Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2880

Appeal PA08-133

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 Act* (the *Act*) for access to:

> [a]ll records from June 1, 2007 to June 30, 2007 communicated by/to Dean of Science […] (personally and/or in his official capacities, including but not limited to Dean of Science) mentioning and/or discussing the meeting of June 14, 2007 involving physics graduate students and [four named faculty members].

The University issued a decision (the initial decision) granting complete access to three responsive records, comprised of three emails.

The requester (now the appellant) appealed the University's decision on the basis that, in his view, additional responsive records should exist.

During the mediation stage of the appeal process, the appellant advised the mediator that he has reason to believe that there should be additional records responsive to his request and that, accordingly, the University should conduct a second search for responsive records, as well as retrieve and search for any emails which may have been deleted.

The University agreed to conduct an additional search for electronic records and subsequently located three duplicate copies of the emails disclosed pursuant to the initial decision, as well as one additional email record. The University issued a supplementary decision (the supplementary decision) in which it provided some details regarding the manner in which it conducted its second search. The University explained that it conducted an additional search of the email account for the Dean of the Faculty of Science using a series of key words including "special meeting," "meeting June 14, 2007," "Physics graduate students meeting" and the names of four University faculty members. In the supplementary decision, the University advised that it was denying access to the additional email in its entirety, pursuant to the exclusion in section 65(6) (labour relations and employment records) of the *Act* and the exemptions in sections 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act*. The University also provided a copy of its email retention policy, "Email Practices at the University of Ottawa" (the Email Retention Policy), in response to the appellant's interest in emails that may have been deleted.

The appellant advised the mediator that he was not satisfied with the second search conducted by the University and that he still believes additional records should exist. Accordingly, the reasonableness of the University's search remains an issue in this appeal. The appellant also advised the mediator that he wishes to pursue access to the additional record. Accordingly, the application of sections 19, 21 and 65(6) of the *Act*, to the additional email record, remains at issue in this appeal.

As further mediation was not possible, the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

I commenced my inquiry by issuing a Notice of Inquiry seeking representations from the University. As the University did not identify in its supplementary decision letter the specific provisions of section 65(6) upon which it is relying, I asked it to do so in its representations.

The University submitted representations and agreed to share them, in their entirety, with the appellant. With regard to its submissions on the application of the exclusion in section 65(6), the University indicated that it was relying on the provisions in sections 65(6)1 (court or tribunal proceedings) and 65(6)3 (matters in which the institution has an interest) of the *Act*.

I then sought representations from the appellant on the application of the exclusions in sections 65(6)1 and 65(6)3 and the exemptions in sections 19 and 21. I included with my Notice of Inquiry a complete copy of the University's representations, including a volume of supporting material that it had provided to me with its representations.

The appellant submitted representations in response and agreed to share the non-confidential portions of them with the University. In his representations, the appellant brought to my attention that I had not set out reasonable search as an issue even though that it had been identified as an issue in the Mediator's Report issued at the conclusion of the mediation stage. The appellant, nonetheless, made submissions on the reasonable search issue and asked that I seek representations from the University on this issue.

I then sought supplementary representations from the University on the reasonable search issue. I also included a severed copy of the appellant's representations and I invited the University to respond to the appellant's representations on the application of the exclusion in section 65(6) and the exemptions in section 19 and 21, as well as the reasonable search issue. The University provided representations, which I shared with the appellant for comment. The appellant chose not to submit further representations.

RECORDS:

There is one record at issue, comprised of a two-page email chain.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General principles

The Ministry claims that the records at issue fall within the exclusionary provisions in sections 65(6)1 and 3 of the *Act*.

Sections 65(6)1 and 3 state:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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

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

Section 65(7) provides exceptions to the section 65(6) exclusions. None of these exceptions apply in the circumstances of this appeal.

Section 65(6) is record-specific and fact-specific. If this section applies to the records at issue in this appeal, these records are excluded from the scope of the *Act*. I will first consider the application of section 65(6)3.

Section 65(6)3: matters in which the institution has an interest

Introduction

Section 65(6)3 stipulates that the *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

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

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

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

Part 1: collected, prepared, maintained or used

To satisfy Part 1 of the section 65(6)3 test, the University must establish that the records were collected, prepared, maintained or used by an institution or on its behalf.

The University states that the record at issue is an internal email that was prepared by one of its employees and is maintained in the University's custody and control.

The appellant's representations do not assist me in my analysis of Part 1 of the test.

As alluded to above, the record at issue consists of an email chain. It is comprised of three email messages. The first email is a message sent by a named individual to the Dean. The second email is from the Dean to legal counsel at the University. In this email, the Dean makes reference to the contents of the first email and requests legal advice. The third email is sent by legal counsel to the Dean, setting out legal advice. I am satisfied that the second email was "prepared" by the University employee and that the email chain, viewed as a whole, was "collected" and "maintained" by the University.

In short, I am satisfied that the record at issue was collected, prepared, maintained or used by an institution. Consequently, the University has met Part 1 of the section 65(6)3 test.

