

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3462

Appeal PA13-418

Ontario College of Art & Design

February 13, 2015

**Summary:** The Ontario College of Art & Design University (OCAD) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about OCAD's President's administrative leave. OCAD denied access to certain emails citing the exclusion in section 65(6)3 of the *Act*. This order upholds OCAD's decision.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 65(6)3 and 65(7)3.

### OVERVIEW:

[1] The Ontario College of Art & Design University (OCAD) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to the following information:

1. All emails, memoranda, correspondence or other records relevant to the approval process for and approval of the decision to pay President [named individual] full salary for administrative leave taken in the year 2011, including any minutes of any meeting of the Board of Governors or Executive Committee of the Board of Governors in which such payment was approved and any agreement between President [named individual], the Board of Governors, the Executive Committee of the Board of

Governors or the Chair of the Board of Governors with respect such payment.

2. All emails, memoranda, correspondence or other records relevant to the approval process for and approval of the decision taken to pay President [named individual] a lump sum payment in lieu of untaken administrative leave in the year 2011, including any minutes of any meeting of the Board of Governors or Executive Committee of the Board of Governors in which such a payment was approved, and any agreement between President [named individual], the Board of Governors, the Executive Committee of the Board of Governors or the Chair of the Board of Governors with respect such payment.

[2] OCAD granted access to most of the responsive records but withheld four records pursuant to the labour relations and employment records exclusion at section 65(6)3 of the *Act*.

[3] The requester, now the appellant, appealed the OCAD's decision.

[4] During the course of mediation, OCAD indicated that it consulted an affected person and that the affected person had consented to the disclosure of two of the withheld records. As a result, OCAD subsequently disclosed two of the withheld records to the appellant.

[5] As mediation did not resolve the remaining issues in this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. In its representations, OCAD relies on the exclusion in section 65(6)3.

[6] During adjudication, OCAD disclosed further information from the remaining records to the appellant.

[7] In this order, I uphold OCAD's decision that the information remaining at issue in the records is excluded from the application of the *Act*.

## **RECORDS:**

[8] At issue in this appeal is the information withheld from two email chains. Withheld from one email chain are two emails and withheld from the other email chain are three emails.

## **DISCUSSION:**

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

[9] 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.

[10] 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*.

[11] 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.<sup>1</sup>

[12] 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.<sup>2</sup>

[13] 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.<sup>3</sup>

[14] 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.<sup>4</sup>

[15] 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

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

<sup>2</sup> *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.

<sup>3</sup> Order PO-2157.

<sup>4</sup> *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.

records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.<sup>5</sup>

[16] 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 employees.<sup>6</sup>

[17] 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.<sup>7</sup>

[18] 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.

[19] OCAD states that the records were prepared and used for the sole purpose of discussions and communications regarding an employee's administrative leave and, as such, there is more than just "some connection" between the records and the subject matter of section 65(6)3. It also states that the discussion in the records is in the context of the employer/employee, human resources relationship between OCAD, as the employer, and the employee.

[20] OCAD further states that the records do not fall within any of the exceptions to section 65(6) in section 65(7).

[21] The appellant states that any records which had the effect of amending the employee's contract by altering her compensation package constitute "an agreement between an institution and an employee resulting from negotiations about employment-

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<sup>5</sup> Orders P-1560 and PO-2106.

<sup>6</sup> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

<sup>7</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

related matters" and must be disclosed under the exception to section 65(6)3 in 65(7)3 of the *Act*. The appellant states that it is only interim steps in the negotiation process are excluded from the *Act* pursuant to section 65(6)3, and not the final agreement.

[22] The appellant submits that it is not possible for compensation arrangements of the employee to have been altered and for the President to have been paid the additional lump sum payment in the absence of some kind of agreement to amend her contract. It states that there must exist within OCAD's records in which the agreement to amend the terms of the employee's compensation were finalized. Even if that agreement took the form of an "informal" email communication, it states that it had the effect of amending the employee's contract and, therefore, constitutes an agreement between an institution and an employee pursuant to the exception in section 65(7)3.

