

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3529

Appeal PA14-65

Sheridan College Institute of Technology and Advanced Learning

August 31, 2015

Summary: The college received a five-part access request filed under the *Act*. The requester sought access to records relating to any academic appeal processes arising from a complaint that he had previously lodged with the college's Board of Governors and records relating to his own academic performance, including his grades and copies of all of his assignments, quizzes, and exams for a number of courses. He also sought access to records outlining grading rubric. The college advised that responsive records for some parts of his request did not exist, granted access to some records and denied access to other records claiming the application of the exclusion for records containing labour relations and employment-related information found at section 65(6)3 of the *Act*. The appellant appealed the college's decision that the exclusion at section 65(6)3 applies to the some of the responsive records and also took the position that the college's search for records was not reasonable as additional records responsive to his request should exist. This order upholds the college's search for responsive records as reasonable. This order also finds that the exclusion at section 65(6)3 applies to exclude many of the responsive records from the scope of the *Act*. As a result, the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 24 and 65(6)3.

Cases Considered: *Ontario (Attorney General) v. Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

OVERVIEW:

[1] Sheridan College Institute of Technology and Advanced Learning (the college) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. The records of all academic appeal processes which Sheridan College claims to have carried out in my name. This includes: all meeting minutes; all statements made by teachers of the courses under scrutiny or by any other contributors to the appeal process; all other evidence considered during the appeal; and the explanations given for any decisions made at the outcome of the processes.

2. All assignment, test, and quiz grades for the following list of courses in which I participated. Include the grading rubric for each course demonstrating the value of each element as a portion of the final course grade.

Note that this information and [the information] requested in item 3, was previously requested from your organization in an FOI request. Your response claimed that you were providing the information "in part". In actuality, NONE of the information was included in the package sent to me. If this was a clerical error, you now have the opportunity to correct it.

...

[list of 14 course numbers]

...

3. a) Copies of all graded assignments, exams, quizzes and any other materials which comprise a portion of the final course grade for the following list of courses which I participated.

b) grading rubrics for each individual item covered by section a) above

...

[list of 19 course numbers]

...

4. All material gathered by [named individual], or any other agent working on her behalf which forms a part of any investigation into the concerns I raised with Sheridan's Board of Governors. This includes:
 1. A list of every individual who contributed information to the investigation,
 2. Copies of all statements made by witnesses and those against whom allegations were raised,
 3. All instructions or guidance on the investigation procedure that was received by any investigator from any member of Sheridan Human Resources, Sheridan Management of the Sheridan Board of Governors,
 4. Any other item which comprises part of: evidence gathered in the investigation; the policies, rules or methodologies which the investigators were to follow; and the logic applied to come to any conclusion claimed by the investigators.

5. All material gathered by [two named individuals] or any other agent working on their behalf which forms part of any investigation into the concerns I raised with Sheridan's Board of Governors. This includes:
 - (i) A list of every individual who contributed information to the investigation,
 - (ii) Copies of all statements made by witnesses and those against whom allegations were raised,
 - (iii) All instructions or guidance on the investigation procedure that was received by any investigator from any member of Sheridan Human Resources, Sheridan Management of the Sheridan Board of Governors,
 - (iv) Any other item which comprises part of: evidence gathered in the investigation; the policies, rules or methodologies which the investigators were to follow; and the logic applied to come to any conclusion claimed by the investigators.

Note: [named individual] was given the task of investigating in spring and summer of 2012. The activities of [2 named individuals] would have taken place in summer and fall of 2012.

NOTE: Items 4 and 5 are requested as separate items. Any excuse used to refuse access to ONE of these items does not automatically allow refusal of the other.

[2] The college located records responsive to the request and issued a decision granting partial access to them. For part 1 of the request, the college advised that access was granted, in its entirety, to an informal appeal application form. The college advised that no other records deemed to be responsive to part 1 of the request were located.

[3] For part 2 of the request, the college indicated that:

The final grades are the records Sheridan retains and these have been released pursuant to the decision dated September 23, 2013. Sheridan does not retain the specific records requested.

[4] For part 3 of the request, the college advised the requester that no responsive records exist.

[5] Finally, for parts 4 and 5 of the request, the college advised that access was denied to the responsive records pursuant to the exclusion for labour relations or employment-related records at section 65(6)(3) of the *Act*.

[6] The requester (now the appellant) appealed the college's decision to deny access to the withheld records, and raised concerns that the college did not conduct a reasonable search for responsive records.

[7] During mediation, the appellant explained that he seeks access to records relating to his academic performance, as well as those which address his academic concerns and complaints about college faculty members that he had previously put before the college's Board of Governors.

[8] The appellant advised that he believes that more records should exist related to parts 1, 2 and 3 of his request, and that he does not agree that the records related to parts 4 and 5 should be excluded from the scope of the *Act* under section 65(6)(3).

