

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3391

Appeal PA13-48

University of Ottawa

September 12, 2014

Summary: The appellant sought access to all records held by the university, relating to her, created within a specified time-frame and located in the offices of a number of identified employees and faculties. The university granted partial access to the records, denying access to some of them pursuant to the exclusionary provision at section 65(6) (labour relations and employment), the mandatory personal privacy exemption at section 21(1), the mandatory third party information exemption at section 17(1), and the discretionary personal privacy exemptions at section 49(a), read with sections 13(1) (advice or recommendations), 14 (law enforcement), and 19 (solicitor-client privilege), and section 49(b). Prior to the completion of the inquiry, the exemptions at sections 17(1), 21(1), and 49(a), read with sections 13(1) and 14(1), and 49(b) were removed from the scope of the appeal. This order finds that the exclusion at section 65(6) applies to all of the records at issue. The university's decision is upheld and the appeal is dismissed.

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

OVERVIEW:

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

Par la présente, j'aimerais demander l'accès à tous les documents, dossiers et/ou registres à mon sujet [nom de l'auteur de la demande] (Numéro d'employée [xxxxxx]), créés, émis et reçus par:

[9 membres du personnel nommés]

J'aimerais également recevoir une copie de mes dossiers (dossiers papiers et électronique) tenus au Département des Langues et Littératures Modernes, à la Faculté des Arts et au Service des Ressources humaines de [l'université nommée].

Les documents mentionnés se trouvent dans les bureaux des personnes susmentionnées de même qu'aux bureaux du Département des Langues et Littératures Modernes, de la Faculté des Arts et du Service des Ressources humaines de [l'université nommée].

Veuillez limiter votre recherche à la période entre le 1^{er} janvier 2012 et aujourd'hui, en tenant compte du fait que les postes décrits ci-dessus ont été occupés par différentes personnes.

[2] The university located the responsive records and issued a decision granting partial access to them. With its decision letter, the university provided the appellant with an index of records that described each record and identified the portions that were being withheld pursuant to the following exemptions: section 49(a) (discretion to refuse a requester's own information), read with sections 13(1) (advice and recommendations), 14 (law enforcement), and 19 (solicitor-client privilege); section 17(1) (third party information); section 21 (personal privacy); section 49(b) (personal privacy); and, the exclusion at section 65(6) (labour relations and employment) of the *Act*.

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

[4] During mediation, the appellant advised that she is not interested in pursuing access to other individuals' personal information such as names, email addresses or contact information. As these types of personal information were the only types of personal information severed from the records, sections 49(b) and 21(1) are no longer at issue in this appeal. She also advised that she is not interested in pursuing access to emails or complaints that originated from her or were sent to her. The appellant advised, however, that she does wish to pursue access to the remaining information that has been withheld.

[5] Also during mediation, the university reviewed the records and granted additional disclosure to the appellant. The university issued two revised decision letters with

accompanying revised indices advising that it was now prepared to grant full access to several additional records and one record in part.

[6] As a mediated resolution could not be reached and the appellant continues to seek access to the remaining information, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. In my inquiry into this appeal, I sought representations from both the university and the appellant.

[7] In its representations, the university advised that it was no longer claiming the application of the discretionary exemption at section 49(a), read in conjunction with either of sections 13(1) or 14. Accordingly, these exemptions are no longer at issue in this appeal.

[8] The university's representations were shared with the appellant in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*. The appellant chose not to submit representations.

[9] In this order, I uphold the university's decision that the records at issue are excluded from the scope of the *Act* by virtue of the exclusion for information related to labour relations or employment-related matters at section 65(6), and I dismiss the appeal. Given my affirmative finding on this issue, it is not necessary for me to address the application of the exemption claimed by the university that remains at issue, specifically, section 49(a), read in conjunction with section 19 of the *Act*.

