



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

ORDER PO-2933

Appeal PA10-8

York University



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NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to York University (the University) for:

...copies of all records, communications and documents, including electronic, produced, sent, or received by [first named individual], [second named individual], [third named individual], [fourth named individual], [fifth named individual], [sixth named individual] and [seventh named individual] that pertain to the preparation, drafting and distribution of, and subsequent controversy about, the announcement of the appointment of [eighth named individual] as the Dean of the Faculty of Liberal Arts and Professional Studies.

The University identified 37 records as responsive to the request, granted full access to some, and partial access to others. Specifically:

- Records 1 – 16, 18 – 10, 23, 25 – 31 and 33 – 37 were released in full.
- Records 17, 20 – 22, 24 were released in part.
- Record 32 was withheld in its entirety.

The University claimed the application of the mandatory exemption in section 21(1) (personal privacy) with respect to Records 17, 20 – 22 and 24. It claimed that one paragraph of Record 20 was non-responsive. With respect to Record 32, the University claimed that the exclusionary provision in section 65(6)3 applied such that the record falls outside the scope of the *Act*.

During mediation, the appellant narrowed the scope of his appeal to Record 32 only.

As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the University and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

RECORD:

The only record at issue is Record 32, which is an email from a consultant to the University's Search Committee dated September 2, 2009, attaching a document.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

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*.

In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, the Ontario Divisional Court defined “relating to” in section 65(5.2) of the *Act* as requiring “some connection” between the records and the subject matter of that section.

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. The meaning of “labour relations” is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

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].

The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees’ actions [*Ministry of Correctional Services*, cited above].

The University submits that because section 65(6)3 applies, Record 32 is excluded from the *Act*.

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

Introduction

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.

The University submits that it prepared and used Record 32 in relation to meetings, discussions, or communications about an employment-related matter in which the University has an interest. It states:

Record 32 is a confidential email sent from [named individual] of [named company], an executive search firm, to the members of the search committee that had recommended [second named individual] for the position of the new Dean. [Named individual] served as a hired consultant to the committee throughout the hiring process. [Named individual's] email, dated February 9, 2009, was written in the context of critical comments made by certain faculty members who did not sit on the search committee concerning [second named individual's] suitability for the job, and was intended to advise the search committee about how to respond so as to uphold the viability of the search and appointment process. Although an offer of employment had been made to [second named individual] and he had accepted, [second named individual] had not yet taken up his duties (which were to begin in July 2009), and there was concern that the comments made about his suitability might affect the successful outcome of the hiring process.

... Record 32 was prepared and maintained in the context of meetings, consultations, discussions and communications regarding the hiring of [second named individual] as the inaugural Dean of the Faculty of Liberal Arts and Professional Studies.

The University also cites Orders M-830 and PO-2123 in support of its position that a job competition and subsequent hiring process are employment-related matters that fall within the scope of section 65(6)3.

The appellant submits that the named consultant who wrote the email was never an employee or involved in labour relations matters at the University. He further submits that the second named

individual had already been selected, offered the job and hired at the time of the record's creation. Finally, the appellant states:

[Named individual's] email can in no way be construed as part of the hiring process, as [the University] alleges. Rather, [named individual's] email pertained to a subsequent public discussion of [the Dean's] appointment, as York University acknowledges, and was sent by a "third party," as York University also acknowledges.

Based on my review of Record 32 and the representations of the parties, I find that Record 32 is excluded from the scope of the *Act*.

Requirements 1 and 2

The University submits that Record 32 was prepared by a consultant it had hired to assist the University's search committee for a new Dean. Further, the University submits that it used and maintained Record 32 in relation to meetings, consultations, discussions and communications about issues surrounding the hiring process of the new Dean. I find that Record 32, which was shared with the search committee was used and maintained by the University in relation to meetings, discussions and communications of the University and thus requirements 1 and 2 of section 65(6)3 have been established.

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

The appellant argues that the author of the email was not in either a labour relations or employment relationship with the University. Further, the appellant submits that at the time Record 32 was created, the new Dean had been hired and thus the record could not be in relation to an employment-related matter.

Neither of the appellant's arguments are relevant to the issue of whether section 65(6)3 applies. While the consultant was not in a labour or employment relationship with the University, the creator of the record does not have to be in such a relationship with the institution for section 65(6)3 to apply¹. In the present case, the named individual was hired by the University to assist in the search for a new Dean. Record 32 relates to the hiring of the new Dean, despite the fact that it was written by a consultant.

Further, I do not accept the appellant's submission that because the new Dean had been hired before Record 32 was created; it is not about employment-related matters. I accept the University's position that despite the fact that the Dean had been hired and had accepted the position, he had not yet assumed this new position. The contents of Record 32 relate to the University's efforts to ensure the integrity of its search and decision to hire the Dean. The email and its attached document address issues which had arisen from the hiring of the new Dean and contains direction from the consultant to the search committee. As such, Record 32 is about the

¹ See for example Order MO-1640 where a Forensic Audit Report prepared by an external consultant was found to be excluded from the *Act* under section 52(3)1.

University's decision to hire the new Dean and thus it is about an employment-related matter for the purposes of section 65(6).

Next, I must determine whether the University had an interest in the employment-related matter. I find that it does. Clearly, the hiring of a new dean for the University is an employment-related matter that pertains directly to its own workforce. 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)*, cited above]. I accept that the University has an interest in the hiring process for the new Dean and, therefore, it has an interest in this employment-related matter.

Accordingly, the University has met the third requirement for the application of section 65(6)3. Further, I find that none of the exceptions in section 65(7) apply to the record. To summarize, I find that Record 32 is excluded from the scope of the *Act* by the operation of section 65(6).

ORDER:

The *Act* does not apply to Record 32.

Original signed by: _____
Stephanie Haly
Adjudicator

November 25, 2010