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

INTERIM ORDER PO-2625-I

Appeal PA06-347

Ryerson University

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NATURE OF THE APPEAL:

Ryerson University (the University) received a request under the *Freedom of Information and Protection of Privacy* Act (the *Act*) for:

> …copies of all sexual harassment complaints filed with the University between 2004 and present with all personal information removed. I'm requesting the original hand-written or typed complaints and all records of the University's handling and resolution of the cases such as any internal reports, disciplinary actions, expulsions or court actions. As well, I request any summary data on sexual harassment at the University for the same time frame including, but not limited to, statistics or listings of incidents and the results of investigations.

The request was clarified to include only records in relation to formal complaints for sexual harassment. As a result, the requester sought:

> …all records of the university's handling and resolution of the cases, such as internal reports, disciplinary options, expulsions and court actions in respect of formal complaints for sexual harassment that existed as of September 7, 2006 [the date of the clarified request].

The requester expressly noted that "personal information" was not sought and directed that the request be responded to "with all personal information removed."

The University issued a decision in which it described the search undertaken for the records responsive to this request. It noted that no responsive records were found in the Centre for Student Development and Counseling and that any responsive records in the Human Resources (HR) and the Discrimination and Harassment Prevention Services (DHPS) departments were excluded from disclosure by reason of the operation of section 65(6) of the *Act*.

In its decision, the University also indicated that:

> Given the small number of formal complaints, and the small size of the Ryerson community, it is not possible to disclose any part of these records without compromising the personal privacy of affected individuals.

It went on to indicate that "all records of formal complaints are also under current litigation or about to be subject to litigation."

The University then stated that:

> [t]he files containing formal complaints of sexual harassment involving faculty or staff would be subject to the exclusion in section 65(6) of the *Act* because all formal complaints are considered to be employment grievances and as such are employment-related matters in which Ryerson has an interest. These files are currently open and therefore Ryerson's interest is current and ongoing…

Further, it noted that "[t]here are no records corresponding to [the] request that are not employment-related records."

The University also applied the exemptions in sections 19(a) and (c) (solicitor-client privilege) and section 21 (personal privacy) to withhold the responsive records.

The requester, now the appellant, appealed this decision.

During mediation, the appellant indicated that he felt there should be responsive records in the Centre for Student Development and Counseling. As a result, the issue of reasonableness of search was added to this appeal. The appellant also raised as an issue the possible existence of a compelling public interest in the disclosure of the records under section 23 of the *Act* in response to the exemptions claimed by the University.

As mediation was not successful in resolving the issue, the file was transferred to me to conduct an Inquiry. I provided the University with a Notice of Inquiry, setting out the facts and issues in the appeal. The University then located additional responsive records in the Human Resources Department, claiming the same exemptions and exclusions apply to them. I decided that I would first adjudicate the issue of whether the records, including the records located during adjudication, were excluded from the *Act* by reason of the operation of section 65(6). The University provided representations in response to the Notice of Inquiry on the possible application of the exclusionary provision in section 65(6). I then sent a Notice of Inquiry, along with a copy of the University's representations to the appellant, seeking his submissions on the applicability of section 65(6) to the records. Portions of the University's representations were not disclosed because of my concerns about their confidentiality. I received representations in response from the appellant and sent a copy to the University, seeking its representations in reply. I received reply submissions from the University.

RECORDS:

The records at issue are letters, emails, reports, notes, memos and transcripts dated from 2004 until September 7, 2006.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

In this interim order I will determine whether section 65(6) applies to exclude the records from the *Act*. If I conclude that section 65(6) does not apply to some or all of the records, I will seek representations on the remaining issues from the parties on the records not excluded from the *Act* and address them in my final order. Section 65(6) 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:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 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) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

In support of its claim that the records are excluded from the operation of the *Act* by reason of section 65(6), the University provided both confidential and non-confidential representations. In its non-confidential representations, it submits that:

