Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3004

Appeal PA08-245

University of Ottawa

October 20, 2011

Summary: The appellant sought access to all University of Ottawa records relating to a transcript of a talk he had delivered at another university. The University of Ottawa took the position that the identified responsive records were excluded from the scope of the *Act* on the basis of section 65(6)3. The university's decision that section 65(6)3 applies to the records is upheld.

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

Orders and Investigation Reports Considered: PO-2951, MO-1412, PO-2105-F.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 98 O.R. (3d) 457

BACKGROUND:

[1] The University of Ottawa (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to a transcript of a talk the requester had delivered in October of 2007 at another university (the transcript). The appellant had received a copy of the transcript following an earlier access request to the university. The appellant's new request was for the following:

> …all records related to, about, and/or accompanying [the transcript], including but not limited to: all correspondence, any contracts or arrangements to hire services, all internal emails discussing the matter, all records of attempts to secure a transcript, any voice recording, etc.

[2] The university located seven responsive records and issued a decision in which it denied access to the records based on the exclusion in section 65(6) (labour relations and employment records), the discretionary exemption in section 19 (solicitor-client privilege) and the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

[3] The appellant appealed the university's decision. In addition to appealing the denial of access, the appellant also took the position that additional responsive records ought to exist, thereby raising the issue of whether the university's search for records was reasonable.

[4] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. During the inquiry into the appeal, representations were sought and received from the university, an affected party and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORDS:

[5] The seven records at issue consist of seven emails or email chains, some with attachments. The records are numbered 1 through 7.

ISSUES:

A. Are the records excluded from the scope of the *Act* because of section 65(6)?
B. If the records are not excluded from the scope of the *Act*, do the records qualify for exemption under the identified sections of the *Act*?
C. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Are the records excluded from the scope of the *Act* on the basis of the exclusion in section 65(6)?

[6] Section 65(6) of the *Act* states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 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.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

[8] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

[9] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

[10] 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, ("*Solicitor General*")].

Representations

[11] The university takes the position that the *Act* does not apply to the records at issue because they fall within the exclusion in section 65(6).

[12] In its representations on this exclusion, the university states that the records were prepared by employees of the university, on behalf of the university, and represent advice provided to management regarding a labour-relations matter. The university states that, with respect to the records at issue, it was acting as an employer. The university then refers to the Divisional Court case of *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 98 O.R. (3d) 457 in support of its position that the records are excluded from the scope of the *Act*. The university also identifies that its relationship with its full-time professors is governed by a collective agreement, and that all labour-relations matters between the university and its professors are dealt with in accordance with the collective agreement. The university then states:

> At the time of the appellant's request for information, which is the subject matter of this appeal, the appellant was an APUO [Association of Professors of the University of Ottawa] member and involved with several labour-relations matters, such as grievances, with [the university]. …
>
> The records relate, amongst others, to the administrative process involved in the development of [the university's] strategy in response to the grievances, disciplinary matters or complaints filed in accordance with the Collective Agreement. This includes, but is not limited to, the obtaining of information, the organization of the relevant materials, the clarification of facts from other individuals or events, the confirmation of what actually occurred in relation to the grievance and disciplinary issues, the general administration of the relevant grievance or disciplinary process, the obtaining of background information and supporting documents, and researching relevant issues. Numerous individuals at [the University] are involved with handling a labour-relations matter, including, but not limited to the Dean of the Faculty of Science, [university] legal counsel, the Vice-President, Academic and Provost, members of the Human Resources department, and other individuals.

[13] In its confidential representations, the university then reviews the specific records at issue, and explains why each of these records, and the issues addressed in them, relate to labour-relations matters. The university then states:

> Accordingly, all of the above-referenced records were prepared by employees of the university. The records were also maintained by the university which was in control and custody of these records. Furthermore, these records contain information pertaining to various

> grievances filed by an individual or disciplinary matters filed against an individual who is subject to the collective agreement, which relate to labour-relations or employment-related matters.

[14] The university then provides representations on the application of the exclusionary provision in section 65(6)3, which I address below.

