Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4283

Appeal PA17-344

Lakehead University

July 27, 2022

Summary: The appellant made an access request to Lakehead University (the university) for the number of full-time permanent and contract faculty as well as part-time contract faculty, broken down by department for the years 2006-2007 through 2016-2017. The university issued a decision denying access to the information based on the application of the employment or labour relations exclusion in section 65(6) to the information. The appellant appealed, taking the position that the exclusion did not apply to the information and that the university did not complete a reasonable search for responsive records. During mediation, the university also took the position that the responsive information would have to be manually collated, organized and edited in order to create a new record, and that this is not required by the *Act*.

In this order, the adjudicator finds that the responsive information contained in the human resources databases is not excluded from the *Act* by section 65(6)3. He also finds that the responsive information in the databases falls under the definition of "record" under paragraph (b) of section 2(1). The university is ordered to produce a record from the responsive information in its human resources database and issue an access decision relating to same.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F31, as amended, section 2(1) (definition of "record"), 10(1) and 65(6)3; Regulation 460 (under the *Freedom of Information and Protection of Privacy Act),* section 2.

Orders and Investigation Reports Considered: Orders MO-2129, MO-2459, MO-2660, MO-3496, MO-3981, MO-4166-I, P-50, P-1369, P-1572, PO-2613, PO-3642, PO-3684, PO-4056 and PO-4095.

Cases Considered: *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; *Ontario* (*Ministry of Correctional Services*) *v. Goodis*, 2008 CanLII 2603 (ON SCDC); *Toronto Police Services Board v.* (*Ontario*) *Information and Privacy Commissioner,* 2009 ONCA 20; *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2014 ONSC 239; *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario,* 2020 ONSC 4413 (CanLII).

OVERVIEW:

[1] The requester, a researcher conducting a research project on the use of contract faculty in Canada, made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Lakehead University (the university) for the following information:

1. The number of **full-time, tenured (or tenure-stream) faculty** in each university department for each year from the 2006-2007 academic year through the 2016-2017 academic year (inclusive). For greater clarity, I am seeking the number of individuals in each category, not the number of *full-time equivalents*. Please include faculty from all bargaining units, as well as any non-organized faculty.

2. The number of **full-time sessional or contractually limited appointments** in each university department for each year from the 2006-2007 academic year through the 2016-2017 academic year (inclusive). For greater clarity, I am seeking the number of individuals in each category, not the number of *full-time equivalents*. Please include faculty from all bargaining units, as well as any non-organized faculty.

3. The number of **part-time sessional or contractually limited appointments** in each university department for each year from the 2006-2007 academic year through the 2016-2017 academic year (inclusive). (These appointments are sometimes called adjunct or contingent faculty and are generally employed on a course-by-course basis, receiving limited-term contracts to teach one or more courses.) For greater clarity, I am seeking the number of individuals in each category, not the number of *full-time equivalents*. Please include faculty from all bargaining units, as well as any non- organized faculty.

[2] The university issued a decision denying access to the requested information, claiming the application of the employment or labour relations exclusion in section 65(6) of the *Act*. In its decision letter, the university informed the appellant that some of the information was contained in its *Institutional Statistics Book* and was publicly available, and included the web address to that information. It also provided the requester with information concerning its instructor numbers for the years 2015 and 2016 that it had previously supplied to Statistics Canada. Specifically, the university provided the total numbers of full professors, associate professors, assistant professors

and lecturers it provided to Statistics Canada for the years 2015 and 2016.

[3] The requester, now the appellant, filed an appeal of the university's decision with the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to explore the possibility of resolving the appeal.

[4] During the mediation of the appeal, the university advised that data from which responsive information could be compiled is housed within its human resources databases, and that few other departments keep such data. The university further stated that responsive records compiled from data kept by departments other than human resources ("derivative records") would also be excluded from the application of the *Act* under section 65(6).

[5] Also, during mediation, the university conducted a sample search for responsive information within the human resources databases and provided two sample sets of raw data to the IPC, which were not shared with the appellant. The university advised that in performing these searches it did not compile the data in the form requested by the appellant.

[6] The appellant advised the mediator of her belief that documents responsive to the request exist at the university. The appellant indicated that she believes documents may exist in both the locations the university determined are excluded from the application of the *Act* (the human resources databases and derivate records found in other departments). As such, the reasonableness of the university's search for records was added as an issue in this appeal.

[7] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act.* The adjudicator originally assigned to the appeal sought and received representations from the parties. These representations were shared in accordance with the IPC's *Code of Procedure* (the *Code*). The appeal was then assigned to me to continue with the adjudication.

[8] During the course of the inquiry, the university raised a new issue, being whether the responsive information in its human resources databases is a "record" within the meaning of the *Act*. The parties made submissions on that issue.

[9] In this order, I find that the responsive information in the human resources databases is not excluded from the *Act* under section 65(6)3. I also find that the responsive information in the human resources databases falls under the definition of "record" under paragraph (b) of section 2(1) and that section 2 of Regulation 460 does not apply. The university is ordered to issue a new access decision with respect to the responsive record.

ISSUES:

A. Does section 65(6)3 exclude the responsive records from the *Act*?

B. Is the responsive information in the university's human resources databases a "record" within the meaning of the *Act?*

DISCUSSION:

Issue A. Does section 65(6)3 exclude the responsive records from the *Act*?

[10] The university takes the position that the information does not exist "in the format" requested by the appellant. In order to respond to the request, the university submits it would have to pull the information from its human resources databases and/or derivative records[1] which it submits consists of employment-related information in which the university has an interest and therefore falls within the exclusion for employment-related records in section 65(6)3.

[11] Section 65(6)3 of the *Act* 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.

[12] If section 65(6) applies to the record, and none of the exceptions found in section 65(7) applies, the record is excluded from the scope of the *Act*.

[13] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.[2]

[14] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some

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[1] In its representations, the university explains that "derivative records" include any record regarding instructor numbers located in other areas of the university outside the human resources database.
[2] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

connection" to labour relations.[3]

[15] 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.[4]

[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.[5]

[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.[6]

Representations

The university's representations

[18] The university provided its representations in an affidavit sworn by the director of risk management and access to information at the university (the director) who initiated and coordinated the search relating to this request. The director submits that after receiving the access request, he informed the university's office of human resources (HR office) and the office of institution planning and analysis (IPA office), as these would be the most likely repositories of the responsive information. The director submits that after discussion with the heads of these two offices, and other university authorities, he informed the appellant that the university was denying access on the grounds that the information falls into the "employment records" exclusion at section 65(6)3.

[19] The university submits that the instructor employment information responsive to the appellant's request would have been collected by the university and records with instructor numbers would have been prepared and maintained by it. The university submits that the information itself and the records created from this information constitute essential communications among university administrative personnel. It submits that the purpose of this information includes: critical review and analysis of program and departmental operations and size, allocation of financial resources to university programs, determining teaching assignments, preparing reports for the federal and provincial governments and professional and accrediting bodies, and archival studies.

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[3] Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).
[4] Order PO-2157, *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2003] O.J. No. 4123 (C.A.).
[5] Order PO-2157.
[6] *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.

[20] The university submits that the instructor employment information and any records created from this information are not compiled simply for the sake of collecting information, but to convey or to communicate, among its administrative employees and others as necessary, functional employment information essential to the university's effective operation and in compliance with government requirements and professional and accrediting expectations. Accordingly, the university submits that its instructor employment records are intrinsically collected, prepared, maintained and used by or on behalf of the university in relation to communications about employment-related matters in which it has an interest.