> Most complaints regarding sexual harassment are handled by the Office of Discrimination and Harassment Prevention Services (DHPS). However, the Human Resources (HR) department may handle a complaint for sexual harassment if it is among other complaints unrelated to the purview of the DHPS...
>
> The DHPS is responsible for administering the Discrimination and Harassment Prevention Policy and Procedures (the Policy) and, as such, complaints about sexual harassment against employees are generally referred to DHPS for investigation. The DHPS provides a wide range of services including the provision of confidential advice to complainants and respondents, the investigation of complaints of discrimination and harassment, mediation and conciliation of complaints, consultation with managers and faculty on investigative processes for the resolution of complaints and maintenance of case files and statistics.
>
> [The Policy] states that "those found to have engaged in such conduct on the basis of a prohibited ground will be subject to discipline. Those found to have been harassed or discriminated against on the basis of a prohibited ground will be entitled to a remedy."…
>
> If well-founded, complaints lodged with the University in relation to sexual harassment by staff would result in penalties including employment-related sanctions up to and including dismissal. [F]ormal complaints of this nature in relation to staff who are members of a trade union could lead to grievances and arbitrations... Employees who are not represented by a union could, as a result of such complaints, be dealt with through discipline up to and including dismissal.
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> [The HR department] would address complaints about employees that raise a number of issues, including an allegation of sexual harassment. Matters that originate with the DHPS may be resolved without a formal complaint where that is appropriate. Once the investigation of a formal complaint is completed a final report is sent to a senior administrator who makes the decision as to penalty.
>
> When complaints of this nature about staff are lodged, the records are "collected, prepared, maintained or used" by or on behalf of the University, as required by subsection 65(6), in order to make the necessary determinations and follow through on any actions that may have to be taken. A review of the records at issue reflects that they were "collected, prepared, maintained or used" by the

DHPS and/or the Human Resources department in relation to one or more of the matters noted in subsections 65(6)1, 2 and 3.

Clearly, the records reflect that they were "in relation to" labour relations and "employment-related matters". Therefore, the records are excluded in consideration of subsections 65(6)1, 2 and 3. The exclusion is broad enough to capture those represented by bargaining agents and those who are not as well as a broad range of individuals in various "employment-related" contexts.

The words "employment-related" are not defined in [the *Act*]. The words should be given their ordinary meaning in the context of a jurisdictionally limiting provision. It is notable that subsections 65(6)1 and 2 are worded differently and speak very clearly to the employment context. Both subsections 65(6)1 and 2 expressly deal with "employment of a person by the institution". Only the basket clause in subsection 65(6)3, uses the term "employment-related" and expressly does not refer to "employment of a person by the institution". It is submitted that subsection 65(6)3 is meant to broadly capture records "about labour relations or employment-related matters'". It is respectfully submitted that this unequivocally reflects the legislative intent that the term "employment-related" does not require that the individual be in an employment relationship.

The Ontario Court of Appeal [in the case of the *Minister of Health and Long Term Care v. Tom Mitchinson, Assistant Information and Privacy Commissioner et al.* (2003), 17 OAC 171], in interpreting the term "labour relations" in subsection 65(6)3, indicated that there is no "reason to restrict the meaning of labour relations to employer/employee relationships." The determination of the Court was in the context of ascertaining the meaning of "labour relations" in respect of the Ontario Medical Association that represents doctors who are not in an employment relationship with the Ministry. In so doing the Court noted that a narrow interpretation of labour relations "would render the phrase, 'employment-related matters' redundant". However, it cannot be said that by so ruling, the Court held that "employment-related matters" necessitates an employment relationship. Indeed, "labour relations" maybe in respect of an employment relationship or not, as the Court noted.

In response, the appellant focused his representations on the exclusionary provision in section 65(6)3. For section 65(6)3 to apply, the University must establish that the following three requirements have been met:

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.

The appellant does not dispute that the first two requirements of section 65(6)3 have been satisfied. He disagrees, however, that the third requirement has been met. The appellant has raised a number of concerns in his representations that the responsive records do not come within the purview of the third requirement of section 65(6)3.

The records at issue were located in the HR and in the DHPS departments. The appellant submits that records from both of these departments should not be excluded from the operation of the *Act*.

The appellant is concerned that if the DHPS records relate to a complaint against a student, visitor or contractor, then the records are not employment-related. Upon my review of the records, I find that the DHPS records concern employment-related matters and do not relate to a complaint against a student, visitor or contractor.