[9] During mediation, the college located additional responsive records. It issued a supplementary decision granting partial access to them, denying access to portions pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*. Those portions of the records that did not pertain to the request were also withheld. As

the appellant confirmed that he is not interested in pursuing access to the information that was withheld from the records addressed in the supplementary decision, it is not at issue in this appeal.

[10] Following a review of the records provided to him as a result of the supplementary decision, the appellant noted that an attachment to an identified email had not been included in the records that had been disclosed to him. He noted that the email appeared to be truncated. In consultation with its Information Technology (IT) department, the college considered the appellant's concern and explained that:

The original message ... was forwarded again ... and was treated as an attachment The second message contains no content other than the first message and the first message is shown in full.

[11] The appellant does not accept the college's explanation. He maintains that the college has not conducted a reasonable search for records responsive to his request. He takes the position that the entire email has not been provided to him as an attachment exists. He believes that there should be a response to the email sent. Additionally, the appellant continues to take the position that additional records responsive to parts 1, 2, and 3 of his request should exist.

[12] Finally, the appellant disputes the college's position that the records responsive to parts 4 and 5 of the request are excluded from the scope of the *Act* pursuant to section 65(6)3. He believes that the *Act* applies to this information and continues to seek access to all of the records that have been withheld pursuant to section 65(6).

[13] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the college, initially. The college provided representations.

[14] In its representations, the college advised that following its receipt of the Notice of Inquiry it had conducted another search for responsive records. It also advised that it issued a second supplementary decision letter to the requester advising that it had located additional records and that it was granting partial access to them. A copy of this letter was enclosed with its representations.

[15] The second supplementary decision advised that the college denies access to portions of some of the newly located records on the basis of the mandatory exemption at section 21(1), relating to personal privacy. As the appellant advised that he is not interested in obtaining access to the personal information of other individuals, the information that is subject to section 21(1) is not at issue in this appeal.

[16] In the second supplementary decision letter, the college also advised that it had located additional information responsive to part 4 of the request. However, it advised that it had was no longer claiming that any of the records responsive to part 4 were excluded pursuant to section 65(6)3 because duplicates of them could be found in a location other than the human resources investigation file. Specifically, the college explained that the records responsive to part 4 of the request consist of emails of a former employee that are now stored on a backup email system. However, the college advised that it would be charging a fee to retrieve them. These records are included in the scope of this appeal and will be discussed below in further detail.

[17] In its representations, the college advised that some additionally located records responsive to part 2 of the appellant's request were exempt from disclosure pursuant to section 22 on the basis that they are publicly available. The college provided the internet link to assist the appellant in locating these records.

[18] Also in its representations, the college elaborated on its amended position, as outlined in its second supplementary decision letter to the appellant, that section 65(6)3 did not apply to the records responsive part 4, including those that had been recently located. I will be addressing this issue below, as a preliminary issue.

[19] The college's representations were shared with the appellant according with the principles outlined in this office's *Practice Direction 7* and the *Code of Procedure*. At that time, I requested that the appellant advise me as to whether he takes issue with the college's claim that some of the newly identified responsive records are publicly available.

[20] In his representations, the appellant did not indicate that he takes issue with the college's position with respect to the publicly available records. Accordingly, section 22 will not be addressed as an issue in this appeal. However, his representations raised issues to which I believed the college should have an opportunity to reply. As the college's subsequent reply representations contained information to which I believed the appellant should have an opportunity to reply, I provided the appellant with the opportunity to submit representations in sur-reply, which he did.

[21] For the reasons outlined below, in this order I find that the college conducted a reasonable search for records responsive to the request and that the exclusionary provision at section 65(6)3, which contemplates records containing labour relations and employment-related information, applies to all records that are responsive to parts 4 and 5 of the request.

RECORDS:

[22] The records that remain at issue are those which are responsive to parts 4 and 5 of the request. These records relate to a human resources investigation into a

complaint regarding the conduct of a number of faculty members that the appellant brought before the college's Board of Governors. Also at issue are additional records that the appellant believes should exist that are responsive to parts 1, 2 and 3 of his request and that relate to an email disclosed in a supplementary decision.

PRELIMINARY ISSUE:

[23] I will first address matters related to the records responsive to part 4 of the appellant's request. These records consist of materials gathered by the college's former Dean of the Faculty of Applied Science and Technology (FAST) which also appear in the college's human resources investigative files relating to the appellant's complaint made to the college's Board of Governors.

[24] At the outset of this appeal, the college took the position that the records responsive to part 4 of the appellant's request (which it submits are emails) were excluded from the scope of the *Act* by virtue of the application of the exemption at section 65(6)3 which addresses records containing information related to labour relations or employment. It advised that all of the records responsive to part 4 were incorporated into the human resources investigation report that is responsive to part 5 of the request.

