

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3417-I

Appeal PA12-298

University of Ottawa

October 30, 2014

Summary: The appellant sought access to all records related to a specified corporation that were in the possession of the university and specified university personnel. The university located records responsive to the request and issued a decision granting partial access to them. The university claimed that a number of records were excluded from the scope of the *Freedom of Information and Protection of Privacy Act* by virtue of sections 65(6)3 and 65(8.1). It also relied on the discretionary exemptions in sections 13 (advice or recommendations), 18 (economic and other interests) and 19 (solicitor-client privilege), and the mandatory exemptions in sections 17 (third party information) and 21 (personal privacy) to deny access to some of the records. During the adjudication stage of the appeal, the university modified the exemptions and exclusions it relied on in respect of some of the records. The university's decision that records 8 and 9 are excluded from the scope of the *Act* under section 65(6)3 is upheld, and the decision on the remaining records is reserved. The responsiveness of the remaining portions of records 2, 3, 4, 5, 6, 7 and 10 that do not refer to the corporation specified in the request is raised as an issue in this interim order. As well, the possible application of the mandatory personal privacy exemption in section 21(1) to the remaining records is raised as an issue. Consideration of the exemptions claimed by the university for these remaining records is deferred in order to provide the parties with an opportunity to address the issues of responsiveness and the possible application of section 21(1).

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

Cases Considered: *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 507.

OVERVIEW:

[1] The University of Ottawa (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

[C]opies of all records related to [a named corporation] and sent to/by and/or received to/by and/or in the possession physically and/or electronically of

- The Office of the President
- The Office of the Vice-President, Governance, formerly known as the Office of the Secretary, including legal Counsel
- The Office of the Vice President, Academic
- The Office of the Vice President, Resources
- The Communications Office (a.k.a. The Communications Directorate)
- The Office of the Dean of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Assistant Dean and Secretary of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Vice Dean of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Dean of the Faculty of Science
- The Office of the Dean of Telfer School of Management
- The Office of Marketing and Development of Telfer School of Management
- The Office of Administrative Services of Telfer School of Management
- Mark Hannington in his duties as Goldcorp Chair in Economic Geology
- The Office of the Department of Earth Sciences
- The Office of the Dean of the Faculty of Social Sciences
- The Office of the Department of Economics
- The Office of the School of Political Studies
- The Office of the School of International Development and Global Studies
- The Office of the Graduate School of Public and International Affairs

Between, March 1, 2007 and present. [*sic*]

[2] The university notified the requester that it was extending the time to respond to the request by 30 days pursuant to section 27(1) of the *Act*. The university then located records which it identified as responsive to the request, 11 emails including attachments, and issued a decision granting access to only two of them, records 1 and 11. The university claimed that the *Act* did not apply to records 2 through 9 by virtue of the research exclusion in section 65(8.1) of the *Act*. It also claimed that section 65(6) excluded records 8 and 9 from the application of the *Act*. Finally, the university claimed that:

- the discretionary exemption in section 13 (advice or recommendations) applied to records 3, 6 and 7;
- the mandatory exemption in section 17 (third party information) applied to records 2, 3, 4, 5, 6, 7 and 10;
- the discretionary exemption in section 18 (economic and other interests) applied to records 2, 3, 4, 5, 6, 7 and 10;
- the discretionary exemption in section 19 (solicitor-client privilege) applied to record 6; and
- the mandatory exemption in section 21 (personal privacy) applied to records 8, 9 and 10.

[3] The requester, now the appellant, appealed the university's decision. During the mediation stage of the appeal, the appellant advised that he was not interested in pursuing access to any of the email addresses contained in the withheld records. Accordingly, all email addresses contained in the records are no longer at issue in this appeal. The appellant also confirmed that he was not interested in pursuing access to the names of individuals contained in record 10. Accordingly, the names of individuals in record 10 are no longer at issue in this appeal.