[21] The university also submits that it has an interest in knowing about and communicating recorded information concerning its employees, including employment numbers and categories for the purposes described above.

[22] The university submits that section 65(7) has no application to the records sought by the appellant as they do not fall into the categories of agreements or expense accounts.

The appellant's representations

[23] In her representations, the appellant submits that the requested records are not properly characterized as falling within the exclusion in section 65(6) based on the university's mere assertion that the records are "employment data." She refers to the affidavit provided by the university where the director stated that the data is stored "to provide information for various purposes."

[24] The appellant relies on *Ontario* (*Ministry of Correctional Services) v. Goodis* (*Goodis*), where the Divisional Court ruled that section 65(6) must be interpreted narrowly in light of the purpose of the *Act*, and applies to exclude only those records that actually relate to collective bargaining or employment.[7]

[25] She also refers to Order PO-2613 where the adjudicator held that a job evaluation system, described as a database of job descriptions, positions, and classification standards, was not excluded from the *Act* pursuant to s. 65(6)2.

[26] The appellant refers to Order PO-3029-I and submits that records that are prepared "in the course of routine procedures" or that concern "generic operational issues" do not normally fall within the scope of section 65(6)3.

[27] Also, she submits that in considering the application of the *Act* to electronic records, adjudicators have clearly indicated that it is not permissible for public bodies to structure their databases in a manner that would, by design or effect, defeat the right of public access. She refers to Order PO-2904 where the adjudicator stated:

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[7] *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

> ... this office has also stated that institutions have an obligation to maintain their electronic records in formats that ensure expeditious access and disclosure in a manner or form that is accessible by all members of the public. In the electronic age, this is essential for an open and transparent government institution. [See Order M0-2199]. Furthermore, in the postscript to Order P-1572, former Assistant Commissioner Mitchinson emphasized that as parts of government become increasingly reliant on electronic databases to deliver their programs, it is critically important that public accessibility considerations be part of the decision-making process on any new systems design.

[28] Although the appellant's representations were provided by her representative, an affidavit sworn by the appellant was also included. In her affidavit, the appellant submits that she made the same three-part access request to all publicly-funded universities in Canada, requesting information on full-time, permanent faculty; full-time, contract faculty; and part-time, contract faculty; broken down by department, for the years 2006- 07 through 2016-17. She submits that her research project was similar to a project (the Brownlee project) conducted previously by another researcher and which was based on a similar access requests for ten years of data from faculties of humanities and social sciences.[8] The appellant submits that she made minor changes to the access request from the Brownlee project for her own request, including removing the reference to faculties of humanities and social sciences.

[29] The appellant submits that she received information from 73 universities as a result of her access requests and only five universities denied access to the requested information on the grounds the information was related to labour relations. She submits that she was informed by Brownlee that Lakehead University released some records in response to its request for similar information.

Reply representations

[30] In its reply, the university submits that while the responsive records are used for "various purposes," the responsive information and records remain employment records.

[31] The university refers to and distinguishes the case law argued by the appellant. It submits that the records in Order PO-3029-I can be distinguished from the ones at issue as the former concerned an organizational review and related to "generic training or operational issues." The university notes that in that order, the adjudicator held that the exclusion at section 65(6)3 cannot be applied to records that concern "operational procedures to be followed by the institution's employees generally, and do not relate to specific employees." The university submits that the records sought by the appellant are

[8] The appellant included a copy of Jamie Brownlee, "Contract Faculty in Canada: Using Access to Information Requests to Uncover Hidden Academics in Canadian Universities," *Higher Education*, vol. 70, 2015, pp. 787-805.

not generic, but concern specific, actual employees categorized by their specific kinds of employment in actual university departments.

[32] The university also refers to *Goodis*, where the Divisional Court stated that section 65(6) "applies to exclude only those records that actually relate to collective bargaining or employment." The university submits that the records sought by the appellant in fact relate only to employment and, therefore, fall within the section 65(6) exclusion.

[33] The university also submits that it agrees with the appellant when she cites Order PO-2904, and asserts that it has not structured its databases "in a manner that would by design or effect, defeat the right of public access." It also relies on the adjudicator's statement in Order PO-2904 that the IPC has stated previously "that government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed."

[34] The university also addresses the Brownlee project referenced by the appellant. The university disagrees with the appellant that her request was only slightly different from the Brownlee request and submits that there was an enormous quantitative difference in that Brownlee requested data from one faculty for 10 years whereas the request in this appeal was for 41 departments within eight faculties. The university submits that as with the earlier request, it disclosed to the requester what records it had available. Further, the university refers to a statement in the Brownlee report that the university was only one of two where complete sets of data for all types of faculty were never produced as it omitted "part-timers." The university submits that in both requests it was able to give the requesters information on full-time faculty but not part-time staff because it does not have the records on their part-time instructors in the format sought by the requester.

[35] In the appellant's sur-reply, she provides a further affidavit where she submits that her interest in the records is related to neither employment nor collective bargaining, but for research purposes only.

Analysis and finding

[36] The university submits that both the responsive information in the human resources databases and any responsive information in other departments (derivative records) would be excluded under section 65(6)3. I will consider the application of the exclusion to the information in the human resources databases first, and then other responsive records found in other university departments (the derivative records).

[37] For section 65(6)3 to apply, the university 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 use 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.

The human resources databases

Part 1: Was the record collected, prepared, maintained or used by an institution or on its behalf?

[38] Based on my review of the university's representations and the two samples of raw data from the human resources database, I find that the information in the human resources databases was collected, prepared and maintained by the university. I agree with the university that records concerning its instructors would have been prepared and maintained by it. I find that information relating to its instructors, located in its human resources database, would be collected, prepared and used by the university.

Part 2: Was this collection, preparation, maintenance or use in relation to meetings, consultations, discussions or communications?

[39] As noted, the university submits that instructor employment information found in the human resources databases could be used by university administrative personnel for purposes including:

- critical review and analysis of program and departmental operations and size
- allocation of financial resources to university programs
- determining teaching assignments
- preparing reports for the federal and provincial governments and professional and accrediting bodies
- archival studies.

[40] In my view, it is not enough to say that that the information in the databases conveys "functional" employment information that can be used in certain ways. If that were the test, the legislature could simply have said that the exclusion at section 65(6)3 applies to all employment related records or information. Rather, the legislature has carefully chosen its words to encompass only records "collected, prepared, maintained or used ... *in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest*."

[41] In Order P-1369, for example, the adjudicator found that section 65(6)3 did not apply to a report of a review of the Liquor Control Board of Ontario because any

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. Instead, the adjudicator found that the record was a broadly-based organizational review "which touches occasionally, and in an extremely general way, on staffing and salary issues."

[42] In contrast, in Order PO-4056 the adjudicator found that a presentation containing information about the staffing mix of its laundry services satisfied part 2 of the test:

> The hospital states that page 406 is part of a presentation it prepared along with its consultants regarding the streamlining of the hospital's laundry and linen services. It states that this presentation was delivered by hospital staff and the hospital's consultants. It states that page 406 contains plans with respect to the staffing mix responsible for the provision of laundry and linen services to the various hospital sites, and the structure of the hospital's distribution program. The hospital submits that page 406 directly addresses conditions of employment for employees working for the hospital.
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> I agree with the hospital, and I find, that parts 1 and 2 of the test have been met as page 406 is part of a presentation prepared by the hospital in relation to meetings, consultations, discussions or communications regarding the hospital's laundry and linen services.[9]

[43] However, as discussed below, the adjudicator went on to find that part 3 of the test was *not* met for this record and, consequently, it was *not excluded* from the application of the *Act* by reason of section 65(6)3.

