

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3324

Appeal PA13-161

McMaster University

March 19, 2014

Summary The appellant sought access under the *Freedom of Information and Protection of Privacy Act* to expense claims of a university faculty member that were the subject of an internal auditor's report. The university located the responsive records and denied access, citing the exclusionary provisions in sections 65(8.1)(a) (record respecting or associated with research) and 65(6)3 (labour relations and employment records). This order upholds the university's decision under section 65(6)3 only and finds that the records are excluded from the application of the *Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 65(8.1)(a) and 65(6)3.

Orders and Investigation Reports Considered: Orders PO-3320, PO-3323, PO-2074-R, PO-3084 and PO-3243.

OVERVIEW:

[1] McMaster University (McMaster or the university) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*).

[2] The request was one of three access requests, submitted by the requester on the same day to the university.¹

[3] In this request (request #2013-004), the requester sought access to the following:

I would like access to all documents related to expenses claimed by [named faculty member] for the years 2007, 2008, 2009 and 2010. I would like these documents to include any and all expense forms, receipts and any correspondence exchanged between McMaster and [him] about his expense claims for that period.

[4] The requester subsequently clarified his request to include only expenses related to the report referenced in request #2013-03.

[5] The university located the responsive records and confirmed that the report referenced in respect of request #2013-003 is an internal audit report prepared by the former Chief Internal Auditor (the auditor) relating to the faculty member and that the report concerned an audit of research expense accounts.

[6] McMaster further stated that it was denying access to any and all documents related to the expenses considered in the report, based on the exclusions contained in section 65(8.1)(a) and 65(6) of the *Act*. McMaster indicated:

- a. The responsive records relate solely to research expense accounts and therefore is excepted from the application of FIPPA pursuant to Section 65(8.1)(a) on the basis that it is a record respecting or associated with research conducted or proposed by an employee of an educational institution.
- b. The responsive records are further excepted from the application of FIPPA pursuant to Section 65(6) on the basis that it is a record that was prepared and used by McMaster in relation to meetings, consultation, discussions and communications about employment-related matters in which the institution has an interest.

[7] The requester, now the appellant, appealed the university's decision to deny access.

[8] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

¹ The other two requests were the subject of related appeals in files PA13-133 and PA13-160, in which the records were ordered excluded under section 65(6)3 in Orders PO-3320 and PO-3323.

[9] I sent a Notice of Inquiry seeking the representations of the university on the application of the exclusions in sections 65(8.1)(a) and 65(6) to the expense claims.

[10] The university provided representations in response to the Notice of Inquiry. The university also advised that the affected person had reviewed its representations and had consented to sharing the information therein with the appellant. I provided the appellant with a copy of the university's representations, along with a Notice of Inquiry. The appellant did not provide representations in response.

[11] In this order, I find that the records are excluded from the application of the *Act* by reason of section 65(6)3.

RECORDS:

[12] The university provided a representative sample of the responsive expense claims, all of which are at issue in the appeal.

ISSUES:

A. Does the section 65(8.1)(a) exclusion for records respecting or associated with research exclude the records from the *Act*?

B. Does the section 65(6)3 labour relations and employment records exclusion exclude the records from the *Act*?

DISCUSSION:

A. Does the section 65(8.1)(a) exclusion for records respecting or associated with research exclude the records from the *Act*?

[13] Section 65(8.1)(a) states:

(8.1) This Act does not apply,

(a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution;

[14] Sections 65(9) and (10) create exceptions to the exclusion found at section 65(8.1). These sections state:

- (9) Despite subsection (8.1), the head of the educational institution shall disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection.
- (10) Despite subsection (8.1), this Act does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49(c.1)(i).

[15] The university describes the records as expense claims of the affected person that relate to an audit of the research expense accounts of the affected person in seven specific research projects.

[16] The university submits that section 65(8.1)(a) applies to exclude the expense claims as they directly relate to the expenditure of funds in research expense accounts which were designated solely for research activities to be carried out by the affected person, who is employed by McMaster. It states that disclosure would be inconsistent with the purposes of the *Act*, the purpose of section 65(8.1)(a) (namely, to protect the principles of academic freedom and foster competitiveness), and would have a chilling effect on academic freedom, competitiveness and research at Canadian universities.