[15] The appellant does not directly address the issue of the application of the exclusion to the records at issue; however, he argues that the approach to this exclusion taken by this office in previous orders is incorrect. The appellant also argues that if the institution obtained or produced the records through actions which were improper or contrary to collective agreements, international agreements, legal precedents and other rules and contentions, any claimed exemptions or exclusions are made void by the institution's breaches. The appellant provides extensive representations identifying how, in his view, the collection and use of the records by the university violated a number of agreements, precedents, rules and conventions.

[16] The appellant also refers to the fact that, pursuant to the applicable collective agreement, two formal grievances have been filed against the university in regards to the actions of the university in collecting and using the records.

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

Introduction

[17] 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.

[18] In addition to the representations set out above, the university confirms that it has an interest in the matters involving its own workforce and, in particular, matters pursuant to the collective agreement referred to. It states that the records at issue are internal emails prepared and maintained in relation to consultations, discussions and communications, and provides the following information on section 65(6)3:

> … [the university] has an interest in this labour-relations or employment-related matter. The information found in the records relate to communications between [university] legal counsel and her assistant, the Vice President, Academic and Provost and the Dean of the Faculty of Science involved in resolving labour relations issues in accordance with the collective agreement. In particular, [the university] prepared and maintained these records with regard to consultations and communications concerning disciplinary matters as well as grievances filed against one of its professors. [The university] had an interest in this matter involving its workforce [*Solicitor General*; Order PO-2626]. For any employer, disciplinary actions and grievances filed under the collective agreement are serious matters which must be solved as efficiently as possible. Grievances as well as any form of tension in the workplace will affect the working environment. This could result in an increased stress level, unpleasant atmosphere, tensed relations between employees, etc. Therefore, [the university] has a definite interest in this matter.

Requirement 1: Were the records collected, prepared, maintained or used by the university or on its behalf?

[19] The university identifies that the records are email communications between university legal counsel and university staff, including officers and agents, and takes the position that the records were collected, prepared, maintained and used by the university. Based on my review of the seven records at issue, all of which consist of emails or email chains (some with attachments) and involve university staff, it is clear that these records were collected, prepared, maintained and/or used by the university.

Requirement 2: Were the records collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

[20] In support of its position that the records were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications, the university states that the records are emails prepared and maintained in relation to discussions and communications. On my review of these records, I am satisfied that they were prepared, maintained or used in relation to discussions or communications. The records themselves consist of email communications prepared by employees of the university, and represent discussions, consultations or communications between these parties and the dean and/or legal counsel.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the university has an interest?

[21] As identified above, the type of records excluded from the *Act* by section 65(6)3 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.

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

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]

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

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

[24] 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 [*Solicitor General* (cited above)].

[25] In support of its position that the records fall within the exclusion in section 65(6)3, the university states:

> The records relate, amongst others, to the administrative process involved in the development of [the university's] strategy in response to the grievances, disciplinary matters or complaints filed in accordance with the Collective Agreement. This includes, but is not limited to, the obtaining of information, the organization of the relevant materials, the clarification of facts from other individuals or events, the confirmation of what actually occurred in relation to the grievance and disciplinary issues, the general

> administration of the relevant grievance or disciplinary process, the obtaining of background information and supporting documents, and researching relevant issues. Numerous individuals at [the university] are involved with handling a labour-relations matter, including, but not limited to the Dean of the Faculty of Science, [university] legal counsel, the Vice-President, Academic and Provost, members of the Human Resources department, and other individuals.

[26] With respect to the issue of whether the university has an interest in the labour-relations or employment-related matters, the university confirms that it has an interest in the matters involving its own workforce and the collective agreement referred to.

Findings

[27] Previous orders of this office, including the decision in "*Solicitor General*," have consistently found that disciplinary actions involving an employee are employment-related matters. In addition, a number of previous orders have established that grievances initiated pursuant to the procedures contained in the collective agreement are, by their very nature, about labour relations matters (Orders PO-1223, PO-1769).

[28] With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis* (2008) that:

> In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,
>
> > It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

[29] Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "(w)hether or not a particular record is 'employment related' will turn on an examination of the particular document."

[30] I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

[31] In this appeal, all of the records at issue are email communications, and all of them involve university legal counsel, as well as other employees or the dean. At the time of the request, the appellant was an APUO member, and was also involved in other labour-relations matters with the university, including grievance prodeedings. Subsequently, grievances were brought against the university relating directly to the collection and use of the records at issue.