[44] In *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*)[10], the Ontario Court of Appeal stated that section 65(6)3, ". . . deals with records relating to *a miscellaneous category of events* about labour relations or employment-related matters in which the institution has an interest." (emphasis added)

[45] The circumstances of this appeal stand in contrast to the adjudicator's part 2 finding in Order PO-4056. Raw data about categories of staff positions residing in a database, or aggregated as requested by the appellant into a record or records showing

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[9] Order PO-4056, paras 120 and 127.
[10] *Solicitor General,* Cited above.

the numbers of staff positions within each category, cannot be characterized as being collected, prepared, maintained or used by the university *in relation to meetings, consultations, discussions or communications* about any of the matters listed by the university above. While the same information may potentially be used in other records relating to those matters – and thereby become the subject of meetings, consultations, discussions or communications in that context – those are not the circumstances before me in this appeal. I am not dealing with records that relate to any *meetings, consultations, discussions or communications* that relate to a miscellaneous category of events, let alone – as I find below – communications about labour relations or employment-related matters in which the university has an interest.

[46] In reviewing the representations and the data samples provided, I am not satisfied that the university has met part 2 of the section 65(6)3 test with regard to the information in its human resources database. For the second requirement to be satisfied, I must find there is *some connection* between the collection, preparation, maintenance or usage of the records and the meetings, consultations, discussions or communications.[11] However, the information in the database, which the university submits is collected intrinsically, appears to be raw data that can be used by the university for many purposes or not at all. The university has indicated some of the purposes for which the information in the databases would be utilized but it has not provided the actual records where the data has been utilized. In my view, it is the derivative records, to use the university's term, that may or may not be excluded by the *Act*, not the raw information from which the derivative record is based. There is no evidence before me showing that the information residing in the human resources databases has been collected, prepared, maintained or used by the university in relation to any specific meetings, consultations, discussions or communications [about labour relations or employment matters]. As I have indicated, while this information has the potential to be so characterized when appearing in other "derivative records," the same cannot be said for the human resources database itself.

[47] Consequently, I am not satisfied that the university has met part 2 of the section 65(6)3 test with regard to the information residing in its human resources databases or compiled in the responsive record(s) in this appeal.

[48] Although all three parts of the test must be met for the exclusion at section 65(6)3 to apply, and I have found that the second part has not been met, I will, nevertheless, discuss if the third part of the test has been met.

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

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

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[11] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII).

- a job competition[12]
- an employee's dismissal[13]
- a grievance under a collective agreement[14]
- disciplinary proceedings under the *Police Services Act*[15]
- a "voluntary exit program"[16]
- a review of "workload and working relationships"[17]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the Health Care Accessibility Act.[18]

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

- an organizational or operational review[19]
- litigation in which the institution may be found vicariously liable for the actions of its employee.[20]

[51] The phrase "employment related matters 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.[21] In *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*)[22], the Ontario Court of Appeal stated that section 65(6)3:

> . . . deals with records relating to *a miscellaneous category of events* "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted [footnote omitted], and the wording of the subsection as a whole, the words, "in which the institution has an interest"

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[12] Orders M-830, PO-2123.
[13] Order MO-1654-I.
[14] Orders M-832, PO-1769.
[15] Order MO-1433-F.
[16] Order M-1074.
[17] Order PO-2057.
[18] *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2003] O.J. No. 4123 (C.A.).
[19] Orders M-941, P-1369.
[20] Orders PO-1722, PO-1905.
[21] *Solicitor General* (cited above).
[22] *Ibid*.

> in subclause 3 *operate simply to restrict the categories of excluded records to those relating to the institution's own workforce* where the focus has shifted from "employment of a person" to "*employment-related matters*". (emphasis added)

[52] The decision of the Divisional Court in *Ontario (Ministry of Correctional Services) v. Goodis* went on to confirm that section 65(6)3 must be interpreted narrowly in light of the purposes of the *Act* so as to exclude only those records that actually relate to employment matters in which the institution has an interest. The Divisional Court stated:

> Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest.[23]

[53] The Court stated that that "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*."[24] The Court also noted that whether or not a particular record is employment-related would depend on an examination of the particular record.[25]

[54] Applying this reasoning in Order MO-2660, the adjudicator found that an organizational review did not qualify for the exclusion, noted:

> All institutions operate through their employees. Employees are the means by which all institutions provide services to the public. In this appeal, the record was not created to address matters in which the institution is acting as an employer, *and the terms and conditions of employment or human resources questions are at issue*, in the sense intended by section 52(3). The record is an operational review of the Toronto Fire Service's dispatch system focusing on the efficient and timely response to communications from an operational standpoint.[26] (emphasis added)

[55] I agree with the reasoning in *Ontario* (*Ministry of Correctional Services*) *v. Goodis* and Order MO-2660. In my view, the issue in this appeal is not whether the records simply include information relating to the university's workforce but whether the records address matters in which the university is acting as an employer, and the terms and

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[23] *Ontario* (*Correctional Services*) *v. Goodis*, (cited above) at para. 23.
[24] *Ibid.* at para. 24.
[25] *Ibid.* at para. 29.
[26] This reasoning has been followed in subsequent orders, including, most recently, in Order PO-4095, at para. 36.

conditions of employment or human resources questions are at issue.

[56] In support of its position that the human resources databases fall within the exclusion in section 65(6)3, the university submits that the instructor information in the databases is compiled in order to communicate, to its administrative employees and others, as necessary, functional employment information essential to the university's effective operation. The appellant submits that according to the university's own representations, the information is collected and stored to provide information for various purposes, most of which are not employment-related.

[57] The flaw in the university's argument is essentially the same flaw identified in my analysis under part two of the test above. The instructor information in the databases may potentially be incorporated into a record used which is in relation to a communication about a specific employment related matter or matters in which the university has an interest. However, that is not the case before me, as illustrated by the authorities outlined below.

[58] After considering the pertinent authorities along with the university's representations and the information samples from the human resources databases it provided, I do not accept the university's submission that the responsive instructor-related information in the human resources databases is information that qualifies for the exclusion in section 65(6)3.

[59] As described by the university throughout its representations, the data concerning the university's instructor positions is collected and used in order to fulfill its mandate as a public institution in the area of post-secondary education. Although the responsive information in the databases concerns the university's staff positions, I am of the view that the raw or aggregated information, when taken in its entirety, cannot be said to have been created or used by the university in circumstances where the terms and conditions of employment or human resources questions are at issue such that the university has the requisite interest as employer.

[60] I find that the information at issue is similar to the type of information that is sometimes found in records in which an organizational review is undertaken and should be similarly treated. As my discussion of Order P-1369 above indicates, the IPC has previously found that records relating to an organizational review are generally not excluded from the *Act* under the labour relations exclusion at section 65(6) (or its equivalent in section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act*), unless the focus of such a review is on employment related matters in which the institution has an interest.

[61] At the same time, I would emphasize here that neither the raw data in the university's databases nor the numerical information aggregated in a record or records responsive to the appellant's request rises to the level of an organizational review. The information is not itself an organizational review nor is there any evidence before me to

indicate that the university has conducted such a review or used the information to prepare an organizational review document. My analysis of the authorities dealing with organizational reviews, below, illustrates that while the numbers of staff in the various categories of positions could potentially be used in another document, the presence of that information – standing alone - would generally not be sufficient to meet the test at section 65(6)3.[27] Even where this type of information appears in such a document, it will not qualify under part 3 of the test unless the review in question is *about* an employment related matter or matters in which the institution has an interest.