The appellant is also concerned that the records at issue concern tenured faculty which do not relate to labour relations or employment-related matters as tenured faculty are not employees. I disagree. Without disclosing whether the records concern tenured or non-tenured faculty or other staff, all of the responsive records concern formal sexual harassment complaints against persons who are in an employment relationship with the University. Tenured faculty are employees of the University [Order PO-2416]. They are subject to the provisions of a collective agreement and are in the employ of the University.

The appellant is concerned that the records in the possession of the DHPS do not relate to "labour relations" or "employment-related" matters as the DHPS' mandate is the protection of human rights and the information it collects or uses is directed at this mandate only. A complainant can seek remedies outside those provided in the Policy, which is administered by the DHPS, including seeking assistance from other bodies such as their union, the Ontario Human Rights Commission, the police or the courts. He submits that:

> [I]t is clear from the remedies and penalties that may be imposed by the DHPS upon a finding of discrimination that the role of the DHPS is to effectively prevent and punish discrimination or harassment.

The appellant submits that it is not the role of the DHPS to decide on the penalty as once the investigation of a formal complaint is completed a final report is sent to a senior administrator, who makes the decision as to the penalty. The appellant relies on Order PO-2095, where Adjudicator Bernard Morrow found that Special Investigation Unit (SIU) records were not excluded from the operation of the *Act* by reason of section 65(6)3 as these records were "collected, prepared, maintained or used the records in relation to its investigation into possible criminal offences, and not for an employment-related purpose."

In reply, the University submits that:

> The records generated from a DHPS investigation into allegations of sexual harassment by employees form the basis for any employment action that may be undertaken and are thus intimately related to employment or labour relations as outlined in subsection 65(6). Employers, including the University, have a duty to ensure that sexual harassment is prevented in the workplace and in furtherance of that, to ensure that allegations are investigated and dealt with appropriately. The DHPS, as it applies to employees, complies with those duties. The records are not excluded simply because they derive from the Human Resources department; rather, they are excluded based on their substance and their real and substantial relationship to employment and labour relations as outlined in subsection 65(6).

I disagree with the appellant that the DHPS' role is not related to "labour relations" or "employment-related" matters. I find that the records at issue have been collected, prepared, maintained or used in relation to an employment-related matter. As stated by the University, the records form the basis for any disciplinary action that may be undertaken against an employee.

The records identified as responsive concern formal complaints of sexual harassment made against University staff. As stated above, staff includes both tenured and non-tenured faculty, as well as others in the employ of the University. The treatment and disposition of these complaints do not arise out of a collective bargaining relationship, but arise as a result of the application of the Discrimination and Harassment Prevention Policy and Procedures to the University's staff. The complaints concern human resources or staff relations issues, and are therefore, "employment-related" matters.

According to the Policy, referred to above, the DHPS' mandate includes "employment-related" matters. The following "employment-related" remedies or penalties may be imposed on staff upon a finding that the Discrimination and Harassment Prevention Policy and Procedures (the Policy) has been breached:

- A directive from the chair or director to the respondent to cease the behavior, with failure to do so leading to further penalty.

- A program of education for the respondent and/or the complainant and/or the department.

- A verbal or written apology to the complainant.
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- Counseling for the respondent - Restricted access to a physical area of the University.

- Suspension for a set time with or without pay for employees.

- Dismissal/expulsion.

The appellant also takes issue with the records that originated in the HR department. He submits that:

