Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4349

Appeal PA20-00607

Human Rights Tribunal of Ontario

February 3, 2023

Summary: The Human Rights Tribunal of Ontario (the HRTO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all records related to her HRTO file. The HRTO granted access to all correspondence with the appellant, but withheld all records responsive to two portions of the request under the exclusion at section 65(3.1) (quasi-judicial records) of the *Act*. The appellant appealed the HRTO's decision, and raised the issue of reasonable search under section 24 of the *Act* as well. In this order, the adjudicator does not uphold the HRTO's application of the exclusion and orders the HRTO to issue the appellant an access decision with respect to the records withheld. However, she upholds the reasonableness of the HRTO's search for records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c.F31, as amended, sections 1(a), 23, 24, 50(1), 65(3), 65(3.1), 65(5.2), 65(6)3 and 65(7); *Statutory Powers Procedure Act*, RSO 1990, c S.22, as amended, section 25*; Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Sch 5, as amended, sections 5(1), 5(2), and 5(4); *Tribunal Adjudicative Records Act*, 2019, SO 2019, c 7, Sch 60, as amended; *Protecting What Matters Most Act (Budget Measures), 2019,* S.O. 2019, c. 7, as amended; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, as amended, section 3(1)(e); *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F- 25, as amended, section 4(1)(b).

Orders Considered: Order MO-3664; British Columbia Orders 00-16 and F11-16.

Cases Considered: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597 (CanLII); *Rogers Communications Partnership v Ontario Energy Board* 2016 ONSC 7810; *Knight v. Indian Head School Division No. 19*, 1990

CanLII 138 (SCC); *Forest Ethics Advocacy Association v. Canada (National Energy Board),* 2014 FCA 245; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* 2001 SCC 52 (CanLII); *City of Ottawa v. Ontario*, 2010 ONSC 6835; *Tremblay v. Quebec (Commission des affaires Sociales)*,1992 CanLII 1135 (SCC); *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC); *Ministry of Attorney General and Toronto Star* 2010 ONSC 991; *Brockville (City) v. Information and Privacy Commissioner, Ontario* 2020 ONSC 4413 (CanLII); *Dagg v. Canada (Minister of Finance)* [1997], 2 S.C.R. 403; *Summit Energy Management Inc.* v. *Ontario Energy Board*, 2012 ONSC 2753 (Div. Ct.);*Re Clendenning and Board of Police Com'rs for City of Belleville* (1976), 15 O.R. (2d) 97 (Div. Ct.); *Agnew v. Ontario Association of Architects* (1987), 64 O.R. (2d) 8 (H.C.J.); *156621 Canada Ltd. v. The City of Ottawa* (2004), 70 O.R. (3d) 291 (S.C.J.); *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38 (CanLII); *Cherubini Metal Works Limited v. United Steel Workers of America and The United Steel Workers of America, Local 4122*, 2007 CanLII 40505 (SCC); *Rudinskas v. College of Physicians and Surgeons of Ontario*, 2011 ONSC 4819 (Div. Ct.); *Aronov v. Royal College of Dental Surgeons of Canada*, [2001] O.J. No. 1927 (Div. Ct.); *Stevens v. Canada (Attorney General)*, 2003 FC 1259; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner),* 2010 BCSC 931.

OVERVIEW:

[1] The Human Rights Tribunal of Ontario (the HRTO) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*, or the *Act*) for records related to the requester's HRTO file including:

> All documents sent to the HRTO by [the requester]
>
> All internal/external e-mails to/from [the requester] or any other 3rd party
>
> All notes and decisions regarding [the requester's] human rights hearing/case
>
> All internal/external memos, notes, letters and requests received/sent by HRTO personnel

[2] In response, through the Access to Records and Information Office at Tribunals Ontario, the HRTO issued an access decision to the requester, granting her partial access to the responsive records. The remainder of the records were withheld under the exclusion found at section 65(3.1) of the *Act*. The access decision stated: "FIPPA does not apply to any adjudicator's personal notes, draft decisions, draft orders, or communications related to draft decisions, pursuant to subsection 65(3.1) of FIPPA."

[3] The requester, now appellant, appealed the HRTO's access decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] A mediator was appointed to explore resolution. During mediation, the appellant

stated that she is seeking access to a particular e-mail, which she received from a specified person at the HRTO on July 24, 2019. She added that this e-mail stated that she would be receiving the HRTO's decision by September 28, 2019 or thereabouts. The mediator relayed the appellant's search issue to the HRTO and it conducted another search.

[5] The HRTO subsequently issued another access decision, disclosing an additional record. The appellant stated that the record disclosed by the HRTO in its supplementary decision is not the e-mail she is seeking and that she believes the record that she seeks should exist. The mediator relayed that to the HRTO and in response, the HRTO stated that it was unable to locate the specific e-mail sought by the appellant. Accordingly, the issue of reasonableness of the search, under section 24 of the *Act*, was added as an issue in this appeal. The appellant stated that she is also seeking access to the records that were withheld under section 65(3.1). The HRTO confirmed that it is not prepared to disclose these records to the appellant.

[6] Since these issues could not be resolved at mediation, the appeal was moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[7] I began a written inquiry under the *Act* by sending a Notice of Inquiry to the HRTO, setting out the facts and issues on appeal. The HRTO provided representations in response. I then asked the appellant for written representations on the issues set out in the Notice of Inquiry and provided her with a full copy of the HRTO's representations and affidavit. The appellant provided representations in response. I determined that it was not necessary to seek further representations from either party.

[8] However, subsequently, I requested that the HRTO provide the records at issue to the IPC, and it did so.

[9] For the reasons set out below, I do not uphold the HRTO's access decision because I find that the records are not excluded under section 65(3.1), but I uphold the reasonableness of HRTO's search. I order the HRTO to issue another access decision in respect of the records it withheld under section 65(3.1).

RECORDS:

[10] The records at issue consist of several emails and email chains among various HRTO personnel, sometimes including the decision-maker. One of the emails contains a draft letter to the appellant as an attachment.

ISSUES:

A. Does section 65(3.1) apply to exclude the records from the application of the *Act*?

B. Did the HRTO conduct a reasonable search for records?

DISCUSSION:

Background information

[11] By way of background found in the parties' representations, the appellant brought an application before the HRTO the hearing of which ended in October 2018. In July 2019, the appellant wrote to the HRTO expressing concerns about the delay in issuing a decision with respect to her application. The HRTO's former Registrar responded by e- mail on July 24, 2019. The appellant believes that the copy of the e-mail which was provided to her through the access request is different than the one she received (which she states she no longer has).

[12] In response to the request that is the subject of this appeal, the HRTO disclosed responsive records, including e-mails sent to the appellant about the delay in issuing the decision. However, the HRTO withheld other records that it claimed were excluded from the *Act* under section 65(3.1). The last of these emails indicates that the decision had not been released as of the date of the appellant's latest inquiry.

Issue A: Does section 65(3.1) apply to exclude the records from the application of the *Act*?

[13] Section 65(3.1) states:

> This *Act* does not apply to personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity.

[14] The meaning of "quasi-judicial capacity" is "'like' or 'similarly' to a judge."[1] There does not appear to be any dispute that the HRTO is a quasi-judicial tribunal or that its decision-makers act in a quasi-judicial capacity.

