

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3641

Appeal PA14-191-2

Fleming College

July 29, 2016

Summary: Fleming College (the college) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for access to meeting records, complaint files, and the college's review of its Emergency Management post-graduate certificate program. The college denied access to the records in part, citing the application of the discretionary economic and other interests exemptions in section 18(1)(c) and (f) and the employment-related exclusion in section 65(6)3 of the *Act*. This order upholds the college's decision under sections 18(1)(c) and (f) and partially upholds its decision under section 65(6)3. This order also upholds the college's search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1)(c) and (f), 24(1), and 65(6)3.

Orders Considered: Order PO-3594.

OVERVIEW:

[1] Fleming College (Fleming or the college) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to the following records:

Record of [date] meeting with [Dean #1] and follow up report Record of telephone conversation on [second date] with [Dean #2] and record of actions taken as a result of discussion.

"Overall complaint file" that [Dean #2] referenced in email on [third date]. Emergency Management [EM] program review as well as all files & reports relating to my personal complaint.

[2] The college issued a decision granting partial access to the responsive records (identified by the college as Records A through N) and indicating that records responsive to one part of the request do not exist. The college cited the discretionary exemptions in sections 13(1) (advice or recommendations), 18(1) (economic and other interests) and the employment-related exclusion in section 65(6) of the *Act* to deny access to the remaining records.

[3] The requester (now the appellant) appealed the college's decision.

[4] In the course of mediation, the college issued a revised decision disclosing additional records and citing sections 13(1), 18(1), 21(1) (personal privacy) and the exclusion in section 65(6) (employment or labour relations) of the *Act* to withhold the remaining records.

[5] Upon reviewing the additional records and the index of records, the appellant indicated that she no longer seeks Records A, B, C, F, G and H. Accordingly, these records and section 21(1) of the *Act* were no longer at issue.

[6] The appellant further indicated that she believes that additional records responsive to her request should exist. The college subsequently conducted two additional searches and reported that no additional records were located.

[7] The college then issued a revised decision with an amended index indicating that the college was granting partial access to Record D. The college explained that due to a further review of the file, the college was releasing two new versions of Records B and D.

[8] The appellant indicated that she continues to believe that additional records relating to Records J, and K, as well as a meeting she had with Dean #1 should exist.

[9] The appellant indicated that she wishes to proceed to adjudication to obtain access to the withheld portions of Records D and L, as well as Records E, I, L, M and N in their entirety, as well as to have the reasonableness of college's search adjudicated upon.

[10] No further mediation was possible and the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Representations were exchanged between the parties in accordance with section 7 of the Information and Privacy Commissioner of Ontario's (the "IPC's") *Code of Procedure and Practice Direction 7*.

[11] In its representations, the college withdrew its section 13(1) claim. Therefore,

this exemption is no longer at issue.

[12] The college then provided the appellant with further disclosure of information from Records D and E, namely the information ordered disclosed in Order PO-3594. Records D and E are identical in both this appeal file and the appeal resulting in Order PO-3594. That order involved the college and resulted from a request by a different requester (appellant).¹

[13] As a result, in Record D, the following information remains at issue:

- page 2 (other than the first paragraph), pages 3, 5, 6, 17 and 20.

[14] And, in Record E, the following information remains at issue:

- page 30, and portions of pages 21 and 22.

[15] In this order, I uphold the college's decision under sections 18(1)(c) and (f) and partially uphold its decision under section 65(6)3. I also uphold the college's search for responsive records

RECORDS:

[16] The records remaining at issue are set out in the following chart:

Record	Description	Released?	Exemptions or Exclusion applied
D	2013 EM Review Report	In part	18(1)(c) and (f)
E	2012 EM Research Findings	In part	18(1)(c)
I	Graduate Student Complaint (May 1, 2013)	No	65(6)3
L	Email Chain from March 2013 between Dean and Chair	In part	65(6)3
M	Professor responding to complaints	No	65(6)3
N	Student feedback session results	No	65(6)3

¹ However, in Order PO-3594, Record D started at page 2 of the records and Record E started at page 22 of the records. In Order PO-3594 there was an additional record (Record B) that was listed as page 1 of the records at issue.

