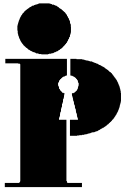

INTERIM ORDER PO-2852-I

Appeal PA08-375

University of Ottawa

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NATURE OF THE APPEAL:

The University of Ottawa (the University) received a request under the *Freedom of Information and Protection of Privacy* (the *Act*) for access to all records about the requester, including:

a) Records sent and received by the Chairman of the Department of Physics [name];

b) Records sent and received by the Office of the Chairman of the Department of Physics;

c) Records sent and received by [two named] professors, Department of Physics; and,

d) Records sent and received by the Dean of Science, and by the Dean's office.

The University located four records responsive to part (d) and issued an access decision with respect to that part. It released Record 1 in full and denied access to Records 2, 3 and 4 in their entirety. The University cited the exclusionary provision in section 65(6) (employment/labour relations records) and the exemption in section 19 (solicitor-client privilege) as the basis for its denial with respect to Records 2, 3 and 4. The University indicated that it needed additional time to respond to parts (a), (b) and (c) of the request.

The requester, now the appellant, appealed the University's decision.

During mediation, the University issued a letter to the appellant with respect to parts (a), (b) and (c) of the appellant's request, in which it stated that:

> Access to the above-referenced records is denied. The University of Ottawa does not have custody of these records and the [professors'] Union [the APUO], through the grievance/arbitration process, has alleged that the University of Ottawa does not have control over these records.

In response, the appellant indicated that he did not wish to pursue, access to the records sent or received by the two named professors (i.e. part (c) of request).

Furthermore, as the issue of custody or control of professor records at the University is the subject of another appeal, the adjudication of parts (a) and (b) of the appellant's request was placed on hold pending the final decision in that appeal.

Concerning part (d), during mediation, the University issued a revised decision in which it released Record 4 in its entirety and released the majority of Records 2 and 3, only withholding an email contained on page 1 of Record 2 and an email contained on page 1 of Record 3.

Also during mediation, the University conducted a further search for paper and electronic records in the Dean of Science's office and located additional records: Records 5 to 23. The University issued a revised decision in which it released Records 5 to 10 in full, denied access in part to Record 11, citing section 65(6), section 49(a) in conjunction with section 19 (solicitor-client privilege), sections 21(1)/49(b) (personal privacy), and denied access in full to Records 11 to 23, claiming that these records were either non-responsive or exempt or excluded by reason of sections 65(6), and 49(b). The University advised the mediator that with respect to section 65(6), it was relying on section 65(6)3. In addition, the appellant maintained that the University has not conducted a reasonable search for responsive records.

As mediation did not fully resolve this appeal, the file was transferred to me to conduct an inquiry. I decided to first adjudicate upon the issues of whether the University conducted a reasonable search for records responsive to part (d) of the request, whether Records 12 to 23 are responsive to part (d) of the request, and whether the information at issue in Records 2, 3 and 11 to 23 are excluded from the application of the *Act* by reason of section 65(6)3. If I find that this information at issue in the records is responsive and not excluded, I will later seek representations on any exemptions claimed by the University.

I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the University, initially. I received representations from the University. I sent a Notice of Inquiry to the appellant, along with a copy of the University's representations. Portions of these representations were withheld due to confidentiality concerns. The appellant did not provide representations in reply, other than relying on the comments he made when he filed his Notice of Appeal.

RECORDS:

The records at issue are all emails and listed as follows. These records are more particularly described in the index of records that accompanied the April 7, 2009 revised decision letter of the University:

- Record 2 (severed email– page 1)
- Record 3 (severed email– page 1)
- Record 11 (severed email– page 1 and top of page 2)
- Records 12-23 (denied in full)

DISCUSSION:

RESPONSIVENESS OF RECORDS

I will first determine whether Records 12 to 23 are responsive to the request.

