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

ORDER PO-2635

Appeal PA07-189

Brock University

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NATURE OF THE APPEAL:

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

> … all records created, amended or distributed in the last six months (including electronic mail, paper and electronic documents and voicemail messages) regarding the budget cuts that have been proposed by the Brock University administration.

The request then identified a number of specific search terms that ought to be used in conducting the search.

After receiving the request, the University contacted the requester, and the requester provided clarification of the request. The clarification confirmed the time period covered by the request, and then read:

> Those records related to the senior University administration are the priority and I am not interested in records that are available publicly via the University's website in such a manner that I could find them by searching the Internet using a commonly available Internet search tool.

In response to the clarified request, the University issued an access decision in which it provided access to four records totaling 15 pages, and denied access to other records on the basis of the exemptions found in section 13(1) (advice or recommendations), 18(1)(f) (economic and other interests), and on the basis that section 65(6)2 of the *Act* applied to certain records, such that those records were removed from the ambit of the *Act*.

The requester, now the appellant, appealed the decision to deny access to the records, and also identified his concern that additional responsive records exist.

During the mediation stage of this appeal, the University provided the appellant with an index of the records which had been withheld. The University also disclosed to the appellant portions of a number of the records remaining at issue, and two additional records in full (Records 13 and 14). Because section 65(6)2 had only been applied to the two records which were now disclosed to the appellant (Records #13 and #14), section 65(6)2 is no longer at issue in this appeal.

With respect to the issue of whether additional responsive records exist, during mediation the University indicated that responsive voicemail messages are not retained, and the appellant accepted this position. The University also identified that, because discussions with the University's senior administration regarding the budget cuts began in December 2006, there are no responsive records for the period prior to that time. The appellant appealed this position, and continued to appeal on the basis that additional responsive records exist.

No further mediation was possible, and the file was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the University, initially, and received representations in response. I then sent the Notice of Inquiry, along with a complete copy of the University's representations, to the appellant, who also provided representations. After my review of those

representations, I shared them with the University and invited the University to provide reply representations, which it did.

RECORDS REMAINING AT ISSUE:

The records remaining at issue are the withheld portions of Records numbered 5, 6, 7, 8, 9, 10, 11, 12.1, 12.2, 12.3, 12.4, 12.5, 12.6, 12.7, 12.8, 12.9 and 15, totaling 19 pages. The records include emails, minutes of a meeting, an agenda for a meeting, various financial statements, draft budget principles and guidelines, and budget timelines.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

Introduction

The University takes the position that portions of Records 5, 6, 7, 9, 10, 11, and 12.1 qualify for exemption under section 13(1) of the *Act*, which reads:

> 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]

Sections 13(2) and (3): exceptions to the exemption

Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

Representations

The University provides specific representations on the application of section 13(1) to the portions of each of the records which it has indicated fit within that exemption. I will review each of those records below.

The appellant does not directly address the issue of whether section 13(1) applies to the withheld portions of records, but does argue that, if section 13(1) were to apply, the exception in section 13(2)(i) ought to apply to any records that contain a final plan or proposal which may be contained therein. Section 13(2)(i) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

Findings

In Order PO-2084 former Assistant Commissioner Tom Mitchinson carefully set out the principles to follow in deciding whether information contained in records constituted "advice or recommendations" for the purpose of section 13(1) of the *Act*. He stated:

> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

In addition, in Order PO-2028, former Assistant Commissioner Mitchinson reviewed the application of this exemption to other types of information. He stated:

> The severances on pages 4 and 5 each consist of a paragraph listed under the heading "Potential Issues". The Ministry submits that they contain advice, and states:
>
> > With respect to the severed "Potential Issues", there is certainly an implied suggestion that these are matters which the decision-makers should take into consideration in reaching a decision on whether or not to approve the project for funding. The suggested course of action in this section is that the decision-makers should take the issues into account during the deliberative process.
>
> I do not accept the Ministry's position on these two severances. In my view, these paragraphs simply draw matters of potential relevance to the attention of the decision-maker. They do not advise or recommend anything, nor do they permit one to accurately infer any advice given.

Finally, in 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.), former Assistant Commissioner Mitchinson had to determine whether a direction given from a supervisor to an investigator constituted "advice or recommendations" for the purpose of section 13. He stated:

> [The record] consists of a … memo from the investigating human rights officer to her supervisor, together with the supervisor's reply. The [first] memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the [identified] response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing legislation. In my view, the … response also does not qualify for exemption under section 13(1).