ISSUES:

- A. Do the discretionary economic and other interests exemptions at sections 18(1)(c) and (f) apply to the information at issue in Records D and E?
- B. Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?
- C. Does the section 65(6)3 employment or labor relations exclusion exclude portions of Record L (pages 52, 53 and 54) and Records I, M and N from the application of the *Act*?
- D. Did the institution conduct a reasonable search for additional records relating to Records J, and K, as well for records related to a meeting the appellant had with Dean #1?

DISCUSSION:

A. Do the discretionary economic and other interests exemptions at sections 18(1)(c) and (f) apply to the information at issue in Records D and E?

[17] Section 18(1) states in part:

A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

[18] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.²

Section 18(1)(c): prejudice to economic interests

[19] The information the college claims is subject to section 18(1)(c) is found at

² Toronto: Queen's Printer, 1980.

pages 2 (other than the first paragraph), 3, 5, 6, and 17 of Record D, as well as pages 21, 22 and 30 of Record E.

[20] The college states that it competes with other colleges for students seeking to enroll in its EM post-graduate certificate program (the program). It lists three other colleges as direct competitors offering programs identical in nature, and lists another three colleges that offer programs in the same area. It submits that disclosure of the information at issue in the records to its competitors would allow them to implement changes to their programs that would counteract the college's strengths and exploit its weaknesses, making the college less attractive to new students enrolling in the program.

[21] Concerning Record D, the college describes the information at issue as follows:

- Page 2 - outlines the strength of the program and compares it to two other institution's programs.
- Pages 2 and 3 - discusses cost structure and contribution to overhead.
- Page 3 – discusses enrolment growth and contribution to overhead.
- Page 5 - discusses graduation rate and student satisfaction data.
- Page 6 - discusses historical enrolment data.
- Page 17 - lists the program's contribution to overhead.

[22] Concerning Record E, the college describes the information at issue as a measurement of the program's strengths and weaknesses by category.

[23] The appellant states that the college actively participated in creating one of its competitor's EM program by selling its own program curriculum to that college. She states that as one would expect the programs to be identical, it is difficult to accept that the college is maintaining a competitive advantage over this competitor college by not disclosing documents.

[24] The appellant states that being primarily distance-education based, both other competitor colleges attract a very different pool of applicants to their program than does Fleming, which operates a classroom-based program. Therefore, she states that there is no substantial basis to believe that disclosure of the documents would negatively impact the college as the other colleges all attract different applicants.

[25] The appellant further states that the programs offered at the three other colleges are not sufficiently related to the college's EM program to be considered as a risk. She states that the colleges offer some courses in the field of emergency management, but they do not offer the same certification as Fleming and should be considered unrelated

and of no concern.

[26] In reply, the college states that making the information at issue available would allow the other colleges to make changes to their programs to more closely mirror Fleming's program and that even if they do not currently compete for the same type of applicant, they could make changes and subsequently offer a program that does.

Analysis/Findings

[27] For sections 18(1)(c) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³

[28] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁴

[29] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁵

[30] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.⁶

[31] After the supplementary disclosure of information from Records D and E to the

³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁴ Order MO-2363.

⁵ Orders P-1190 and MO-2233.

⁶ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

appellant by the college, I sought further representations from the appellant as to the information remaining at issue in these two records with reference to my findings in Order PO-3594, which was issued while the current appeal was being processed. The appellant did not provide further representations on these two records.

[32] In Order PO-3594, regarding the information remaining at issue in Records D and E, I stated:

I agree with the college that information in the records that would allow the college's competitors to implement changes to their programs that would exploit the college's weaknesses, would make the college less attractive to new students enrolling in the program. I do not have evidence that the weaknesses of the program included in the records have been addressed as referenced by the appellant. I find that information about weaknesses in the program comes within section 18(1)(c) as being information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of the college.

However, I do not accept the college's argument that information about the EM program's strengths is information that comes within section 18(1)(c). I find that information about the program's strengths is information that the college would publicize and is information whose disclosure would not be prejudicial to its economic interests or competitive position, but beneficial to the same.

