Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2683

Appeal PA07-266

University of Toronto

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NATURE OF THE APPEAL:

Victoria University, which is part of the University of Toronto (the University), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> [t]he report written in 2005 by [a named consultant] for the United Church of Canada/Victoria University Archives Task Force that was formed as part of what was described as a program renewal exercise.

The University located the responsive record and denied access to it, in its entirety, on the basis it was not within its custody or control for the purposes of the *Act*. In the alternative, the University asserted that even if the document is within its custody or control, it is exempt from disclosure under the discretionary exemption in section 13(1) (advice or recommendations) of the *Act*.

The requester, now the appellant, appealed this decision.

At the mediation stage of the appeal process, the University issued a second decision letter in which it claimed the application of not only the discretionary exemption in section 13(1) to the record, but also the mandatory personal privacy exemption in section 21(1) and the application of the exclusionary provision in section 65(6)3 as the report addresses "labour relations matters that are considered to be outside the scope of the *Act*". Further mediation was not possible and the file was moved to the adjudication stage of the appeal.

I initially sent a Notice of Inquiry seeking representations to the University and the United Church of Canada (the Church), as its interests could be affected by the disclosure of the information contained in the record. Both provided submissions, the non-confidential portions of which were then shared with the appellant, along with a Notice. The appellant also provided representations, which were shared, in their entirety, with the University and the Church. I then received additional submissions by way of reply from both of these parties.

In his representations, the appellant indicates that he is not seeking access to any personal information relating to salaries that may be included in the responsive record. As the University has only applied the mandatory personal privacy exemption in sections 21(1) to certain salary information in page 2 of Appendix 1 to the record, I find that this information is not at issue and I will not address it further in this order.

RECORDS:

The sole record at issue in this appeal consists of a document entitled "2005 Program Review" dated June 29, 2005.

DISCUSSION:

CUSTODY OR CONTROL

Section 10(1) of the *Act* sets out the statutory basis upon which a request for access is made. The section states, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Factors relevant to determining "custody or control"

Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the record? [Orders P-120, P-239]

- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record? [Order M-315]

- Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

- Should the fact that the individual or organization which created the record has refused to provide the institution with a copy of the record have any bearing on the control issue? [Order MO-1251]

The University and the Church have provided identical submissions respecting this issue. They argue that they maintain joint control over the subject record and that because the Church is not an institution under the *Act*, the University is not obliged to render a decision respecting access to it. They acknowledge that the University received a copy of the report from the consultant who prepared it and that the consultant was retained by a Task Force consisting of members of the University and the Church to assist in its deliberations about the future of the Archival program, which is jointly administered by these two bodies.

In his submissions, the appellant reviews several of the factors outlined in Order MO-1251 which favour a finding that the institution has the requisite degree of control over a record. He points out that the University and Church have failed to tender evidence from the contract which it entered into with the consultant respecting their ownership or property interest in the consultant's finished product. The appellant also draws parallels between the factual underpinnings of the decision in Order MO-1251 and the present circumstances, in that there exists a joint undertaking for the retention of a consultant which the appellant likens to an agency arrangement. He submits that the University acts as agent for the Church and that it has the ultimate authority to determine issues of custody or control over the record.

In its reply submissions, the University indicates that the Church paid all of the costs associated with the preparation of the consultant's report.

Findings

It is clear from the wording of section 10(1) that in order to be subject to an access request under the *Act*, a record must either be in the custody **or** under the control of an institution (see, for example, Orders M-1078, P-1397 and PO-1947).

In Order P-120, former Commissioner Linden considered what constitutes *custody* under the *Act* and concluded that physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession. However, *bare possession* does not amount to custody for the purposes of

the *Act* (Order P-239); rather, there must be some right to deal with the records and some responsibility for their care and protection. Nevertheless, the *Act* will apply to information in the custody or under the control of an institution notwithstanding that it was created by a third party (Orders P-239, P-1001 and MO-1225).