I accept the approach taken in the above orders, and apply it in the context of this appeal. I will now review the specific records at issue and the specific submissions made by the University on the application of each record, to determine whether the record qualifies for exemption under section 13(1) of the *Act*.

Record 5

The University identifies that this record is an email from a University Vice-President to the University's President and another Vice-President regarding "a brief summary" of an identified committee meeting. The University states:

> The undisclosed portions of this record are deliberations of the decision-making process regarding necessary budget cuts. Specific advice and a recommended course of action were provided in this record.

Record 5 is an email as described by the University, and paragraphs 4, 5, 6, 9 and a portion of paragraph 7 have been severed from this record on the basis of section 13(1). This record is a brief summary of a meeting that was held and, on my review of the information contained in paragraphs 4, 5, 6 and 9, I am satisfied that they contain information which sets out specific advice or recommendations made to the President. Accordingly, I find that these paragraphs of Record 5 qualify for exemption under section 13(1). However, the withheld portion of paragraph 7 is, in my view, more in the nature of a comment made by the author of the email, and does not contain advice or recommendations for the purpose of section 13(1). I will, accordingly, order that this portion of paragraph 7 be disclosed.

Record 6

This record is a two-page email string between a University Vice-President and one of the Deans. The University states that "the undisclosed portions of this record include the requested course of action as outlined and accepted."

There are four emails in this string. The last, brief email in the string, which has been disclosed, confirms the author's decision regarding the subject matter of the emails. The other three emails in this email string are the correspondence between the authors of the emails regarding a proposed course of action, and I am satisfied that the disclosure of these emails would reveal the advice or recommendations given regarding the subject matter. Accordingly, the severed portion of Record 6 qualifies for exemption under section 13(1).

Record 7

This record is a brief email from a University Vice-President to a Dean. The University submits as follows regarding this record:

> The undisclosed portions of this … email included the Vice-President … providing advice to the Dean … regarding budget cuts.

Although the University's representations suggest that this record contains the Vice-President's advice, on my review of this record I find that it actually contains the decision of the Vice-President regarding a certain matter, but it references previous information the Vice-President had received from the Dean. In the circumstances, I am satisfied that the disclosure of this email would reveal the advice or recommendations given to the Vice-President regarding the subject matter, and that the severed portion of Record 7 qualifies for exemption under section 13(1). In addition, given the manner in which this record is drafted, it is not possible to sever the Vice-President's decision (which does not constitute advice or recommendations) from the record without disclosing the advice which was provided.

Record 9

This record is a brief email between a University Vice-President and a Director of a University program. The University states that the email is "advising the Director of a specific course of action." On my review of this brief record, I find that the disclosure of this record would reveal advice the Director provided to the Vice-President. As a result, I am satisfied that the disclosure of this email would reveal the advice or recommendations given to the Vice-President regarding the subject matter, and that the severed portion of this record qualifies for exemption under section 13(1).

Record 10

This record is a two-page email string, containing three brief emails between a University Vice-President and a Dean. The University submits that the undisclosed portions of these emails contain a specific, recommended course of action to be followed. Based on my review of this email string, I am satisfied that the disclosure of the withheld portions would reveal advice or recommendations regarding the subject matter, and that the severed portions of Record 10 qualify for exemption under section 13(1). Given the manner in which this email string is drafted, it is not possible to sever portions of the record without disclosing the advice which was provided.

Record 11

This record consists of two emails between a University Vice-President and an Associate Vice-President. The University submits that the undisclosed portions of these emails "include a deliberative process regarding the suggested course of action proposed." Based on my review of these emails, I am satisfied that they contain advice or recommendations, as they refer to a suggested course of action, proposed by the Associate Vice-President. The email response by the Vice-President refers to the suggested course of action, and I am satisfied that the disclosure of these emails would reveal advice or recommendations regarding the subject matter. Accordingly, the severed portions qualify for exemption under section 13(1).

Record 12.1

This record contains the minutes of a meeting of an identified council held in early January, 2007. Portions of the record have been disclosed, and two of the withheld portions of this record are withheld on the basis of section 13(1). The University takes the position that the two undisclosed portions which it claims fall within the section 13(1) exemption "include specific recommendations regarding the 2007/2008 budget."

I have reviewed the two paragraphs of this record (paragraphs 3 and 6) which the University claims fall within section 13(1). Paragraph 3 contains a decision regarding the nature of the meeting, and I find that it does not contain "advice or recommendations" for the purpose of section 13(1). This paragraph does not contain a suggested course of action which may be either accepted or rejected in the deliberative process; rather, it simply contains a decision and/or direction regarding the meeting.