[33] I then specifically considered the application of section 18(1)(c) to the records in Order PO-3594 and found the following:

Record D - 2013 EM Program Review Report from February 5, 2013. ... Although the college has provided a description of the information at issue in this record, it did not provide, about this and about the other records at issue, explicit representations as to the potential for harm should the specific information at issue be disclosed.

I will consider the information at issue on each page of Record D.

Pages 2 to 4 [pages 1 to 3 of Record D in this appeal] - [Page 2, other than the first paragraph] and page [3] reveal weaknesses in the program and I find that section 18(1)(c) applies to this information.

Pages 6 and 7 [pages 5 and 6 of Record D in this appeal] - I agree with the college that these two pages are exempt under section 18(1)(c) as these pages are charts that categorize and tabulate the information that is summarized on page [3] of Record D. As stated above, I have found that the information on page 4 is subject to 18(1)(c) ...

Page 18 [page 17 of Record D in this appeal] - The college has severed the percentage the program contributes to its overhead from page [17]. As I have found the same information on page [3] subject to section 18(1)(c), I find the exemption applies to the same information on page [17] of Record D ...

Record E - this record is entitled Key Research Findings. The college has withheld this entire 23-page record under section 18(1)(c) and describes this as information that measures the program's strength and weaknesses by category. Much of this record contains research from publicly available sources about the college, other colleges, job postings, and registration data. I find that this information is not subject to section 18(1)(c). However, I find that certain information in this record does reveal weaknesses in the program, specifically page 31 [page 30 of Record E in this appeal] and certain information on pages 22, and 23, [pages 21 and 22 of Record E in this appeal] and I find that this information is subject to section 18(1)(c). Other than this information on pages [21, 22 and 30], I will order the remaining information in Record E disclosed, as no other exemptions have been claimed for this information.

[34] Both the college and the appellant in this appeal made similar representations on the application of section 18(1)(c) as did the college and the appellant in Order PO-3594, and the appellant did not provide any representations when provided with a copy of that order. In these circumstances, I adopt my findings for Records D and E in Order PO-3594 and find that the information at issue in these two records for which section 18(1)(c) has been claimed is subject to this exemption.

Conclusion re section 18(1)(c)

[35] In conclusion, I find that the following information is exempt under section 18(1)(c), subject to my review of the college's exercise of discretion:

- page 2 (other than the first paragraph), pages 3, 5, 6, and 17 of Record D, and
- page 30 and portions of pages 21 and 22 of Record E.

[36] I will now consider the application of section 18(1)(f) to page 20 of Record D, as the college has claimed this exemption for this information.

Section 18(1)(f): plans relating to the management of personnel

[37] In order for section 18(1)(f) to apply, the institution must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:
 - (i) the management of personnel, or
 - (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public⁷

[38] This office has adopted the dictionary definition of “plan” as a “formulated and especially detailed method by which a thing is to be done; a design or scheme”.⁸

[39] The college states that the exemption at section 18(1)(f) applies to page 20 of Record D since these are all “suggested” changes for the program title and outcomes upon successful completion of the program. It states that these changes would be put in place once the plans outlined earlier in the document have been put in place.

[40] The appellant states that although these documents may include plans to change the EM program, they are all part of a complaint that originated from the 2011-2012 academic year. She states that if not a single item has yet to be “put in place,” by August 2015, then this suggests that there is no actual plan, and that the college is simply withholding the information.

[41] In reply, the college states that the appellant has no knowledge as to the reason why this review was conducted, the extent of these plans or how long it would take to put these plans in place.

Analysis/Findings

[42] In Order PO-3594, I found that page 20 of Record D contains a “formulated and especially detailed method by which a thing is to be done; a design or scheme” as to what it anticipates the program will offer in the future. I also found in that order that I had no evidence that the plan on page 20 has been put into operation or made public. Therefore, I found that this page was subject to section 18(1)(f).

[43] As was the case with the section 18(1)(c) exemption, both the college and the appellant in this appeal made similar representations on the application of section 18(1)(f) as did the college and the appellant in Order PO-3594.

