

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3846

Appeal PA17-172

Wilfrid Laurier University

May 23, 2018

Summary: The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* for certain emails that reference him. The university issued a decision denying access in part to the responsive records, citing the exclusion in section 65(6)3 (labour relations and employment related matters), and the exemption in section 13(1) (advice or recommendations).

In this order, the adjudicator partially upholds the university's decision under section 65(6)3 and does not uphold its decision concerning the information for which it has only claimed section 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 65(6)3, 13(1).

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) to Wilfred Laurier University (WLU or the university). His request was for all emails that:

(1) were sent between [dates];

(2) were sent by any one of the following individuals:¹

- Associate Dean, Student Affairs and Special Projects, Faculty of Arts,
- Associate Dean, Research and Curriculum, Faculty of Arts,
- Vice-president: Academic and Provost,
- Assistant Vice President: Human Resources,
- Senior Administrative Officer, Faculty of Arts,

and sent or cc'd to someone else on this list;

(3) reference the appellant ... in any way; and,

(4) are emails on which the appellant was not copied.

[2] The university issued an access decision granting partial access to the emails. It cited the exclusion in section 65(6) (labour relations and employment related matters), and the exemptions in section 21(1) (personal privacy) and section 13(1) (advice or recommendations) to deny access to portions of the responsive records.

[3] The appellant appealed the university's access decision to this office.

[4] During mediation, the university clarified that, with respect to section 65(6), it was relying upon section 65(6)3. The appellant confirmed that he was disputing the university's sections 65(6)3, 21(1) and 13(1) claims. The appeal could not be resolved at the mediation stage and it proceeded to the adjudication stage, where an adjudicator conducts an inquiry.

[5] As the records may contain the personal information of the appellant, I added the discretionary personal privacy exemption in section 49(b) and the discretionary exemption in section 49(a) (discretion to refuse requester's own information) as issues in this appeal.

[6] Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[7] In his representations, the appellant indicated that he is only seeking his own personal information, not that of other individuals, and particularly is not interested in receiving access to any emails sent by students.

¹ Names listed in request removed, replaced by titles from WLU's website.

[8] As the appellant is not interested in receiving access to other individuals' personal information, the personal privacy exemptions in sections 21(1) and/or 49(b) are no longer at issue in this appeal.

[9] In this order, I partially uphold the university's decision under section 65(6)3 and do not uphold its decision concerning the information for which it has only claimed section 13(1).

RECORDS:

[10] The records at issue are emails. The portions containing the personal information of other individuals are no longer at issue. Of the remaining information, the university has claimed the application of:

- section 65(6)3 for all of the pages at issue, except for pages 22-23, 53-58;
- section 13(1) for pages 28-29, 53-58, 87-90, 99-107, 118-119, 126-143, 165-175, 179, 188-190, 195-197, 201, 215-221, 225-226, 233-234, 244-245, 262-263, 267, 273-274, 303.

ISSUES:

- A. Does the section 65(6)3 labour relations and employment records exclusion exclude the records from the *Act*?
- B. Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the information at issue?

DISCUSSION:

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

[11] Section 65(6) 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:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

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

[12] 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*.

[13] 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.²

[14] 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.³

[15] 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.⁴

[16] 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.⁵

[17] 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 *Municipal Freedom of Information and Protection of Privacy Act*.⁶

[18] 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

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

³ *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.

⁴ Order PO-2157.

⁵ *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.

⁶ Orders P-1560 and PO-2106.

employees.⁷

[19] 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.⁸

[20] 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.

Part 1: collected, prepared, maintained or used

[21] The university states that employment/human resources matters are at issue in the records, which were all created internally by its employees who collected, prepared, maintained or used the records within the scope of their employment.

[22] The university states that two of the individuals named in the appellant's request had duties directly and specifically related to employment matters in their roles as the Assistant Vice-President: Human Resources and the Vice-President: Academic and Provost (who was the appellant's direct supervisor). The university further states that other named individuals in the records worked in these offices or worked directly with the appellant in the same office.