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

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The University submits that:

> In part (d) of the appellant's request, the appellant sought access to all records about the appellant that were sent or received by the Dean of Science and the Office of the Dean of Science…
>
> The University was thorough in it's analysis of the records at issue and determined that records 12 to 23 were not responsive to the appellant's request. Although these records were sent or receive by the Dean of Science or by the Office of the Dean of Science, these records were not about the Appellant.
>
> …the records at issue concern a grievance instituted by an APUO [Association of Professors of the University of Ottawa] member under the APUO Collective Agreement… The information contained in records 12 to 23 (which in themselves constitute a string of emails) does not concern the appellant… The indirect, brief, reference to the appellant is incidental; the main thrust of the information set out in records 12 to 23 relates to a labour relations and employment related matter between the University of Ottawa and a member of the APUO Collective Agreement. These records do not "reasonably relate" to the appellant's request and, therefore, are non-responsive to the request.

The appellant did not address this issue in his Notice of Appeal letter.

Analysis/Findings

Based upon my review of the records at issue and the confidential and non-confidential portions of the University's representations, I agree with the University that Records 12 to 23 are not about the appellant. Although the appellant is mentioned in these records, the subject matter of and contents of these records do not concern the appellant. I agree with the University that the records only contain an indirect brief reference to the appellant and that the records are about a matter between the University and a professor. As the records do not reasonably relate to the appellant's request, I find that they are non-responsive [Orders P-880 and PO-2661]. Therefore, Records 12 to 23 are not at issue in this appeal and I will not consider whether they are excluded from the application of the *Act* by reason of section 65(6)3.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Section 65(6) states in part:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

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 [*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].

The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)]

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

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

The University submits that section 65(6)3 applies to the severed portions of Records 2, 3 and 11, which are all email chains. The University states that these portions of records have been excluded under section 65(6)3 because they relate to a grievance filed under the APUO Collective Agreement and refer to matters involving the University's own workforce.

The disclosed portions Records 2 and 11 are identical, except for the severed portions.

Record 2 is a four email chain and contains one severance, being the body of an email from the Dean of Science dated November 10, 2008. Record 11 is a five email chain and contains the same severance as Record 2, as well as severance of certain portions of a responding email dated the same day from the Dean of Graduate Studies. Two emails from the appellant are part of these email chains in Records 2 and 11. The initiating email in both Records 2 and 11 is from the appellant.

Record 3 contains four emails and is a different email chain from Records 2 and 11. At issue in this record is the body of the email from the Dean of Science to various University staff about the appellant.

The appellant did not provide specific representations on this issue in his Notice of Appeal letter, other than stating that he was not involved in a labour relations dispute with the University.

Part 1: collected, prepared, maintained or used

The University submits:

> The records at issue were collected, prepared, maintained or used by several employees of the University of Ottawa on behalf of the University of Ottawa in respect of a labour relations matter.

Analysis/Findings

Based upon my review of the records at issue, I find that, as internal University emails, these records were prepared and maintained by the University. Therefore, the first requirement of section 65(6)3 has been met.

Part 2: meetings, consultations, discussions or communications

The University submits that:

> The issues addressed in these records relate to on-going labour relations and employment-related dispute between the University [as the employer] and a member of the APUO. This member is not the appellant…
>
> The records at issue were collected, prepared, maintained or used in relation to meetings, consultations, discussion or communications related to labour relations or employment-related matters. The said records represent advice and discussions regarding labour relations or employment-related matters within the University of Ottawa.

Analysis/Findings

For the second requirement to be met, I must be satisfied that the University collected, prepared, maintained or used the records in relation to meetings, discussions, or communications.

In Order MO-2024-I, Senior Adjudicator John Higgins elaborated on the nature of the term "in relation to" in circumstances where the institution sought to rely on section 52(3)1 (the municipal equivalent of section 65(6)1) to exclude records relating to amounts it paid to a law firm for legal services. Senior Adjudicator Higgins stated:

> [T]he term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

I agree with the reasoning of the Senior Adjudicator, and I adopt it for the purposes of this order.