Part 2: meetings, consultations, discussions or communications

To satisfy Part 2 of the section 65(6)3 test, the University must establish that the collection, preparation, maintenance or usage of the record by an institution was 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].

Neither the University's nor the appellant's representations assist me with my review of this part of the test under section 65(6)3. The University's representations do not identify specific meetings, consultations, discussions or communications that took place relating to the record at issue. However, it is evident from my review of this record that internal meetings, discussions, consultations and communications of various sorts took place with respect to the contents of the record. Consequently, I find that the collection, preparation, maintenance and use of the record at issue by an institution were in relation to meetings, consultations, discussions or communications.

In short, I am satisfied that the University has met Part 2 of the section 65(6)3 test.

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

To satisfy Part 3 of the section 65(6)3 test, the University must establish that the meetings, consultations, discussions or communications that took place were about labour relations or employment-related matters in which the Ministry has an interest.

The phrase "labour relations or employment-related matters" has been found to apply in the context of a grievance under a collective agreement [Orders M-832, PO-1769].

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

The University states that the record was prepared and maintained with regard to communications and consultations "concerning a grievance filed against one of its professors."

The University states that it considers the grievance to be a "serious matter" that could adversely affect the University "working environment."

The appellant's representations do not address Part 3 of the test under section 65(6)3.

I have carefully examined the contents of the record at issue and the circumstances surrounding its existence. I find that the information contained in this record relates to a complaint about one of the University's employees about an employment-related matter. I am satisfied that the University has an interest in this employment related-matter that extends beyond a "mere curiosity or concern" and which involves the University's own workforce.

Accordingly, I am satisfied that the University has met Part 3 of the section 65(6)3 test.

Conclusion

Given that the Ministry has met the three-part section 65(6)3 test, I find that the record at issue is excluded from the scope of the *Act* under that section. It is, therefore, not necessary for me to assess whether it is also excluded under section 65(6)1.

As noted above, in addition to relying on the exclusions in sections 65(6)1 and 3, the University has claimed the application of the exemptions in sections 19 and 21 to the information in the record at issue. Having found that this record is excluded from the scope of the *Act* under section 65(6)3, it is not necessary for me to determine whether the exemptions in sections 19 and 21 apply to it.

REASONABLE SEARCH

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.

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.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Parties' representations

I first sought and received representations from the appellant on the search issue. The appellant provided lengthy representations that critique the University's search efforts. The appellant's key concerns can be summarized as follows:

1. The University has not provided a breakdown of the results of the Dean's own search efforts in relation to the original search, despite identifying the Dean as the central focus of the search for responsive records.

2. In its second search, the University improperly confined its efforts to a "key-word" search. The appellant argues that performing only a key-word search "could easily omit important records that fit the criteria of the request." The appellant also appears to suggest that additional records "could easily be found by performing a search using a 'data-mining' approach, where the person performing the search would look for other records related to the records that they have found" through the key-word search. The appellant states that given the "limited scope and time period of the requested records" a data-mining search could be completed with little effort.

3. The appellant's request is focused on gaining information pertaining to a meeting of graduate students in the Department of Physics at which several named University faculty members were present. The appellant believes that any reasonable search should include a search of communications between the Dean and the University faculty members named in the request. However, the appellant questions whether the University has done so in this case.

4. The appellant notes that the University's Email Retention Policy states that when a "user reads [an] email, *a copy may or may not be kept on the user's workstation*, depending upon the user configuration, as well as the client (software) they are using to read the email." The appellant states that despite this statement he questions whether the University ever searched for "local copies" of responsive emails on the Dean's workstation.

5. The appellant states that, according to the University's supplementary decision letter, the Dean was communicated to about this matter by several identifiable individuals and yet, in the appellant's view, the University's search did not reveal records sent from the Dean in response to these communications. The appellant suggests that, under the circumstances, the Dean must have responded to these communications and he questions the whereabouts of his responses.

6. The appellant questions the University's apparent decision to restrict the scope of its search to the Dean's email account only.

The University responded with a detailed account of the processing of the appellant's request, including a summary of the steps it took to respond to the request. The University's representations were submitted by its Freedom of Information Coordinator (the FOIC). The FOIC outlined the following sequence of events regarding the processing of the appellant's request, supported by affidavits sworn by the Dean and his Administrative Assistant:

- January 25, 2008 – The University receives the appellant's access to information request.

- January 29, 2008 – The University's Associate Legal Counsel sends an email to the Dean asking his office to conduct a search for all records responsive to the request.

- April 24, 2008 – The Associate Legal Counsel sends a follow-up email to the Dean's Administrative Assistant requesting that a search for responsive records be completed.

- April 24, 2008 to May 5, 2008 – The Dean conducts a search for responsive records. In his affidavit, sworn March 12, 2009, the Dean states that he conducted a search in Microsoft Outlook for "all email documents communicated by, or to, me for the period between June 1, 2007 and June 30, 2007 inclusive." The Dean submits that he then "individually examined all emails that were obtained during this time period for documents responsive to the request." The Dean states that the records found as a result of the search were then forwarded to the Associate Legal Counsel for review.