[25] Subsequently, the college amended its position that section 65(6)3 applies to the records responsive to part 4. The college conceded that it might also be able to locate copies of records addressing the appellant's complaint held by the former Dean of FAST outside of the investigation report, specifically, in backup email systems. As a result, the college submits that the records are not excluded by section 65(6)3 and are subject to the *Act*. By supplementary decision letter, the college provided the appellant with a fee estimate of \$600 for the work required to retrieve the records responsive to part 4 of his request from backup email systems and advised that it would process the request upon receipt of a deposit of 50 per cent of that amount, as set out in the fee provisions in the *Act*.

[26] The appellant states that he agrees with the college's amended position with respect to its claim regarding the application of the exclusionary provision at section 65(6)3 to the records responsive to part 4 of the request. He argues that while the records that he seeks in part 4 of his request might be found in an aggregate file containing other information (the human resources investigative file), the records responsive to part 4 were originally created for a purpose which does not allow for their exclusion from the *Act*.

[27] Additionally, the college has confirmed that the records responsive to part 4 exist in an easily accessible and retrievable form within another collection of materials (the investigation file). Given that confirmation, the appellant disputes the college's decision to charge him a \$600 fee to retrieve these records from a backup email system.

[28] On a preliminary view of the college's representations on why it has withdrawn its claim that section 65(6)3 applies to records responsive to part 4 of the request, I am of the view that I must nevertheless determine whether the exclusion continues to apply. Section 65(6)3 is not a discretionary exemption that an institution may choose to apply to information or not. It is an exclusionary provision. If section 65(6)3 applies to records sought by a requester, they are excluded from the scope of the *Act* and I have no jurisdiction to review them in any manner or to order their disclosure. In such a case, the college is not precluded from disclosing them, or portions of them, as it sees fit; nor is it precluded from denying access to them. Simply put, they are records that are not subject to the access to information regime set out in the *Act*.

[29] Accordingly, despite the college's change of position with respect to the possible application of this exclusion, prior to making any determination with respect to the disclosure of the records responsive to part 4 (including the appropriateness of the fee estimate quoted by the college), I must first determine whether these records fall under the exclusion at section 65(6)3 of the *Act*. My analysis will be set out below, together with my analysis of whether section 65(6)3 applies to the records responsive to part 5 of the request.

ISSUES:

- A. Did the college conduct a reasonable search for responsive records?
- B. Does section 65(6)3 exclude any of the records at issue from the scope of the *Act*?

DISCUSSION:

A. Did the college conduct a reasonable search for responsive records?

[30] 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 24.¹ 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. 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 to show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

[31] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴ 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.⁵

[32] 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.⁶

Representations

[33] The appellant believes that more records exist in relation to the email identified in the second supplementary decision and to parts 1, 2 and 3 of his request. He also believes that an attachment and response to an identified email should exist. Finally, in his representations he states that he takes issue with the search conducted by the college with respect to records responsive to part 4 of his request.

[34] In its initial representations, the college submits that it has conducted a reasonable search for records responsive to parts 1, 2 and 3 of the appellant's request. It explains that the search is described in an affidavit sworn by its General Counsel and Freedom of Information Coordinator (FOIC).

[35] In her affidavit, the FOIC explains that she interpreted part 1 of the request (appeal processes which the college carried out in the appellant's name) as referring to three incidents that the appellant has alleged represent improperly handled academic appeals. She submits that she relied on the human resources investigation report that dealt with these allegations as a means of identifying individuals who might have records responsive to this part of the request in their custody or control. She submits that she contacted those individuals and they produced relevant responsive records, all of which she disclosed to the requester.

[36] In part 2 of the request the appellant sought access to grades for his assignments, tests and quizzes in 14 identified courses. The FOIC submits that while this type of information is generally maintained on the college's electronic management system, the information pertaining the appellant and the identified courses was contained in an older version of that system that is no longer used. She submits that information contained in that version was retained for one year prior to being deleted. She submits that she was advised by the manager of the college's Learning Management System & Learning Technologies department, as well as the Associate Dean, Digital Learning, that given that the appellant last attended the college in the

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

winter semester of 2012, the college is unable to retrieve information pertaining to him from the previous version of its electronic management system.

[37] The FOIC also submits that she coordinated a search for records containing the appellant's grades that might be held outside of the electronic management system. Specifically, she submits that she sought such records under the custody or control of two associate deans responsible for the appellant's program and each of the professors of the identified courses, provided they remained employed at the college. She submits that these searches produced a number of records, all of which were disclosed to the appellant.

[38] In part 2 of the request, the appellant also sought access to the "grading rubric for each course demonstrating the value of each element as a portion of the final course grade." The FOIC submits that in the second supplementary decision letter she directed the appellant to an online source for this information and claimed the exemption at section 22 of the *Act*. Section 22 addresses information that is to be published or is currently available to the public.