[15] The HRTO has the onus of proving that the records at issue are excluded from the scope of the *Act* under section 65(3.1).[2]

[16] The effect of an exclusion is different from the effect of an exemption. If a record is found to be excluded under the *Act*, that means that the *Act* does not apply to the record, although an institution may choose to disclose the record outside of the access scheme of the *Act*.[3]

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[1] *British Columbia* (*Attorney General*) *v. British Columbia* (*Information and Privacy Commissioner*) *et al.*, 2004 BCSC 1597 (CanLII).
[2] Order MO-3191-I.
[3] Order PO-2639.

The HRTO's representations

[17] At the HRTO, applications are heard and decided by a "Tribunal Member" or "Member." The HRTO uses these terms in its representations. For the sake of simplicity in this order, I will instead use the term "decision-maker."

Description of the records

[18] The HRTO describes the records as emails consisting of the following:

1. approximately six e-mails between the Assistant Registrar and the decision-maker responsible for hearing the merits of the appellant's HRTO application relating to when the decision might be released;

2. approximately two e-mails between staff containing a draft letter to the appellant incorporating the decision-maker's comments;[4] and

3. approximately six e-mails between the Assistant Registrar, Registrar and staff relating to the issuance of the decision and containing the decision-maker's instructions on when the decision will be released.[5]

[19] The HRTO's position is that the above emails are "'related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity.'" The HRTO says the emails between staff and the decision-maker about the release of the decision, and emails between staff about file processes and when a decision would be released, are excluded pursuant to section 65(3.1) of the *Act*. The HRTO argues that disclosure of these emails would have an impact on the HRTO's "control of its own process." It states that the emails are all created by or for the decision-maker, a person who is acting in a quasi-judicial capacity.

Control of its own process

[20] The HRTO states that communications between staff and the HRTO's decision-makers often involve a choice of process with respect to next steps in a proceeding. The HRTO states that this choice of process is often inextricably linked to a possible outcome of a case and the thought process of a decision-maker. It states that an example of this is that complex cases could result in more case management than others. The HRTO states that disclosing communications between staff and decision makers would result in the HRTO having to explain case management processes and

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[4] The HRTO had initially stated that the draft letter to the appellant related to the release of the decision, but later stated that this was in error because of chains of emails that overlapped between staff and the adjudicator.

[5] The HRTO had initially stated that this group of records contained approximately nine emails, but clarified that it had counted two emails that were duplicates and saved under different file names and that one of the emails should not have been counted at all because of the date (it was created after the end of the date range for the search specified by the appellant.)

individual decision makers' thought processes to parties on an ongoing basis in a way that courts do not.

[21] The HRTO states that section 25 of the *Statutory Powers Procedure Act*[6] (the *SPPA*) protects a tribunal's power to control its own process, and that this applies to the HRTO. Section 25 of the *SPPA* says:

> A tribunal has the power to determine its own procedures and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1.

[22] The HRTO also cites a Divisional Court decision, *Rogers Communications Partnership v Ontario Energy Board*,[7] which applied reasoning from the Supreme Court of Canada affirming a tribunal's right to control its own process:

> The Supreme Court of Canada held in *Knight v. Indian Head School Division* that a tribunal is the master of its own procedure; a principle that has been widely-applied in the jurisprudence. It is natural, therefore, that a tribunal's choice of procedures is a factor in determining the precise scope of procedural fairness in proceedings before it. As noted by Stratas J.A. in *Forest Ethics Advocacy Association v. Canada (National Energy Board)* (in reference to the National Energy Board, a tribunal [is] very similar in nature to the OEB)[.][8]

[23] The HRTO then submits: "In preventing disclosure of the records, the [HRTO] controlled its process, thereby preserving procedural fairness in its proceedings."

Adjudicative independence

[24] The HRTO states that section 65(3.1) of the *Act* codifies the concept of deliberative secrecy, which is central to adjudicative independence, which in turn is critical to promoting fairness in decision-making. It further submits that communications, like the emails that are at issue in this appeal and that relate to the release of decisions, go to adjudicative independence.

[25] The HRTO says that in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*,[9] the Supreme Court of Canada recognized that administrative tribunals span the constitutional divide between the

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[6] R.S.O., 1990, c.S.22.
[7] 2016 ONSC 7810 (CanLII).
[8] 2016 ONSC 7810 (CanLII), paragraph 17.
[9] 2001 SCC 52 (CanLII), [2001] 2 SCR 781.

judiciary and the executive, and stated the following:

> The degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature. Absent constitutional constraints, this choice must be respected.[10]

[26] The HRTO submits that without adjudicative independence and deliberative secrecy, the impartiality of decision-makers is undermined. It states that it is noteworthy that fairness in decision-making was one of the four major rationales for public sector access to information legislation such as *FIPPA*, citing the court in *City of Ottawa v. Ontario*.[11] Considering the purposive approach outlined by the court in *City of Ottawa v. Ontario*, the HRTO argues that disclosure of records related to the adjudicative process would be inconsistent with the promotion of fair decision-making.

[27] Furthermore, the HRTO states that because the members of its tribunal act judicially, they require a level of independence akin to courts because failing to protect decision-makers' deliberations, even as they relate to when decisions would be released, would have the same consequences as failing to protect deliberations of judges. The HRTO states that judges' work product and communications with staff about when a decision will be released or processes used to case manage files in courts would never be disclosed. The HRTO argues that the Legislature has now codified this protection for adjudicative tribunals through the enactment of section 65(3.1) of the *Act*.

[28] The HRTO submits that respecting the Legislature's choice to accord the HRTO with a high degree of independence under section 65(3.1) of the *Act* is consistent with the Supreme Court's reasoning in *Ocean Port.* The HRTO states that this legislative choice is also expressed in the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*[12] (the *ATA*), pursuant to which decision-makers are appointed. The *ATA* states that its purpose is: "to ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making."

[29] The HRTO argues that even in the context of an appeal from an adjudicative decision, in order for a competent court to lift deliberative secrecy applicable to adjudicative tribunals, a litigant must present valid reasons for believing that a particular process followed by the tribunal failed to comply with natural justice.[13] The HRTO states that there is no such evidence in this case.

[30] Finally, the HRTO submits that if delay in the release of decisions results in

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[10] *Ibid*, paragraph 24.
[11] 2010 ONSC 6835 at paragraph 25.
[12] S.O, 2009, c.33.
[13] The HRTO cites *Tremblay v. Quebec* (*Commission des affaires Sociales*), 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952 at 964-65

prejudice to a party, that can be the subject of an appeal or review, but is not properly addressed through the *FIPPA* process. The HRTO says that, in other words, while transparency of government is one of the purposes of *FIPPA*, challenging decisions for procedural fairness require litigants to follow judicial processes that are in place, and that *FIPPA* is not a means by which litigants can circumvent legislative grounds of appeal or review. The HRTO argues that, similarly, *FIPPA* is not a means to investigate tribunal proceedings.

[31] Given these considerations, the HRTO states that it fulfilled its legislative mandate for fair and impartial decision-making when it denied disclosure of the records at issue.

The appellant's representations

[32] The appellant's representations contain details about many matters unrelated to the question of whether the exclusion at section 65(3.1) of *FIPPA* applies, such as her dealings with the HRTO and her views about the decision-making at the HRTO. As these matters do not relate to whether the test for section 65(3.1) is met, I will not set them out here.