[17] The university states that there is "some connection" between the records and the research because the subject matter of the records relates solely to an audit of expense accounts that are directly respecting or associated with the affected person's research.

[18] The university states that, as was the case in Order PO-3084, the responsibility for managing research funds begins with the person to whom a research grant or contract is awarded. It states that the records are concerned with the affected person's use of research funds held in expense accounts, which accounts are solely to be used for research purposes. No funds in the research accounts in question were to be used for ineligible expenses unrelated to research.

[19] According to the university, the records arise from and are directly related to the affected person's research as it is concerned with the expenditure of research funds and grants. Therefore, the university states that the records have "some connection" to research.

Analysis/Findings

[20] Research is defined as "... a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." The research must be

referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution.²

[21] This section applies where it is reasonable to conclude that there is “some connection” between the record and the specific, identifiable “research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution.”³

[22] The records excluded in Order PO-3084, which was referred to by the university in its representations, included expense claim forms and receipts for research undertaken by a professor.

[23] The records in this appeal are expense claim forms containing information that is also found in the internal auditor’s report. The internal auditor’s report does not contain references to the affected person’s research projects. I found the internal auditor’s report not subject to section 65(8.1)(a) in Order PO-3320. Based on my review of the records and the internal auditor’s report, I do not agree with the university that the expense claims being audited in the records solely relate to the affected person’s research projects identified in the university’s representations. Therefore, I find that the university has failed to establish “some connection” between the records and these research projects.

[24] In Order PO-3243, Adjudicator Stella Ball considered the application of section 65(8.1)(a) to emails that were associated with research conducted or proposed by an employee of the university or by a person associated with it. In determining that section 65(8.1)(a) did not apply to the records, she stated:

Previous orders of this office have established that records must relate to specific, identifiable research projects in order to be excluded under section 65(8.1)(a) of the *Act*.⁴ In adopting this approach, I note that the email records in this appeal are communications aimed at organizing the preparation of future research project proposals in compliance with certain timelines. The emails discuss possible research initiatives, potential research partnerships and prospective avenues of research funding. While the emails refer to academic disciplines and related research funding options, they do not refer to any “specific, identifiable research projects that have been conceived.”⁵ Because the records do not reveal any specific, identifiable and conceived research project, they do not satisfy the requirement that the research be “conducted or proposed” in order to

² See Order PO-2693.

³ Order PO-2942; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁴ Orders PO-2693, PO-2694, PO-2942, PO-2946, PO-2947 and PO-3084.

⁵ Orders PO-2693 and PO-3084.

qualify for exclusion under section 65(8.1)(a). Therefore, I find that the records are not excluded from the *Act* by section 65(8.1)(a).

[25] I adopt this analysis of Adjudicator Ball in Order PO-3243 and find that the records in this appeal are not excluded from the application of the *Act* by reason of section 65(8.1)(a). The records are expense claims of a particular university faculty member.⁶ Although the faculty member may have used funds that were held in a general research expense account, the records do not refer to any specific identifiable research projects that have been conceived. Therefore, I conclude that the records do not satisfy the requirement that the research be "conducted or proposed" in order to qualify for exclusion under section 65(8.1)(a).

[26] In conclusion, I find that the records are not associated with research conducted or proposed by the affected person, a faculty member at the university. Accordingly, I find that the records are not excluded by reason of section 65(8.1)(a) of the *Act*.

B. Does the section 65(6)3 labour relations and employment records exclusion exclude the records from the *Act*?

[27] Section 65(6)3 states:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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

[28] 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*.

[29] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.⁷

[30] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining

⁶ The affected person.

⁷ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.⁸

[31] 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.⁹

[32] 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.¹⁰

[33] 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*.¹¹

[34] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees¹²

[35] 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.¹³

[36] 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

⁸ *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.

⁹ Order PO-2157.

¹⁰ *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.

¹¹ Orders P-1560 and PO-2106.

¹² *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

¹³ *Ministry of Correctional Services*, cited above.

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

[37] The university states that the records were:

(i) Collected, Prepared, Maintained or Used by Institution: It is submitted that the records were documents relating to expense claims of the affected [person] and relate to an audit of expense accounts. The records were used by McMaster in the course of an internal audit of said expense claims.

(ii) Related to Meetings, Consultations, Discussions or Communications: The records were used in relation to meetings, consultations, discussions and communications with McMaster's internal audit department, legal counsel and the affected [person].