[39] The FOIC explains that, with respect to the portion of part 3 of the request, where the appellant sought access to "copies of graded assignments, exams, quizzes and any other materials," she confirmed that the college does not retain this information. With respect to the portion of part 3 in which the appellant sought access to "grading rubrics for each individual assignment, exam, quiz..." for a list of 19 courses, the FOIC confirmed that she coordinated a search for rubrics held by the professors of the identified courses who remained employed by the college and she disclosed what was located to the appellant.

[40] With respect to part 4 of the request, in which the appellant sought access to all materials gathered by the Dean of FAST as part of the investigation into the complaint filed by the appellant with the college's Board of Governors, the FOIC submits that she advised the appellant that the dean was no longer employed by the college. She submits that she confirmed that, with the exception of emails, all of the former dean's computer files had been deleted from their electronic systems and the college does not retain any responsive physical records. She also submits that any emails sent and received while the dean was employed are only stored on backup tapes. The FOIC advised that the Director, Information Security and Compliance, estimated that it would take ten hours of a technician's time to restore data from the tape to translate it into searchable form. She submits that the appellant was provided with a fee estimate of \$600 to locate such records. However, she concedes that as any records responsive to part 4 of the request would form part of the human resources investigation file that they would be necessarily be included in the records that are responsive to part 5 of the request.

[41] The appellant submits that contrary to the college's position, there should be more records responsive to part 1 of his request which was for records relating to all academic appeal processes carried out in his name. The appellant submits that although the college suggests that the appeal did not take place, several emails clearly indicate that an appeal meeting took place in the fall of 2010. He submits that any such information should have been provided to him automatically as a result of the college's own policies and procedures. He submits that appeals were not carried out according to official policy and procedure because otherwise the complete records of the appeals would appear within the files of their investigations. He submits that if such records are not there, "this reveals a serious problem with the investigations themselves and thus the validity of the investigations become questionable."

[42] With respect to the possible existence of additional grade information described in parts 2 and 3 of his request, the appellant submits that the college's electronic management system was not the primary location for this type of information to be recorded. He submits that although the electronic management system was intended to contain a tool for course instructors to post grades for assignments, tests, and quizzes, instructors failed to post grade information in the system "with any regularity." He submits that grade information was entered sporadically, or not at all. Additionally, he states that not only is the posting of grade information unreliable, even when it is posted to the system it is difficult to access and often "blocked." He acknowledges that his explanation of the failings of the electronic management system "will likely not increase my chances of getting the data at this time." However, he submits:

Perhaps, though, the adjudicator can begin to question whether [the college] ever recorded or stored the information with any reliability to begin with. Hopefully, that doubt will have a bearing on the issues surrounding some of the other data sought in my [Freedom of Information] request.

[43] The appellant also suggests that although the college claims that the information relating to his grades no longer exists, "the destruction of that information, though prearranged for a particular time, was carried out despite the fact that members of [the college's] faculty and management knew that [he] was seeking access to it..."

[44] Addressing the records he sought in part 4 of his request, materials gathered by the former Dean of FAST that form part of the investigation into the concerns he raised in his complaint, he submits that there has been a clear indication that this information currently exists within the records that are responsive to part 5 of his request. He submits that although the college submits that a copy of these records exist in an easily accessible and retrievable form within the human resources investigation file, the college "seek[s] to force the retrieval to come from another source" that is not easily accessible. He submits that it has indicated that this other source contains only a portion of the materials and that it will charge a fee for the retrieval of this information.

He submits that the college is obligated to search in the place where the data is most likely to be found, which is the file held by their human resources department and they are refusing to search in that location. He states:

Effectively, what [the college] seem[s] to have done is create an aggregate file from a collection of other files, material and data. The material in these smaller files was originally created for a purpose which does not allow an exclusion from the *Act*. Into the new aggregate file [the college has] also mixed some new data for which there may be an argument for exclusion from the *Act*. The original files (such as grades, or accounts of academic appeals) have then been destroyed or placed into deep storage in a form that is very difficult to retrieve. In the case of the backup tapes [containing emails], [the college doesn't] actually know that any of it is there. [The college] couldn't possibly because [it] can't see it. After all, "it would take ten hours of technical work to restore data from backup tapes so it is in searchable form," according to [the college's] statement.

[45] In reply, regarding its search for records responsive to part 1 of the request, the college submits that although the requester provides evidence that there was an appeal meeting that occurred in the fall of 2010, he does not provide any basis to believe that there are any additional records associated with this meeting.

[46] Responding to the appellant's argument that the electronic management system referred to in the college's representations was not the primary or only system for storage of grade information, the college submits that the appellant has not provided a reasonable basis to conclude that additional records exist. It submits that his representations indicate that his real concern is the college's alleged failure to enter grade information into the electronic system in a reliable manner. The college submits that the completeness of the input of information into the college's former information is not an issue under appeal and reiterates that its initial submissions demonstrate that it conducted a reasonable search for records responsive to part 2 of the appellant's request.