[33] On the issue of whether section 65(3.1) applies, the appellant states the following:

> Although 65(3.1) of FIPPA does apply to a portion of my FOI request, for the reasons stated above, this section of the Freedom of Information and Protection of Privacy Act is being used improperly by the HRTO. In this case, the application of 65(3.1) allows the HRTO to hide their possibly illegal and unethical behaviour. Allowing the HRTO to hide behind 65(3.1) of FIPPA is not in the public's interest.

Analysis/findings

[34] Based on my review of the records and the parties' representations, I do not uphold the HRTO's decision to withhold the records at issue under the exclusion at section 65(3.1) of *FIPPA*.

What types of records are at issue in this appeal?

[35] Based on my review of the records, I agree for the most part with the HRTO's overall characterization of the records, that they are emails between various HRTO personnel, in some instances including the decision-maker. However, I do not agree that the third group of emails can accurately be characterized as "containing the decision- maker's instructions on when the decision will be released." Rather, they reflect the HRTO staff's views on how to respond to the appellant's inquiries which in two instances refer to information received from the decision-maker.

[36] Section 65(3.1) states:

> This Act does not apply to personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity.

[37] To qualify for the exclusion at section 65(3.1), the emails must be one of the types of records listed in section 65(3.1). The HRTO does not argue that the emails are "personal notes," "draft decisions," or "draft orders," and I find no basis for characterizing them that way.

[38] Turning to the remaining wording of section 65(3.1), the question, then, is whether the records at issue in this appeal, as emails, are "communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi- judicial capacity." To begin interpreting this language, I must consider the purpose of *FIPPA* and section 65(3.1) itself, since sections of a statute must be interpreted harmoniously with the purpose of the statute.[14]

Interpreting section 65(3.1)

[39] The exclusion at section 65(3.1) is a new addition to *FIPPA* introduced in the *Tribunal Adjudicative Records Act, 2019*,[15] which was contained within the *Protecting What Matters Most Act (Budget Measures), 2019.*[16]

[40] As this appeal involves the first substantive interpretation of the exclusion at section 65(3.1) of *FIPPA*,[17] I reviewed the legislative debates and found no mention of the exclusion at section 65(3.1).[18]

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[14] *Rizzo & Rizzo Shoes Ltd.* (*Re*), 1998 CanLII 837 (SCC), [1998] 1 SCR 27.
[15] S.O. 2019, c. 7, Sched. 60, s. 9.
[16] S.O. 2019, c. 7.
[17] Three previous IPC orders mention section 65(3.1) of *FIPPA*. In Order PO-4102, the IPC held that the ministry is not able to rely on the exclusion because it was not in force at the time of the request. In Order PO-4174, the IPC noted that the adjudicator's personal notes had been withheld under section 65(3.1); the issue in that appeal, however, was whether the HRTO conducted a reasonable search. In Interim Order PO-4320-I, the issue before the adjudicator was reasonable search.
[18] This page can be retrieved online at: https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-100/debates. Although the Legislative Assembly's public website does not contain relevant debates about section 65(3.1), it does contain an "Explanatory Note" about Bill 100, which says the following about section 65(3.1) of *FIPPA*: "The [*Tribunal Adjudicative Records Act, 2019*] also amends the *Freedom of Information and Protection of Privacy Act* to provide that it does not apply to notes, communications or draft decisions or orders prepared by or for a person acting in a quasi-judicial capacity" (emphasis mine). This "Explanatory Note" is somewhat misleading concerning the interpretative question raised. Section 65(3.1) does not apply to "*communications or draft decisions or orders prepared by or for a person acting in a quasi-judicial capacity.*" Rather, it applies to "communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity. In any event, the "Explanatory Note" is not part of the law and is not determinative of the purpose or interpretation of the exclusion.

[41] Accordingly, the analysis that follows turns on the wording of section 65(3.1) itself and principles drawn from the related concept of deliberative secrecy at common law.

The wording of section 65(3.1)

[42] The language in section 65(3.1) relevant to this appeal is "communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity." It is important to emphasize that the communications must relate to draft decisions or draft orders.

[43] Certain other Canadian jurisdictions contain similar exclusions in their freedom of information laws, the interpretation of which I examine below. Some of those exclusions appear to be broader in scope than Ontario's, while others are more restrictive.[19]

[44] Turning to the records before me in this appeal, the question is whether they are "communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity." An important step in answering this question is considering the meaning of the words "related to."

[45] To begin, I will consider the phrase "related to" in light of the jurisprudence about this phrase (or similar phrases) found in other exclusions from *FIPPA*.

[46] In interpreting the phrase "a record relating to a prosecution" in *Ministry of Attorney General and Toronto Star*,[20] the Divisional Court overturned the IPC's finding that a *substantial* connection between a record and a prosecution is required for the prosecution exclusion at section 65(5.2) of the *Act* to apply, and held that only *some connection* to the prosecution is necessary.

[47] The IPC has applied this reasoning to the labour relations and employment matters exclusion at section 65(6)3 of the *Act* to hold that a party seeking to rely on section 65(6)3 only needs to show that the records at issue have "some connection" to labour relations or employment matters. In Order MO-3664, the IPC went on to find that this standard was not met where the documents in question showing the amount of legal feels incurred in labour relations negotiations were 'only tangentially related' to

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[19] See, for example, similar provisions in the corresponding freedom of information statutes of British Columbia and Alberta. Section 3(e) of British Columbia's *Freedom of Information and Protection of Privacy Act* says: "This Act does not apply to the following: a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity." Section 4(1)(b) of Alberta's statute says: "This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the *Administrative Procedures and Jurisdiction Act* applies."

[20] 2010 ONSC 991 (CanLII).

labour relations.[21] In its judgment in *Brockville (City) v. Information and Privacy Commissioner, Ontario* upholding Order MO-3664, the Divisional Court affirmed that the "some connection" standard must, involve a connection that is relevant to the scheme and purpose of the *Act*, understood in their proper context, and that the city had failed to meet that standard.[22] The Divisional Court stated:

> The "some connection" standard still must involve a connection that is relevant to the statutory scheme and objects understood in their proper context. *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*.[23] [Emphasis mine.]

[48] In my view, the same approach should be applied to the exclusion at section 65(3.1). That is, to show that the records "relate to" a draft decision or order, they must have some connection to the draft decision or order that is relevant to the purposes of the *Act* and the exclusion.

[49] From the background provided by the parties, the HRTO's description of the records, and my review of the records themselves, it is clear that the records relate to the HRTO's responses to the appellant's inquiries about when the decision would be released, given the amount of time that had passed since her hearing concluded. It is equally clear that the records do not relate in any discernable way to any issues raised in the appellant's application, any submissions made in the proceedings, any aspect of the decision-maker's deliberative or reasoning processes, the contents of any draft decision or the possible outcome of any decision that would ultimately be reached. Further, the records do not indicate that the decision-maker sought or was provided with any input with respect to his deliberative processes on any substantive elements of a draft decision.

The purposes of the *Act*, and the HRTO's Service Standards

[50] I now turn to the purposes of the *Act*. As I stated above, the "some connection" standard must take into account the statutory scheme, including the purpose of the *Act* as a whole and the purpose of the exclusion understood in their proper context. There are two purposes to *FIPPA*, set out in section 1 of *FIPPA*:

> The purposes of this Act are,
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> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,

[21] Order MO-3664
[22] *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).
[23] *Ibid*, at paragraph 39.

> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government;
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[51] The Supreme Court of Canada has held that "[t]he overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry."[24] In light of this, the language of section 1(a) of *FIPPA*, and the principle that sections of a statute must be interpreted harmoniously with the purpose of a statute, it is my view that section 65(3.1) must be interpreted to ensure that the accountability purposes of the *Act* are respected, while also respecting the intent of the section 65(3.1) exclusion.

[52] Given that the emails at issue relate to the appellant's inquiries concerning the timeliness of the HRTO's decision, it is significant that the *ATA* requires the HRTO to develop a service standard policy and a process for making, reviewing, and responding to complaints about the HRTO's service.

[53] As the HRTO explains on its public website, its mandate is to resolve claims of discrimination and harassment brought under the *Human Rights Code* in a fair, just and timely way.[25] Under "Timing of Decisions," the HRTO's website states, in part:

> If your hearing lasted 3 days or less, you should receive your final decision within 3 months. If your hearing lasted longer than 3 days, you should receive your final decision within 6 months. These timelines start after the last hearing date or the date when written submissions were due.[26]

[54] Similarly, under "Service Standards," the website repeats these timelines and further notes that the HRTO expects to meet these standards 80% of the time.[27]

[55] In my view, given the mandate of the HRTO and its service standards with respect to the timeliness of decisions, a measure of transparency regarding

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[24] *Dagg v. Canada* (*Minister of Finance*) [1997], 2 S.C.R. 403.
[25] This information can be accessed here: Human Rights Tribunal of Ontario | Tribunals Ontario.
[26] This information can be accessed here: HRTO: Application & Hearing Process | Tribunals Ontario.
[27] This information can be accessed here: HRTO: Service Standards | Tribunals Ontario.

communications about the timing of the release of decisions is consistent with the transparency objectives of *FIPPA* – that is, to shed light on the operations of a tribunal that has been tasked with delivering justice to Ontarians in a timely way.[28]

[56] The HRTO submits that the appellant did not present valid reasons for believing that a particular process followed by the tribunal failed to comply with natural justice in order to lend support to her position. However, I am not persuaded that she was required to do so for the reasons set out below.

[57] The service standards provisions set out in the *ATA,* together with Tribunal Ontario's Complaint's Policy and Process for complaints regarding adherence with an applicable service standard, shed some light on this issue. Section 5 of the *ATA* provides as follows (in part):

> 5 (1) Every adjudicative tribunal shall develop a service standard policy.
>
> (2) The service standard policy must contain,
>
> (a) a statement of the standards of service that the tribunal intends to provide;
>
> (b) a process for making, reviewing and responding to complaints about the service provided by the tribunal;
>
> ...
>
> (4) Nothing in the service standard policy shall be interpreted as affecting,
>
> (a) a process or remedy available under the Ombudsman Act;
>
> (b) a right of appeal from decisions of the tribunal available under any Act; or
>
> (c) a right to bring an application for judicial review.

[58] Tribunal Ontario's Complaint's Policy and Process, which applies to the HRTO, describes the scope and the limits of the Policy, as follows:

> It is important to note that:

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[28] The HRTO submits that similar notes regarding the timing of a judge's decision would never be disclosable. *FIPPA* contains an exclusion at section 65(3) regarding judge's records, which says: "This Act does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with the proceeding." I do not need to decide whether the HRTO is correct in asserting that similar records would not be disclosable for a judge, either by virtue of section 65(3) or the common law doctrine of deliberative secrecy, or both, because my task in this appeal is to interpret the exclusion before me, at section 65(3.1) of *FIPPA*.

> • Dissatisfaction with the outcome of a decision from Tribunals Ontario's constituent tribunals does not constitute a complaint under the Policy. The procedure outlined in the Policy cannot be used as a form of reconsideration, review or appeal of a tribunal decision.
>
> • The Policy does not affect the public's right to raise concerns with the office of the Ontario Ombudsman.
>
> • The Policy does not affect any rights provided in legislation applicable to the constituent tribunals such as the right to request a review of a decision, a right of appeal of decisions under any Act, or the right to bring an application for judicial review.

[59] The first bullet point above indicates that the proper subject matter of a complaint is one that does not relate to the outcome of the decision of tribunal in question. The third bullet point indicates that, regardless of the application of the Policy, a party is entitled to pursue any rights or remedies provided in other legislation applicable to the tribunal.

[60] In this case, the issue raised by the appellant's appeal is her right of access to records that relate to the HRTO's adherence to its service standards. The appellant's appeal does not relate to the outcome of the HRTO's decision disposing of her application. In fact, the appellant's request for access to the records at issue predates the issuance of that decision. Rather, she seeks records that will permit her to understand the reasons for what she believes is the inordinate delay in the issuance of the HRTO's decision disposing of her application. While the appellant may feel the delay was unfair and be unhappy with the outcome of the decision, her appeal to this office does not – and cannot – challenge the HRTO decision or raise an issue that is properly the subject an application for judicial review. The appellant is simply exercising her rights under *FIPPA* to pursue access to records that relate to the HRTO's service standards.

[61] Consequently, the HRTO's argument that the appellant should be required to follow other judicial processes for raising a procedural fairness issue has no application in this case. Exercising her statutory right of appeal under section 50(1) of *FIPPA*, the only decision the appellant is challenging in this appeal is the HRTO's decision refusing access to the records in reliance on the exclusion at section 65(3.1). It is noteworthy in this respect that the Tribunal Ontario's Complaint's Policy and Process cited above states at the third bullet point (in part): "The Policy does not affect any rights provided in legislation applicable to the constituent tribunals ...". In short, the Tribunal Ontario's Complaints Policy and Process, and the statutory provisions governing the HRTO in this connection, lead me to conclude that there is no impediment at law that would preclude the IPC reviewing the appellant's appeal from the HRTO's denial of access to the records at issue based on the exclusion at section 65(3.1).

[62] Before leaving this subject, it is significant that the HRTO has publicly and actively established service standards for the timely release of its decisions following the conclusion of a hearing. Consequently, the HRTO's own service standards have effectively invited the very kinds of inquiries the appellant has made to HRTO in this case. In my view, participants in HRTO proceedings would reasonably expect the HRTO to be forthcoming in answering inquiries about HRTO's apparent failure to comply with its own service standards; and answering such an inquiry would logically necessitate the creation of communications in the nature of those at issue in this case.

[63] At some point it might have become apparent to the HRTO that the appellant's inquiries expressing dissatisfaction with the length of time it was taking to produce a decision effectively amounted to a service standards complaint that could have been treated as such under the Tribunal Ontario's Complaints Policy and Process. Whether or not that happened here (and I make no findings about that), as the Complaints Policy and Processes document itself indicates, the complaint process is not the exclusive mechanism by which parties to proceedings may pursue remedies relating to service standards concerns. As I have indicated, the right of access to records under *FIPPA* provides a viable alternative mechanism.

[64] All of this leads me to two conclusions. First, the appellant is not obliged to raise an issue of procedural fairness in the HRTO processes in order to pursue a request for access to records relating to compliance with the HRTO's published service standards. As the HRTO itself submits, a procedural fairness issue would properly be the subject of other avenues of appeal or review. In this case, however, the appellant's appeal to the IPC is not "challenging [the decision] for procedural fairness" and does not seek to "circumvent legislative grounds for appeal or review." It is an appeal from the denial of access to information in response to her request for records relating to the HRTO's adherence to published service standards.