Clearly, the University enjoys physical possession of the requested record and I conclude that this is not one of those rare situations where such possession does not amount to custody of a document within the meaning of section 10(1). It has provided me with a copy of the document and acknowledges that members of the University's staff who served on the Task Force were provided with copies by the consultants. As a result, I have no difficulty in determining that the University has custody of the subject record for the purposes of section 10(1) of the *Act*.

For the sake of completeness, I will also determine whether the University exercises the requisite degree of control over the subject record. Examining the indicia of control set forth above, I find that a number of factors favouring a finding that the University also exercises the requisite degree of control over the record are present. Specifically, I find that:

- The activity being studied in the report, the maintenance of its archival material, falls within the ambit of the University's "core, central or basic" function;
- The content of the record relates directly to this record-keeping function;
- The University maintains physical possession of the record as it was voluntarily provided to it by the consultants; and
- The University has not provided any evidence to support a finding that there exist any limits on the use to which the University may put the record.

However, several factors favour a finding that the University does not exercise the requisite degree of control over the record:

- The consultants' report was paid for by the Church;
- There are no specific provisions contained in the record which would allow for its disclosure; and
- The consultants who created the record were not acting as agents for the University.

In my view, balancing the factors favouring a finding that the University exercises "control" over the record against those against such a determination, I conclude that the University has the requisite degree of control over the record for the purposes of section 10(1). Beyond the fact that it has physical possession of it, I find that the circumstances surrounding the creation of the record, particularly its submission to the joint Task Force comprised of staff from both the University and the Church, favour a finding of control. The subject matter of the record involves the record-holdings and record-keeping practices of the University, as well as the Church. In my view, the maintenance of archival material is one of the core functions of a University and the record addresses issues surrounding this function directly.

In conclusion, I find that the University exercises the requisite degree of control over the record.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The University and the Church take the position that the record falls outside the ambit of the *Act* owing to the operation of section 65(6)3.

General Principles

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.

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*.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

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 [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

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 [Order PO-2157].

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 [*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].

Section 65(6)3: matters in which the institution has an interest

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;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Parts 1 and 2: collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

The University submits that the record was prepared by the consultants for use by the Church and the University and that this use was in relation to meetings, consultations and discussions that took place regarding the future of the Archival program. The appellant does not dispute that such activities took place.

I conclude that parts one and two of the test under section 65(6)3 have been satisfied as the University has demonstrated that the record was prepared and used in relation to various meetings, consultations, discussions and communications between it and the Church around the issue of the future of the Archival program.

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

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

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]

- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]

- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

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 [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

The records collected, prepared maintained or used by the Ministry … 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. [*Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (Div. Ct.)]

The University argues that "the link between the report [the record at issue] and labour relations and an employment-related matter is that the review and recommendations about the future of the Archival program include recommendations about the staff of the Archival program." It goes on to add that "[t]he University appointed the Task Force to study the Archives program including its human resources and as part of the deliberative process, the Task Force considered the recommendations contained in the [subject] record." The University provided me with additional representations which I am unable to refer to in the body of this order because to do so would reveal the contents of the record at issue.

The University addressed the "has an interest" aspect of part 3 of the test under section 65(6)3 by stating that "[s]hould the University not follow proper lay-off procedures, it may be subject to several statutes including the *Employment Standards Act*, the *Ontario Human Rights Code* and other legal rights and obligations."

The appellant argues that "the preponderance of authority on this matter indicates that in order for the meetings, consultations, discussions or communications to be 'about labour relations' or 'employment-related matters in which the institution has an interest,' they must involve more than a cursory examination of these matters." Specifically, the appellant relies on the reasoning contained in Orders P-1369, M-941 and MO-1711, in which decision makers held that the subject matter of the records related only peripherally to labour relations and did not, therefore, fall within the ambit of section 65(6)3. He also cites Orders PO-1722 and PO-1905 in which it

was held that records relating to an organizational or operational review did not qualify for exclusion under section 65(6)3. The appellant submits that the University itself referred to the work undertaken by the Task Force, which gave rise to the creation of the record, as a "program renewal exercise." For this reason, he argues that the record is not directly related to a labour relations or employment-related matter within the meaning of section 65(6)3.