[23] The appellant did not directly address the three-part test under section 65(6). He did, however, submit that the interpretation of the exclusion in section 65(6) in IPC decisions has become so broad that this interpretation is in conflict with the principle enunciated in section 1(a)(ii), namely that "exemptions from the right of access should be limited and specific."

[24] The appellant also submits that by entering into collective agreements, it is clear that in this case the university does not see allowing employee's access to their personal information (which might include assessments and evaluations) to be detrimental to harmonious labour relations.

⁷ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁸ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

Analysis/Findings re part 1

[25] As all of the records are internal university emails, I agree that the records were prepared or maintained by the university. Therefore, part 1 of the test has been met.

Part 2: meetings, consultations, discussions or communications

[26] The university states that the records in question are communications (primarily email) about employment and labour relations matters, many of which resulted, or stemmed from meetings, consultations or discussions.

Analysis/Findings re part 2

[27] I agree with the university that the records at issue, which are all emails, were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications.

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

[28] The university states that the records relate only to university employees and university employment-related matters.

[29] The university also considered the following orders in making its determination:

- PO-2658, PO-2982 - records relating to an investigation of complaints filed and review of decisions fall within 65(6)3.
- PO-2658 - as an employer of a person who has had a complaint filed against them, the institution clearly has an interest in the employment-related records at issue.
- PO-2057- 65(6) can be applied in context of review of workload and working relationships.

[30] The university states that it considered the principles and intent of the *Act* to allow individuals to have access to their own personal information. It states that it applied the exclusion in section 65(6)3 only where it was clear that there was a need to restrict access to ensure the confidentiality of labour/employment relations information.

[31] The university further states that individuals engaged in university business must have confidence that their communications about labour relations or employment-related matters will be confidential so that they may fully engage in discussions.

Analysis/Findings re part 3

[32] The phrase "labour relations or employment-related matters" has been found to

apply in the context of:

- a job competition⁹
- an employee's dismissal¹⁰
- a grievance under a collective agreement¹¹
- disciplinary proceedings under the *Police Services Act*¹²
- a "voluntary exit program"¹³
- a review of "workload and working relationships"¹⁴
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.¹⁵

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

- an organizational or operational review¹⁶
- litigation in which the institution may be found vicariously liable for the actions of its employee.¹⁷

[34] 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.¹⁸

[35] The records collected, prepared maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.¹⁹

⁹ Orders M-830 and PO-2123.

¹⁰ Order MO-1654-I.

¹¹ Orders M-832 and PO-1769.

¹² Order MO-1433-F.

¹³ Order M-1074.

¹⁴ Order PO-2057.

¹⁵ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

¹⁶ Orders M-941 and P-1369.

¹⁷ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

¹⁸ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹⁹ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

[36] The university did not provide representations on the information at issue in each specific record.

[37] In my view, not all of the emails at issue in the records for which section 65(6)3 has been claimed are records about labour relations or employment-related matters in which the institution has an interest.

[38] I find that pages 8-9, 10, 11, 37, 52, 67, 68-69, 74-75, 76-77, 156, 191, and 223 do not contain information about labour relations or employment-related matters and that part 3 of the test under section 65(6)3 has not been met for this information. These pages contain general administrative matters, not records where the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue.

[39] I will order these pages disclosed, except for the personal information of other individuals found on these pages.²⁰

[40] I find the remaining information in the records meets part 3 of the test under section 65(6)3. These pages do contain information where the university is acting as the employer and the terms and conditions of employment or human resources questions are at issue. None of the exceptions to section 65(6) in section 65(7)²¹ apply to this information.

[41] In conclusion, I have found that, other than the information on pages 8-9, 10, 11, 37, 52, 67, 68-69, 74-75, 76-77, 156, 191, and 223, the remaining pages for which section 65(6)3 have been claimed are excluded from the *Act*.

²⁰ Some of these pages contain the personal information of individuals other than the appellant. For example, page 68 contains the home and cell phone number of an individual other than the appellant in accordance with paragraph (c) of the definition of personal information in section 2(1). Page 74 contains personal information about another individual's medical history in accordance with paragraph (b) of the definition of personal information in section 2(1).