[65] Second, having actively published service standards for the timeliness of its decisions, the HRTO has effectively represented to the public that this is an area in which it is – or should be – prepared to be held accountable. In my view, records relating to adherence to an administrative tribunal's timeliness service standards should generally not be shielded from scrutiny unless overriding concerns for protecting deliberative secrecy can be shown to be present. This engages the transparency purposes of the *Act* and, in turn, requires an examination of the extent to which principles underlying deliberative secrecy at common law are reflected in the wording of the exclusion at section 65(3.1).

What does "deliberative secrecy" mean at common law?

[66] HRTO submits that the exclusion at section 65(3.1) of *FIPPA* simply reflects the existing common law concept of deliberative secrecy.

[67] I agree that the text of the exclusion reflects, in large part, the common law of

deliberative secrecy and I have no trouble accepting that the purpose of section 65(3.1) is to protect many records that would be subject to the common law concept of deliberative secrecy.

[68] In my view, it is useful to review some well-established principles regarding the common law deliberative secrecy that may assist in informing an understanding of what type of information or record would qualify (or not qualify) for the exclusion. A helpful summary of these principles can be found in the decision of the Ontario Superior Court of Justice (Divisional Court) in *Summit Energy Management Inc.* v. *Ontario Energy Board* ("*Summit Energy*").[29] Below, I outline some of the main points that may be taken from that decision:

- The doctrine or principle of deliberative secrecy promotes adjudicative independence, collegial debate, and the finality of decisions. Under this doctrine, a judge or an administrative tribunal decision-maker generally cannot be compelled to testify about *the deliberations or the substance of the decision-making process or how or why a particular decision was reached by the court or administrative tribunal*.[30]

- The principle of deliberative secrecy does not apply as strongly to administrative tribunals as to courts, but the Supreme Court of Canada has confirmed that deliberative secrecy is the general rule for administrative tribunals.[31]

- The substance of the decision-making process includes what material was considered or not considered by the decision-maker, whether the decision-maker pre- judged the matter, and the extent to which the decision-maker was influenced by the views of others.[32]

- Deliberative secrecy would cover the involvement of independent counsel unless there was good reason and a factual foundation to believe that counsel transgressed the limits of fairness and natural justice.[33]

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[29] 2012 ONSC 2753 (Div. Ct.), paras. 76-82.

[30] *Re Clendenning and Board of Police Com'rs for City of Belleville* (1976), 15 O.R. (2d) 97 (Div. Ct.); *Agnew Ontario Association of Architects* (1987), 64 O.R. (2d) 8 (H.C.J.); *156621 Canada Ltd. v. The City of Ottawa* (2004), 70 O.R. (3d) 291 (S.C.J.).

[31] *Cherubini Metal Works Ltd. v. Nova Scotia* (*Attorney General*), 2007 NSCA 38 (CanLII) at para. 16. The Supreme Court of Canada did not grant leave to appeal that decision of the Nova Scotia Court of Appeal; see *Cherubini Metal Works Limited v. United Steel Workers of America and The United Steel Workers of America, Local 4122*, 2007 CanLII 40505 (SCC).

[32] *Agnew v. Ontario Association of Architects*, *supra,* at p. 17.

[33] *Rudinskas v. College of Physicians and Surgeons of Ontario*, 2011 ONSC 4819 (Div. Ct.); *Aronov v. Royal College of Dental Surgeons of Canada*, [2001] O.J. No. 1927 (Div. Ct.); *Stevens v. Canada* (*Attorney General*), 2003 FC 1259.

- Deliberative secrecy also extends to the administrative aspects of the decision-making process - *at least those matters which directly affect adjudication* - such as the assignment of adjudicators to particular cases.[34] (Emphasis added)

- Deliberative secrecy does not extend to matters that are extraneous to the decision-making process.[35]

[69] These points indicate that deliberative secrecy relates to matters which directly affect the decision-maker's actual decision-making about the matter(s) which he or she is tasked to decide. It is understandable that, under the common law, deliberative secrecy would extend to the assignment of decision-maker(s) to particular cases, in part, due to the tribunal's responsibility to ensure that decision-makers have no personal or other relationships with any parties that may affect the judgment on a matter. However, as discussed, the exclusion at section 65(3.1) of *FIPPA* specifically lists four categories of records. Therefore, in my view, if records relating to the administrative aspects of the decision-making process do not squarely fit into any one of these categories, they are not excluded under section 65(3.1) of *FIPPA*.

[70] In the final portion of my analysis regarding the purpose of section 65(3.1) of *FIPPA*, I turn to the interpretation of a similar provision in British Columbia's access to information law.

Interpretation of a similar provision in British Columbia's law

[71] A provision similar to section 65(3.1) of *FIPPA* is found at section 3(1) of BC's freedom of information law, which states:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: …
>
> > (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity.

[72] I note that the BC provision, unlike Ontario's, does not require that the communication be related to a draft order or decision, and therefore, the BC provision arguably would exclude a wider range of records than Ontario's.

[73] In any case, section 3(1) of BC's freedom of information law has been interpreted by that province's Information and Privacy Commissioner (the BC IPC) and its courts. While the BC decisions were interpreting a provision with different wording,[36]

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[34] *Cherubini Metal Works Ltd. v. Nova Scotia* (*Attorney General*) (2007), *supra* at para. 15, citing *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 at 831-33.
[35] *Summit Energy*, *supra*, at para. 84.
[36] Among other things, the BC provision covers communications of a person acting in a judicial capacity. In Ontario's *FIPPA*, a separate exclusion covers records of judges, at section 65(3), which says: "This Act

and I am not bound by these decisions, I find the reasoning summarized in the BC IPC's Order F11- 16[37] to be helpful in interpreting the similar language found in section 65(3.1) of *FIPPA*. Order F11-16 sets out a comprehensive summary of prior BC IPC and court decisions, and a thorough analysis of the BC exclusion.

[74] In Order F11-16, the records in dispute were correspondence to and from a quasi- judicial decision-maker and her interview notes.[38] The BC IPC had to decide whether the records in dispute were the quasi-judicial decision maker's "personal notes" or her "communications" for the purposes of section 3(1)(b) of BC's freedom of information law.

[75] The adjudicator first accepted what previous BC IPC orders had held about the purpose of section 3(1)(b): it is to "protect 'deliberative secrecy.'"[39]

[76] Second, the adjudicator noted the definitions of "deliberate" and "deliberation" from *Black's Law Dictionary*:

> *Deliberate* - (of a court, jury, etc) to weigh and analyze all the evidence after closing arguments.[40]
>
> *Deliberation* - The act of carefully considering issues and options before making a decision or taking some action; esp., the process by which a jury reaches a verdict, as by analyzing, discussing, and weighing the evidence.[41]

[77] Third, the adjudicator cited the BC Supreme Court's comments on the purpose of section 3(1)(b) in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*.[42] In that case, the Court considered whether a draft report of a commission that had been shut down before concluding, was the draft report of a person "acting . . . in a quasi-judicial capacity."

[78] The BC's court's observations assist in understanding the scope of the exclusion in the BC law:

> All are agreed that the purpose of s. 3(1)(b) is the protection of deliberative secrecy. One aspect of that is the need to protect the ability of those exercising judicial or quasi-judicial functions to express

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does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with the proceeding."

[37] *Provincial Health Services Authority* (*Re*), 2011 BCIPC 22 (CanLII).

[38] *Provincial Health Services Authority* (*Re*), *supra*, at para. 7.

[39] See Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34, for example.