Paragraph 6 refers to a decision made by the Chair regarding further actions. In my view, this paragraph also does not contain "advice or recommendations" for the purpose of section 13(1), as there is no suggested course of action which may be either accepted or rejected in the deliberative process. It contains general information regarding the process to be followed and the next steps to be taken, and in my view this paragraph does not qualify as "advice or recommendations" for the purpose of section 13(1).

The exception in section 13(2)(i)

I have found that portions of Records 5, 6, 7, 9, 10 and 11 qualify for exemption under section 13(1). As identified above, the appellant takes the position that the exception in section 13(2)(i) would apply to any records that contain a final plan or proposal which may be contained therein. Section 13(2)(i) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

I have carefully reviewed the portions of Records 5, 6, 7, 9, 10 and 11 which I have found contain "advice or recommendations" for the purpose of section 13(1). All of these records consist of emails between University personnel regarding matters relating to the subject matter of the emails. In my view, none of these portions of records contain a "final plan or proposal to change a program of an institution, or for the establishment of a new program" such that the exception in section 13(2)(i) would apply, and I find it does not apply to these portions of records.

In summary, I find that the following records or portions of records qualify for exemption under section 13(1) of the *Act*:

- the portions of Record 5 for which section 13(1) is claimed, with the exception of paragraph 7 of Record 5, and
- the portions of Records 6, 7, 9, 10 and 11 for which section 13(1) is claimed.

However, I find that the following portions of the records do not qualify for exemption under section 13(1)

- paragraph 7 of Record 5, and
- paragraphs 3 and 6 of Record 12.1.

Accordingly, I will order that those portions of those records be disclosed.

ECONOMIC AND OTHER INTERESTS

The University has claimed that Records 12.3, 12.4, 12.5, 12.6, 12.7, 12.8, 12.9 and 15 and portions of Records 8, 12.1 and 12.2 are exempt under section 18(1)(f) of the *Act*. Those records

include portions of an email (Record 8), portions of minutes of a meeting (Record 12.1), portions of a proposed agenda (Record 12.2), draft financial records (Records 12.3, 12.4, 12.7), draft budget principles and guidelines (Record 12.5), draft budget revenue/reduction timelines and processes (Records 12.8 and 15), and draft budget development timelines (Record 12.9).

Section 18(1)(f) reads:

> A head may refuse to disclose a record that contains,
>
> > (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

The purpose of section 18 is to protect certain economic interests of institutions and avoid creating an unfair advantage for those with whom the institution may do business by the premature disclosure of plans to change policy or commence projects. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.
>
> …
>
> There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project.
>
> …
>
> [T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other government. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the

> negotiations could significantly weaken the government's ability to bargain effectively.

In order for section 18(1)(f) to apply, the institution must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or
   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

Previous orders have defined "plan" as "… a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348].

Representations

The University provides representations in support of its position that the identified records qualify for exemption under section 18(1)(f). The University reviews the three parts of the test as set out above, and argues that all three parts of the test have been established. The University also states that the University's 2007/2008 Budget was approved at the June 28, 2007 Board of Trustees meeting, and that the Budget is available on the Brock University website.

The University then provides representations supporting the application of the section 18(1)(f) exemption to each of the records or portions of records remaining at issue. The University states:

> ***Record 8***
>
> This record is an email from [a University Vice-President] to the Deans … regarding the future administration and operation of the University that the Deans are to follow. The undisclosed portions of this record include the plans outlined by the Vice-President.
>
> ***Record 12.1***
>
> This record is a meeting of [an identified Council] regarding a review of [the University's] financial position dated January 11, 2007. [It includes specific recommendations]. Based on the advice received during the meeting, changes would be made to the Budget Development plans.

Record 12.2

This record is the Proposed Agenda from the January 11, 2007 [meeting of the identified Council] regarding a review of [the University's] financial position dated January 11, 2007. The undisclosed portions of this record include a detailed agenda of plans to meet necessary budget reductions.

Record 12.3 and 12.4

This record is a two-page Review of the Financial Position for the Fiscal year 2007/2008. The undisclosed portions of this record include detailed plans required to accomplish the specific goal of budget reduction.

Record 12.5 and 12.6

This two page record entitled Budget Principles and Guidelines for fiscal 2007/2008, dated January 11, 2007, sets out high level critical plans needing to be followed in order to accomplish the goals for the 2007/2008 budget. The undisclosed portions of this record include the course of action.