In its reply submissions, the University submits that the review was initiated in order to examine the costs associated with operating the program and the efficacy of continuing with the cost sharing agreement between the [Church] and the University. It goes on to argue that since the labour component of the Archives program comprised a large proportion of the budget in the year 2004/05, it cannot be said that the labour relations aspect of a review of the Archives program represents only a "cursory examination of these matters," as alleged by the appellant.

Findings

I have carefully reviewed the representations of the parties, including the confidential submissions received from the University and, more particularly, the record itself. The issue under consideration in this appeal revolves around how the record itself is characterized. If I make a finding that the record pertains to labour relations or an employment-related matter, then I must conclude that it is excluded from the operation of the *Act* by virtue of section 65(6)3. However, if I find that the record pertains only in a peripheral way to these matters, I must conclude that the *Act* applies to it.

In my view, it cannot be said that the review conducted by the consultants in the present situation, which gave rise to the creation of the record, was a "broadly-based organizational review which touches occasionally, *and in an extremely general way*, on staffing and salary issues," as was the case with the record under consideration in Order P-1369 [my emphasis]. The record at issue is a very detailed and comprehensive study of all aspects of the Archives program, including an in-depth examination of questions relating to staffing models and budgeting, in the context of an examination of all administrative and operational aspects of the Archives program.

In Order MO-1654-I, former Assistant Commissioner Tom Mitchinson addressed the application of section 54(3)3 of the *Municipal Freedom of Information and Protection of Privacy Act*, which is the equivalent provision to section 65(6)3. In that case he addressed the application of the exclusionary provision in section 54(3)3 with respect to an organizational review conducted by a consultant of the City of Hamilton's Emergency Medical Service (the EMS). The former Assistant Commissioner included in the Order a description of the purpose behind the review provided by the City in its representations as follows:

> The consulting firm [the consultant] was hired by the City of Hamilton to address several issues and challenges related to the newly established Emergency Services unit of the newly amalgamated City of Hamilton (January 2001) and the impact on the EMS. The objectives for [the consultants] were to review the EMS

> organizational structure and develop recommendations for an effective and efficient EMS operation.
>
> Some of the issues and challenges being examined by [the consultants] included:
>
> - Development of a business plan
> - Development of job description for key management personnel
> - Defining roles and responsibilities
> - Securing financial and budgetary information in a timely manner
> - Maintaining proper staffing levels
> - Recruiting qualified staff
>
> [The consultants] examined and evaluated the challenges and issues facing the newly amalgamated EMS mainly through reviewing existing EMS documents, and consulting with key divisional personnel – such as the manager of EMS, and Manager of Fire Operations. With respect to the latter [the consultants] consulted with the EMS staff through meetings, e-mail and telephone conversations.
>
> The result of [the consultant's] evaluation of its meetings, e-mail messages, and telephone conversations with EMS staff is a draft report (File #6 – Record 5) and the final report (File #2 – Record 1; File #6 – Record 1, 3).

In the present appeal, I note that the University submits that the University and the Church jointly appointed a "Strategic Review Task Force" with a mandate "to examine the future of the Archival program." It goes on to add that the Task Force retained the services of the consultants "to conduct an assessment of the Archival program and make recommendations for future governance, organizational structure, accommodations and human and financial resources."

In my view, the mandate of the consultants in the present case was similar in nature to that which governed the review undertaken by the consultants retained by the City of Hamilton in the fact situation that gave rise to Order MO-1654-I.

The former Assistant Commissioner then went on to evaluate whether the records responsive to the request fell within the ambit of part three of the test under section 54(3). He found that:

> Having reviewed the terms of reference for the consultant's assignment, as described in the City's representations, I find that records produced in this context were not created or prepared for "the purpose of" or "as a result of" an employment-related matter. The consultant was hired to conduct a review of the newly-established EMS organization that was put in place at the time of the amalgamation of various municipalities into the new City of Hamilton. The mandate, as described by the City, was to "review the EMS organizational

> structure and develop recommendations for an effective and efficient EMS operation", not to investigate the performance of a particular employee. In this regard, it closely resembles the situation in Order M-941. The fact that a review of this nature involves organizational issues and job design is not, in my view, sufficient to alter the purpose of the review and the nature of the records produced in that context.
>
> The question of whether any of the records stemming from the consultant's review are "substantially connected to" an employment-related matter turns on the question of how the records were maintained or used by the City outside the primary purpose of assessing the effective and efficient operation of the EMS. In my view, if the City were able to establish that records were maintained or used in relation to a labour relations or employment-related matter, that would satisfy the "substantially connected to" component of the test, regardless of whether they were created or prepared by the consultant for this purpose.