[40] 8th ed. St. Paul, Minn.: Thomson/West, 2004, "*deliberate*".

[41] 8th ed. St. Paul, Minn.: Thomson/West, 2004, "*deliberation*".

[42] *British Columbia (Attorney General) v. British Columbia* (*Information and Privacy Commissioner*), 2004 BCSC 1597.

> preliminary and tentative remarks and conclusions that might later have to be changed. The risk of their being published could have a constraining effect on the creative process. That consideration would apply to commissions of inquiry reviewing the propriety of conduct of individuals. [Emphasis mine.]
>
> However, deliberative secrecy is meant also to protect individuals who could be affected by the publication of such preliminary and tentative remarks. I am sure that any judge would acknowledge having made notes, comments or observations in memoranda, bench books or similar such places which subsequently turn out to be unsupportable and which should not be published, not just to avoid embarrassment to the judge, but also because of the unfairness to third parties involved. That too would apply to commissions of inquiry engaged in judging the conduct of individuals. It seems to me to be especially so of the Smith Commission draft report which contains extensive but not final judgments of misconduct of many individuals who did not have, as the Commissioner intended, a full opportunity to defend themselves.[43]

[79] Order F11-16 also comments on another BC Supreme Court decision, where the Court stated the following about the purpose of section 3(1)(b):

> . . .The purpose of s.3(1)(b) . . . is to protect deliberative secrecy. Deliberation encompasses the gathering of information, its assessment, and the formulation of an opinion or conclusion in respect of it.
>
> . . . .
>
> Because of the process which has been created for the purpose of addressing human rights and privilege issues, all *deliberative* steps must be protected. In that way, *those charged with the responsibility of formulating opinions which are essential to the eventual disposition of a complaint* will be able to *formulate their opinions free from concerns about inquiries into their thought-making processes*.[44] [Emphasis mine.]

[80] Order F11-06 also agreed with an earlier BC IPC order that stressed that communications that do not engage the deliberative process are not protected.[45]

[81] Overall, I find the reasoning in these cases persuasive and helpful in the present appeal. While the wording of the BC and Ontario provisions is not identical, both

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[43] *British Columbia* (*Attorney General*) *v. British Columbia* (*Information and Privacy Commissioner*), 2004 BCSC 1597, at paras. 70-71.
[44] *Provincial Health Services Authority v. British Columbia* (*Information and Privacy Commissioner*), 2010 BCSC 931, paragraph 33.
[45] BC IPC Order 00-16.

provisions, in my view, have as their aim the protection of the deliberative secrecy afforded to quasi-judicial decision-makers within the scope of the wording of each exclusion.

[82] In addition, it is worth reiterating that BC's exclusion does not contain a qualification of what the communication has to relate to in order to qualify for the exclusion. In contrast the exclusion in Ontario's *FIPPA* applies, in part, to "communications related to draft decisions or draft orders." As I have set out above, BC's exclusion has been read as a codification of deliberative secrecy. Despite the differences in wording of section 65(3.1) and the BC exclusion, which may affect their application in a particular case, I find that section 65(3.1) is generally intended to protect deliberative secrecy according to the principles articulated by the BC IPC and the BC courts in the authorities cited above.

[83] Therefore, I find that the purpose of section 65(3.1) is to exclude communications relating to draft decisions to the extent that they have some relevance to the purposes of the exclusion – protecting records that have some bearing on the deliberations of a decision-maker from the reach of the freedom of information law in Ontario. A principal purpose of deliberative secrecy is to protect the ability of those exercising quasi-judicial functions to express preliminary and tentative remarks and conclusions about an application, appeal or other matter they are entrusted to resolve, or communications that would otherwise have some cognizable impact on the deliberative processes of the decision-maker. In my view, the purpose of the exclusion is not to provide a blanket protection from disclosure to any record that a decision-maker generates, or is generated for a decision-maker, simply on the basis of a connection to the decision-maker. Such an interpretation would be overly broad, capturing records that do not reflect or impact in any way on the decision-maker's deliberative processes.

Are the records at issue in this appeal excluded under section 65(3.1) of FIPPA?

[84] Having reviewed the records the HRTO withheld under section 65(3.1), and the HRTO's representations, I am not persuaded that the records at issue in this appeal qualify for the exclusion at section 65(3.1). I reach this conclusion having regard to my characterization of the records at paragraph 49 above and the "some connection" standard articulated by the Divisional Court in *Brockville (City) v. Information and Privacy Commissioner, Ontario*, which for the convenience of the reader I reproduce again here:

> The "some connection" standard still must involve a connection that is relevant to the statutory scheme and objects understood in their proper context. 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. [Emphasis mine.]

[85] Similarly, I find that it is significant that the HRTO has offered no evidence or explanation showing how the release of the emails would have any effect on the deliberative processes of the decision-maker.

[86] Each of the records is an email message generated as a result of inquiries the appellant made to the HRTO about when the decision in her case would be issued. They are concerned with how to respond to the appellant's inquiries. In light of the foregoing, I am unable to apprehend how the release of the emails would have any impact on the decision-maker's deliberative processes or impinge on deliberative secrecy. Consequently, while the decision-maker is the sender or recipient of some of the emails, I find that none of these emails can reasonably be said to have "some connection" with a draft decision in any way that is relevant to the statutory scheme and objects of the exclusion understood in their proper context.

[87] In my view, in order to respect the transparency and accountability objects of the *Act*, the connection between the communications withheld under section 65(3.1) cannot be remote or merely tangential to the actual draft decisions or draft orders. In other words, it is not enough to say that but for the fact that a draft decision is pending, the communications would not exist and therefore are covered by the exclusion at section 65(3.1). This interpretation is consistent with the interpretation of the common law principle of deliberative secrecy, and of the similar exclusion in British Columbia's freedom of information legislation, as discussed above.

[88] I find that communications about when the decision or order would be issued have, at most, a tangential and, based on the material before me, inconsequential relation to the decision-maker's deliberative process. In coming to this conclusion, I have carefully considered the purpose of the exclusion in the context of the broader purposes of the *Act*. The emails do not contain or reflect "the gathering of information, its assessment, and the formulation of an opinion or conclusion in respect of it," to borrow the words of the BC IPC. Simply put, the emails at issue in this appeal do not relate even remotely to the HRTO decision-maker's actual deliberations or deliberative process in the appellant's HRTO case.

[89] I have considered the HRTO's submissions about tribunal independence and am satisfied that my reading of the exclusion and its application to the records in this appeal do not undermine tribunal independence. I note that the Legislature has crafted the exclusion to capture a certain type of record, and not every record generated by (or for) a decision-maker. The type of information that is protected from disclosure by the exclusion at section 65(3.1) of *FIPPA* is information that has some connection to a draft decision in the sense that it has some bearing on the deliberative process of the decision- maker. I find that the emails at issue (including the attachment at issue) do not relate to the deliberative process itself. Further, questions of deliberative secrecy aside, the HRTO has offered nothing beyond a bare assertion that disclosure of the records would somehow impinge on quasi-judicial independence.

[90] I am also not persuaded by the HRTO's arguments attempting to draw parallels with the protection of the deliberations of judges (and what the scope of those deliberations entails). Judges' communications are the subject of a different exclusion found in section 65(3) of *FIPPA*. The interpretation of that exclusion is not before me in this appeal. Numerous decisions of the IPC have also found that certain other court records are not in the custody or control of the Ministry of the Attorney General (MAG), notwithstanding the fact that many of the court's administrative functions are under MAG's jurisdiction.[46] Again, the extent to which court or judges' records are accessible under the *Act* is not an issue before me in this appeal.