Record 12.7

This record entitled Analysis of Revenue/Reduction Targets for fiscal 2007/2008, dated January 11, 2007, is a formulated and especially detailed method of analysing the finances in preparation for the 2007/2008 budget.

Record 12.8

This record entitled 2007/2008 Budget Revenue/Reduction Timelines and Process, dated January 11, 2007, is a chart setting out the high level critical path of the project that describes time frames for its successful completion.

Record 12.9

This record entitled 2007/2008 Budget Revenue/Reduction Timelines and Process, dated January 11, 2007, describes time frames for the budget plan's successful completion.

Record 15

This record entitled 2007/2008 Budget Revenue/Reduction Timelines and Process, dated January 11, 2007, is a chart setting out the high level critical path of the project that describes time frames for its successful completion.

Finally, the University refers to Records 12.1 through 12.9 and 15, and states that the undisclosed portions of these records "were early plans that were amended prior to being put into operation."

The appellant's representations address the issue of the possible application of section 18(1)(f). He states:

> If any of the records at issue contain information about a plan that has been made public, the appellant maintains that such records should be released.
>
> …
>
> There is a difference between withholding a record because it refers to a plan that has not yet been put into operation or made public (implying that there is an intention to implement or consider implementing that specific course of action at a later date and that releasing information about such a plan would hinder its eventual implementation) and withholding a record because it refers to a plan that was, at one point in time, considered and has been explicitly or effectively rejected by the adoption of a different plan (implying that another or better course of action was or is being implemented or that it has become impossible to implement a previously considered plan).
>
> If any of the records at issue contain information about a plan that the University has not put into operation or made public but no longer intends to put into operation, for how long can such a record reasonable be withheld if the goal is to ensure the open and transparent operation of a public institution?

The appellant's representations were shared with the University, and the University responded to these representations on section 18(1)(f) of the *Act* by stating:

> As noted in [our earlier representations], the 2007/2008 Final Budget plans are available on the University's website….

The University then refers to the definition of "plan" from Order P-348 as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". The University then states:

> The University contends that Records 8, 12, and 15 are exempted under section 18(1)(f) as they meet the above definition; for reasons noted in the [earlier] representations; and that these plans were later adopted and implemented by the University, as the formulation of the detailed 2007/2008 budget plan.

The University then states that the appellant had already received a copy of certain responsive records including Budget Development – Principles and Guidelines, Budget Development Budget Estimates and Budget Development Timelines and Process.

Findings

I have carefully reviewed the material provided by the parties, as well as the records for which the University has claimed section 18(1)(f).

Some of the records for which the University has claimed section 18(1)(f) do not, in my view, qualify as "plans" for the purpose of section 18(1)(f). For example, Record 12.1 contains the minutes of a meeting, and Record 12.2 is the agenda for that meeting. Neither of these records contains information which in my view qualifies as an "especially detailed method by which a thing is to be done", rather, these records contain, at best, suggestions or ideas about possible approaches to take regarding particular matters, or discussions which were conducted. It is also unclear to me how some of the other records for which section 18(1)(f) is claimed can be regarded as a "plan" for the purpose of section 18(1)(f) (for example, Record 8).

However, it is not necessary for me to determine exactly which of these records contain "plans" for the purpose of section 18(1)(f) because, in my view, the University has failed to establish that the third requirement of section 18(1)(f) has been met.

As set out above, in order to qualify for exemption under section 18(1)(f), the third requirement is that "the plan or plans have not yet been put into operation or made public" (Order PO-2071). The records for which the University has claimed section 18(1)(f) are all records that relate to the 2007-2008 Budget, and the University has made it clear that the final Budget is publicly available on the University's website, including the Budget Development – Principles and Guidelines, Budget Development Budget Estimates and Budget Development Timelines and Process. Accordingly, the "plan" to which the records relate has been made public, and section 18(1)(f) cannot apply to the information in the records, as that section only applies to a record that contains plans "that have not yet been … made public".

The University might be taking the view that the draft "plans" contained in the record do not necessarily contain the final "plan" that was made public, and that the draft "plans" have therefore not been made public, and qualify under section 18(1)(f). However, the word "yet" in section 18(1)(f) suggests that the "plans" which qualify under it will at some point in time be put into operation or made public. Clearly the draft "plans" contained in the records at issue were drafts of the 2006/2007 budget, which has been made public, and I have no information from the University suggesting that the drafts will be put into operation or made public in the future. They are simply the drafts of the Budget which was made public.