> It is unclear from [the University's] representation whether Human Resources is directly involved in the investigation of a complaint of sexual harassment against an employee or whether it simply forwards such a complaint to DHPS. Certainly, the Policy assigns the role of investigating complaints to the DHPS, and not to Human Resources. As to the penalty to be imposed for acts of harassment, the Policy assigns the role of making a recommendation as to appropriate punishment to the DHPS and assigns the role of determining the appropriate penalty to a "senior administrator". Human Resources does not appear to be involved, other than in implementing any sanction that is ultimately imposed on an employee that is found to have engaged in harassment…
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> Even if Human Resources is involved in investigating a harassment complaint against a Ryerson employee, this investigation would be governed by the Policy... [The Policy] relates to the protection of human rights and to the prevention of discrimination and harassment. To the extent that Human Resources collects, uses or maintains information in relation to harassment complaints, it cannot be said that the substantial purpose of this collection, use or maintenance is in relation to labour relations or employment matters. Rather, it relates to the enforcement of the Policy. If Human Resources were to be involved in investigating a complaint of sexual harassment or in mediating a settlement of the complaint, this work would not be work related to "labour relations" or "employment-related" matters any more than if the same work were performed by the DHPS.
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> The mere fact that a finding of guilt for harassment or discrimination may result in the termination or suspension of an employee does not make such harassment or discrimination a labour relations or employment-related matters. If it did, then the "criminal law" would arguably also be a labour relations or employment-related matter because employees that are found to have committed criminal offences may also be dismissed or suspended. Indeed, a wide variety of misconduct by employees may affect their employment. To say that all such matters are in relation to "labour relations" or are "employment-related" matters would have the effect of excluding a significant amount of information from [the *Act*]. Such information – relating as it does to misconduct by those employed by the government-is precisely the type of information that the public has an interest in receiving.

> The details of a sexual harassment complaint involving faculty or staff may be discussed in the course of meetings, consultations, discussions or communications that relate to labour relations or employment-related matters. However, this does not mean that the Responsive Records themselves were collected, prepared, maintained or used in those meetings. … [T]he mere fact that sexual harassment complaint and its resolution may have been discussed in meetings that relate to labour relations or employment related-matters does not mean that the Responsive Records themselves are exempt from the application of FIPPA pursuant to s. 65(6)3.

I disagree with the appellant's argument the Human Resources department records concerning sexual harassment complaints against employees are not "employment-related" records. The HR department handles sexual harassment complaints about employees if it is made in the context of other complaints unrelated to the purview of the DHPS. As the DHPS investigates sexual harassment complaints against employees, sexual harassment complaints arising from the same event may be found in both the HR and DHPS departments. As well, as stated by the appellant, the HR department implements any sanctions that are ultimately imposed on an employee found to have engaged in sexual harassment.

The phrase in part 3 of the test under section 65(6)3 "in which the institution has an interest" has been interpreted to mean more than a "mere curiosity or concern" and to refer to matters involving the institution's own workforce of *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 OR. (3d) (C.A.), leave to appeal to the SCC dismissed [2001] SCCA No. 509.

Based on the confidential and non-confidential representations of the University, I am satisfied that the third requirement under section 65(6)3 has been met. The records in both the HR and the DHPS departments were collected, prepared, maintained or used by or on behalf of the University in relation to meetings, consultations, discussions or communications about employment-related matters concerning the University's staff.

I am satisfied that the University has established that it has an interest in these employment-related matters. The matters giving rise to the records at issue in this appeal relate to the University's management of its own workforce and, thereby, engage its interest. In addition, the University's interest as an employer is clearly more than a mere curiosity or concern [Orders PO-2096-R and PO-2106].

In the circumstances of this appeal, I am satisfied that the records at issue, which consist of records relating to formal sexual harassment complaints against University staff and concern employment-related matters, and thereby satisfy all three parts of the test under section 65(6)3.

The records at issue consist of letters, emails, reports, notes, memos and transcripts. None of the exceptions in section 65(7) apply to the records at issue. Therefore, I find that the University has established that section 65(6)3 applies to the records at issue and that the *Act* does not apply to these records.

As I have found that all of the records at issue are excluded from the operation of the *Act* by reason of section 65(6)3, there is no need for me to seek representations or decide on whether the records are exempt by reason of sections 19 and 21(1). However, as the appellant believes that there should be responsive records in the University's Centre for Student Development and Counseling, I will be seeking representations from the parties on whether the University's search was reasonable and I will issue a final order respecting this issue in due course.

ORDER:

I uphold the University's decision that all of the records at issue are excluded from the *Act* and I remain seized of the remaining issue in this appeal.

Original Signed by: November 29, 2007
Diane Smith
Adjudicator