[62] In my discussion of Order PO-4056 under part 2 of the test, I observed that the record at issue in that case containing information about the staffing mix of the hospital's laundry services satisfied part 2 of the test, but that part 3 of the test was not met. The hospital's submission at paragraph 120 is reproduced again here, along with the adjudicator's part 3 finding at paragraph 128:

> The hospital states that page 406 is part of a presentation it prepared along with its consultants regarding the streamlining of the hospital's laundry and linen services. It states that this presentation was delivered by hospital staff and the hospital's consultants. It states that page 406 contains plans with respect to the staffing mix responsible for the provision of laundry and linen services to the various hospital sites, and the structure of the hospital's distribution program. The hospital submits that page 406 directly addresses conditions of employment for employees working for the hospital.
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> However, *part 3 of the test is not met.* Page 406 [i.e., containing the staffing mix] is part of a general review of the hospital's laundry and linen services, which appears at pages 352 to 423 and 455. Based on my review of the content of the review including page 406, I find that the record that includes this page does not fall within section 65(6)3 as the meetings, consultations, discussions or communications were not about labour relations or employment-related matters in which the institution has an interest for the purpose of part 3 of the test under section 65(6)3. *This is because the review as a whole does not relate to employment-related matters and the hospital's relationship with its workforce.* Rather, it is an overall operational review of the hospital's operations. (emphasis and square parentheses added)

[63] Similarly, in Order PO-4095, the adjudicator rejected the ministry's claim that records implementing an Ontario First Nations Policing Agreement were excluded "because they contain 'communications about staffing and other human resource

[27] Order P-1369.

matters' that the OPP has an interest in as an employer." The adjudicator stated:

> It is accurate, as argued by the ministry, that the records contain components that deal with labour relations or employment related topics, including information about what the ministry has referred to as "human resources considerations." However, when viewed against the entirety of the records, I find that this information is incidental to a separate matter, the ministry's obligations and possible options in relation to the provision of police services to First Nations communities in Ontario.
>
> ...
>
> The application of the exclusions in the *Act* is based on a review of the record at issue. It is also carried out on a record-by-record basis, which emphasizes that the focus of the analysis is whether the record as a whole is in relation to meetings or discussions about labour relations or employment issues. That a record contains information that deals with labour relations or employment topics is not sufficient to attract the exclusion in section 65(6) without other evidence that the record as a whole was created or used for, in this case, a labour relations or employment related matter.
>
> As the adjudicator in Order MO-2660 observed when finding that an organizational review did not qualify for the exemption, "[a]ll institutions operate through their employees. Employees are the means by which all institutions provide services to the public." *The issue is not whether the* records include information pertaining to employees but whether the records were created to address matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue.
>
> In my view, the records at issue were prepared to assist and advise ministry decision makers regarding the matter of provision of police services to First Nations communities, which is not a labour relations or employment purpose. Although some of the records may touch on employment matters, I am of the view that none of the records at issue, when viewed in its entirety, was created or used for a labour relations or employment purpose. Accordingly, I find that section 65(6)3 does not apply to exclude the records from the scope of the *Act.* (emphasis added)

[64] In contrast, records which "directly engage the institution's role as an employer and relationship with its workforce … are … properly excluded under section 65(6)."[28] In Order MO-3496, for example, the record was distinguished from a simple organizational

[28] Order PO-4056.

or operational review where it did more than touch "occasionally, and in an extremely general way" on staffing and other employment related issues. The adjudicator found that the bulk of the report considered the organizational structure of the municipality in terms of employment positions, staffing issues, the working environment and compensation. The adjudicator observed that it was clear from a review of the record as a whole that it had the requisite connection with meetings, consultations, discussions or communications about labour relations and employment-related matters.

[65] Similarly, in Order PO-3684, the adjudicator described the report at issue as a "review of a university department," and in light of this description addressed the issue of whether the report could be considered an operational or organizational review:

> 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 of its creation was to inform discussion about the reappointment of the chair. This distinguishes the report from organizational or operational reviews.* (emphasis added)

[66] In contrast, the responsive records in this appeal are not compiled or maintained in relation to any meetings consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. Although the information at issue in the databases concerns faculty positions, it does not relate to any communications about the university's relationship with its workforce nor does it involve employment-related matters such as staffing issues, the working environment or compensation.

[67] In my view, the mere numbers of staff in various categories themselves do not relate to specific communications about employment-related matters in which the university has an interest or the university's "relationship with its workforce." While the databases may, at some point, incidentally be used for employment-related purposes, their function is primarily, as the university appears to acknowledge, to fulfill its mandate to operate as a publicly-funded institution of post secondary teaching and research. In my view, this type of information is not the type of information section 65(6) is designed to remove from the operation of the *Act.* Moreover, the *Act*'s purpose of shedding light on the operations of institutions would be undermined if this type of information were to be excluded in its entirety from the operation of the *Act.*[29]

[68] This brings me to a consideration of the countervailing transparency purposes of the *Act* and confidentiality purposes of the exclusion at section 65(6). The purposes of

[29] As mentioned above, even if the exclusion does not apply, the institution may still be able to claim the application of one or more exemptions from the right of access to the database, in whole or in part. However, the application of any exemptions is not an issue before me because the university did not claim any exemptions in the alternative to its position that the exclusion applies.

the *Act* and the exclusion, as recognized by Ontario's Divisional Court, were recently discussed in Order MO-3981:

> ... [T]he Ontario courts have said that the exclusions are designed to preserve the confidentiality of *sensitive* labour relations and employment related information. Further, the exclusions are not designed to remove all records involving the institution's employees from the scope of the *Act*. For example, as explained in *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, it is not intended to exclude operational records where the institution is engaged in a capacity calling for public accountability.
>
> In *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, the Divisional Court observed that the scope of section 65(6) was informed by the legislative history indicating that "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":
>
> > Section 65(6) was added to the Act by the Bill 7, An ct to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations, 1st Sess., 36th Leg., Ontario, 1995. The explanatory note in respect of Bill 7 provided that the Act will not apply to "certain" records relating to labour relations and employment matters.
> >
> > On first reading of the Bill, the Honourable David Johnson, then Chair of the Management Board of Cabinet, stated that the proposed amendments to the Act were "to ensure the confidentiality of labour relations information": see Ontario, Legislative Assembly, Official Report of Debates (Hansard), (4 October 1995) (Hon. Allan K. McLean). On proclamation of Bill 7, the Management Board of Cabinet responded with the following comments to the question of whether labour relations documents will be exempt from disclosure under the changes to the Act:
> >
> > > Yes. This change brings us in line with the private sector. Previously, orders under the *Act* made some *internal labour relations information* available (e.g. grievance information, confidential information about labour relations strategy, and other sensitive information) *which could impact negatively on relationships with bargaining agents*. That meant that unions had access to some employer labour relations

> information while the employer had no similar access to union information: see Ontario, Management Board Secretariat, Bill 7 Information Package, Employee Questions and Answers, (10 November 1995).

In *Ministry of Community and Social Services*, the Court went on to distinguish the operational role the institution plays in discharging its institutional mandate from its role as employer:

> Accordingly, a purposive reading of the Act dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals, rather than in the context of the institution discharging its mandate qua employer, the s. 65(6)3 exclusion does not apply. *Excluding records that are created by government institutions in the course of discharging public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act.* The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the Act, but not under s. 65(6).

