Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3227

Appeal PA12-44

University of Ottawa

June 28, 2013

Summary: The appellant sought access to subject lines for emails between a named professor and three identified external email addresses. The university took the position that the emails were not within its custody and control, but requested that the named professor conduct a search for responsive records. In the course of mediation, the named professor conducted a search of his faculty email server and advised the university that no responsive emails were found, which the university then set out in a supplementary decision letter to the appellant. The appellant took issue with the university's position that the requested emails were not within its custody and control and challenged the reasonableness of the university's search for responsive records. This decision finds that the university's search for responsive records within its custody or control is in compliance with its obligations under the *Freedom of Information and Protection of Privacy Act.*

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1), 24(1)(a), 24(1)(b).

Orders Considered: PO-3009-F, PO-3050, PO-3084.

Cases Considered: *City of Ottawa v. Ontario,* 2010 ONSC 6835; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

OVERVIEW

[1] The University of Ottawa (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to "all subject lines for all emails sent or received by [a named professor] to or from any email addresses from the following: [three listed external email addresses] since January 1, 2009."

[2] In its initial decision letter the university advised that the named professor was asked to conduct a search for responsive records and that:

> It was determined that the university is not in the custody or the control of the records you are requesting on the basis that these records would relate to personal matters or activities that are wholly unrelated to the university's mandate.

[3] The requester (now the appellant) appealed the university's decision.

[4] In the course of mediation, after consulting with the named professor, the university issued a supplementary decision letter stating that:

> The professor mentioned in your request has performed a search in his university email account for records responsive to your request and did not locate any records.
>
> Since records such as these, relating to personal matters or activities are never in the university's custody or control, it does not require them to be retained.

[5] In response, the appellant requested a confirming affidavit from the professor. The university advised that it would not provide the requested affidavit.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. In the course of adjudication, I sought and received representations from the appellant, the university, the named professor and the Association of Professors of the University of Ottawa (the association). In the Notice of Inquiry that I sent to the parties, I specifically invited them to consider Orders PO-3009-F, PO-3050 and *City of Ottawa v. Ontario*.[1]

[7] The university, the named professor and the association all provided responding representations. I then sought representations from the appellant on the facts and

[1] 2010 ONSC 6835.

issues raised in the Notice of Inquiry, as well as the severed representations of the university, a complete copy of the association's representations and a summarized version of the named professor's representations. The appellant provided responding representations. I determined that the appellant's representations raised issues to which the other parties should be provided an opportunity to reply. Accordingly, I sent a letter to the university, the named professor and the association inviting their submissions in reply. Only the named professor and the association provided reply representations.

DISCUSSION:

[8] Section 10(1) of the *Act* reads, 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 . . .

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

[10] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[2]

[11] That section reads, in part:

> 24(1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; …

[12] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[13] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence

[2] Orders P-85, P-221 and PO-1954-I.

to show that it has made a reasonable effort to identify and locate responsive records.[3] To be responsive, a record must be "reasonably related" to the request.[4]

[14] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[5]

[15] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[6]

The initial representations

[16] The named professor submits that in keeping with the principle of academic freedom discussed by Commissioner Ann Cavoukian in Order PO-3084, "the university exercises no control over professors' communications with [the entities whose emails addresses are listed in the appellant's request]."

[17] The named professor submitted that it has never been part of his employment obligations to liaise with the entities whose email addresses are listed in the appellant's request, "on official university business." He submits that the university cannot require him to send emails of this kind and he does not seek nor need the university's permission to do so. He submits that sending an email of to one of these entities is a matter of personal choice and that any responsive records would relate to personal matters or activities that are wholly unrelated to the university's mandate, "as that phrase is used in paragraph 181 of Order PO-3009-F."

[18] The named professor submits, however, that when asked, he complied with the university's request for him to search for responsive records.

[19] The university takes the preliminary position that the issue of custody or control is not in dispute at this time on the basis that:

> No records responsive to the request have been located. Without any records there cannot be any evaluation of whether the university is in the custody or control of the records. In addition, the mediator indicated in her report that the only issue at this time was the one of reasonableness of the search.

[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Order MO-2246.
[6] Order MO-2185.