I find support for this approach to section 18(1)(f) in the words set out above from the Williams Commission Report which explain the rationale for including the "valuable government information" exemption, where it states:

> There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public *by exploiting their premature knowledge of some planned change in policy or in a government project*.
> [emphasis added]

In my view, this reinforces the position that the *premature* disclosure of plans would lead to unfairness, and that this premature disclosure is what section 18(1)(f) is designed to guard against.

Accordingly, I am satisfied that section 18(1)(f) does not apply to the records at issue in this appeal. As no other exemptions have been claimed for those records, I will order that they be disclosed to the appellant.

EXERCISE OF DISCRETION

I have found that some of the records qualify for exemption under section 13(1) of the *Act*. As noted, section 13 is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

In its representations, the University has provided me with submissions respecting the reasons behind the decision to exercise its discretion to deny the appellant access to the records for which section 13(1) is claimed. These reasons were shared with the appellant, who provided reasons why he believed the University ought to disclose the records. On my review of the representations of the parties, I find no reason to disturb the manner in which the University exercised its discretion to apply section 13(1) to the records which I have found qualify for exemption under that section. I am not satisfied that the University erred in exercising its discretion not to disclose this information, and I uphold the University's decision.

REASONABLE SEARCH

Introduction

As set out above, the appellant took the position that additional responsive records exist with the University. During mediation, the University indicated that responsive voicemail messages are not retained, and the appellant accepted this position. The University also identified that, because discussions with the University's senior administration regarding the budget cuts began in December 2006, there were no responsive records for the period prior to that time. The appellant did not accept this position, and "reasonable search" remained an issue in this appeal.

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the University has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the University's decision will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the Act does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. In my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

In its representations in support of the position that the University conducted a reasonable search, the University confirms that it clarified the request with the appellant. The University then provides details of the searches carried out for responsive records, and states that the searches were conducted "by employees who are familiar with the subject area and have detailed knowledge of the respective records management systems." The University states that a "thorough search of the electronic and paper records was conducted", and then identifies the six individuals whose offices were searched, and the time it took to conducted those searches. The University also refers to "additional search time" that was spent, and that those searches "turned up no further responsive records."

With respect to the question of whether additional records may have existed but may have been destroyed, the University states that there may have been records that were created and destroyed prior to the University receiving the request. It also refers to the fact that general records do not have a designated retention schedule under the *Act*.

The University also provides an affidavit in support of its position that the searches conducted by it were reasonable.

The University's representations were shared with the appellant, and the appellant responds by stating that it is not in a position to indicate which relevant records exist or may have existed. The appellant states that the University's initial decision to withhold the index of records from the appellant was a reason why the appellant was initially skeptical about the thoroughness of the University's searches. Lastly, the appellant identifies the concerns he has about the University's records retention policies, and its statement that responsive records "may have been destroyed", in light of the fact that the responsive records could not have been very old, given the timeframe for which records were requested and the date of the request.

Finding

As set out above, the issue that I must decide is whether the University has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the University will be upheld. If I am not satisfied, further searches may be ordered.

The appellant's request for information was fairly detailed, identifying the specific information he was seeking, and also indicating the search terms that ought to be used. The appellant also provided further clarification. The University conducted searches for the records and the appellant was provided with partial access to them. The appellant was also provided with an index of the responsive records. In his representations, the appellant does not address the question of whether the University's search was reasonable, although he does identify one of the reasons why he raised the issue in the first place.

As set out above, the University has provided details about the searches conducted, and has also provided an affidavit in support of its position. Based on the information provided by the University about the searches it has conducted, and in the absence of representations suggesting that the search was not reasonable, I find that I am satisfied that the searches conducted by the University for responsive records was reasonable, and I dismiss this aspect of the appeal. I make this finding notwithstanding the fact that the affidavit provided by the University was of very little assistance in making this determination.

ORDER:

1. I uphold the application of the exemption in section 13(1) to the portions of Record 5 for which section 13(1) is claimed (with the exception of paragraph 7 of Record 5), and to the portions of Records 6, 7, 9, 10 and 11 for which section 13(1) is claimed.

2. I do not uphold the application of section 13(1) to the other records for which it is claimed, nor do I uphold the application of section 18(1)(f) to any of the records at issue, and I order the University to provide the appellant with the remaining records at issue by sending him a copy by **March 5, 2008** but not before **February 29, 2008**.

3. I uphold the University's search and dismiss that aspect of the appeal.

4. In order to verify compliance with this order, I reserve the right to require the University to provide me with a copy of the Records which are disclosed to the appellant pursuant to Provision 2, upon request.

Original signed by: January 15, 2008
Frank DeVries
Adjudicator