[4] A mediated resolution of the appeal was not possible, and the appeal was transferred to the adjudication stage of the appeal process for an inquiry under the *Act*. I began my inquiry by inviting representations from the university. The university provided representations and agreed to share them with the appellant. In its representations, the university advised that it no longer relied on the solicitor-client privilege exemption in section 19 to exempt record 6 from disclosure; however, it claimed that the mandatory third party information exemption in section 17(1) applies to this record. It also advised that it no longer claimed that records 2 through 7 were excluded from the scope of the *Act* by virtue of section 65(8.1). Finally, the university advised that it no longer relied on the section 18(1) exemption in respect of records 2 through 7, and relied on section 18(1)(c) only in respect of record 10. I modified the Notice of Inquiry I sent to the appellant to reflect these changes to the exemptions and

exclusions relied on by the university. I invited the appellant's representations and granted the appellant multiple extensions for the submission of his representations; however, the appellant did not provide representations.

[5] In this interim order, I uphold the decision of the university that records 8 and 9 are excluded from the scope of the *Act* under section 65(6)3. I also raise the issue of the responsiveness of the portions of records 2, 3, 4, 5, 6, 7 and 10 that do not refer to the corporation specified in the request, and of the possible application of the mandatory exemption in section 21(1) to these same records. I defer my decision on these records in order to provide the parties with an opportunity to address these new issues.

RECORDS:

[6] The records at issue are nine emails identified as records 2 through 10, including attachments.

ISSUES:

- A. Does section 65(6)3 operate to exclude records 8 and 9 from the *Act*?
- B. Are the remaining records at issue responsive to the request in their entirety?
- C. Does the mandatory personal privacy exemption also apply to some of the information in records 2 through 7?

DISCUSSION:

A. Does section 65(6)3 operate to exclude records 8 and 9 from the *Act*?

[7] The section 65(6)3 exclusion addresses labour relations and employment records. If section 65(6)3 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*. 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:

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

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

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

[9] 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.

[10] 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.⁴

Section 65(7): exceptions to section 65(6)

[11] If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. Section 65(7) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

² Order PO-2157.

³ *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.

⁴ *Ibid.*

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Representations

[12] The university states that records 8 and 9 consist of emails that contain a professor's contract renewal package. It explains that record 8 is the email from the professor to the dean of his faculty enclosing his contract renewal package which includes his résumé, a detailed description of his research activities, sample teaching materials, plans for publications and other scholarly activities. The university states that the professor provided this information for the review of the Departmental Teaching Personnel Committee (DTPC) which was to prepare a report pertaining to the first renewal of the professor's contract. The university explains that the DTPC is a committee established by it under the terms of the collective agreement between it and the union which represents its full time professors, the Association of Professors of the University of Ottawa (APUO). In support of its submission, the university provides an excerpt of Article 15.1 of the APUO Collective Agreement which sets out general provisions regarding the existence, composition and structure of the DTPC, the election of DTPC members and terms of office and vacancies.

[13] The university submits that records 8 and 9 were collected, prepared, maintained and used by it in relation to meetings, consultations, discussions and communications with the DTPC and the Office of the Dean of the Faculty of Science for the purpose of considering the professor's first renewal of his contract. The university further submits that the renewal of a contract of one of its professors is an employment-related matter in which it has an interest. It asserts that its interest in records related to its workforce qualifies as being more than a mere curiosity or concern. The university concludes by stating that the exceptions contained in section 65(7) do not apply in this appeal and accordingly, records 8 and 9 fall within the purview of the exclusion in section 65(6)3 of the *Act*.

[14] As noted above, the appellant did not provide representations.

Analysis and findings

[15] Record 8 is an email from a professor to the Dean of the Faculty of Science and another university administrator enclosing the professor's résumé. Record 9 is an email from a university administrator forwarding the email in record 8 to another university administrator. Thus, both records contain the professor's résumé and his original email enclosing his résumé. In receiving the email in record 8, I find that the university collected it, and subsequently maintained and used it when record 8 was forwarded in its entirety to another university administrator. The first requirement of section 65(6)3 is therefore met.