RECORDS:

[10] The records include incident reports, forms, emails and other correspondence. Those that remain at issue are as follows:

- Records 32, 33, 35, 45 to 48, 52, 67 to 69, 73, 75 to 78, 80, 83 to 86, 88 to 90, 97, 98, 110, 114, 131 to 134, 137 to 147, 149, 155 to 157, 160, 161, 163 to 170, 178, 179, 186, 188, 189, 191, 194 to 197, 200 to 206, 208 to 211, 213 to 215, 217 to 220, 222 to 226, 229 to 240, 243, 245 to 253, 257 to 262, 265 to 269, 271 and 272.

DISCUSSION:

Are the records excluded from the scope of the *Act* pursuant to the labour relations and employment exclusion at section 65(6)?

[11] In its final index of records, the university claims that the exclusion at section 65(6) of the *Act*, which addresses information relating to labour relations and employment, applies to remove all of the records that remain at issue from the scope of the *Act*.

[12] In its representations, the university clarifies that it is relying on paragraph 3 of the exclusion at section 65(6). It also submits that it is relying on paragraph 1. The relevant portions of section 65(6) state:

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

[13] 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*.

[14] 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.¹

[15] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.²

[16] 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.³

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

² *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.

³ Order PO-2157.

[17] 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.⁴

[18] For section 65(6)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[19] 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.

Representations

[20] In its representations, the university explains that its relationship with its part-time professors is governed by a Collective Agreement between itself and the Association of Part-Time Professors of the University of Ottawa (APTPUO) and, as a result, all labour-relations matters between the university and APTPUO members are dealt with in accordance with the Collective Agreement.

[21] The university submits that at the time the request for information was submitted, the appellant was a part-time professor at the university and an APTPUO member. The university submits that the appellant filed a workplace harassment and discrimination complaint with the university's human resources department and has lodged complaints with the Ministry of Labour and the Ontario Human Rights Tribunal regarding employment-related matters.

⁴ *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.

[22] The university takes the position that both paragraphs 1 and 3 of section 65(6) apply to all records for which the exclusion was claimed given that the appellant had filed workplace harassment and discrimination complaints against the Dean of the Faculty of Arts and the Chair of the Department of Modern Languages and Literatures. It submits that the records generally relate to consultations, discussions and communications about labour relations and employment-related matters involving the appellant. It submits that each record falls into one or more of the following general categories:

- records relating to the appellant's workplace harassment and discrimination complaint and the investigation of the allegations;
- records relating to the appellant's employment status; and
- records relating to the appellant's workload duties, her behaviour in the workplace and her performance of her employment duties with the Department of Modern Languages.

[23] The university submits that the records were prepared and maintained in connection with consultations, discussions, and communications between university staff in relation to employment-related matters involving the appellant. It further submits that, without a doubt, it has an interest in matters involving its own workforce.

[24] As noted above, the appellant chose not to submit representations.

Analysis and finding

[25] Having closely reviewed the records for which the exclusion has been claimed, I find that they were collected, prepared, maintained or used by an institution in relation to meetings and discussions related to labour relations or employment-related matters in which the ministry has an interest as contemplated by the exclusion at paragraph 3 of section 65(6) of the *Act*.

[26] As indicated above, to find that section 65(6)3 applies, I must determine whether the records for which section 65(6) has been claimed meet all three of the requirements of the section 65(6)3 test set out above.

[27] *Part 1 – collected, prepared, maintained or used by an institution*

[28] Upon review, the records consist primarily of emails and other communications between university employees, deans and vice deans of the specific faculties, chairs of specific department, human resources personnel and legal counsel. I accept that all of the records for which the exclusion has been claimed were collected, prepared,

maintained or used, by an institution, in this case the university, as contemplated by the first requirement of the section 65(6)3 test.

[29] *Part 2 – meetings, consultations, discussions, or communications*

[30] It is evident on the face of the records that they were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions and communications. As previously mentioned, the great majority of the records at issue are emails and communications between employees or the university and, in my view, it is clear that they represent discussions, consultations, or communications between those employees. Some of the records relate to meetings, consultations and discussions between university staff, including legal counsel, and others relate to communications prepared by the university. Therefore, I find the second requirement of the section 65(6)3 test has been met.

[31] *Part 3 – labour relations or employment-related matters in which the institution has an interest*

[32] Finally, with respect to part 3, I also find that the meetings, consultations, discussions and communications relate to *labour relations or employment-related matters* in which the institution *has an interest*.