Similarly, in its decision in *Ontario* (*Ministry of Correctional Services*), the Divisional Court held that the exclusion does not extend records related to the actions of its employees that may give rise to claims against the institution in its capacity of defendant, based on vicarious liability. As the Court said, this would undermine the public accountability purpose of the *Act*:

> The exclusion in s. 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees....
>
> The interpretation suggested by the Ministry in this case would seriously curtail access to government records and thus undermine the public's right to information about government. If the interpretation were accepted, it would potentially apply whenever the government is alleged to be vicariously liable because of the actions of its employees. Since government institutions necessarily act through their employees, this would potentially exclude a large number of records and undermine the

> public accountability purpose of the Act. (emphasis added; footnotes omitted)

[69] The courts have recognized that taking into account the transparency purposes of the *Act* is appropriate when interpreting and applying section 65(6) (or its municipal counterpart, section 52(3)). In *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario,*[30] the Divisional Court recently endorsed the adjudicator's approach in applying the "labour relations" component of the exclusion in light of these competing purposes, again citing the passages from *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*[31] referred to above:

> In my view, the adjudicator's reasons demonstrate an intelligible and justifiable approach to her analysis and interpretation of the statute in this case. As noted by the city, the purpose of the exclusion recognized by Sachs J. in *Ontario* (*Ministry of Community and Social Services*) *v. Doe* involves an assessment of whether the provision in issue might upset the delicate balance of labour relations by impacting negatively on employers' relationships with bargaining agents.
>
> However, in the same case Sachs J. went on to note a countervailing statutory purpose. She wrote:
>
> > ...Excluding records that are created by government institutions in the course of discharge of public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act. The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the *Act*, but not under [the analog to s. 52(3).]
>
> Ensuring accountability for public expenditures is a core focus of freedom of information legislation. In the *Ministry of Community and Social Services* case, this court upheld the decision of an adjudicator *declining* to apply the labour relations exclusion to documents where doing so would undermine the goal of enhancing fiscal transparency and the disclosure sought would not cause any identifiable harm to labour relations. In this case, the adjudicator dealt with both the purpose of the labour relations exclusion and the overriding policy under the statute favouring transparency concerning government expenditures of public funds.

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[30] 2020 ONSC 4413 (CanLii).
[31] 2014 ONSC 239.

[70] In *City of Brockville,* the Court went on to observe that the institution was unable to show how any identifiable labour relations interest would be adversely affected by disclosure of the information at issue:

> ... It is very significant that there was no evidence adduced before the adjudicator that would help her understand how the release of legal fee figures from negotiations would have any effect on labour relations, let alone an unbalanced or destabilizing effect. Counsel's invocation before us of phrases such as "the hearts and minds of the public" and "knowledge is power", while interesting and emotive, are not a substitute for admissible evidence establishing an actual, identifiable risk of prejudice to labour relations.

[71] While the expenditure of public funds is not directly in issue before me, the interest of transparency with respect to records arising in the context of a provincial institution's operational mandate is squarely raised. Excluding the records from the scope of the *Act* could have the effect of shielding university officials from public accountability. Against this interest, the university has advanced no evidence regarding the sensitivity of the records relative to its role as employer or otherwise explained how release of the records would affect how it conducts its relationship with its employees. Simply asserting that the records are employment related and could be used for the purposes the university had listed above is insufficient to satisfy me that they relate to communications about employment related matters in which the university has an interest in its capacity of employer.

[72] As a result, I find that the third part of the test for the application of section 65(6)3 has not been met for the responsive information stored in the human resources database. Since all three parts must be met for the exclusion to apply, section 65(6)3 does not apply to the information contained in the human resources database.

[73] As I have found that the information stored in the human resources databases is not excluded under section 65(6)3, under Issue B I will go on to examine if the university is required to produce a record from that same information. Before doing so, I will address the university's section 65(6)3 claim in respect of the derivative records.

Derivative records

[74] The university also claims that "derivative records" of the human resources databases located in other parts of the university's record holdings are excluded by section 65(6)3 for similar reasons as the human resources databases.

[75] The university describes the "derivative records" as communications between administrative staff for the purposes of teaching assignments and budgeting, amongst other things. The university submits that when it contacted the various faculties and schools within the university about the request, it determined that if responsive

information was available it would be comprised of raw and incomplete data that would have to be manually collated, edited and organized into a responsive record. It also determined that some schools or faculties compiled instructor numbers into reports that were sent to external agencies. The university submits that it is a reasonable inference that these records, which are outside of the human resources database, would also be excluded by section 65(6)3 as they are "indisputably 'communications about employment- related matters in which the institution has an interest.'"

[76] Previous IPC decisions have held that section 65(6) requires a record-specific and fact-specific analysis.[32] In addition, when determining whether the exclusion applies, the record is examined as a whole rather than by individual pages, paragraphs, sentences or words. This whole record method of analysis has also been described as the "record by record approach".[33] In that regard, the IPC has emphasized that in addressing the possible application of the 65(6) exclusion, the whole record is considered.[34]

[77] Just because certain information in a record at issue may be derived from, or contain the same information found in, another record that is subject to section 65(6)3, does not mean that the record at issue is also excluded. For example, an offer of employment specifying an employee's start date, or a letter of resignation specifying the last day of employment, may both be said to qualify for the exclusion at section 65(6)3.[35] However, information in a human resources database setting out the start and end dates of employment would not qualify for the exclusion unless used in another record that is separately shown to be about an employment matter in which the institution has an interest – for example, a letter of recommendation or the employer's response to a grievance.

[78] The way the university has framed its submission would require me to determine whether each derivative record (as a whole) relates to employment-related matters in which the university has an interest. However, the university has not provided a copy of these records and it is clear from its representations that it has not identified all possible responsive derivative records that may exist. As a result, while these records may or may not fall within the exclusion in section 65(6)3, I am unable to determine if any such records" are excluded from the *Act* by section 65(6)3 as claimed.

[79] For these reasons, I am unable to uphold the university's decision that the derivative records, as described in its representations, are excluded under section 65(6)3. If or when the university conducts a search for these derivative records, it will be open to the university to consider whether those specific records are excluded from the *Act*.

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[32] Orders P-1242 and MO-3163.
[33] See, for example, Orders M -352, MO-3798-I, MO-3927, MO-3947, MO-4071, PO-3642 and PO-3893-I.
[34] See Order PO-3642, for example.
[35] Leaving aside the issue of whether an exception in section 65(7) might apply.

Issue B. Is the responsive information in the university's human resources databases a "record" within the meaning of the *Act*?

[80] Because the appellant claims that additional responsive records exist in locations the university did not search, another issue in this appeal is whether the university's search was reasonable. In my view, it is premature to determine the search issue before addressing the issue of whether the responsive information is a "record," since a finding that the responsive information is a "record" may obviate the need for a search for additional responsive records. The university concedes that the responsive information is contained in its human resources databases but takes the position that this information is not a "record" within the meaning of the *Act*, because it cannot be compiled into a record without significant manual work. Consequently, before addressing the search issue, a determination must first be made whether a responsive "record" as defined in the *Act* can be generated from the university's databases.

[81] At mediation and in its representations during the inquiry, the university raised the issue of whether it was required to create a record from the human resources databases and the appellant responded to this claim during the inquiry.

[82] In light of the university's submissions, and considering the relevant case law (set out below), I find that that the university can produce a responsive record from its human resources databases, and that doing so would not unreasonably interfere with the operations of the university.

Representations

[83] The relevant sections of the *Act* and Regulation 460 are set out below.

[84] Section 2(1) of the *Act* defines a "record" as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> > (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
> >
> > (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[85] Section 2 of Regulation 460 under the *Act* states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the *Act* if the process of producing it would unreasonably interfere with the operations of an institution.