[16] The professor's original email contains the phrase "contract renewal" in the subject line along with his name, and confirmation in the body of the email that the attached résumé comprises his "contract renewal package." I find that on their face, the records support the university's submission that they were collected, maintained and used by the university for the purpose of considering the professor's contract renewal. I further find that this collection, maintenance and usage was in relation to consultations, discussions or communications about employment-related matters; namely, the consideration of and ultimate decision on whether or not the professor's contract with the university would be renewed. I find that the renewal of an employee's contract of employment is a matter involving the university's workforce and in accordance with the ruling of the Court of Appeal for Ontario in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*,⁵ I further find that this is a matter in which the university has an interest.

[17] Accordingly, I find that all three of the requirements under section 65(6)3 have been established to support the application of the exclusion in section 65(6)3 to these records. Additionally, I find that none of the exceptions to the exclusion outlined in section 65(7) apply in this appeal. I conclude that as a result of operation of the exclusion at section 65(6)3, records 8 and 9 fall outside of the scope of the *Act* and I have no jurisdiction to determine whether any of the exemptions claimed by the university apply to them.

B. Are records at issue responsive to the request in their entirety?

[18] The remaining records to be addressed in this appeal are the emails and their attachments which comprise records 2, 3, 4, 5, 6, 7 and 10. The emails in records 2 through 7 consist of communications between executives and administrators from the university and executives from other universities. The email in record 10 is also a communication between university administrators and executives that contains a list of university donors as an attachment.

⁵ *Supra*, footnote 3.

[19] Having reviewed these records, I note that they contain a significant amount of information that appears not to be responsive to the appellant's request. The request as framed by the appellant is broad in terms of the individuals and communications it aims to encompass, however, it is specific in stating that the records the appellant seeks are those that are "related to" a specified corporation. While the name of the specified corporation appears once in each of records 2, 3, 4, 5, 6, 7 and 10, the records primarily contain information that is related to matters that do not involve the corporation but instead involve other entities and individuals. Accordingly, I am not convinced that the parts of the records other than the very discrete portions that refer to the specified corporation are responsive to the request.

[20] As the issue of the responsiveness of the portions of records 2 through 7 and 10 that do not relate to the specified corporation is not one that has been previously raised in this appeal, I defer my decision on these records in order to provide the parties an opportunity to address it. In my interim order below, I will invite the university's representations on why it believes that records 2, 3, 4, 5, 6, 7 and 10 (with the exception of those portions that refer to the specified corporation) are responsive to the appellant's request. To be considered responsive to the request, records must "reasonably relate" to the request.⁶

C. Does the mandatory personal privacy exemption also apply to some of the information in records 2 through 7?

[21] On my review of the remaining records at issue, I also note that the mandatory personal privacy exemption at section 21(1) may apply to portions of records 2 through 7, despite the university's reliance on section 21(1) to withhold portions of record 10 only. Although the appellant confirmed during mediation that he is not interested in obtaining access to the names of individual donors listed in record 10 or in the email addresses contained in the records, there appears to be other personal information in the records which neither the appellant nor the university has addressed. Accordingly, I will defer my decision on the remaining records in order to provide the parties an opportunity to address the possible application of section 21(1) to these portions of records 2 through 7. In my interim order below, I will invite the university to submit representations on whether the mandatory personal privacy exemption in section 21(1) applies to records 2, 3, 4, 5, 6 and 7 in addition to record 10.

INTERIM ORDER:

1. I uphold the university's decision that records 8 and 9 are excluded from the application of the *Act* under section 65(6)3.

⁶ Orders P-880 and PO-2661.

2. I defer my decision on the remaining records in order to provide the parties with an opportunity to address:
 - (a) the responsiveness to the request of the portions of records 2, 3, 4, 5, 6, 7 and 10 that do not refer to the specified corporation or matters pertaining to the corporation.
 - (b) The possible application of the mandatory personal privacy exemption in section 21(1) to records 2, 3, 4, 5, 6 and 7.
3. I order the university to provide me with representations on provisions 2(a) and 2(b) above by **November 28, 2014**.
4. I remain seized of the appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ October 30, 2014