[44] Therefore, I adopt my findings for Record E in Order PO-3594 and find that page 20 of Record E is subject to section 18(1)(f). Page 20 of Record E contains plans

⁷ Orders PO-2071 and PO-2536.

⁸ Orders P-348 and PO-2536.

relating to the management of personnel or the administration of the college that have not yet been put into operation or made public. Therefore, this information is exempt, subject to my review of the college's exercise of discretion.

B. Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

[45] The section 18(1) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[46] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[47] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[48] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁰

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

⁹ Order MO-1573.

¹⁰ Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[49] The college states that in exercising its discretion, it considered that the appellant did request access to her own personal information in the form of documentation of her complaint and it disclosed these records to her (Records J and K). The college further states that the nature and quantity of the information to which access is denied under sections 18(1)(c) and (f), as it relates to the EM program, is significant enough in its entirety to be harmful to college's ability to compete against other colleges in attracting new students to the program.

[50] The appellant did not address this issue for Records D and E in her representations.

Analysis/Findings

[51] Based on my review of the information at issue and the college's representations, I find that the college exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[52] I find that the college properly considered the purpose of the section 18(1) exemption, which is to protect information whose disclosure would be sensitive to its economic interests. Therefore, I uphold the college's exercise of discretion and find that the following information is exempt from disclosure:

- page 2 (other than the first paragraph) and pages 3, 5, 6, 17, and 20 of Record D, and
- page 30 and portions of pages 21 and 22 of Record E.

C. Does the section 65(6)3 employment or labour relations exclusion exclude portions of Record L (pages 52, 53 and 54) and Records I, M and N from the application of the *Act*?

[53] 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.

[54] 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*.

[55] 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.¹¹

[56] 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.¹²

[57] 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.¹³

[58] 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.¹⁴

[59] The exclusion in section 65(6) does not exclude all records concerning the

¹¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹² *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.

¹³ Order PO-2157.

¹⁴ *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.

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.¹⁵

[60] 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.¹⁶

[61] 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.

[62] The college states that Record L is an email chain that was collected by the college for the purposes of discussing the complaint brought forward by the appellant in relation to another employee (page 52). It states that this email details issues that will be discussed with an employee about their involvement in the complaint (page 52). It also states that the email references further actions that need to be taken with regards to the working relationship with said employee (page 54).

[63] The college states that Record I was prepared by the Dean of the School in response to telephone and email complaints received from students in the EM program. In it, the working relationship between one employee and the college's students is discussed.

[64] The college states that Record M was prepared by an employee of the college as a communication in response to the complaint received from the appellant that outlines the working relationship between the employee, other employees who teach in the program and students of the program.

[65] The college states that Record N is a survey of students who were enrolled in the EM Program, which was collected by the college for the purpose of consulting with students on their working relationship with their professors, in response to the

¹⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

¹⁶ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

complaint raised by the appellant.

[66] The appellant states that while all four records were prepared by the institution in relation to communications, thereby satisfying the first two conditions of 65(6)3, the records fall short of meeting the third criteria. She states that the records were generated after an email sent by her that outlines "general concerns with the 2011/2012 EM program" and raises concerns over the behaviour of a Fleming College employee. She states that because all of the reports were generated as a result of a complaint regarding the actions of an employee, they should not be considered as employment-related matters.

[67] In reply, the college states that Record L does not discuss the employees' past actions, but references a similar action that the institution undertook in relation to another employee and documents actions that will be taken to investigate the complaint (page 52), as well as further actions that need to be taken with regards to the working relationship with said employee (page 54).

[68] The college states that Record I does not discuss employees' past actions but discusses the timeline that led to the complaint and the actions undertaken to investigate the complaint.

[69] The college states that Record M does not discuss employees' past actions but outlines the working relationship between the employee, other employees who teach in the program and students of the program. It states that this is a document that outlines the actions of the students who were involved in bringing forward the complaint and defends the state of the program by bringing forward evidence on the quality of the program and the employees who teach the program.

