclosure of responsive records, if they exist, would not consist of an unjustified invasion of the personal privacy of any identifiable individuals as required by part one of the section 21(5) test.

Part two: Would disclosure of the fact that the record exists (or does not exist) in itself convey information to the requester, and is the nature of the information conveyed such that disclosure would constitute an unjustified invasion of personal privacy?

[40] Having considered the evidence before me, I do not accept that disclosure of the fact that records responsive to the appellant's request exist (or do not exist), would convey information to the requester that amounts to an unjustified invasion of personal privacy. In my view, disclosure of the fact that HSN has in its custody or control records addressing medical assistance in dying does not reveal information that can be qualified as personal information about any identifiable individuals. In the absence of any personal information contained in the records, I am not satisfied that disclosure of the fact that responsive records exist, or do not exist, would in itself convey information to the appellant which would constitute an unjustified invasion of personal privacy. Therefore, I find that HSN has not established that part two of the section 21(5) test applies.

[41] I have found that neither part of the section 21(5) test are established. As both parts of the two-part test must be met for section 21(5) to apply, I find HSN is not entitled to apply section 21(5) to refuse to confirm or deny the existence of any records responsive to the appellant's request, if they exist.

C. Has HSN properly applied the refuse to confirm or deny provision at section 14(3) of the *Act*?

[42] HSN also relies on section 14(3) to refuse to confirm or deny the existence of responsive records. Section 14(3) states:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

[43] For section 14(3) to apply, HSN must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 14(1) or (2), and

2. disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[12]

Representations

[44] HSN submits that paragraphs (e) and/or (i) of section 14(1) would apply to any responsive records, if they exist. Those sections state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) Endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or a system or procedure established for the protection of items, for which protection is reasonably be required;

[45] HSN submits that disclosing the very existence of records responsive to the request would reveal information that qualifies for exemption under sections 14(1)(e) and/or (i).

[46] The appellant indicates that he fails to see how the disclosure of the information that he seeks would "endanger the safety or security of individuals or facilities."

Analysis and finding

[47] I do not accept that HSN is entitled to apply section 14(3) to refuse to confirm or deny the existence of records responsive to the request.

Part one: Would the records, if they exist, qualify for exemption under sections 14(1)(e) and/or (i)?

[48] Given the appellant has clearly indicated that he does not seek access to any identifying information about patients, hospital staff or any other person, any responsive records that might exist would not identify any individual person. Therefore, I do not accept that their disclosure (if they exist) could reasonably be expected to endanger the life or physical safety of any person as contemplated by section 14(1)(e).

[49] I also do not accept that disclosure of any records responsive to the request (if they exist) could reasonably be expected to endanger the security of the hospital within the meaning of the exemption at section 14(1)(i). In my view, HSN has not provided sufficient evidence to establish that the disclosure of responsive records, if they exist,

[12] Order P-1656.

could reasonably be expected to endanger the security of the hospital.

[50] I am not persuaded that the disclosure of records responsive to the appellant's request (if they exist) could reasonably be expected to give rise to either of the harms set out in sections 14(1)(e) or (i). Accordingly, I find that part one of the section 14(3) test has not been established.

Part two: Would disclosure of the fact that records exist (or do not exist) itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity?

[51] I am also not persuaded that merely confirming the existence or non-existence of records responsive to the appellant's request would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity. HSN has not provided any evidence to this effect and in my view, it is not clear from the face of the request. Therefore, I find that part two of the test for section 14(3) to apply has not been established.

[52] Based on the circumstances before me, I find that neither part of the two-part test for section 14(3) has been established. As both parts of the test must be met for section 14(3) to apply, I find that HSN it not entitled to exercise its discretion under that section to refuse to confirm or deny the existence of records responsive to the request, if they exist.

ORDER:

1. I do not uphold the application of either of sections 21(5) or 14(3) by HSN.

2. I order HSN to issue a revised decision letter to the appellant pursuant to section 26 of the *Act*, using the date of the order as the date of the request for all **procedural requirements** set out in section 24 to 30 of the *Act*. I do not intend this provision to be read as the request having been submitted after the inclusion of the 65(11) amendment in the *Act*.

3. I have released this order to HSN in advance of the appellant in order to provide HSN with an opportunity to review the order and determine whether to apply for judicial review.

4. If I have not been served with a Notice of Application for Judicial Review by **August 3, 2018**, I will release this order to the appellant by **August 8, 2018**.

5. In order to verify compliance with order provision 2, I reserve the right to require HSN to provide me with a copy of the decision letter issued to the appellant.

Original signed by June 29, 2018

Catherine Corban
Adjudicator