

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3684

Appeal PA15-468

University of Ottawa

January 11, 2017

Summary: The University of Ottawa withheld a report responsive to the appellant's request for a copy of a report and any accompanying letters about allegations of bias, favouritism or nepotism against a named individual. The section 65(6)3 exclusion for certain employment-related records applies to the report, so it is excluded from the scope of the *Act*.

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

Orders and Investigation Reports Considered: Order P-1369; PO-2157; PO-3029-I; PO-3194, PO-3549.

Cases Considered: *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (CanLII); *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

OVERVIEW:

[1] The appellant made a request to the University of Ottawa (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a report and any accompanying letters addressing allegations of bias, favouritism or nepotism by a named individual.

[2] The university identified a report with a cover letter (the report) and an email as

responsive to the request. The university granted access to the email, but denied access to the report, citing several exclusions and exemptions in the *Act*. The university also assessed a fee for access to the records.

[3] The appellant appealed the university's decision. During mediation, the appellant continued to seek access to the report, except any signatures in the report. He also took the position that there was a public interest in disclosure of the report, raising the application of the public interest override at section 23 of the *Act*.

[4] As mediation did not resolve the appeal, it proceeded to adjudication. The university was invited to provide representations on the issues set out in a Notice of Inquiry.

[5] In its representations, the university clarified that it withheld the report on the basis of the exclusions at section 65(6)3 (labour relations and employment-related records) and section 65(6)5 (records related to hospital privileges), and, in the alternative, applying the exemption at section 21 (personal privacy). The appellant was invited to provide representations on these issues, in addition to the issues raised by the appellant regarding the application of the section 23 public interest override and the university's fee for access to the records.

[6] The parties' representations were shared in accordance with IPC *Practice Direction 7*.

[7] This order finds that the withheld report is outside of the scope of the *Act* under section 65(6)3. As a result, I do not have the jurisdiction to make an order for its disclosure or non-disclosure, and the issue of fees becomes moot.

RECORD:

[8] The report, including the cover letter, comprises eight pages.

DISCUSSION:

LABOUR RELATIONS OR EMPLOYMENT-RELATED RECORDS

Does section 65(6)3 exclude the report from the scope of the *Act*?

[9] Sections 65(6) states in part:

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

...

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

[10] If section 65(6) applies to the report, and none of the exceptions found in section 65(7) apply, the report is excluded from the scope of the *Act*. The effect of such a finding is that I would lack the jurisdiction to make any order to disclose or withhold the report. In such an instance, the university would have full discretion to disclose or withhold the report outside of the *Act's* access regime.

[11] For section 65(6)3 to apply, the university must establish that:

1. the records were collected, prepared, maintained or used by the university 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 university has an interest.

Part 1: report collected, prepared, maintained or used

[12] The university says that the report was prepared for the Dean of the Faculty of Medicine by a review team. This is supported by my review of the report. I will discuss the use of the report further below, but I am satisfied that part one of the test is met.

Part 2: meetings, consultations, discussions or communications

[13] As the university's representations state, the report addresses the possible reappointment of the Chair of a university department (the chair), in addition to discussing the state of the department generally. The report was commissioned to coincide with the end of the chair's 5-year term and possible reappointment. I am satisfied from the content and timing of the report that it was the catalyst for meetings, consultations, discussions or communications, at least with the chair, if not others including the report's authors, regarding the reappointment of the chair. Therefore, I find that part two of the section 65(6)3 test is met.

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

[14] 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.¹

[15] The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.² The phrase “labour relations or employment-related matters” has been found to apply, for example, to:

- a review of “workload and working relationships”³
- a job competition⁴
- an employee’s dismissal⁵
- records relating to a consulting firm report on human resources⁶
- a review of the reasonableness of an employee’s conduct⁷

[16] The issue of reappointment of the chair is clearly an employment-related matter, as it is a human resources decision. Therefore, the meetings, consultations, discussions or communications regarding the reappointment of the chair are about employment-related matters.

In which the institution has an interest

[17] 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.⁸ Whether to re-appoint the chair is an employment-related matter in which the university has an interest, because it is a human resource decision that affects the university and an individual who holds a senior position within the university.

Appellant’s representations

[18] The appellant’s sole submission in this appeal is based on a provision of the collective agreement⁹ which makes clear that members (which would include the chair) and the employer shall avoid actions on any matters in which they have a conflict of

¹ *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

² Order PO-2157.

³ Order PO-2057.

⁴ Orders M-830 and PO-2123.

⁵ Order MO-1654-I.

⁶ Order PO-3194.

⁷ Order PO-3549.

⁸ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

⁹ Section 10.2 of a Collective Agreement available at <http://hrdocrh.uottawa.ca/pdf-nac/agreements/apuo.pdf>.

interest. The appellant says that to the extent that the report is an investigation of a conflict of interest, such a conflict takes the matter outside of the sphere of the employment relationship. The implication of the appellant's argument seems to be that this would make the report incapable of being prepared or used in relation to an employment-related matter. I do not accept that the issue raised by the appellant affects the application of section 65(6)3 to the report. Without disclosing the report's contents, even if the report or the meetings, consultations, discussions or communications dealt with a conflict of interest of the type referred to by the appellant, in the circumstances this would still qualify as an employment-related matter, because it would impact on the employees' employment, and would therefore be considered a human resources issue.