²¹ Section 65(7) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment related matters.
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.

B. Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the information at issue?

[42] The ministry has claimed the application of section 13(1) to pages 28-29, 53-58, 87-90, 99-107, 118-119, 126-143, 165-175, 179, 188-190, 195-197, 201, 215-221, 225-226, 233-234, 244-245, 262-263, 267, 273-274, and 303 of the records.

[43] Other than pages 53 to 58, for which section 65(6)3 was not claimed, I have found the remaining pages for which section 13(1) has been claimed to be excluded from the *Act* by reason of section 65(6)3.

[44] Therefore, I will only consider whether section 13(1) applies to the information at issue in the email chain found at pages 53 to 58. Of these pages, the university has only withheld information from the top three emails on page 53.²²

[45] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[46] The university states that it applied section 13(1) to communications between university employees in which advice or recommendations were provided about departmental or program matters, or where a course of action was recommended. It states that the exempted records contain opinions of university employees pertaining to a decision to be made and are not factual information on matters factual in nature. It states:

The email communication in the records would reveal the advice or the recommendation of a university employee communicated to another university employee, frequently in response to a request for advice. This advice or recommendation is more than mere factual information.

University administrators, including faculty members when acting in their capacity as administrators, deal with a range of issues involving students and departmental/academic unit requirements. Disclosure of the advice or recommendations contained in the relevant records will reasonably be

²² The top three emails on page 53 do not contain the personal information of the appellant, therefore, section 49(a) does not apply to this information. Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

expected to inhibit the free flow of advice or recommendations to the university.

[47] The appellant did not address this issue in his representations.

Analysis/Findings

[48] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²³

[49] “Advice” and “recommendations” have distinct meanings. “Recommendations” refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[50] “Advice” has a broader meaning than “recommendations”. It includes “policy options”, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant’s identification and consideration of alternative decisions that could be made. “Advice” includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²⁴

[51] “Advice” involves an evaluative analysis of information. Neither of the terms “advice” or “recommendations” extends to “objective information” or factual material.

[52] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.²⁵

[53] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section

²³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

²⁴ See above at paras. 26 and 47.

²⁵ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff’d [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.²⁶

[54] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).²⁷

[55] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information²⁸
- a supervisor's direction to staff on how to conduct an investigation²⁹
- information prepared for public dissemination³⁰

[56] The university did not provide representations specific to the actual information at issue on page 53. The university was asked the following questions in the Notice of Inquiry:

1. What is the advice?
2. What is the recommended course of action?
3. Was the advice given by a public servant, another person employed in the service of an institution or a consultant retained by an institution? Please explain.
4. If the advice or recommendation is not contained in the record, how could disclosure of the record reveal the advice or recommendation?

[57] The university did not respond to these questions as they concern the information at issue on page 53. Based on my review of this information, I find that the three emails at issue on page 53 do not contain advice or recommendations. These emails do not contain an evaluative analysis of information or a suggested course of action. Nor do they contain the views or opinions of a public servant as to the range of policy options to be considered by the decision maker or a suggested course of action.

[58] Therefore, I find the exemption in section 13(1) does not apply to exempt the

²⁶ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

²⁷ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

²⁸ Order PO-3315.

²⁹ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

³⁰ Order PO-2677.

information at issue on page 53. As no other exemptions have been claimed for this information, I will order it disclosed.

ORDER:

1. I order the university to disclose the information at issue on pages 8-9, 10, 11, 37, 52, 53, 67, 68-69, 74-75, 76-77, 156, 191, and 223, to the appellant by **June 21, 2018**, except for any personal information of other individuals on these pages. For ease of reference, I am providing the university with a copy of these pages of the records, highlighting the information not to be disclosed.
2. I uphold the university's decision to withhold the remaining information at issue in the records.

Original Signed by: _____
Diane Smith
Adjudicator

_____ May 23, 2018