Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4186

Appeal PA19-00230

Ministry of Labour, Training and Skills Development

September 20, 2021

Summary: This order deals with two records at issue as a result of an access request made to the Ministry of Labour, Training and Skills Development (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The ministry denied access to two records, claiming the application of the employment or labour relations exclusion in section 65(6)3 to one and that a portion of the other was not responsive to the access request. The appellant appealed the ministry's access decision and also raised the possible application of the head's obligation to disclose in section 11(1) and reasonable search. In this order, the adjudicator finds that the exclusion in section 65(6)3 does not apply to a five-page email, that a portion of another record is not responsive to the request and that the obligation to disclose under section 11(1) of the *Act* rests solely with the head. She further finds that the ministry's search for records responsive to the request was reasonable. The ministry is ordered to issue an access decision regarding the email.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 11(1), 24 and 65(6)3.

Orders and Investigation Reports Considered: Orders MO-3225, MO-3766, PO-3557, PO-3861, PO-3909.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of Labour, Training and Skills Development (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for records relating to two complaints the requester made to the ministry.

The first complaint was regarding a health and safety incident at the requester's workplace and the second was regarding a ministry employee.

[2] The ministry located records responsive to the request and issued an access decision to the requester, granting partial access to them. The ministry withheld access to other records, claiming the application of the exclusion in section 65(63) (employment or labour relations) to one record and the mandatory exemption in section 21(1) (personal privacy) to a portion of another record.

[3] The requester (now the appellant) appealed the ministry's decision to the Office of the Information and Privacy Commissioner/Ontario (the IPC).

[4] During the mediation of the appeal, the appellant advised the mediator that he was of the view that more records exist. As a result, the ministry conducted a second search for records, located more records and disclosed the majority of them to the appellant. The ministry withheld a portion of one record, claiming that it was not responsive to the request. The ministry also disclosed to the appellant the information in the record that it had previously withheld under section 21(1). As a result, section 21(1) is no longer at issue in this appeal because the appellant was granted full access to this record. The appellant's position remained that there were more records that exist relating to this access request. The appellant further advised the mediator that the ministry should disclose the records under the obligation to disclose provision in section 11(1) of the *Act*.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. Representations were sought and received from both parties with respect to the two records remaining at issue. Representations were shared between the parties, with the exception of portions of the ministry's representations, as they met the IPC's confidentiality criteria set out in *Practice Direction 7*.[1]

[6] For the reasons that follow, I find that the exclusion in section 65(6)3 does not apply to a five-page email, that a portion of another record is not responsive to the request and that the obligation to disclose under section 11(1) of the *Act* rests solely with the head. I further find that the ministry's search for records responsive to the request was reasonable.

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[1] In his representations, the appellant questioned the ministry's section 21(1) claim. I will not be addressing this issue, given that during the mediation of the appeal, the ministry disclosed to the appellant all the information for which it had claimed section 21(1). As stated above, section 21(1) is no longer at issue in this appeal.

RECORDS:

[7] The records are a five-page email between ministry staff and a portion of handwritten notes of a ministry inspector.

ISSUES:

A. Does the ministry have an obligation to disclose the records under section 11(1)?

B. Does section 65(6)3 exclude the five-page email from the *Act*?

C. Did the ministry properly withhold a portion of the handwritten notes as not responsive to the request?

D. Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the ministry have an obligation to disclose the records under section 11(1)?

[8] The appellant takes the position that the ministry must disclose the records under section 11(1) of the *Act*, which states:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Representations

[9] The ministry submits that the duties and responsibilities set out in section 11(1) belong solely to the head and, as such, the IPC does not have the authority to make an order under section 11(1). It goes on to argue that even if the IPC had the authority to make an order under section 11(1), the appellant has not established that the records at issue reveal a grave environmental, health or safety hazard to the public, nor is it in the public interest for records relating to an employment-related matter be disclosed.

[10] The appellant's representations do not address this issue.

Analysis and findings

[11] I agree with the ministry that section 11(1) is not properly before me. As set out above, section 11(1) is a mandatory provision, which requires the head to disclose records in certain circumstances; specifically, if the head has reasonable and probable

grounds to believe that it is in the public interest to do so and the record reveals a grave environmental, health or safety hazard to the public.

[12] However, Order 65, and subsequent IPC orders[2] have affirmed that the duties and responsibilities set out in section 11(1) of the *Act* belong to the head alone. As a result, neither the Commissioner nor her delegate have the authority under section 11(1) of the *Act* to order disclosure of the records pursuant to section 11(1), and I expressly decline to do so in this appeal.

Issue B: Does section 65(6)3 exclude the five-page email from the *Act*?

[13] The ministry is claiming the application of the exclusion in section 65(6)3 to a five-page email between ministry staff. 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:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[14] 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*.

[15] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[3]

[16] 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]

[17] 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]

[18] 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

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[2] See for example Orders MO-3225, MO-3766, PO-3557 and PO-3909.
[3] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[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.

conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[6]

[19] 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.

[20] 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.[7]

[21] The records collected, prepared maintained or used by the 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.[8]

[22] 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:
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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.
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> 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.