[86] The university submits that it is not required to create a record responsive to the appellant's request. It takes the position that the responsive information in its human resources databases falls outside of the definition of record in section 2(1) at paragraph (a) because the data would have to be extensively manually collated and edited to create a record containing the kind of information sought by the appellant. It also submits that the definition of record in paragraph (b) does not apply as it is unable to produce a responsive record from the machine readable information in the databases, by means of computer hardware and software or any other information storage equipment and technical expertise normally used.

[87] The director notes in his affidavit that after consulting with the IPC's mediator, he again communicated with the HR and IPA offices about the nature of the records and confirmed:

> …we do have employment data in our electronic databases concerning full- time sessional and part-time sessional instructors, but it is only in piecemeal, fragmentary form. We can put queries into our system to extract the fragments, but would then have to engage in extensive, time-consuming (at least 70 hours by their estimation) manual editing and collation (including analyzing, cleaning, and compiling the extracted, fragmentary data) to construct the data set sought by the Appellant. In other words, to respond to this request much of our effort would go into creating new records.

[88] The university submits that by means of "computer hardware and software," it could extract from the "machine-readable records" in its databases, information responsive to the request, but even after that, extensive manual collation and editing would be required to create the records sought by the appellant. The university submits that it would have to create new records at a great cost of staff time. The university submits that the *Act* does not impose this obligation on institutions.

[89] The university notes that during mediation it provided to the IPC samples of the raw data provided by the IPA office, to illustrate the kinds of data that its staff would have to deal with and edit to respond to the request. The university confirms that this raw data was obtained after searching the HR databases, because only HR has instructor numbers information systematically organized.

[90] In her representations, the appellant submits that given the limited information she requested, the number of persons employed in certain categories, this should properly be characterized as a record under paragraph (b) of the definition of "record"

in section 2(1), because this information is a "record that is capable of being produced from a machine-readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution."

[91] The appellant submits that the university, in its submissions, appears to have confirmed that it would be possible to create a responsive record. She submits that it is possible for the university to fulfill the request using computer hardware, software and technical expertise currently in use. She also submits that the university has not demonstrated that fulfilling the request would unreasonably interfere with its operations.

[92] The appellant submits that the jurisprudence decisively recognizes the obligation of a public institution to create a record in response to an access request, if it is possible to do so from machine-readable records, or, in modern terms, data.

[93] The appellant also submits that the university previously responded to other organizations' requests for similar information, specifically Statistics Canada and the Council of Ontario Universities (COU). She refers to Statistics Canada, which collects an annual count of the number of full-time teaching staff at Canadian universities and she includes a chart setting out this information as well as a description of the data Statistics Canada relied on. She submits that this demonstrates that the university is able to respond to requests for information similar to her own.

[94] The appellant also refers to a survey conducted by the Council of Ontario Universities (COU) where the university provided the COU with exactly the kind of information that she has requested. The appellant included the COU survey as an exhibit to her affidavit. Further, the appellant submits that the university's position is inconsistent with the director's own acknowledgment in a supplementary affidavit that similar documents were previously prepared and disclosed to the COU in 2015, as well as Statistics Canada.

[95] In its reply representations, the university confirms that apart from the information it already provided to the appellant, it does not have the requested information in the format the appellant seeks.

[96] The university submits that since the record is not capable of being produced "by means of computer hardware or software or any other information storage equipment and technical expertise normally used" by it, it is not necessary to examine section 2 of Regulation 460. In other words, the university submits that it does not have an obligation to show that the process in producing the records would "unreasonably interfere with the operations" of the university.[36] However, it submits that in any event, if it were compelled to produce the responsive records it would unreasonably interfere

[36] Section 2 of Regulation 460.

with its operations. It submits that as the third smallest public university in Ontario it has very limited staff resources to devote to operations outside its academic and research missions and mandates. It submits that its IPA office advises that these resources would be put under severe strain if required to produce records to the appellant's specifications.

[97] The university's director refers to a 70-hour estimate to create a record, and submits that this is only for the work done in the IPA office and that he is informed by the IPA office that the number of hours required could triple given the work required from other departments. The director provides the following process for producing a record:

a. create a query report with software to query existing data from the HR database (1 staff member from each of HR, Enterprise Resource Planning ("ERP") - a department of Lakehead's Technology Services Centre, & IPA, with the IPA staff member having to devote 15 hours to this activity; the HR and ERP members would probably also each have to spend at least 15 hours on completing this task)

b. manually test query (1 staff member from each of HR, ERP, & IPA, with the IPA employee having to devote 10 hours to this exercise; the HR and ERP members would probably also each have to spend at least 10 hours on completing this task)

c. manually check and clean data results from query (1 employee from each of HR & IPA, with the IPA staff member having to devote 20 hours to this task; the HR member would probably have to spend an equal amount of time)

d. verify results are correct/add additional data:

    a. personally contact each Faculty/department (1 employee from each Faculty and each of HR & IPA; the IPA member, and likely each of the Faculty and HR employees, would have to devote 10 hours to this operation)

    b. use software to create supplemental queries to support data results (1 staff member from each of HR & IPA; the IPA member would have to devote 10 hours to this task, and the HR member likely an equal amount of time)

e. manually parse data into full-time vs part-time, by year and then by department (1 staff member of the IPA would have to spend at least 3 hours on this task)

f. manually compile numbers into each category by year and then department (1 staff member of the IPA would have to devote at least 2 hours to this task).

Analysis

[98] After reviewing the parties' representations and considering the relevant case law, I conclude that the information in the human resources databases that would be responsive to the appellant's request falls under paragraph (b) of the definition of "record" in section 2(1) of the *Act*, and that section 2 of Regulation 460 does not apply.

[99] In *Toronto Police Services Board v.* (*Ontario*) *Information and Privacy Commissioner*[37] the Ontario Court of Appeal discussed the application of a contextual and purposive analysis of paragraph (b) of the definition of "record." In that case, the information, sought by a journalist concerning racial profiling, was stored in two electronic databases maintained by the Toronto Police Services Board (the police), but contained personal identifiers. In order to avoid infringing the privacy rights of the individuals in question, the journalist asked that the unique identifiers for each individual be replaced with randomly generated, unique numbers, and that only one unique number be used for each individual. As set out in an affidavit by a computer analyst employed by the police, they had the technical expertise needed to retrieve the information in question in the format requested, but to do so, they would have to design an algorithm that was capable of extracting and manipulating the information that presently existed in the two electronic databases and reformatting it.

[100] The adjudicator whose order was subject to the appeal[38] had found that the information being sought by the journalist constituted a "record" under the *Act* and ordered the police to respond to the requests by issuing access decisions in accordance with the notice provisions of the *Act*. The police applied to the Divisional Court for judicial review of that decision and explicitly raised for the first time the argument that the information requested did not constitute a "record" within the definition under paragraph (b) because it could only be produced by means of software that the police did not normally use. The Divisional Court found that the adjudicator's interpretation of paragraph (b) of the definition of "record" was unreasonable and allowed the application.

[101] In allowing an appeal of the judicial review and upholding the adjudicator's decision, the Court of Appeal discussed the application of a contextual and purposive analysis paragraph (b) of the definition of "record". I quote from the Court's decision at some length, given its relevance to the issue before me:

> A contextual and purposive analysis of s. 2(1)(b) must also take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored. This technological reality tells against an

[37] 2009 ONCA 20.
[38] Order MO-1989.

interpretation of s. 2(1)(b) that would minimize rather than maximize the public's right of access to electronically recorded information.