[70] The college states that Record N does not discuss employees' past actions but is a survey of students who were enrolled in a subsequent year of the EM program. It was collected by the college for the purpose of consulting with the students on their working relationship with their professors.

Analysis/Findings

[71] I agree with the appellant and the college that both parts 1 and 2 of the test have been met for the four records at issue, namely that:

1. the records were prepared by the college, and
2. this preparation was in relation to communications.

[72] I will consider whether part 3 of the test has been met for each record, that is,

whether these communications are about employment-related matters¹⁷ in which the college has an interest.

[73] 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.¹⁸

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

- a job competition¹⁹
- an employee's dismissal²⁰
- a grievance under a collective agreement²¹
- disciplinary proceedings under the *Police Services Act*²²
- a "voluntary exit program"²³
- a review of "workload and working relationships"²⁴
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.²⁵

¹⁷ The records do not concern labour relations as they do not refer to the collective bargaining relationship between the college and its employees, as governed by collective bargaining legislation, or to analogous relationships.

¹⁸ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

¹⁹ Orders M-830 and PO-2123.

²⁰ Order MO-1654-I.

²¹ Orders M-832 and PO-1769.

²² Order MO-1433-F.

²³ Order M-1074.

²⁴ Order PO-2057.

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

- an organizational or operational review²⁶
- litigation in which the institution may be found vicariously liable for the actions of its employee.²⁷

[76] 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.²⁸

[77] Record L - is an email chain between the Dean and Chair of the department that contains the EM program. Most of this record has been disclosed to the appellant. As stated in the disclosed portions of the record, this record concerns the appellant's complaint about the program. I find that this record is not about employment-related matters but discusses the program.

[78] Although a staff member is named in the severed portions of Record L, this information is not about the terms and conditions of this or any other college employee's employment or about human resources questions.

[79] In my view, the information at issue discusses the processing of the complaint. Based on my review of the record, I do not agree with the college that the severed portions reveal "...issues that will be discussed with an employee about their involvement in the complaint [and] further actions that need to be taken with regards to the working relationship with said employee." Accordingly, I find that the information at issue in Record L is not excluded under section 65(6)3 and I will order the college to issue an access decision regarding it.

[80] Record I - is entitled "Graduate Student Complaint" and is comprised of the details of the college's investigation of complaints about a college employee, a professor. None of the exceptions in section 65(7) apply to this record.²⁹ I agree with

²⁵ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

²⁶ Orders M-941 and P-1369.

²⁷ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

²⁸ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

²⁹ If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. Section 65(7) states:

This Act applies to the following records:

the college that section 65(6)3 applies as it is a document related to matters in which the institution is acting as an employer, and one of its employee's terms and conditions of employment or human resources questions are at issue.

[81] Record M - is described by the college as "Professor responding to complaints". This response by the professor is in response to the investigation conducted by the college as set out above concerning Record I. None of the exceptions in section 65(7) apply to this record. I find that section 65(6)3 applies, as this record is a document related to matters in which the institution is acting as an employer, and one of its employee's terms and conditions of employment or human resources questions are at issue.

[82] Record N - is a survey entitled "Emergency Management 2013 Class Survey Results". It provides student feedback of the students who were enrolled in one year of the EM program. This survey contains several questions about the EM program, the college, and the administration of the program.

[83] I disagree with the college that Record N is a survey about the program's student's working relationship with their professors, as it encompasses several areas about the program. Therefore, I find that this is not a survey about an employment-related issue. Accordingly, as none of the exceptions in section 65(7) apply, I find that the information at issue in Record N is not excluded under section 65(6)3 and I will order the college to issue an access decision regarding it.

Conclusion

[84] In conclusion, I have found that the section 65(6)3 employment or labor relations exclusion applies to exclude only Records I and M of the *Act*. Therefore, I will order the college to issue an access decision regarding Records L (pages 52, 53 and 54) and N, as I have found that section 65(6)3 does not apply to this information.

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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.
 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

D. Did the institution conduct a reasonable search for additional records relating to Records J and K, as well for records related to a meeting the appellant had with Dean #1?

[85] 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 24.³⁰ 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.