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[6] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[7] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[8] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

Representations

[23] The ministry submits that the internal email exchange is related to a complaint the appellant made to the ministry regarding a ministry employee and contains evaluative and performance related information. The ministry further submits that the email exchange was initiated as a direct response to the appellant's complaint submitted to the ministry online and through a quality of service feedback survey.

[24] With respect to the three-part test required to establish that section 65(6)3 applies, it submits that all three parts of the test have been met. In particular, the ministry submits that the first part of the test has been met, as the email exchange at issue was created internally by the ministry in response to a complaint submitted to it by the appellant. The second part of the test has been met, the ministry submits, because the use of the email exchange was in relation to a manager's discussion/communication about the substance of the complaint against the ministry's employee. The ministry goes on to state:

> The term "in relation to" has been previously defined as "for the purposes of, as a result of, or substantially connected to" [Order P-1223]. The ministry submits that if not for the complaint about the particular employee the record at issue would not have been created. The email exchange was created for the purpose of looking into the Appellant's allegations of wrongdoing against a specific Ministry employee.

[25] With respect to the third part of the three-part test, the ministry submits that the discussion and communication is about an employment-related matter in which it has an interest. In support of its position, the ministry relies on Order PO-2658 in which the IPC held that part three of the test had been met because the records related to an investigation of complaints filed against two OPP officers. The IPC further held that the records were "employment-related" because of the potential for disciplinary action against the officers, and that the institution had an interest in the employment-related matters in the records that extended beyond "mere curiosity or concern."[9]

[26] Lastly, the ministry submits that none of the exceptions in section 65(7) apply and that the record should be excluded from the application of the *Act* because it falls squarely within the intent of the exclusion.

[27] The appellant's representations do not address the possible application of the exclusion in section 65(6)3 to this record.

Analysis and findings

[28] If section 65(6)3 applies to the record, and none of the exceptions found in

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[9] See also Order PO-2748.

section 65(7) applies, the record is excluded from the scope of the *Act*. For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects referred to in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[10] As previously stated, the record at issue is an internal email exchange between ministry staff regarding a complaint the appellant made about a particular ministry employee.

[29] I accept that the record was prepared, maintained and used by the ministry directly as contemplated by part one of the three-part test. From my review of the record itself, as well as the ministry's representations, it is evident that the record captures discussions and communications that took place between ministry staff regarding the complaint made by the appellant to the ministry regarding a ministry employee. Therefore, I find that part two of the test has been met with respect to this record.

[30] To establish part three of section 65(6)3, the ministry was required to provide evidence to demonstrate that the discussions or communications that took place were about employment-related matters in which the ministry has an interest. Past orders of the IPC have found that where records relate to an institution's own workforce, the institution's interest in them, for the purpose of part three of the test in section 65(6)3, amounts to "more than a mere curiosity or concern."[11]

[31] Also, in the *Goodis*[12] case, the Divisional Court found that a file documenting the investigation of a complaint against a police officer was employment-related because of the potential for disciplinary action against the police officer. Notably, in making that finding, the Court also stated at para. 29:

> However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the Act, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document.

[32] In other words, in *Goodis* the Court recognized that investigations into complaints brought by third parties which may result in disciplinary action *may* be employment-related, but may not, depending on the record itself. In the circumstances of this case, I am not satisfied on my examination of this record as well as the evidence provided by the ministry that the record is "employment-related" for the purposes of the exclusion in section 65(6)3.

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[10] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Toronto Star*).
[11] See, for example, Order PO-2426.
[12] Cited in note 6.

[33] In Order PO-3861, I examined a number of records for which the exclusion in section 65(6)3 had been claimed by a hospital. The records related to complaints made by the appellant (in that appeal) to the hospital and the College of Physicians and Surgeons (the CPSO) about a medical resident and the hospital's Chief of Staff. In that order, I found that records that contained information that had some connection to the overall performance appraisal of the medical resident by their supervising physician, as well as records that detailed the overall responsibility of the position of a medical resident qualified as relating to an employment-related matter in which the hospital had an interest.

[34] Conversely, I found that the records relating to the appellant's complaints did not meet the third part of the three-part test. In making that finding, I stated:

> I find that these records relate to the appellant's complaints and involve discussions surrounding the existence of the complaints, how to gather information to respond to the complaints, how to respond to the CPSO, and how to respond to the appellant in response to the complaints. In my view, the records were created in order to respond to the complaints made by the appellant, and were not created in order to enable the hospital to determine whether to take disciplinary or other workplace action against either the medical resident or the Medical Chief of Staff.

[35] Applying the approach taken in Order PO-3861 and on my review of the record itself, without disclosing its content, I find that this record was created in order to respond to the complaint and not for the purpose of enabling the ministry to determine whether to take disciplinary action against the ministry employee or for another employment-related reason.

[36] As a result, I find that part three of the three-part test has not been met, meaning that section 65(6)3 does not apply to the record and, therefore, it is subject to the *Act*. I will order the ministry to issue an access decision under the *Act* to the appellant regarding this record.