- May 5, 2008 – The FOIC sends a decision letter to the appellant granting complete access to three records.

- August 13, 2008 – The FOIC sends an email to the Dean asking his office to conduct a second search for responsive records with an expanded scope, including such terms as "special meeting," "meeting June 14, 2007" and "Physics graduate students" in the search. The Dean states in his affidavit that on or about August 13th he asked his Administrative Assistant to undertake an additional search for responsive records.

- August 13 to August 25, 2008 – The Dean's Administrative Assistant conducts a search for responsive records. In her affidavit, sworn March 12, 2009, the Administrative Assistant states that her efforts involved searching the Dean's University mailbox in Microsoft Outlook for "all email documents communicated by, or to, the Dean of the Faculty of Science for the period June 1, 2007 and June 30, 2007 inclusive." She submits that she "individually examined all emails that were obtained during this time period for documents responsive to the request." She also confirms using the "key-words" set out above in the appellant's representations. During this period, the Administrative Assistant states that she also searched the "paper files in the Office of the Dean" for any responsive records and, in doing so, used the key-words identified above. The FOIC states in the University's representations that one additional record was found and sent to the Secretary of the University on August 25, 2008.

- August 28, 2008 – The FOIC issues a supplementary decision letter denying access to the new responsive record pursuant to the exclusion in section 65(6) and the exemptions in sections 19 and 21.

The University submits that it has conducted a reasonable search for responsive records and has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate records responsive to the appellant's request. The University submits that in conducting its searches, it considered the appellant's request, took into consideration the dates specified by the appellant in his request, examined the electronic and paper records of the Office of the Dean and used the methods of search available to it. The University concludes that its searches have produced all available records that are responsive to the appellant's request. The University adds that "[i]f any responsive records were destroyed (which is not known or determined), they would have been so destroyed in accordance with the [University's] Procedure 20-4 (Records Retention Periods) or the email practices of the [University]." The University provided copies of the "Procedure 20-4" document and its Email Retention Policy with its representations.

Analysis and findings

As indicated above, the issue for me to decide is whether the University has taken *reasonable* steps to search for records responsive to the appellant's request [Orders P-85, P-221, PO-1954-I]. A reasonable search is one in which an experienced employee expending *reasonable* effort conducts a search to identify any records that are *reasonably* related to the request [Order M-909]. The key is, therefore, *reasonableness*. An institution is not required to go to extraordinary lengths to search for records responsive to a request. The *Act* does not require an institution to prove with absolute certainty that records do not exist. Accordingly, an institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

I have carefully reviewed and considered all of the evidence presented to me on the reasonable search issue. While I appreciate the appellant's concerns regarding the breadth, scope and effectiveness of the University's search efforts, I am satisfied that the University has provided me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the appellant's request. I have reached this conclusion for the following reasons.

Firstly, although the appellant takes issue with the University's interpretation of the scope of his request, in my view, the University has conducted its search based on a reasonable interpretation of the wording of the request and, in doing so has addressed many, if not all of the concerns raised by the appellant in his representations. In his request, the appellant asked for "all records […] communicated by/to [the] Dean" in relation to a meeting that took place on June 14, 2007 involving "physics graduate students and [four named faculty members]." Based on this wording, it is not unreasonable that the University's search for records, both in electronic and hardcopy format, would begin and end in the Office of the Dean, from which responsive records were either sent or received.

The University has demonstrated through its representations, including the affidavits sworn by the Dean and his Administrative Assistant, that reasonable efforts were expended to locate all responsive records that were communicated by or to the Dean. Two separate searches of the Dean's Microsoft Outlook account were conducted using search criteria derived from the wording of the request. As well, a separate search was conducted of all paper files in the Office of the Dean for any responsive records, again using search criteria derived from the wording of the request. While the appellant may take issue with the techniques and approaches used by the Office of the Dean to search for responsive records, I am satisfied that they were appropriate and reasonable in light of the wording of the request.

Secondly, even if other records did at one time exist, above and beyond those located, on my reading of the University's Email Retention Policy, these records would in all likelihood no longer exist. The "Archives and Back-ups" section of this document states as follows:

> There is no system in place to 'archive' email. There is a back-up system in place that is used to restore specific files in the case of human error (accidentally deleting a file) or system failure (server failure). The key difference between an 'archive' system and a back-up system is that [archive] system[s] are used to retain files and documents for future reference according to a retention schedule, whereas back-up is a service that is performed to help in recovering files in the case of accidental deletion. With back-ups there is no intention of long-term retention […].
>
> …
>
> For centrally maintained back-ups (server or desktop), the absolute maximum that an email file will be maintained is 30 days.

Accordingly, for the reasons set out above, I conclude that the University has conducted a reasonable search for records responsive to the appellant's request.

ORDER:

1. I uphold the University's application of the exclusion in section 65(6)3 to the record at issue.

2. I uphold the University's search for records responsive to the appellant's request.

3. I dismiss the appellant's appeal.

Original signed by: March 30, 2010
Bernard Morrow
Adjudicator