He then went on to conclude that:

> Having carefully reviewed the representations and evidence provided by the City, I am not persuaded that any of the records created or prepared in the context of the consultant's organizational review were subsequently maintained or used for meetings, consultations, discussions or communications about labour relations or employment-related matters, including the employment-related dispute involving the City and its former EMS manager. As such, these records are not "substantially connected to" any of the activities listed in section 53(3)3, and therefore not "in relation to" them.
>
> . . .
>
> Accordingly, I find that the third requirement of section 52(3)3 has not been established for any of the Category 2 records at issue in this appeal.

I adopt the reasoning set out in Order MO-1654-I for the purposes of the present appeal. In my view, based on my review of the record itself and the representations of the parties I conclude that the record is not "substantially connected" to labour relations or employment-related activities within the meaning of section 65(6)3. The report at issue addresses a wide range of issues, particularly those pertaining to the administrative management of the Archives program and its future. While labour relations and employment-related issues form the basis for discussion in much of the report, I find that these issues are subsumed in the overall review of the many different aspects of the review of the Archival program. Clearly, any discussion of the work performed by the staff of the program will include consideration of workplace and staffing issues; this is certainly the case in the record at issue. However, in my view, the discussion in the report is substantially connected to an examination of the entire Archival program, including those aspects of it which touch on labour relations or employment-related matters. I find that

these were not the primary focus of the review and the report and it cannot, accordingly, be said that the record that was prepared and used by the University in the course of its meetings and discussions about the future of the Archival program were "about labour relations or employment-related matters" within the meaning of section 65(6)3.

I conclude that the record at issue is not excluded from the operation of the *Act* by virtue of section 65(6)3 and I will go on to evaluate whether the exemptions claimed for the document apply.

ADVICE OR RECOMMENDATIONS

The University submits that the discretionary exemption in section 13(1) applies to the entire report. This section 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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, 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 *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].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, 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 *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]

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

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; 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.); Order 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]

The University submits that the report at issue was prepared by the consultants for the Task Force and that it addresses the future of the Archives program. According to the University, the report itself contains specific recommendations in the Executive Summary at pages one to six. Beginning at page 14 of the report, the University submits that "the recommendations are explained more fully" and that it:

> . . . provides an assessment of the proposed options. As discussed in Order P-1182, the advantages and disadvantages of the options provided as part of the deliberative process are also considered to provide the rationale of the recommended course of action with respect to the future of the Archival program and are to be exempted from disclosure.

The University then provided me with much more detailed representations which address in detail each of the options described in the records. I am unable to describe these submissions in greater detail as to do so would reveal the substance of the record and render the appeal moot.

The appellant's submissions focus on the application of the mandatory exceptions to the section 13(1) exemption that are contained in sections 13(2)(f) and (k), which state:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
>
> (k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

With respect to section 13(2)(f), the appellant states that the record was created:

> . . . specifically for the purpose of reviewing the performance and efficiency of the Archives housed at the University. The Task Force was entrusted with determining the future of the Archives, and there is no question that this specific program was the issue being considered by the consultant hired by the Task Force, as evidenced by the University's own communications on the matter.
>
> This point is conceded by the University in paragraphs 82 and 83 of its submissions: '. . . the central focus of the record at issue is to provide recommendations relating to the future of the Archival program. . .' The interpretation of the 'performance or efficiency' of a program is surely encompassed by an entire review of the program and its future. It is absurd to contemplate a narrower meaning of the words 'future of the Archival program' given the purpose of the *Act* is to provide access to documents to the public.

The appellant's representations respecting the application of the exception in section 13(2)(k) are as follows:

> . . . the record in question is a report of a consultant engaged for that very purpose: to make recommendations to the institution, the institution being the Task Force on the future of the Archives.