In the circumstances of this appeal, and with the benefit of having reviewed the withheld portions of the emails, I am not satisfied that these records were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications. The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The records concern the appellant, not the individual who is identified in the records and who has an on-going labour relations and employment-related dispute with the University. The University has not identified the relationship between these emails and this ongoing dispute concerning the identified individual in its representations. Based upon my review of the records, I find that there is no more than a superficial connection between the creation, preparation, maintenance and/or use of these records and the labour relations or employment-related proceedings or anticipated proceedings that the University has referred to in its representations [Order MO-2024-I]. Therefore, I find that the second requirement of section 65(6)3 has not been met. The portions of Records 2, 3 and 11 at issue are not excluded from the application of the *Act* by reason of section 65(6)3.

As the University has claimed the application of sections 21(1) and 49(a) in conjunction with section 19 of the *Act* to the withheld portions of Records 2, 3 and 11, I will be seeking representations from it on these exemptions.

REASONABLE SEARCH

I will now determine whether the University conducted a reasonable search for records responsive to part (d) of the appellant's request.

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 [Orders P-85, P-221, PO-1954-I]. 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.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

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.

The University was asked to provide a written summary of all steps taken in response to the request. In particular, the University was asked to respond to the following, preferably in affidavit form:

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

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

   (a) choose to respond literally to the request?

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

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

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

The University provided me with affidavits from the Dean of Science and his administrative assistant, executive assistant and secretary detailing the searches undertaken by them. The University submits that:

> In accordance with part (d) of the request, the University of Ottawa conducted two searches for responsive records about the appellant sent and received by the Dean of Science, [name], and the Dean' s Office. The search involved a search for paper and electronic records and covered the general office of the Dean, the Dean's workstation and his Microsoft Outlook account. In addition, a search was also made of the personal workstations and Microsoft Outlook accounts of the Dean of Science's Administrative Assistant, his Secretary and his Executive Assistant for paper and electronic records responsive to part (d) of the request. The first search was conducted between November 12 and November 25, 2008 and the second search was conducted between March 30, 2009 and April 3, 2009.
>
> The following key-word was used in the first search: [appellant's first and last name] for responsive records as any records about the appellant would be referred to under his name. As result of mediation held on March 27, 2009, when the second search was conducted, the key word of [appellant's last name] was added in an effort to ensure that all possible records concerning the appellant, including his activities, would appear in the search. The …Coordinator then reviewed the records for responsiveness, eliminating any records referring to [an individual] unrelated to the appellant.

> The searches were conducted by experienced employees who are familiar with the operation of, and filing systems within, the Office of the Dean of Science, and that they had expended reasonable efforts in conducting a search for records reasonably related to the request. [Order - M-909]

The appellant did not provide representations on this issue in his Notice of Appeal letter, other than stating that the University's search was incomplete.

Analysis/Findings

I find that the University has provided sufficient evidence to show that it has made a reasonable effort to identify and locate copies of records responsive to part (d) of the appellant's request [Order P-624]. In this appeal, experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records which were reasonably related to the request [Orders M-909, PO-2469 and PO-2592].

The University has provided a comprehensive description of the steps it undertook to locate the information sought by the appellant. In addition, the appellant has not provided me evidence establishing a reasonable basis for concluding that additional responsive information exists. Accordingly, I find that the University has performed a reasonable search.

ORDER:

1. I uphold the University's search for responsive records.

2. I uphold the University's decision that Records 12 to 23 are not responsive to the appellant's request.

3. I do not uphold the University's determination that the portions of Records 2, 3 and 11 at issue are excluded from the scope of the *Act* under section 65(6)3.

4. I remain seized of this appeal to deal with all outstanding issues including the application of exemptions to the withheld information in Records 2, 3 and 11 and the issue of the University's custody or control of records responsive to parts (a) and (b) of the appellant's request.

Original signed by:____________ December 2, 2009
Diane Smith
Adjudicator