[19] In any event, I am satisfied that there were meetings, consultations, discussions or communications relating to the possible reappointment of the chair, that this qualifies as an employment-related matter, and that the report, in its content and timing, has some connection to those meetings, consultations, discussions or communications.

Organizational or operational review

[20] Though not raised by the appellant, I note that the phrase "labour relations or employment-related matters" has been found not to apply in the context of an organizational or operational review.¹⁰ For example, in Order P-1369, section 65(6)(3) was found not to apply to a report of a review of the Liquor Control Board of Ontario, because the connection between the contents of the record and "meetings, consultations, discussions or communications about labour relations or employment-related matters" was considered too remote to find that the collection, preparation, maintenance or use of the record was "in relation to" such meetings, consultations, discussions or communications. In addition, the adjudicator was not persuaded that the record itself represented a consultation or discussion "about" labour relations or employment-related matters; rather, it was found to be a broadly-based organizational review which touched occasionally, and in an extremely general way, on staffing and salary issues. Given that the mandate for the report at issue in this appeal was described as a review of a university department, I will address this issue.

[21] While the mandate of the report at issue suggests a broad organizational or operational type review, as noted above, the university says that one of the purposes the report was used for was in making a decision regarding the reappointment of the chair. I am satisfied that a key function of the report and, in context, a good deal of the purpose for its creation was to inform discussion about the reappointment of the chair. This distinguishes the report from organizational or operational reviews.

[22] Further, prior to 2010, some orders had interpreted the term "in relation to" in

¹⁰ Orders M-941, P-1369 and PO-3029-I.

section 65(6) to mean “for the purpose of, as a result of, or substantially connected to.”¹¹ However, in 2010, in *Ontario (Attorney General) v. Toronto Star*,¹² (*Toronto Star*) the Divisional Court addressed the meaning of the term “relating to” in section 65(5.2) of the *Act*. Relying on the interpretation of that phrase by the Supreme Court of Canada, the Divisional Court found that the phrase requires “some connection” between the records and the subject matter of that section. The court rejected an interpretation of “relating to” as requiring a “substantial connection”.

[23] Subsequent orders have applied the Divisional Court’s findings in *Toronto Star* to the words, “in relation to” in section 65(6).¹³ Consequently, for the collection, preparation, maintenance or use of a record to be “in relation to” the activities mentioned in this section, it must be reasonable to conclude that there is “some connection” between them.¹⁴

[24] For section 65(6)3 to apply, therefore, there must be some connection between the report and “meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.” If section 65(6)3 required the record at issue to have a single purpose, it might be more difficult to conclude the section 65(6)3 exclusion applies to the report. However, the Divisional Court decision in *Toronto Star* found that only “some connection” between the records and the subject matter of that section was required.¹⁵ In my view, this means that the report can have some aspects that deal with more general organizational matters and still meet the section 65(6)3 requirements.

[25] While the mandate of the report at issue suggests a broad organizational or operational type review, even if it contains some information of this type, which the university itself accepts, the record at issue directly addresses an employment-related matter that was the subject of discussions, namely the reappointment of the chair. Because of the context in which the report was prepared and its content, I am satisfied that there is a clear connection between the report and the meetings regarding reappointment of the chair. That distinguishes the record from those involving organizational or operational reviews, such as Order P-1369.

Summary: section 65(6)3

[26] I have found that there is a clear connection between the report that was prepared for the university and meetings, consultations, discussions or communications

¹¹ For example, Order P-1223.

¹² *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (CanLII).

¹³ For example, Orders MO-2589, PO-3194 and PO-3549.

¹⁴ *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (CanLII) at para 43, applied in Order MO-2589.

¹⁵ As noted in Order PO-3194, two of the three orders where organizational or operational reviews were found to fall outside the section 65(6)3 exclusion were decided before the *Toronto Star* decision.

regarding the reappointment of the chair, which I found was an employment-related matter. This is because of the content of the report, and the university's evidence of the purpose and context of the report, including the timing of its creation, as outlined above. I am therefore satisfied that the report satisfies the requirements of section 65(6)3.

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

[27] The *Act* still applies to the report if it falls within any of the exceptions in section 65(7). The parties did not raise the section 65(7) exceptions, and none arise from my review of the report. Therefore, section 65(6)3 applies to the record and it is excluded from the scope of the *Act*.

Other issues

[28] Given my finding that section 65(6)3 applies to exclude the report from the scope of the *Act*, it is not necessary to consider the possible application of the section 65(6)5 exclusion, the section 23 public interest provision, or the issue of the fee for access to the report.

ORDER:

I uphold the university's decision that section 65(6)3 applies to exclude the report from the scope of the *Act*.

Original Signed by: _____
Hamish Flanagan
Adjudicator

January 11, 2017