[23] In reply, OCAD states that the records reflect discussions about financial and other details of the President's administrative leave of absence and do not constitute an agreement, nor do they amend the President's employment agreement.

[24] OCAD states that neither of the emails that constitute the first record can constitute an agreement or amendment to the President's employment agreement. Rather, they constitute interim steps in the negotiation process, and as such, are excluded from the operation of *FIPPA*.

[25] With respect to the second record, OCAD states that this record contains a number of emails among the Director of Finance, the Director of Human Resources, Board Chair, Board Vice-Chair/Finance Committee Chair, and the President. It states that these emails broaden the discussions about the financial and other aspects of the leave, among the President, the Director of Finance and the Director of Human Resources from the first record to include the Board Chair and the Board Vice-Chair/Finance Committee Chair. OCAD further states that none of the emails in the second record constitute an agreement or amendment to an agreement.

[26] OCAD states that given the breadth of the exclusion, section 65(7)3 must be read narrowly to apply to "an agreement" rather than consultations, discussions or communications about an employment-related agreement.

[27] In surreply, the appellant submits that the objects of *FIPPA* are best achieved through applying section 65(7)3 so as to require the disclosure of agreements, including any records documenting the approval of or agreement to the President's compensation package and that there is no reason to interpret section 65(7)3 narrowly.

### ***Analysis/Findings***

[28] The records at issue in this appeal consist of two email chains. One email chain consists of two emails and the other email chain consists of three emails.

[29] Based on my review of the records and the parties' representations, I find that the records were prepared and used by OCAD in relation to discussions or communications about payment to the OCAD President, an employee of OCAD. Therefore, parts 1 and 2 of the test have been met.

[30] Concerning part 3 of the test, the phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition<sup>8</sup>
- an employee's dismissal<sup>9</sup>
- a grievance under a collective agreement<sup>10</sup>
- disciplinary proceedings under the *Police Services Act*<sup>11</sup>
- a "voluntary exit program"<sup>12</sup>
- a review of "workload and working relationships"<sup>13</sup>
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.<sup>14</sup>

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

- an organizational or operational review<sup>15</sup>
  
- litigation in which the institution may be found vicariously liable for the

<sup>8</sup> Orders M-830 and PO-2123.

<sup>9</sup> Order MO-1654-I.

<sup>10</sup> Orders M-832 and PO-1769.

<sup>11</sup> Order MO-1433-F.

<sup>12</sup> Order M-1074.

<sup>13</sup> Order PO-2057.

<sup>14</sup> *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

<sup>15</sup> Orders M-941 and P-1369.

actions of its employee.<sup>16</sup>

[32] 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.<sup>17</sup>

[33] The 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.<sup>18</sup>

[34] The records are about the mode of payment to the President concerning her administrative leave from her employment at OCAD. I find that the records, therefore, are about employment-related matters in which OCAD has an interest and part 3 of the test has been met. Subject to my review of the exception raised by the appellant in section 65(7)3, the records are excluded from the application of the *Act* by reason of section 65(6)3.

[35] If the records fall within an exception in section 65(7), the *Act* applies to them. Section 65(7)3, raised by the appellant, reads:

This Act applies to the following records:

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.

[36] The appellant states that that there must exist within OCAD’s records an agreement to amend the compensation terms of the President’s employment agreement, even by email. However, based on my review of the information at issue in the records, I find that the withheld information does not amend the President’s compensation arrangement. I find that the withheld information in the records is merely a discussion about the mode of payment. I find that the exception in section 65(7)3 does not apply. Nor do any of the other exceptions to section 65(6)3 in section 65(7)<sup>19</sup>

<sup>16</sup> Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

<sup>17</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

<sup>18</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

<sup>19</sup> Section 65(7) states:

This Act applies to the following records:

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

apply. Therefore, as the exceptions in section 65(7) to section 65(6)3 do not apply, I find that the records are excluded from the application of the *Act*.

**ORDER:**

I uphold OCAD's decision that the information at issue in the records is excluded from the application of the *Act*.

Original Signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

February 13, 2015 \_\_\_\_\_