[20] The university submits that as indicated in the university's supplementary decision letter, a search for responsive records was conducted by the named professor. The university submits that the named professor then advised the university's Access to Information and Privacy Coordinator (the coordinator) that he had searched his faculty mail server for the requested addresses and did not locate any emails prior to and including the date of the request. This was confirmed in an affidavit of the university's coordinator that the university provided with its representations. The university submits that it conducted a reasonable search for responsive records.

[21] The association submits:

> … the requested emails are either personal communications, and the *Act* does not apply to these emails according to *City of Ottawa v. Ontario*, 2010 ONSC 6835, or are communications sent or received by the named professor in the fulfillment of his academic work, and are not in the custody or under the control of the university, according to the principles of academic freedom and the practices that exist to protect it at the university.

[22] The association submits that a purposive approach should be taken when determining custody or control[7], and that:

- the requested emails were not sent or received by the named professor as part of the fulfillment of any of his administrative functions, and they "are not available to the university by customary practices relating to academic freedom"

- these long standing customary practices have been integrated into collective agreements

- a conclusion that the requested records are under the custody or control of the university "would infringe significantly on academic freedom, a fundamental value in universities and in society at large"

- in its *Recommendation concerning the Status of Higher-Education Teaching Personnel* (November 11, 1997), UNESCO "has deemed it necessary to include the principle of academic freedom as a fundamental democratic cornerstone of universities"[8]

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[7] The association refers to the *City of Ottawa v. Ontario*, 2010 ONSC 6835 in support of this submission.
[8] The association included an excerpt from the recommendation in its representations. The association also cited the definition of academic freedom found in *York University v. York University Faculty Association*, 167 L.A.C. (4th) 39.

- the collective agreement between the association and the university contains provisions relating to academic freedom[9]

[23] After setting out the criteria for determining custody or control established by Former Commissioner Sidney Linden in Order P-120, the association submits that:

> The analysis presented by [Former] Commissioner Linden is based on determining whether or not an action is of a personal or professional nature and relying on that finding for a determination of custody or control. However, it was also recognized that these criteria reflect only a specific factual situation and are not exhaustive.
>
> Moreover, the criteria developed in Order MO-1251 and in the subsequent jurisprudence of the Commission recognize the specific relevance of the customary practice of the institution and similar institutions. In the present debate, the specificity of the university context requires the use of different criteria or a different analysis under the criteria previously used.

[24] After quoting extensively from the decision of Adjudicator Diane Smith in Order PO-3009-F[10], the association submits:

> The freedom to make inquiries or the freedom to request documents is an important part of the work of academic staff; the records of such communications must be protected according to the principles of academic freedom.

[25] Relying on Commissioner Ann Cavoukian's Order PO-3084, the association submits that "the impact of academic freedom is fundamental in the determination of the custody and control of documents requested under *FIPPA*". The association submits that granting access to the requested emails would "deny the protection necessary to the investigative process used by academic staff, a process essential to academic work".

[26] Finally, the association distinguishes Order PO-3050 on its facts. The association submits that in that order:

> … the discussion concerning the records of [a named professor] was limited to the issue of reasonableness of the search for responsive records. That discussion did not address the issue of custody or control of documents in possession of academic staff. [The association] submits that

[9] The association points to article 9 of the Collective Agreement.
[10] The association refers to the analysis at paragraphs 134, 174 and 181 of Adjudicator Smith's decision.

> the deletion of an email does not modify the nature of a record, and does not modify the analysis related to its custody or its control.

The appellant's representations

[27] The appellant expresses a concern "about the attempt to make the argument that e-mails that were sent from university computers, on university e-mails, through university servers, are somehow outside of the university's custody and control". The appellant submits that other institutions "happily release such records, with personal information redacted of course."

[28] The appellant submits:

> Yes e-mails of a personal nature do end up on work accounts, but to create a broad self-exemption, where the sender and receiver of e-mails on university computers can retroactively designate e-mails as "personal" would create a dangerous precedent. … I expect [the university], like many workplaces, requires in its computer usage policies that work e-mail be used nearly exclusively for work purposes, …

[29] Referring to an article in an on-line magazine serving the University Community, the appellant further submits that the named professor has made it "clear in interviews that he does consider his broader efforts on various issues to be part of his work."

[30] With respect to the reasonableness of the search for responsive records the appellant expresses concern about the university's decision to have the named professor:

> … do his own search and make his own rulings on what is and what isn't subject to Freedom of Information [legislation]. …, it seems to create a potential area of abuse, where individual employees, who may or may not be experienced in handling of Freedom of Information requests, to decide on their own what can and can't be retained.