[47] Addressing the appellant's request for records responsive to part 3 of his request, the college submits that again, the requester only challenges the colleges evidence adduced in the FOIC's affidavit that despite searches being conducted for copies of assignments, tests and quizzes, none were found and that this reflects the college's general practice of returning copies of student work to students. In response, the college provided another affidavit sworn by the FOIC providing more detail on the searches conducted for this information and advised that additional searches were made and one additional record was located. The college submits that it has now "searched exhaustively" for records responsive to this part of the request.

[48] Finally, with respect to part 4 of the request, the college reiterates its position that section 65(6) applies to the information responsive to part 5 of the request which, in turn, contains information that is responsive to part 4 of the request. Specifically, the college submits that the records responsive to part 4 have been incorporated into the human resources investigation file and have been used to resolve the appellant's complaint addressing the conduct of members of the college's faculty. The college submits that these records "are akin to documents placed in a lawyer's file" which are protected by solicitor-client privilege. The college submits that the records in the investigation report are excluded from the operation of the *Act* as a result of the application of section 65(6). It submits that to locate records responsive to part 4 of the request from another source would require the work described in the fee estimate outlining what is required to search backup tapes.

[49] In sur-reply, the appellant continues to submit that the college did not conduct a reasonable search for responsive records. He also submits that it is important to judge the documents on their intended purpose at the time of their creation and therefore, that the records responsive to part 4 of his request should be extracted from the investigation file which is responsive to part 5.

Analysis and finding

[50] With respect to the searches conducted by the college for records responsive to the various parts of the appellant's request, I accept that they were reasonable and uphold them.

[51] As set out above, the *Act* does not require the college to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request. From the FOIC's affidavits it is clear that various college employees and faculty members were involved in the search for responsive records that she coordinated. I accept that all of the employees who conducted the searches for responsive records were experienced employees, knowledgeable in the subject matter of the request and the records that they were required to search. I accept that the methods that they employed were reasonably suitable to locate responsive records and that they expended a reasonable effort to locate any such records.

[52] In her affidavits, the FOIC provides detailed explanations as to the searches conducted for records responsive to parts 1, 2, 3, and 4 of the appellant's request. She also provides explanations as to why some of the records that the appellant believes should exist do not. In many instances in his representations, the appellant takes issue with the college's record keeping systems and suggests that with respect to certain

types of records, that record keeping is not reliable. He also submits several times that the lack of responsive records indicates that the college did not follow its own policies and procedures. In this respect, the appellant is reminded that it is beyond my jurisdiction to make an assessment regarding either the college's record keeping methods or the manner in which it conducts its own internal affairs, including academic appeals or human resources investigations. As mentioned above, the *Act* does not require the college to provide with absolute certainty that further records do not exist, it simply requires that it provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In my view, in the circumstances of this appeal, the college has done so.

[53] Additionally, as previous stated, 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 additional records might exist. Aside from asserting that additional records *should* exist, the appellant has not provided me with any substantive explanation to support his position. Without further explanation, I do not accept that I have been provided with sufficient evidence of the possible existence of additional records.

[54] During mediation, the appellant stated that an attachment to a specific email and a response to that email should exist. Neither the college nor the appellant specifically addressed this issue in their representations. During mediation, the college explained that the attachment was simply the original message, forwarded again and that there was no response to the email. The appellant has not provided with a reasonable basis to conclude that an attachment to that email, or a response, exists. As a copy of that email is before me, I have reviewed it and accept the explanation provided by the FOIC during mediation regarding the attachment. Additionally, on its face, in my view it is reasonable to assume that no response was sent. In the absence of an explanation providing a reasonable basis upon which to believe that a response to that email or an attachment that amounts to more than the original forwarded message exists, I accept that the college has conducted a reasonable search for both such records.

[55] Accordingly, I find that the college has provided me with sufficient evidence to demonstrate that its searches for records responsive to the various parts of the appellant's request were reasonable and in compliance with its obligations under the *Act*. I uphold the college's search for records responsive to all parts of the appellant's request and dismiss this part of the appeal.

B: Does section 65(6)3 exclude any of the records at issue from the scope of the *Act*?

[56] The college submits that the records responsive to part 5 of the appellant's request are excluded from the *Act* by virtue of the operation of the exclusion at section 65(6)3. As previously noted, in its second supplementary decision letter and in its

representations, the college now advises that it has amended its position that section 65(6)3 applies to exclude the records responsive to part 4 of the request from the scope of the *Act*. It submits that even though the records responsive to part 4 of the request are contained in the human resources investigation report (which makes up the records responsive to part 5), given that they might also be also be retrieved from a different location (in backup email systems) section 65(6)3 does not apply to them when they appear in that alternate context.