[33] The type of records excluded from the *Act* by section 65(6) are documents related to the matter 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.⁵

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

- a job competition⁶
- an employee's dismissal⁷
- a grievance under a collective agreement⁸
- disciplinary proceedings under the *Police Services Act*⁹

⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 280 (Div. Ct.).

⁶ Orders M-830 and PO-2123.

⁷ Order MO-1654-I.

⁸ Orders M-832 and PO-1769.

⁹ Order MO-1433-F.

- a “voluntary exit program”¹⁰
- a review of “workload and working relationships”¹¹

[35] Previous orders of this office, including the decision in *Ontario (Solicitor General)*,¹² have found that disciplinary actions involving an employee are employment-related matters. In addition, a number of previous orders have established that grievances initiated pursuant to the procedures contained in the collective agreement are, by their very nature, about labour relations.

[36] With respect to the scope of the exclusionary provision, Swinton J., for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis* (2008)¹³ that:

In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Ms. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para 60, Lane J. stated,

It seems probable that the intention of the amendment was to protect the interests of institutions by removing public right of access to certain records relating to their relations with their own workforce.

[37] Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that “[w]hether or not a particular record is ‘employment related’ will turn on an examination of the particular document.”

[38] I agree with the analysis set out above and adopt it for the purpose of making my determinations in this appeal.

[39] All of the records at issue are email communications involving university employees, the deans and vice-deans of various faculties, department chairs of specific

¹⁰ Order M-1074.

¹¹ Order PO-2057.

¹² *Supra*, note 4.

¹³ *Supra*, note 5.

departments, human resources personnel and, in some circumstances, university legal counsel. The subject matter of all of them relate to matters concerned with the appellant's employment with the university including complaints she filed regarding her treatment by other university employees, her workplace relationships, her employment status and her workload, including teaching responsibilities.

[40] As stated, the terms "labour relations" and "employment-related" have different meanings. "Labour relations" specifically refers to matters arising from the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation or analogous relationships. Although the appellant was, at the time of the creation of these records, an APTPUO member, I have not been provided with any specific evidence to confirm that these records relate to any formal grievances filed under the collective agreement between the university and the APTPUO. However, even if it can be argued that the subject matter of these records does not arise out of the collective bargaining relationship, and therefore cannot be said to relate to "labour relations" within the meaning of section 65(6), in that case the information at issue can clearly be described as relating to "employment-related matters" as it addresses human resources and staff relations matters arising from the relationship between an employee and employer. Accordingly, I am satisfied that the type of information at issue can, depending on the context, be described as either relating to "labour relations" or "employment-related matters" and therefore would fall squarely within one of the two terms contemplated in the exclusion at section 65(6)3.

[41] As mentioned above, the final component for section 65(6)3 to apply, is that the university must "have an interest" in these labour relations or employment-related records. 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.¹⁴

[42] Given that the records address complaints filed by and about the appellant who is a professor at the university, they clearly relate to the university's management of its own workforce. Therefore, I accept that the university has more than a mere curiosity or concern with respect to these matters. Accordingly, I am satisfied that the university has an interest in these records as contemplated by the third requirement outlined in the section 65(6)3 test.

[43] I find that all three requirements have been established to support the application of the exclusionary provision in section 65(6)3 to the records at issue. It is clear that all of the records were collected, prepared, maintained or used by the university in relation to meetings, consultations, discussions or communications about either labour relations or employment-related matters in which it has an interest. Additionally, I find that none of the exceptions to the exclusion outlined in section 65(7) are relevant in the circumstances of this appeal. Accordingly, I find that as a result of

¹⁴ *Ontario (Solicitor General), supra* note 4.

operation of the exclusion at section 65(6)3, all of the records at issue fall outside of the scope of the *Act* and I have no jurisdiction to determine whether any exemptions apply to them.

ORDER:

I uphold the university's decision that section 65(6) applies to exclude the records at issue from the scope of the *Act* and dismiss the appeal.

Original Signed By: _____
Catherine Corban
Adjudicator

_____ September 12, 2014