(iii) Labour Relations or Employment Related Matters: The records relate to an employment related matter of the affected [person], namely the records are expense claim documentation relating to the employees use of funds contained in research expense accounts maintained by the institution on the employee's behalf. Although the records relate to expense accounts and funds for research projects funded by parties other than McMaster and the expenses related to the records were not incurred in the course of the employee's employment per se, McMaster employees conducting research are nonetheless subject to McMaster's research integrity policy and, in turn, may be subject to discipline if found to be in breach of same. Moreover, the affected [person's] continued employment with the institution is directly dependent on [him] receiving and maintaining external funding for his research. Hence, the records are related to the employment of the affected [person].

Analysis/Findings

Part 1: collected, prepared, maintained or used

[38] I agree with the university that the records were prepared and used by it as part of its audit of the affected person's expenses. Therefore, part 1 of the test has been met.

Part 2: meetings, consultations, discussions or communications

[39] I agree with the university that the records were used in relation to meetings, consultations, discussions and communications with McMaster's internal audit department, legal counsel and the affected person. Therefore, part 2 of the test has been met.

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

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

- a job competition¹⁴
- an employee's dismissal¹⁵
- a grievance under a collective agreement¹⁶
- disciplinary proceedings under the *Police Services Act*¹⁷
- a "voluntary exit program"¹⁸
- a review of "workload and working relationships"¹⁹
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.²⁰

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

- an organizational or operational review²¹
- litigation in which the institution may be found vicariously liable for the actions of its employee.²²

¹⁴ Orders M-830 and PO-2123.

¹⁵ Order MO-1654-I.

¹⁶ Orders M-832 and PO-1769.

¹⁷ Order MO-1433-F.

¹⁸ Order M-1074.

¹⁹ Order PO-2057.

²⁰ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

²¹ Orders M-941 and P-1369.

²² Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

[42] 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.²³

[43] Records collected, prepared maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions.²⁴

[44] The records in this appeal are similar to the record which was the subject of Reconsideration Order PO-2074-R. In that case, the record was an audit report prepared by the Audit and Quality Assurance Branch of the Ministry of the Attorney General. The audit resulted from a pilot project initiated by the Criminal Injuries Compensation Board (the board) to determine the most efficient method to obtain investigative services. During the review, unexplained discrepancies were discovered between actual and reported investigations completed by one investigator. As a result, the individual was suspended with pay pending the completion of the audit. The individual subsequently resigned his position.

[45] In Reconsideration Order PO-2074-R, Senior Adjudicator David Goodis found that section 65(6)3 excluded the audit report from the application of the *Act*. He concluded that the board’s interest in the record was more than “a mere curiosity or concern”, and that the matter giving rise to the record related to the board’s own workforce where the focus had shifted from “employment of a person” to “employment-related matters”.

[46] I adopt these findings of Senior Adjudicator Goodis in Reconsideration Order PO-2074-R and find that part 3 of the test has been met in the present appeal. The records in this appeal are expense claim forms submitted by the affected person for reimbursement of expenses. These expenses were the subject of an internal auditor’s report. The records in this appeal form the basis for the internal auditor’s report considered by me in Order PO-3320 and the related letter considered by me in Order PO-3323. I found in both of these orders that the records were excluded from the application of the *Act* by reason of the exclusion in section 65(6)3.

[47] I also find that the records in this appeal, the expense claim forms of the affected person that formed the subject matter of the internal auditor’s report, are excluded from the application of the *Act* by reason of section 65(6)3. These records are communications about an employment-related matter in which the university has an interest. The records contain information that is also contained in the internal audit undertaken for the university’s Audit Committee members. This internal audit addressed issues related to human resources and other matters about the affected person’s employment. The university’s interest in the records is more than “a mere curiosity or

²³ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

²⁴ *Ministry of Correctional Services*, cited above.

concern". The matter giving rise to the records relate to the university's own workforce where the focus had shifted from "employment of a person" to "employment-related matters".

[48] As none of the exceptions to section 65(6) in section 65(7) apply, I find that the records in this appeal are excluded from the *Act* by reason section 65(6)3.

ORDER:

I uphold the university's decision and dismiss the appeal.

Original Signed By: _____
Diane Smith
Adjudicator

_____ March 19, 2014