[57] As set out above, given that section 65(6)3 is an exclusionary provision, I am of the view that despite the college's amended position I must nevertheless determine whether the exclusion applies to these records, whatever their origin. Such a determination must be made to establish whether they are subject to the *Act* and therefore, whether I have the jurisdiction to review them. Accordingly, my analysis below will determine whether the exclusion at section 65(6)3 applies to the records responsive to both parts 4 and 5.

[58] 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.

[59] 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*.

[60] 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

[61] 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.⁸

[62] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human

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

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.

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

[63] 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

[64] 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 *Act*.¹¹

[65] 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.¹²

[66] 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

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

[67] 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.

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 *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

Part 1: collected, prepared, maintained or used

[68] In its representations, the college provides some background to give context to the records at issue, specifically those that relate to part 5 of the appellant's request.

[69] The college explains that the records relating to part 5 of the appellant's request relate to a complaint that he made to the college's Board of Governors regarding alleged misconduct by college employees. The college states that, at the time of the complaint, the Dean of FAST directly supervised all associated deans of that faculty, including two associate deans who were the subject of the appellant's complaint. The college submits that following receipt of the complaint, the Dean of FAST exchanged a series of emails with the appellant and subsequently advised that human resources would investigate the complaint.

[70] The college explains that an employee in human resources (one of the individuals named in the request) gathered information from the complaint itself, as well as the emails between the appellant and the Dean of FAST to create a confidential investigation plan outlining the appellant's allegations. The two issues identified in that investigation plan as requiring investigation were whether one employee violated the college's Code of Conduct and whether the another employee violated both the Code of Conduct and the Conflict of Interest Policy. The college submits that subsequently, pursuant to the investigation plan, the human resources employee (together with an external consultant, also named in the request) gathered facts and evidence from the appellant, two faculty members alleged to have committed wrongdoing and six other witnesses. During the investigation, a third faculty member was added to the complaint by the appellant. The college explains that at the conclusion of the investigation, the human resources employee issued her confidential report to the Dean of FAST, as well as to her supervisor, the college's VP Academic and VP Human Resources. Following their review of the report, the college explains that the appellant was advised that there was insufficient evidence to support his allegations of misconduct by any of the three faculty members as that term is defined in its Code of Conduct and also that there was no violation of its Conflict of Interest Policy.

[71] The college submits that all of the records that are responsive to part 5 meet the requirements of part 1 of the test as they were collected, prepared, maintained and used by the college during a human resources investigation of alleged employee misconduct.

[72] In his representations, the appellant does not specifically address whether the records at issue were collected, prepared, maintained or used by the college. Rather, the appellant focuses his representations on his view that the possible application of section 65(6)3 is contrary to the college's own policies, specifically that which states that respondents to a complaint being investigated are entitled to know the allegations against them and that statements made by the respondents are disclosed back to the

complainant. He also submits that the exclusion at section 65(6)3 was never intended to permit an institution to override or ignore its own policies or procedures. I will address the appellant's arguments in this respect following my application of the three-part test for the establishment of section 65(6)3.

[73] Having reviewed the records responsive to part 5 of the request, I accept that they were collected, prepared, maintained or used by the college. The records include letters, emails, handwritten notes, hard copies of electronic notes, completed administrative forms and reports relating to the investigation into the alleged misconduct by college employees. All of them appear to have been generated (or prepared) by the college and they are all contained (or maintained) and organized by tab in a binder (collected) in manner that indicates that these records were relied upon (used) by the college in coming to its conclusion that the allegations were unfounded. Accordingly, I accept that all of the records responsive to part 5 of the request were collected, prepared, maintained or used by the college and meet the first requirement of the section 65(6)3 test.

[74] With respect to the records that are responsive to part 4 of the request, the college explains that the emails gathered by the former Dean of FAST form part of the investigation into the concerns raised by the appellant. They submit that although all of these records were included in the human resources investigation report that consist of the records that are responsive to part 5, they can also be located in their original form, in backup email systems.

[75] The appellant submits that "the location of the storage of the record is incidental to the question of whether the information meets the criteria for exclusion." The appellant also submits that it is "important to judge the documents on their intended purpose at the time of their creation."

[76] For part 1 of the section 65(6)3 test to apply, the records must have been collected, prepared, maintained *or* used by the college (or on its behalf). As indicated by the use of the word "or," there is no requirement that all four components be established, simply one of them must be met. Additionally, there is no requirement in this or any part of the section 65(6)3 test, that the location of the storage of the records or their intended purpose at the time of their creation be considered.

[77] In the circumstances of this appeal, I find that the records responsive to part 4 of the request were prepared and used by the college, thereby meeting the requirements of part 1 of the section 65(6)3 test.