Issue C: Did the ministry properly withhold a portion of the handwritten notes as not responsive to the request?

[37] The ministry is claiming that a portion of a ministry inspector's handwritten notes is not responsive to the appellant's access request. The notes relate to a field visit made in response to the appellant's original workplace complaint.

[38] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,

> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

. . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[39] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[13]

[40] To be considered responsive to the request, records must "reasonably relate" to the request.[14]

Representations

[41] The ministry submits that a portion of an inspector's handwritten notes was deemed non-responsive because it deals with a matter unrelated to the appellant or his complaints. The ministry further submits that it is not uncommon to have notes from different matters contained on the same page of a notebook.

[42] The appellant's representations do not address this issue.

Analysis and findings

[43] I have reviewed the portion of the inspector's notes that was withheld from the appellant and I agree with the ministry that it is wholly unrelated to the appellant's complaints, and relates to another matter. As a result, I find that this portion of the inspector's notes is not responsive to the appellant's access request and I uphold the ministry's decision in this regard.

Issue D: Did the ministry conduct a reasonable search for records?

[44] 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.[15] If I am satisfied that the

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[13] Orders P-134 and P-880.
[14] Orders P-880 and PO-2661.
[15] Orders P-85, P-221 and PO-1954-I.

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.

[45] 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.[16] To be responsive, a record must be "reasonably related" to the request.[17]

[46] 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.[18]

[47] 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.[19]

[48] 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.[20]

[49] The ministry was required to provide a written summary of all steps taken in response to the request, and was asked the following questions:

1. Did the ministry contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the ministry did not contact the requester to clarify the request, did it:

    a. choose to respond literally to the request?

    b. choose to define the scope of the request unilaterally? If so, did the ministry outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the ministry inform the requester of this decision? Did the ministry explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the

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[16] Orders P-624 and PO-2559.
[17] Order PO-2554.
[18] Orders M-909, PO-2469 and PO-2592.
[19] Order MO-2185.
[20] Order MO-2246.

search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Representations

[50] The ministry submits that it conducted a reasonable search. In particular, it submits that the Program Manager who received the access request left a message for the appellant after he was unable to locate any responsive records. Once it was discovered that the two case identification numbers provided by the appellant in his access request were, in fact, event identification numbers, the Program Manager was able to oversee the search for records, which was conducted by a Program Assistant. The responsive records located were field visit reports, correspondence, event information forms and inspectors' notes. The ministry submits that the Program Manager was satisfied that the information provided was comprehensive and responsive to the appellant's request, and that the Program Manager is an experienced employee who is knowledgeable and well versed in coordinating freedom of information searches.

[51] The ministry further submits that during the mediation of the appeal, the appellant's position was that more records should exist, including inspector notes and notes from a telephone call to the ministry's contact centre. As a result, further searches were conducted and more records were located, namely notes made by two inspectors as part of a field visit. With respect to the contact centre, the ministry advises that generally the contact centre does not keeps notes of communications and that recordings of the actual calls are only stored for 90 days and then destroyed.

[52] The appellant questions why his correspondence with the contact centre was destroyed. The appellant also submits that there were two field visits and not one, as suggested by the ministry. He is also of the view that there are inaccuracies and discrepancies in the records that he was granted access to.

[53] In reply, the ministry submits that it has provided the appellant with the field visit reports and other records related to the two complaints the appellant made to it. The ministry goes on reiterate that it conducted a reasonable search for records. In particular, it conducted an initial search upon receipt of the appellant's access request and further searches during the mediation of the appeal. The ministry also submits that it did not alter any records as suggested by the appellant.

[54] In sur-reply, the appellant submits that records of his call to the contact centre are a crucial piece of evidence and the ministry should have made a reasonable effort to review and retain them. These type of calls are part of the intake function and must be a part of permanent records held by the ministry. The appellant further submits that he was present at a second field visit and witnessed notes being taken and a report

being printed.

Analysis and findings

[55] I am satisfied that the ministry conducted a reasonable search for records responsive to the appellant's access request. In particular, I find that the ministry attempted to contact the appellant to clarify the identification numbers of the complaints that were the subject matter of the request. It then conducted a search for records and located field visit reports, correspondence, event information forms and inspector notes. I also accept the ministry's evidence that there was a single field visit and that audio tapes of calls made to the contact centre are stored for only 90 days.

[56] I further find that the ministry conducted additional searches during the mediation of the appeal in response to the position taken by the appellant, which is that further records exist. Further records responsive to the appellant's access request were located and subsequently disclosed to the appellant.

[57] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In this case, I find that two experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records, namely the Program Manager and the Program Assistant. As a result, I find that the ministry has made a reasonable effort to identify and locate responsive records.

ORDER:

1. I order the ministry to issue an access decision under the *Act* to the appellant regarding the five-page email, treating the date of this order as the date of the request.

2. I uphold the ministry's decision regarding the responsiveness of the handwritten notes.

3. I uphold the ministry's search for records responsive to the access request.

Original Signed by: September 20, 2021
Cathy Hamilton
Adjudicator