[91] The HRTO has also claimed that releasing the emails at issue in this appeal would undermine its power to control its own process. Again, I am not persuaded by this argument, nor do I accept that the withholding of the records necessarily preserves procedural fairness.[47] As I noted above, the exclusion at section 65(3.1) of *FIPPA* lists four categories of records; if records do not squarely fit into any one of these categories, they are not excluded under section 65(3.1) of *FIPPA*. In my view, the Legislature has carefully crafted the exclusion in a way that does not purport to exclude all records generated by decision-makers – only those records that have some connection to a draft decision or draft order in the sense its release would have some impact on the decision- makers deliberations.

[92] For these reasons, I find that the records at issue do not qualify for the exclusion at section 65(3.1) of the *Act*.

[93] As a result, I will order the HRTO to issue the appellant another access decision with respect to those records, without relying on the section 65(3.1) exclusion.

Issue B: Did the institution conduct a reasonable search for records?

[94] For the following reasons, I uphold the HRTO's search as reasonable in the circumstances.

[95] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[48] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[96] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to

[46] See, for example, Orders P-995, PO-4222, and PO-4286.
[47] I make no comment on whether one of the exemptions from the right of access, found at sections 12-22 of the *Act*, may apply to any of the records.
[48] Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.[49] To be responsive, a record must be "reasonably related" to the request.[50]

[97] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[51]

[98] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[52]

[99] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[53]

[100] The HRTO was asked to provide a written summary of all steps taken in response to the request, and to provide an affidavit signed by the person or persons who conducted the search. The HRTO did so, and I will summarize its evidence below.

The HRTO's evidence

[101] The HRTO's position is that its searches were reasonable and that further searching will not lead to the discovery of the e-mail the appellant alleges the HRTO continues to withhold (an e-mail dated July 24, 2019). The HRTO states that the appellant alleges that the HRTO is withholding an e-mail dated July 24, 2019 that it has not disclosed. However, the HRTO states that no other July 24, 2019 e-mail exists beyond the one it has already disclosed to the appellant.

[102] The HRTO submits that knowledgeable and experienced staff searched for records and used their best efforts over an extended period of time to locate records reasonably responsive to the request. The HRTO states that the staff (which are more specifically identified in the HRTO's affidavit evidence, discussed below) involved in the search were well versed on records related to the appellant. It also explains that the Assistant Registrar communicated with the appellant many times before the search and was already familiar with her concerns.

[103] Since staff had to search for records of the former Registrar and there was a large volume of records that included frequent communication between the HRTO and the appellant, the HRTO states that the search initially conducted was complex. The HRTO states that these factors would have contributed to the difficulty locating the July

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[49] Orders P-624 and PO-2559.
[50] Order PO-2554.
[51] Orders M-909, PO-2469 and PO-2592.
[52] Order MO-2185.
[53] Order MO-2246.

24, 2019 e-mail during its initial search.

[104] The HRTO states that its second search was conducted during mediation at the IPC, as the mediator indicated that the appellant alleged that the HRTO failed to disclose one specific record – an e-mail sent to her on July 24, 2019 by the then-Registrar. The HRTO explains that this narrowed the search to a single record that was easy to identify. A specified Executive Assistant at the HRTO, who was not available during the initial search, assisted her colleagues and located an e-mail that fit the description conveyed by the mediator. The HRTO then issued a supplementary access decision to the appellant, disclosing the Registrar's July 24, 2019 e-mail to her. After receiving this record, the appellant still alleged that there must be another July 24, 2019 e-mail withheld by the HRTO. The HRTO submits that the appellant has not provided a reasonable basis for concluding that an additional July 24, 2019 e-mail exists.

[105] The HRTO further explains that around early February 2020, the appellant began raising concerns that she was missing e-mails the HRTO had sent her previously. She suggested that these e-mails went missing only after dates she believed the HRTO had "promised" her it would issue its decision, alleging that the e-mails did not disappear "by accident" and implied that the HRTO contrived to have the e-mails deleted from her computer or other device. The HRTO explains that it does not have the technical capability to access and interfere with a party's e-mails and that the inability of the appellant to access her e-mails had nothing to do with the HRTO.

[106] In addition, the HRTO states that when the appellant raised the issue of the missing July 24, 2019 e-mail from the former HRTO Registrar with the IPC's mediator during mediation, she indicated that the e-mail had included a promise that the HRTO would issue the decision by a date at the end of September, and no longer indicated that the HRTO had advised her to wait until the end of September to inquire with the HRTO about the status of the decision. The HRTO states that, assuming that the appellant could not locate her original copy, the appellant may not have recalled what the HRTO set out in the e-mail but, in the HRTO's view, it is clear that her *perception* of the information the HRTO had conveyed to her changed over time.

[107] According to the HRTO, upon receiving the July 24, 2019 e-mail with the HRTO's supplementary decision letter, the appellant began insisting that the HRTO had withheld a different e-mail, sent the same day by the same person (the former Registrar). She indicated that the withheld e-mail told her the HRTO would issue the decision by a specified date in September 2019. The HRTO states that, in other words, when confronted with an e-mail that did not support her assertion that the HRTO promised her a decision by that date in September, the appellant insisted that there must be an additional e-mail that confirmed her assertion.

[108] The HRTO submits that although the appellant may genuinely believe that the HRTO failed to disclose all the e-mails sent to her on July 24, 2019, she has not

provided a reasonable basis to conclude the "missing" e-mail exists. Furthermore, the HRTO states that although it did not locate the Registrar's July 24, 2019 e-mail in the first search, it ultimately found it when conducted a very focussed second search. Therefore, the HRTO submits that if the second e-mail exists, the HRTO would likely have located it during the second search.

[109] In addition, the HRTO submits that the appellant's insistence that the HRTO Registrar sent two e-mails the same day providing conflicting information about when it anticipated/promised it would issue its decision does not provide a basis to conclude the second e-mail exists.

[110] In addition to providing representations about its search efforts, the HRTO also provided an affidavit affirmed by an individual employed by Tribunals Ontario as a Business Analyst in the Access to Records and Information Office, the office responsible for processing access to information requests received by any of the 14 tribunals making up Tribunals Ontario, including the HRTO. This is the employee who was responsible for coordinating the access request that is the subject matter of this appeal. I will refer to this employee as the FOI analyst.

[111] In her affidavit, the FOI analyst explains that she is partly responsible for coordinating access to information requests relating to any tribunal within Tribunals Ontario. At the time of affirming her affidavit, she had coordinated over thirty access requests since taking on the role, and in the course of carrying out those duties, she has consulted with senior staff, such as Assistant Registrars, to gather information responsive to requests. Therefore, the FOI analyst affirms that she has the necessary expertise and knowledge to coordinate and facilitate thorough and reasonable searches for records, including records responsive to a request relating to the HRTO.

[112] The FOI analyst explains that she responded literally to the request; she found the request to be straightforward and specific, needing no clarification.

[113] When she received the appellant's access request, the FOI analyst affirms that she forwarded it to the then HRTO Acting Executive Assistant, and copied the Assistant Registrar at the HRTO. She asked these individuals if the HRTO had already provided any records in response to the request. The Assistant Registrar responded that same day, saying she was unaware that the appellant had made an access request under *FIPPA*. They also exchanged further e-mails about the status of the appellant's HRTO application.