The Divisional Court made no mention of these principles of interpretation in constructing s. 2(1)(b) of the Act and in concluding that the Adjudicator's interpretation was unreasonable. *This omission led the court to give s. 2(1)(b) a narrow construction – one which, in my respectful view, fails to reflect the purpose and spirit of the Act and the generous approach to access contemplated by it.*

The Divisional Court's interpretation of s. 2(1)(b) would eliminate all access to electronically recorded information stored in an institution's existing computer software where its production would require the development of an algorithm or software within its available technical expertise to create and using software it currently has. In my view, other provisions in the *Act* and the regulations tell against this interpretation.

Sections 45(1)(b) and (c) of the *Act* require the requester to bear the "costs of preparing the record for disclosure" and "computer and other costs incurred in locating, retrieving, processing and copying a record," in accordance with the fees prescribed by the regulations. Subsections 6(5) and (6) of Reg. 823[39] were enacted pursuant to s. 45(1) of the *Act*. These provisions state:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> …
>
> 5. For developing a computer program or other method of producing a record from machine-readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

In my view, a liberal and purposive interpretation of those regulations when read in conjunction with s. 2(1)(b), which opens with the phrase "subject to the regulations," and in conjunction with s. 45(1), strongly supports the contention that the legislature contemplated precisely the situation that has arisen in this case. *In some circumstances, new computer programs will have to be developed, using the institution's*

[39] The Court was referring to the *Municipal Freedom of Information and Protection of Privacy Act* and its associated Regulation 823. The comparable provisions under the *Act* are section 57 and Regulation 460.

> *available technical expertise and existing software, to produce a record from a machine readable record, with the requester being held accountable for the costs incurred in developing it.* (emphasis added footnotes omitted)

[102] In an early IPC order, Order P-50, former Commissioner Linden found that the *Act* imposes additional obligations on institutions when dealing with the types of records set out in paragraph (b):

> When a request relates to information that does not currently exist in the form requested, but is "… capable of being produced from a machine-readable record …" [paragraph (b) of the definition of "record" under subsection 2(1)], the *Act* requires the institution to *create* this type of record, "subject to regulations."

[103] In short, the former Commissioner found that the *Act* requires an institution to locate information and produce it in the requested format if that information is capable of being produced from an existing machine readable record, and doing so would not unreasonably interfere with the operation of the institution within the meaning of the Regulation.

[104] As noted by the appellant, the adjudicator in Order MO-2129 saw a clear policy rationale underlying the special rules governing computerized or electronic records inherent in paragraph (b) of the definition of record, where he stated:

> The data in a machine readable record, such as a database, can be retrieved, manipulated and reorganized with ease through the use of information technology tools, such as computer software. Consequently, in comparison to paper records, it is significantly easier and less labour intensive for institutions to organize electronic data into the format sought by the requester. This is why section 2(1) of the *Act* defines a record as including any record that is capable of being produced from a machine readable record in the circumstances set out in paragraph (b).

[105] I also agree with the appellant that Order MO-2459 supports the principle that information storage systems developed by institutions ought to foster public access and should not stand as a barrier to access. In that order, the adjudicator stated:

> Moreover, in my view, the manner in which records are stored should not dictate the form in which requests for that information are made. Rather, information storage systems developed by institutions ought to foster public access. They should not stand as a barrier to access or require payment of individual request fees where someone asks for the same information about a number of properties or cases. Referring to electronic records, in *Toronto* (*City*) *Police Services Board v. Ontario* (*Information*

> *and Privacy Commissioner*) [2009] O.J. No. 90, the Ontario Court of Appeal recently quoted with approval the following passage from Order 03-16 (issued by British Columbia's Information and Privacy Commissioner):
>
> > The public has a right to expect that new information technology will enhance, not undermine, information rights under the *Act* and that public bodies are actively and effectively striving to meet this objective.

[106] In a postscript to an earlier order, Order P-1572, the adjudicator discussed the government's increasing reliance on electronic databases:

> As the Ministry and other parts of government become increasingly reliant on electronic databases . . . to deliver their programs, it is critically important that public accessibility considerations be part of the decision-making process on any new systems design. The public's statutory right of access to government records is a critically important component of our system of government accountability. Accessibility and transparency are inexorably linked to public trust and faith in government. Retaining access rights to raw electronic data is an important part of this overall accountability system, and factoring public access requirements into the design of new systems will ensure that these important rights are in fact enhanced rather than irretrievably lost through technology advances.

[107] In a recent order, Order MO-4166-I, the adjudicator examined whether information in a database created and maintained by a health unit could be used to create a responsive record. The requester sought COVID-19 statistics at the lower tier municipality level, rather than at the level the health unit was reporting on its website.

[108] During the inquiry leading to Order MO-4166-I, the health unit was asked about its ability to produce responsive records from the database and whether the process would unreasonably interfere with its operations. The health unit acknowledged that it was able to analyse the data in the database and compile it into computer-generated records; however, it maintained that the many steps to do so would unreasonably interfere with its operations. The adjudicator found that based on the health unit's representations, it was capable of producing a record from the information in its database by means of computer hardware and software, and technical expertise normally used by it. She also found that the health unit's representations on the issue of whether producing the record would unreasonably interfere with its operations did not satisfy the minimal threshold that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities," and found that section 2 of Regulation 460 of the *Act* was not engaged. In so deciding, she stated at paragraph 34:

> The health unit's assertion that it would take an hour to check and confirm the accuracy of each record whose postal code does not align with the 12 named municipalities, and, moreover, its suggestion that epidemiologists would have to perform this check and confirmation, are not reasonable. I agree with the appellant that the health unit appears to overstate the frequency of postal code discrepancies and the time required to check them for accuracy. The health unit does not explain why it would take "one hour per case to produce accurate data" and it provides no evidence to support this submission. I also agree with the appellant that confirming that a postal code falls within a municipality is an administrative task that can be performed by administrative staff. Again, the health unit does not explain why it would employ an epidemiologist to perform this task, or why epidemiologists would be "compelled" to perform this task. It simply declares that its epidemiology team would be tasked with producing the responsive records. Despite my specific related questions, the health unit does not address how providing the requested information would be significantly different, in terms of interference, from its current process of producing the Daily Summaries, which does not appear to unreasonably interfere with its operations.

[109] In my view, there are significant parallels between the circumstances in Order MO- 4166-I and those in the present appeal. In both appeals, the relevant institution took the position that it was not required to produce a responsive record, despite having produced very similar information previously, apparently without incident.

[110] Based on the submissions the university has provided, I find that the university can create a responsive record "by means of computer hardware or software or any other storage equipment and technical expertise normally used" by the university within the meaning of a "record" in paragraph (b) of the definition.

[111] To begin with, I have considered the university's arguments concerning this issue in the context of its submissions on the application of the exclusion at section 65(6)3 of the *Act* to the same responsive records. The university's own submissions in that connection (summarized at pages 5 and 6 of this order) clearly indicate that it has the ability to manipulate and use the employment information in its human resources databases – including "employment numbers and categories" – for a variety of operational and reporting purposes. That summary is reproduced again here for ease of reference:

> The university submits that the instructor employment information responsive to the appellant's request would have been collected by the university and records with instructor numbers would have been prepared and maintained by it... It submits that the purpose of this information includes: critical review and analysis of program and departmental operations and size, allocation of financial resources to university

> programs, determining teaching assignments, preparing reports for the federal and provincial governments and professional and accrediting bodies, and archival studies.
>
> The university submits that the instructor employment information and any records created from this information are not compiled simply for the sake of collecting information, but to convey or to communicate, among its administrative employees and others as necessary, *functional employment information essential to the university's effective operation* and in compliance with government requirements and professional and accrediting expectations...
>
> The university also submits that it has an interest in knowing about and communicating recorded information concerning its employees, *including employment numbers and categories* for the purposes described above. (emphasis added)

[112] In arriving at my conclusion, I have also considered the following relevant factors:

1. the university has produced similar records in the past, to the COU and Statistics Canada (if not broken down in the same level of detail)

2. the university has acknowledged that its human resources databases contains the relevant information, although some is in piecemeal fragmentary form

3. the only information it claims is in *piecemeal, fragmentary form* concerns "full-time sessional and part-time sessional *instructors"*

4. it has programming and other technical expertise to accomplish this task.