[86] 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.³¹ To be responsive, a record must be "reasonably related" to the request.³²

[87] 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.³³

[88] 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.³⁴

[89] 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.³⁵

[90] The institution was required to provide a written summary of all steps taken in response to the request.

[91] The college states that both Dean #2 and the Chair completed a search of their own hardcopy files and their email accounts. For the Vice President of Academics (who had retired at the time of the document search), the Administrative Assistant to the Vice President searched both hardcopy files and the email account of the Vice

³⁰ Orders P-85, P-221 and PO-1954-I.

³¹ Orders P-624 and PO-2559.

³² Order PO-2554.

³³ Orders M-909, PO-2469 and PO-2592.

³⁴ Order MO-2185.

³⁵ Order MO-2246.

President. The college further states that, other than the following records, there are no other responsive records with Dean #2, the Chair, or the Vice President of Academics:

- Record J, which was created from a conversation between the appellant and Dean #2 in September of 2012;
- Record K, which was created from an email chain between the appellant and Dean #2 in April of 2013;
- Record M, which is the response by the professor regarding the complaint by the appellant; and
- Record I, which is the summary of the complaint written by Dean #2 in May of 2013.

[92] With regards to records related to a meeting the appellant had with Dean #1, the college states that, as Dean #1 had retired prior to receiving the request, the following searches were conducted:

1. The Chair (who was second in command below Dean #1) searched all hardcopy records in both her filing cabinet and those of Dean #1 as well as her email account.
2. The Operations Liaison (who acts in an administrative support role to Dean #1) also searched all hardcopy records in the possession of the school in filing cabinets.
3. A second Operations Liaison searched through her email account as well as the email account belonging to Dean #1. Record L page 52 outlines the results of the search in the Dean #1's email account and confirms that there were no records found.
4. The Freedom of Information Coordinator witnessed the Information Technology department's search through the email account belonging to Dean #1.

[93] The appellant states that:

Search remains an issue because the institution was unable to produce a record of the appointment in which the student met with Dean #1. The student later produced this information **for the institution** as proof that the meeting took place. If the institution was unable to find the confirmation email when they conducted their search but the student was able to produce it for them, then it is difficult to believe in the thoroughness of the search conducted by the college. Furthermore, during the meeting, Dean #1 stated that he was going to discuss the issues

raised with [named professor], and yet no record of that meeting was produced [emphasis in original].

[94] In reply, the college contends that it conducted a thorough search of the email belonging to Dean #1. It considers the four steps listed above to be exhaustive in attempting to locate this record.

Analysis/Findings

[95] The request sought access to records regarding:

- a meeting with Dean #1,
- a telephone conversation with Dean #2 and record of actions taken as a result of this discussion,
- the overall complaint file,
- the EM program review, and
- all files and reports relating to the appellant's complaint.

[96] In her representations, the appellant submits that the college has not located a record of the appointment with a retired dean, Dean #1, that the appellant already had a copy of. She is also concerned about records relating to discussions with a professor. As noted above, the latter records have been located and the college has applied the section 65(6)3 exclusion to them.

[97] The college provided the appellant with a detailed index listing 13 records that it had located, some of which were denied in part or in full due to the section 65(6)3 exclusion or the section 18(1) exemption.

[98] Based on my review of the parties' representations and the records, I find that the college has conducted a reasonable search for responsive records. It has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. As stated above, *FIPPA* does not require the college to prove with absolute certainty that further records do not exist. I find that the appellant has not provided a reasonable basis for me to conclude that the searches conducted by the college were not reasonable.

[99] Accordingly, I uphold the college's search for responsive records.

ORDER:

1. I uphold the college's decision to deny access to the following information:

- Records I and M,
 - page 2 (other than the first paragraph), pages 3, 5, 6, 17, and 20 of Record D, and
 - page 30 and portions of pages 21 and 22 of Record E.
2. I order the college to provide the appellant with an access decision regarding the information in Records L (pages 52, 53 and 54) and N, treating the date of this order as the date of the request.
 3. I uphold the college's search for records.

Original Signed by: _____
Diane Smith
Adjudicator

_____ July 29, 2016