Findings

Application of section 13(1) to the record

I find that pages one through six of the Executive Summary portion of the record contain advice or recommendations from the consultants to the Task Force respecting the future operations of the Archives program. These recommendations "suggest a course of action that will ultimately be accepted or rejected by the person being advised," in this case the Task Force, with respect to the entire administration of the Archives program. The recommendations expressed in the

Executive Summary at pages one to six of the record are duplicated in the body of the report, in greater detail. In my view, this information falls within the ambit of the exemption in section 13(1) and ought not to be disclosed.

Similarly, additional recommendations relating to each of several component parts of the program review are interspersed throughout the document which comprises the record at issue. In my view, these portions of the record fall within the ambit of "advice or recommendations" as contemplated by section 13(1). Accordingly, I find that they qualify for exemption from disclosure, subject to my discussion of sections 13(2)(f) and (k) below.

Similarly, I find that the disclosure of Exhibits A and B to the report would permit one to accurately infer the advice or recommendations given by the consultants in the body of the report. The Exhibits are, therefore, also exempt under section 13(1).

The remaining portions of the record do not, however, contain information that qualifies as advice or recommendations, nor would their disclosure permit one to accurately infer the advice or recommendations given in the exempt parts of the record. Accordingly, I conclude that this information does not qualify for exemption under section 13(1).

Specifically, I find that the following information qualifies as "advice or recommendations" for the purposes of section 13(1):

- the Recommendations section of the Executive Summary contained in pages 1 to 6 of the record;
- the Recommendations section of the Archives Governance discussion at pages 21 and 22 of the record;
- the Recommendations section of the Management of Archives discussion at pages 25 and 26 of the record;
- the Recommendations section of the Financial Management of the Archives discussion at pages 33 and 34 of the record;
- the Recommendations section of the Reporting Relationship discussion at page 36 of the record;
- the Recommendations section of the Operational Management discussion at page 37 of the record;
- the Recommendations section of the Human Resource Management discussion at page 41 of the record; and
- Exhibits A and B to the report

I note that the salaries listed on page 2 of Appendix 1 are not at issue in the appeal as they were removed from its scope by the appellant during the inquiry stage of the appeal. None of the information contained in the remaining portions of the record or its Appendices qualify for exemption under section 13(1) and as no other exemptions have been claimed for them and no mandatory exemptions apply, I will order that this information be disclosed to the appellant.

Exceptions to the section 13(1) exemption in sections 13(2)(f) and (k)

As identified above, the appellant refers to the application of sections 13(2)(f) and (k), which are mandatory exceptions to the discretionary exemption in section 13(1). If these exceptions to the exemption are found to apply, the portions of the records which I have found to be exempt under section 13(1) must be disclosed. The exceptions in sections 13(2)(f) and (k) are set out in my discussion above.

Section 13(2)(f): performance or efficiency report

In my view, the exception to the section 13(1) exemption in section 13(2)(f) does not apply to the information contained in the record. I do not agree that it relates to an evaluation of the performance or efficiency of the Archival program. The Task Force was not empowered to review these aspects of the Archival program's work; nor did it request the consultants it retained to do so. Instead, I find that the Task Force, and the consultants working under its direction, were asked to examine whether the program ought to continue at all and if so, in what form. I cannot agree that the report prepared by the consultants represents a performance or efficiency report within the meaning of section 13(2)(f) and conclude that this exception to the exemption does not apply in the present circumstances.

Section 13(2)(k): committee, council or other body report

Section 13(2)(k) applies to any entity, body or organization similar to a committee or council, as long as the other elements of paragraph (k) are met. A body may be considered "attached" to an institution, even if it maintains some degree of independence from the institution [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*].

In Order PO-2681, Senior Adjudicator John Higgins canvassed the meaning of section 13(2)(k) and described the component parts of the requirements of the section as follows:

> An examination of this exception reveals that it has three essential requirements:
>
> (1) the record must be a "report" of a "committee, council or other body";
> (2) the committee, council or other body must be "attached to" an institution;
> (3) the committee, council or other body must have been established 'for the purpose of undertaking inquiries and making reports or recommendations to the institution.'