[114] A few weeks later when the appellant inquired about the status of her request, the FOI analyst e-mailed the Assistant Registrar, asking whether there was anything that HRTO could release at that time. The Assistant Registrar informed the FOI analyst that she discussed the access request with the then Registrar, and that she had also contacted Legal counsel, and copied the FOI analyst on the e-mail.

[115] The Assistant Registrar later clarified the parameters of the search with legal counsel, and copied the FOI analyst on that e-mail.

[116] When the appellant e-mailed the Assistant Registrar the following month to ask about the status of her access request, the Assistant Registrar sent an e-mail inquiring about the status of the request to a specified Case Processing Officer, the aforementioned Acting Executive Assistant, the HRTO staff members who were assisting the Assistant Registrar in conducting the search. The Assistant Registrar copied the FOI analyst on this e-mail.

[117] The Assistant Registrar, the Acting Executive Assistant, and the Case Processing Officer all sent their responsive records to the FOI analyst. The Assistant Registrar later also e-mailed HRTO staff and legal counsel again requesting all records responsive to the request; she copied the FOI analyst on this e-mail.

[118] On the day that the FOI analyst sent the appellant the access decision letter and the records approved to be disclosed, the appellant contacted her and raised concerns about the responsive records. Specifically, the appellant said the disclosed records did not include a July 24, 2019 e-mail sent to her by the HRTO Registrar (in response to a complaint she made to the HRTO regarding the delay in resolving her application). As a result of the appellant's concerns, on the following day, the FOI analyst contacted the Tribunals Ontario staff member responsible for responding to complaints made to Tribunals Ontario, to confirm whether there were any responsive records. This employee replied stating that no records related to the appellant were found.

[119] The FOI analyst affirms that during mediation at the IPC, the mediator sent the HRTO an e-mail regarding the appellant's concern that the disclosed records did not include the July 24, 2019 e-mail sent to her by the HRTO Registrar. The FOI analyst affirms that she responded to the mediator and attached a copy of an e-mail thread previously disclosed to the appellant which included a July 24, 2019 e-mail that the Case Processing Officer had sent the appellant from the generic HRTO-Registrar e-mail account. The mediator responded, stating that the appellant advised her that she already had the July 24, 2019 e-mail from the Case Processing Officer, but was seeking an e-mail of the same date from the HRTO Registrar. The mediator asked the FOI analyst to search for that e-mail. The FOI analyst affirms that she advised that the HRTO would do so.

[120] In order to conduct a further search, the FOI analyst contacted the Assistant Registrar to request that the HRTO conduct an additional search for the Registrar's July 24, 2019 e-mail. The Assistant Registrar coordinated the search with the current Executive Assistant and Administrative Assistant. The Executive Assistant located an e-mail dated July 24, 2019 from the then HRTO Registrar that was sent to the appellant. The FOI analyst affirms that the HRTO did not locate this e-mail during its initial search.

[121] The FOI analyst subsequently sent a supplementary access decision letter to the

appellant disclosing the July 24, 2019 e-mail referred to above. The IPC mediator later advised the FOI analyst that the appellant indicated that that e-mail was not the e-mail she sought and that she wished to proceed to adjudication.

[122] The FOI analyst affirms that to her knowledge, neither she nor anyone at the HRTO can do anything further to search for responsive records.

The appellant's evidence

[123] The appellant asserts that the e-mail of July 24, 2019 "clearly said" that the vice-chair (decision-maker) had "done his part," but the version of the July 24, 2019 that she received did not. She states that the July 24, 2019 e-mail had "disappeared from [her] e-mail inbox" and it took her a year and a half to get the "version" that she received from the HRTO through mediation. She asserts that in the latter, "the wording had been totally altered and it no longer read that the vice-chair had done his part or that a decision would be sent by the end of September."

[124] The appellant states that she referred to the words or contents of the July 24, 2019 in e-mails she sent to certain HRTO employees in November 2019 and March 2020. The appellant asserts that she does not have any difficulty recalling the contents of "the original" July 24, 2019 e-mail and is "completely aware" of what it said. She alleges that "[t]he e-mail in question was either held back or reworded."

[125] Furthermore, the appellant also alleges that the e-mail dated November 4, 2019 disappeared from her e-mail folder immediately after she spoke to the HRTO on January 31, 2020. She alleges that this "e-mail was taken immediately upon telling HRTO staff [she] was looking at this e-mail" and that it later "turned up in [her] spam folder near the end of February 2020 after the HRTO was informed I had a copy of this e-mail and its attached letter in my possession." She states that no e-mail from the HRTO had ever gone to her spam folder before that time, in the years she had dealings with the HRTO. The appellant states that she has a copy of this November 2019 e-mail and the attached letter because she had printed them both off and forwarded them to a different e-mail address "due to the disappearance of the July e-mail." She places the disappearance of the July 24, 2019 e-mail at some time after it was sent but before September 2019.

[126] The appellant states that the HRTO uses the Outlook e-mail system. She asserts that the HRTO "is able to delete e-mails through [that system] . . . as [her] original FOI request documents were sent by 'Outlook' September 24, 2020" (the date she received some disclosure in response to her request).

Analysis/findings

[127] Having considered the evidence presented by the HRTO and the appellant, I find that the HRTO has provided sufficient evidence that it conducted reasonable search efforts, and that the appellant has not established a reasonable basis for believing

additional responsive records exist.

[128] As mentioned, a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.

[129] Based on my review of the HRTO's representations and affidavit evidence, I find experienced employees were responsible for conducting the searches for records responsive to the appellant's request. The FOI analyst called upon the relevant employees to conduct searches for responsive correspondence between the HRTO and the appellant. I accept that the Assistant Registrar was familiar with the appellant's file, as the representations of both the HRTO and the appellant indicate. Since the record that the appellant was seeking was an e-mail involving a specific individual on a specific date, I accept the HRTO's position that this was a record that would be easy to identify and locate in its e-mail system, and I find that the HRTO had the employee do that. Given the nature of this record, an e-mail still within the HRTO's accessible e-mail system, and the expertise of the individuals involved in the search, I am satisfied that the HRTO conducted a reasonable search.

[130] I am also satisfied that ordering a further search would serve no useful purpose in terms of locating another version of the July 24, 2019 e-mail, as alleged by the appellant. I find the HRTO's explanation regarding the alleged difference between the e-mail sent to her on July 24, 2019 and the one that was disclosed to her, that being that the appellant did not accurately remember the contents of the July 24, 2019, to be a reasonable and plausible explanation for this difference. The appellant's reference to the July 24, 2019 in later e-mails, assertions regarding the contents of the e-mail sent to her on July 24, 2019, and assertions about the disappearance of e-mails is insufficient and unpersuasive evidence to establish that another version of the July 24, 2019 existed but no longer exists in its original form, or exists and has not been found (or is being withheld).

[131] For these reasons, I uphold the reasonableness of the HRTO's search.

ORDER:

1. I do not uphold the HRTO's decision that the records are excluded under section 65(3.1) of the *Act*. I order the HRTO to issue the appellant another access decision regarding the records, without relying on the exclusion. For the purposes of the procedural requirements of the access decision, the HRTO is to treat the date of this order as the date of the request.

2. I uphold the HRTO's search for responsive records as reasonable.

Original signed by: February 3, 2023

Marian Sami

Adjudicator