Part 2: meetings, consultations, discussions or communications

[78] With respect to the second part of the test for the application of paragraph 3 of section 65(6), the college submits that the records were collected, prepared, maintained or used, in relation to meetings, discussions and communications relating to the terms of employment of the faculty members who were the subjects of the appellant's complaint. The college submits that all of the records have "some connection" to "employment-related matters" as they relate to the potential discipline of college employees and that based on the Divisional Court's decision in *Ontario (Attorney General) v. Toronto Star*¹⁴, "some connection" to an employment-related matter is all that is required for the exclusion in section 65(6) to be engaged.

[79] Again, the appellant does not make any specific representations on whether the records responsive to parts 4 or 5 of the request were collected, prepared, maintained or used by the university in relation to meetings, discussions and communications.

[80] As noted above and as referred to by the college, the Divisional Court in *Ontario (Attorney General) v. Toronto Star*,¹⁵ instructs that for the collection, preparation, maintenance or use of a record to be considered as being "in relation to" any of the circumstances identified in section 65(6), including the meetings, consultations, discussions or communications referred to in paragraph 3, that it must be reasonable to conclude that there is "some connection" between them.

[81] In my view, it is evident on the face of the records for which section 65(6)3 has been claimed that they were collected, prepared, maintained and/or used "in relation to meetings, consultations, discussions or communications" between employees of the college regarding matters relating to the complaints filed by the appellant regarding alleged misconduct by several faculty members. While some of the records clearly relate to meetings, consultations and discussions between college staff, others can be more accurately characterized as communications prepared by the college to facilitate such meetings, consultations and discussions. I accept that it is reasonable to conclude that there is "some connection" between their collection, preparation, maintenance or use and meetings, consultations, discussions or communications held by the college. Accordingly, I find that the second requirement of the section 65(6)3 test has been met.

[82] To be clear, my finding that the requirements of part 2 of the test have been met also applies to the records responsive to part 4 of the request. Regardless of what their original intended use or where they are stored, the records responsive to part 4 of the request were indeed used "in relation to meetings, consultations, discussions or communications" within the college. Therefore, I find that the second part of the test

¹⁴ *Supra*, note 7.

¹⁵ *Ibid.*

set out to determine whether section 65(6)3 applies has been met with respect to the records responsive to part 4 of the request.

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

[83] 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.¹⁶

[84] 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.¹⁷

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

- a job competition¹⁸
- an employee’s dismissal¹⁹
- a grievance under a collective agreement²⁰
- disciplinary proceedings under the *Police Services Act*²¹
- a “voluntary exit program”²²
- a review of “workload and working relationships”²³
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.²⁴

¹⁶ *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.

¹⁷ Order PO-2157.

¹⁸ Orders M-830 and PO-2123.

¹⁹ Order MO-1654-I.

²⁰ Orders M-832 and PO-1769.

²¹ Order MO-1433-F.

²² Order M-1074.

²³ Order PO-2057.

²⁴ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

[86] 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.²⁵

[87] In the circumstances of the current appeal, the college submits that the records responsive to part 5 of the appellant's request relate to employment-related matters as they relate to allegations of employee misconduct by college employees. It submits that allegations of misconduct are clearly human resources issues and that, in such context at all times, the college is necessarily acting in the capacity of employer.

[88] The college also submits that the records responsive to part 5 of the request amount to the complete investigation file of a specific complaint and that if any such records also exist outside of the investigation file, they are not responsive. The college submits that it has a "critical interest in the process supported by the records in the human resources investigation file" and that such interest satisfies the requirement that it must be of more than a "mere curiosity or concern" requirement. It submits that the appellant's complaint outlined serious allegations of misconduct regarding members of the college faculty which are, by their very nature, related to the employment of those individuals.

[89] The appellant does not make any specific representations on whether any meetings, consultations, discussions or communications by college employees regarding the records were about labour relations or employment-related matters in which the college has an interest.

[90] As previously stated, there is no requirement on the test established for the application of section 65(6)3 that the location of the storage of the records or their intended purpose at the time of their creation be considered. Accordingly, I will not be considering either of these two factors in my assessment of whether part 3 of the section 65(6)3 test has been established.

[91] I will first assess whether the records have some connection to meetings, consultations, discussions or communications about "labour relations or employment-related matters."; then I will determine whether the records relate to 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.²⁶

[92] As stated, the terms "labour relations matters" and "employment-related matters" 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.

²⁵ *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.

²⁶ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, note 11.

[93] The records (responsive to both parts 4 and 5) make it clear that the individuals who were named in the complaint and subject to the investigation of possible misconduct were, at the time of their creation, employees of the university. While it is likely that their employment with the university was governed by a collective bargaining agreement, I have not been provided with specific evidence of this fact. However, even if it can be argued that the subject matter of these records does not arise out of a collective bargaining relationship and, therefore, cannot be said to relate to "labour relations". In my view, the information at issue would clearly be described as relating to "employment-related matters." The records address an investigation into serious allegations of misconduct of members of the college's faculty which are clearly matters arising from a relationship between an employer and its employees.