Requirement 1

In relation to the question of whether a record is a "report", previous orders of this office have defined this word as follows:

> The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact. [Orders 200, M-265, P-363, upheld on judicial review in *Ontario (Human Rights Commission)* v. *Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.)]

This definition has also been applied in the context of section 13(2)(k) (Orders PO-1709 and PO-1823).

I have concluded that the Program Review document at issue in this appeal clearly qualifies as a "report." It contains a formal statement of the results of the collation and consideration of information the consultant received in the course of its examination of the issues under review. I find that this examination involved a detailed analysis of the responses it received and the preparation of a series of wide-ranging and detailed recommendations to the Task Force.

The appellant submits that the Task Force, which retained the services of the consultant who prepared the report, is the institution referred to in the exception in section 13(2)(k) and, by reference, that this entity constitutes an "other body" for the purposes of that section.

I note that the Task Force was composed equally of representations of the Church and the University and that the consultant was paid exclusively by the Church. Each member of the Task Force received a copy of the report from the consultant but the Task Force did not prepare a document for the University setting out its position on the continuation of the Archival program. In my view, the report which comprises the record at issue, was not prepared by the Task Force or a "committee, council or other body." Rather, the report was prepared by a consulting firm retained by the Task Force and paid by the Church. Accordingly, I find that the exception in section 13(2)(k) does not apply.

For the sake of completeness, however, I will also consider whether the second requirement for section 13(2)(k) has been satisfied in this case.

Requirement 2

In Order PO-1709, Senior Adjudicator David Goodis addressed the meaning of the word "attached" for the purposes of section 13(2)(k) of the *Act* in Order PO-1709:

> The word "attached" is defined as follows:
>
> > A term describing the physical union of two otherwise independent structures or objects, or the relation between two parts of a single structure, each having its own function ... [emphasis added]

Black's Law Dictionary, 6th ed. (St. Paul: West, 1990), p. 125

> In my view, the above definition indicates that two entities may be "attached" or joined in a "union", while still remaining "otherwise independent". Had the Legislature intended that section 13(2)(k) exclude bodies with some degree of independence, it could have used language to suggest this, such as referring to the body as a "department", "branch" or "part" of the institution (see, for example, section 2(3) of the Act's municipal counterpart).

Senior Adjudicator Goodis went on to find that an advisory body to the Ministry of Health (as it was then called), was "attached" to the Ministry despite having some degree of independence. He considered a variety of factors that tended to show attachment, and weighted them against factors indicating independence. These same conclusions were reiterated in Order PO-1823. I agree with this approach and will apply it here.

In the present appeal, the report was prepared by a firm of independent consultants who are not "attached" to the University in any way. The consultants were retained by the Task Force and paid by the Church. For these reasons, I find that it cannot be said that the consultants are "attached" to the University for the purposes of section 13(2)(k). As all three components of the test under that section must be met, I find that the exception in section 13(2)(k) cannot apply to those portions of the record which I found to be exempt under section 13(1) above.

ORDER:

1. I uphold the University's decision to deny access to the following information contained in the record:

   - the Recommendations section of the Executive Summary contained in pages 1 to 6 of the record;
   - the Recommendations section of the Archives Governance discussion at pages 21 and 22 of the record;
   - the Recommendations section of the Management of Archives discussion at pages 25 and 26 of the record;
   - the Recommendations section of the Financial Management of the Archives discussion at pages 33 and 34 of the record;
   - the Recommendations section of the Reporting Relationship discussion at page 36 of the record;
   - the Recommendations section of the Operational Management discussion at page 37 of the record;
   - the Recommendations section of the Human Resource Management discussion at page 41 of the record;
   - Exhibits A and B to the review report, and
   - the salaries listed on page 2 of Appendix 1.

2. I order the University to disclose the remaining portions of the record to the appellant by providing him with a copy by **July 15, 2008** but not before **July 10, 2008**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the University to provide me with a copy of the record which is disclosed to the appellant.

Original signed by: June 10, 2008
Donald Hale
Adjudicator