[31] The appellant submits that:

> … it seems far more common for all records to be provided to the Freedom of Information/Access to Information coordinator, so that they can review the records and properly apply exemptions in accordance with the law, rather than have someone who is in an obvious conflict of interest decide what they will and won't release on their own.

[32] The appellant also submits that there has been "a lack of a consistent response from the university" in this matter. He submits:

> In their first response letter, they detail that the records were outside the custody and control of the university. In their subsequent response, they changed their story and claimed no such records existed. This changing story raises serious concerns about what happened to the records in the interim.

[33] The appellant submits that the following points support his position:

- the university's first decision letter seemed to imply that responsive records existed but that they were not within the university's custody or control
- in its second decision letter the university states that no such records existed, "and that they didn't need to be retained"
- the summary of the professor's submissions in the Notice of Inquiry, "seems to suggest that the records did indeed exist, but that he considered them outside the custody of the university"
- in its discussion of Order PO-3050, the association "suggests that the e-mails were deleted"

[34] The appellant submits that it would be "concerning if records were being destroyed to avoid having to release them under Freedom of Information [legislation]".

[35] The appellant submits:

> While the university, [the association] and the professor in question can argue that the records were outside the custody and control of the university and not subject to the *Act*, a pre-emptive decision to delete the records before your review was complete shows a shocking lack of respect for your office, for the process and for Freedom of Information laws.

The reply representations

[36] The association submits that the requested emails were not "retroactively designated as 'personal' in order to be 'deemed outside of the custody and control of an agency'" as alleged by the appellant, but rather:

> The requested emails are communications sent, received, and stored using university computers, university electronic communications services, and university servers. However, the use of various systems provided by the university does not change the nature of the communications sent or received through these systems.

> The communications are either personal communications or communications sent or received by the named professor in the fulfillment of his academic work.

[37] The association refers back to its initial submissions to emphasize that based on principles of academic freedom and the university's practices to protect it, communications sent or received by the named professor in fulfillment of his academic work are not in the custody or under the control of the university.

[38] The association further submits that:

> … applying the principles of academic freedom in the determination of custody and control does not result in the creation of a new exemption. The exercise of this fundamental right by academic staff is an integral part of the customary practices at the university and preempted [sic] the application of the *Freedom of Information and Protection of Privacy Act* to universities.

[39] Relying on an excerpt from *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[11], the association submits that the historical function of the university must be analyzed in order to determine custody and control of records, which, in this case, supports its position.

[40] The association submits that:

> … in order to exercise academic freedom, academic staff have to be protected from undue surveillance and monitoring. Allowing all records in the possession of academic staff to be subject to surveillance and monitoring is contrary to the principles of academic freedom. It would have a chilling effect on academic staff and would undermine their ability to fulfill their responsibilities to the institution and the public.

[41] The association submits that when it asked the named professor to conduct his own search the university was following the direction of Adjudicator Smith in Order PO-3009-F.

[42] With respect to Order PO-3050, the association submits that it was stating that the determination of custody or control is a matter that should not be dependent on whether an email has been deleted or not, but on the nature of that email.

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[11] 2010 SCC 23.

[43] The named professor submits in reply that there is no contradiction in the university's position. He submits that the first letter set out the university's position that the emails were not within its custody or control, without expressing whether they existed or not. He states that it was only at the mediation stage that the appellant insisted that a search be done. The named professor submits that he complied and advised that no responsive emails were located. Hence, the second letter was sent.

[44] The named professor submits that Order PO-3009-F sets out the correct procedure for the university to follow in these matters and that this procedure was properly followed in this appeal.

[45] Finally, the named professor submits that with respect to the allegation of email destruction, "[the appellant] certainly does not accept that like most people, I have more than one email account, including a personal, non-university account often used for private correspondence … ."

Analysis and findings

[46] In Order PO-3009-F, Adjudicator Diane Smith discussed the types of records that may be in the custody of university professors that may also be within the control of the university. In Order PO-3009-F,[12] she determined that:

> 1. records or portions of records in the possession of an association member that relate to personal matters or activities that are wholly unrelated to the university's mandate, are not in the university's custody or control;
>
> 2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody and/or control if they would be accessible to it by custom or practice, taking academic freedom into account;
>
> 3. administrative records are prima facie in the university's custody and control, but would not be if they are unavailable to the university by custom or practice, taking academic freedom into account.