[94] Accordingly, I am satisfied that the type of information at issue can, depending on the context, be described as either "labour relations" or "employment-related" matters and therefore would fall squarely within either of the two terms contemplated in the exclusion at section 65(6)3.

[95] The final component that is required for the exclusion at section 65(6)3 to apply is whether the university "has an interest" in the labour relations or employment-related records. As stated above, that phrase requires the university to have more than a "mere curiosity or concern" in the information and has been held to apply to matters involving the university's own workforce.

[96] Given that the records address allegations of misconduct by members of the college's faculty and the subsequent investigation into those allegations, I accept that they clearly relate to the college's management of its own workforce. Therefore, I find that the college has more than a mere curiosity or concern with respect to these matters. I am satisfied that the college has an interest in these records. Also, I have found that the subject matter of the records has "some connection" to labour relations or employment related matters in which the college "has an interest". Accordingly, the requirements of part 3 of the section 65(6)3 test has been established.

Conclusion

[97] In summary, I find that all three requirements have been established to support the application of the exclusionary provision in section 65(6)3 of the *Act* to the records responsive to both parts 4 and 5 of the request. It is clear that the records responsive to these parts of the request were collected, prepared, maintained or used by the college in relation to meetings, consultations, discussions or communications about either labour relations or employment-related matters in which it has an interest.

[98] Additionally, I find that none of the exceptions outlined in section 65(7) apply to any of the records at issue in this appeal. Accordingly, I find that, as a result of the operation of the exclusion at section 65(6)3, the records responsive to parts 4 and 5 of

the request fall outside of the scope of the *Act*. As a result, I have no jurisdiction to determine whether any exemptions apply to them. I dismiss this part of the appeal.

Appellant's arguments regarding the disclosure of records responsive to part 5 of the request

[99] While, as noted above, the appellant did not make representations that correspond directly to the three components of the test that is to be applied to determine whether records are subject to the exclusion at section 65(6)3, he made a number of general arguments outlining his view that section 65(6)3 does not apply to the records he seeks in part 5 of his request and why such records should be disclosed to him.

[100] Specifically, the appellant submits that the exclusion at section 65(6)3 is contrary to the college's own policies and procedures which establish an obligation for the college to disclose "much or all" of the information responsive to part 5 of his request. He submits that the college's policies and procedures clearly indicate that statements and information must be available to all participants in an investigation. He submits that the investigations done in response to his complaint were done in secret and no statements made by the respondents were disclosed to him.

[101] The appellant states that section 65(6)3 was never intended to permit an institution "to override or ignore its own established policies or procedures or to ignore its contractual obligations to its client or to its own employees." He also submits that based on the college's own policy and procedure documents, it never intended such investigations into employee conduct to be exempt from disclosure under the *Act*. He further suggests that at the time the records were created, there was no intent for them to be excluded from disclosure under the *Act*. He submits that the college has not provided any argument for overriding its own policies and procedures and applying the provisions of the *Act* not to disclose the records related to the investigation that arose as a result of his complaint.

[102] The college is an institution under the *Act*. Therefore, regardless of any policies or procedures that it establishes, all records under its custody or control are subject to the possible application of a number of identified exemptions and exclusions outlined therein. As explained above, when an exclusion applies to a particular record that record falls outside of the scope of the *Act* and this office does not have any jurisdiction over them; specifically, this office cannot order either their disclosure or their non-disclosure.

[103] In the circumstances of this appeal I have found that the exclusion at section 65(6)3 applies and the records responsive to parts 4 and 5 of the request are not subject to the *Act*. As a result, regardless of what policies or procedures have been

established, it is not within my jurisdiction to order the college to disclose them to the appellant.

[104] The appellant also submits that the procedure for the investigation was kept secret, both "procedure [that the college] was supposed to be following as well as any procedure that they were actually using – deviations from official policy." He submits that the college "certainly [was] not following the rules of any established procedure document" and states that it has said so in a number of emails.

[105] Additionally, the appellant explains that the only information that was disclosed to him was a short written statement issued upon completion of the investigation. He submits that this statement confirms only that an investigation was carried out and identifies the issues and allegations that were investigated. He submits that he observed that the college did not list all of the issues that it claims to have investigated and that the listed issues do not match with the allegations he raised.

[106] In response to the appellant's comments regarding how the college addressed his complaint, although there is no evidence before me of any wrongdoing on the part of the college, it is outside of my jurisdiction to determine whether the investigation into the complaint that he filed was completed in accordance with any policies or procedures regarding such investigations that may have been established by the college. Accordingly, it is not incumbent on me, nor is it appropriate for me, to comment on any of these matters.

ORDER:

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

Original signed by: _____
Catherine Corban
Adjudicator

_____ August 31, 2015