[113] *While* the university's director points to "extensive manual collation and editing" that would be required to create the records sought by the appellant, he also confirms that the university has provided similar information in the past. The university submits that it could take up to 210 hours to create a responsive record from the databases. However, it is noteworthy that the university's representations do not address the ability of computer software to assist in organizing the information in the databases together with information that might exist with the faculties. The university's own website indicates that it has been teaching computer science for 25 years at the graduate and post- graduate level, and offers courses in artificial intelligence algorithms. Therefore, it is apparent to me that the university has the "technical expertise normally used" to compile the responsive record from the information in its databases.

[114] Further, I find it is difficult to accept that the university and/or its faculties would not have and maintain a list of teaching staff and the corresponding positions they

occupy, and, further, that they would not have this information in an electronic format that would permit its manipulation and collation in the categories requested by the appellant. For example, from its online presence as evidenced by its website, the university has a faculty and staff directory that is searchable by faculty/staff name or number (presumably instructor number), campus, and department. It lists the name and title of the faculty member - e.g., dean, professor, professor emeritus, associate professor, assistant professor, lecturer, contract lecturer, research chair, acting graduate coordinator, program facilitator, technician, etc.; contact information – telephone and email; and location - by building, campus and office number. Presumably this directory would be archived from year to year or could be recreated from the data in its databases.

[115] The university submits that the information produced from the HR databases would need to be checked and completed by additional searches. However, paragraph (b) of the section 2(1) definition of "record" does not require that the record be exclusively produced using electronic technology. Further, if the university determines that additional "collating" and "editing" is necessary to produce an accurate record, it is reasonable to expect that this could also be accomplished through the development of specifically tailored software using the university's existing technical expertise. If it does not want to create the necessary algorithm(s), it has the choice of collating the data manually. In my view, the definition of record in paragraph (b) does not exclude additional editing or manipulation.

[116] In *Toronto Police Services Board*,[40] the adjudicator was provided with expert affidavit evidence concerning the creation of an algorithm in order to generate a responsive record. In this appeal, it does not appear that the university considered this possibility. Considering the case law set out above and based on the university's own representations, I find that it has ability and the duty to use its existing technical expertise, employing an algorithm or algorithms if necessary, to create a record from the information in its databases, combined, if necessary, with information located in its faculties and/or schools.

[117] The university submits that responsive information in the human resources databases would have to be extensively manually collated and edited in order to capture the kind of information requested by the appellant; however, it has not provided adequate information concerning the mechanics of this process that would include the use of an algorithm(s) nor has it provided samples from the human resources directory that successfully illustrates its obstacles (except the raw samples provided to the mediator, referred to above).

[118] In any event, a database, by definition, is meant to organize information or data in a way that relevant information can be extracted as required. In the normal course, and based on the university's own submissions summarized above, the information in

[40] Cited above.

the university's electronic database should be organized in a way that it can be manipulated and used for whatever purpose the university needs, including responding to an access request. As I have said, the university could use its own technical expertise to create an algorithm to assist in this endeavour. To the extent that additional work would be required to identify and segregate full-time and part-time sessional instructors (i.e., the information the university says is "fragmented"), the university's technical expertise could also be used to develop software to assist in this task. If additional manual work is required to collate and check the accuracy of this information, that work would not in itself remove the responsive information from the scope of the definition of record at paragraph (b) of the definition of "record" in the *Act.*

[119] I have also considered the university's submissions that given the time estimate to create a record, doing so would unreasonably interfere with the operation of the university.

[120] Previous IPC orders have considered the question of whether the process of producing a record would unreasonably interfere with the operations of an institution.[41] Order PO-2151 determined that in order to establish "interference," an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities." I apply this approach in my consideration of the university's representations.

[121] I find that creating a record in the form requested will not unreasonably interfere with the university's operations. First, the university submits that it will need to expend up to 210 hours to produce the requested information and describes a large amount of time for manual extraction and cross-referencing. Although the university set out the proposed mechanism for creating a record from the information in the human resources databases, it does not address the creation of an algorithm to achieve, or assist in achieving, the same result. Also, it is apparent that the university provides much of the responsive information to Statistics Canada and COU without its interfering with the university's operations. While the university has confirmed that the information in its human resources databases concerning part-time and sessional staff is in piecemeal and fragmentary form, in my view, it describes an overly complicated process to extract this information into a record that would be responsive. What I do not see, is the university focussed on more than just the actual faculty numbers of the requested categories existing in the databases that may be responsive, such as other basic information that might allow an algorithm to extract this same information. For example, information concerning the university's payroll system is likely stored in the human resources databases as opposed to being stored in each separate faculty or department. It is not apparent that the university put its mind to other means of information that may be responsive, other than numbers of faculty already existing in the system.

[41] See Orders P-1572, PO-2730, PO-2752, and PO-3280.

[122] In any event, after reviewing the university's representations, they do not show that its proposed process for extracting information from the human resources databases will unreasonably interfere with its operations. It has not provided evidence to show that responding to the request would "obstruct or hinder the range of effectiveness" of the university's activities except to state broadly that as the third smallest university in Ontario it has limited staff resources to devote to operations outside its academic and research missions and mandates and that the IPA office says it will be put under severe strain to respond to this request.

[123] The university's representations on this issue do not satisfy the minimal threshold. Accordingly, I find that the process of producing responsive records would not unreasonably interfere with its operations and that section 2 of Regulation 460 of the *Act* is not engaged in this appeal.

[124] In short, the university has not persuaded me that it cannot produce a responsive record or records using the hardware and software it normally uses (including by developing an algorithm or other software if necessary), or that it cannot do so without unreasonably interfering with its operations.

[125] Since I have found that the responsive information in the human resources databases is not excluded by section 65(6)3, the university will be ordered to produce a responsive record or records, including a fee estimate, if appropriate, to address compiling the information from the databases. The university should also consider working with the appellant to determine how best to extract this information into a responsive record given her indication that she is willing to work with the university. As stated, if the university does not want to utilize computer software, it has the option of compiling specific parts of the record manually instead.

[126] In light of my findings above, it may be unnecessary for the university to search for so-called "derivative" records and I will therefore not address at this time the reasonableness of the university's search for such records. If the appellant is dissatisfied with the university's next access decision, she has the option of appealing it, including on the basis of the reasonableness of the university's search.

ORDER:

1. I find that section 65(6)3 has no application to the responsive information in the human resources databases and that information is, therefore, subject to the *Act.*

2. I find that the responsive information from the human resources databases is a "record" within the meaning of the *Act.*

3. I order the university to issue a new decision in relation to the request, which may include a fee estimate.

4. For the purposes of the procedural requirements of the university's access decision, the date of this order is to be treated as the date of the request.

Original Signed By: July 27, 2022

Alec Fadel
Adjudicator