[47] In Order PO-3009-F[13], Adjudicator Smith set out the proper procedure to be followed when records are alleged to be in the custody or control of the university's professors:

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[12] See paragraph 181 of Order PO-3009-F.
[13] See paragraph 182 of Order PO-3009-F.

> Accordingly, the next steps should be for the university to request that [association] members produce records to it that would be responsive to the clarified request and are in the university's custody or under its control, taking these three criteria into account. The decision as to whether exclusions or exemptions apply to such records is for the university to make, subject to appeal to this office.

[48] I agree with the approach taken by Adjudicator Smith in Order PO-3009-F.

[49] Relying on an excerpt from an on-line interview, the appellant submits that the named professor has made it "clear in interviews that he does consider his broader efforts on various issues to be part of his work". However, the appellant does not go the extra step to explain the nexus between his submission and the "subject lines" for emails to, or from, three identified external email addresses, so as to assist me in determining how, if they were found, such records might fit into the three categories set out by Adjudicator Smith in Order PO-3009-F.

[50] The university, the association and the named professor do not provide any information relating to "subject lines" but do provide submissions relating to how, if the records were found, they might fit into the analysis set out in PO-3009-F.

[51] I will first address whether, if the records had been found, they would fit within the categories of records discussed in Order PO-3009-F. I will address the categories in reverse order.

[52] I am not satisfied on the evidence before me that emails sent to those external email addresses would be "administrative records" as discussed in Order PO-3009-F. Therefore, in my view, they would not fit into the third category of records set out in Order PO-3009-F.

[53] If the emails are related to teaching or research, which in my view has not been established by the appellant, the appellant has not provided sufficient evidence to challenge the university's and the association's position that the requested emails would not be accessible to the university by custom or practice, taking academic freedom into account. Hence, I am not satisfied that the records, if they were found, would fit into the second category, even if the appellant had established that they are related to teaching or research.

[54] This leaves the first category of records. In my view, the appellant has not provided sufficient evidence to challenge the university and the named professor's position that the requested records, if they were found, would relate to personal matters or activities that are wholly unrelated to the university's mandate. Accordingly, the appellant has not provided sufficient evidence to establish that the records, if they

had been found, would not fall within the scope of the first category of Order PO-3009-F set out above.

[55] Thus, on the evidence before me, if the requested records had been found, they would not have been within the university's custody or control.

[56] However, notwithstanding the above, I am satisfied that the named professor searched his faculty email account and found no responsive records. I am satisfied that in requesting that the named professor search his own records, the university was following the proper procedures in matters of this nature, as established by Adjudicator Smith in Order PO-3009-F.

[57] In that regard, I am not satisfied that the appellant has established that a deletion of any responsive records took place. In support of this assertion the appellant points to his perception of a discrepancy between the first and second decision letters and other factors.

[58] In my view, no discrepancy exists between the first and second decision letters. The first letter was issued before the named professor conducted his search. It set out the university's position on custody or control, not on whether any responsive records might exist. The second letter confirmed that, after searching his faculty email, the named professor found no responsive records.

[59] Furthermore, the summarization in the Notice of Inquiry of the named professor's submissions also does not support the appellant's position. I have reviewed the named professor's submissions and the manner in which I summarized them, and can find no support for an inference that responsive emails were deleted.

[60] Finally, Order PO-3050 dealt with the deletion of emails from a professor's email account. The submissions of the association pointed to making a determination of custody and control based on the nature of an email, not on whether it had been deleted or not. This is an argument advanced by the association in general. In my view, this does not mean, the association is also suggesting that responsive emails were deleted by the named professor in the appeal before me.

[61] I find that, these points, whether taken separately or together, do not support an inference that responsive emails were deleted.

[62] Accordingly, I am not satisfied that the appellant has provided a reasonable basis for me to conclude that responsive records exist. I also find that the university has provided sufficient evidence to demonstrate that it has conducted a reasonable search for responsive records within its custody or under its control.

[63] Accordingly, I am satisfied that the university's search for responsive records within its custody or under its control, is in compliance with its obligations under the *Act*.

ORDER:

1. The university's search for responsive records within its custody or under its control is in compliance with its obligations under the *Act*.

2. Accordingly, the appeal is dismissed.

Original Signed by: June 28, 2013
Steven Faughnan
Adjudicator