[32] The university has stated that the records relate to the administrative process involved in the development of the university's strategy in response to the grievances, disciplinary matters or complaints filed in accordance with the collective agreement governing the appellant's employment with the university. On my review of the records at issue, for which the exclusion in section 65(6)3 is claimed, as well as the confidential representations of the university relating to each record, I am satisfied that all of the records were prepared and maintained by the university with regard to consultations and/or communications concerning a disciplinary matter involving one of its professors. Accordingly, I find that the records relate to the university's relations with its own workforce, and the university has an interest in the records at issue. In these circumstances, I am satisfied that the exclusionary provision in section 65(6)3 applies to the records, and they fall outside the scope of the *Act*.

[33] With respect to the appellant's argument that the exclusionary provision cannot apply because certain records were obtained or produced improperly or contrary to various agreements or protocols, I addressed a similar argument in Order PO-2951, where I reviewed this argument and then stated:

> … in my view the manner in which the University obtained the records does not affect my finding that they are excluded from the scope of the *Act*, in the circumstances of this appeal. It is clear that the University used these records in relation to discussions or communications about labour relations or employment-related matters. Indeed, the manner in which the University collected and used the records appears to itself be an issue in two other grievances. In these circumstances, I find that the questions regarding the manner in which these records were obtained or used does not affect my finding that they are excluded from the scope of the *Act*.

[34] I apply this same approach to the records at issue in this appeal, and find that the questions raised by the appellant regarding the manner in which certain records were obtained or used does not affect my finding that the records at issue are excluded from the scope of the *Act*.

[35] In conclusion, I find that the records at issue are excluded from the scope of the *Act* on the basis of section 65(6)3.

[36] Having found that the records are excluded from the scope of the *Act*, it is not necessary for me to determine whether or not the identified exemptions apply to them.

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

[37] The university submits that it has conducted a reasonable search for all records responsive to the request. In its representations, the university reviews the searches for paper and electronic records that it conducted. These include initial searches by the Office of the Vice-President Academic and Provost, the Office of the Dean, Faculty of Science, the Office of the Secretary of the University and the former President and Vice-Chancellor. During mediation, the university also conducted additional searches for responsive records, which include searches by the Associate Vice-President, Human Resources, the Assistant-Director, Academic Labour Relations, the Office of the Dean, Faculty Graduate and Postdoctoral Studies, and the Office of the Vice-President, Resources. No additional responsive records were found as a result of these additional searches for paper and electronic records responsive to the request. The university also reviews its record-keeping practices, and explains the circumstances relating to the searches for records of individuals no longer employed by the university. The university also provides nine affidavits sworn by various individuals who conducted the searches described above.

[38] The appellant takes the position that more responsive records should exist. Specifically, he refers to the gap in time between the date of the talk which he delivered (the transcript of which is referred to in the request) and the dates of the responsive records relating to the transcript. He also refers to an individual whose electronic records ought to have been searched, as well as his concern that an original voice recording of the talk was not identified as a responsive record.

[39] On my review of the appellant's request and the responsive records, it appears to me that the appellant raises some relevant questions concerning whether additional records responsive to the request either may exist or may have existed. There does appear to be a gap in the time period between the date of the talk and the date of the responsive records. Furthermore, it appears that an original voice recording of the talk existed and was in the custody or control of the university at some point. The university's representations on the search issue, though extensive, do not address these questions raised by the appellant, and I considered sharing the appellant's representations with the university to allow it to address these questions. However, because of my findings above regarding the application of section 65(6)3 to the records which have been identified as responsive, I have decided that it is not necessary to do so.

[40] I have found above that the responsive records that have been located as a result of the university's extensive searches fall outside the jurisdiction of this office due to the application of section 65(6)3 of the *Act*. Previous orders have examined the obligations on an institution to conduct further searches for records in circumstances where section 65(6) applies to records which have already been identified. In Order MO-1412, senior adjudicator Goodis was faced with a similar issue which involved the equivalent provision to section 65(6) contained in the *Municipal Freedom of Information and Protection of Privacy Act* [section 52(3)]. He stated:

> ... the appellant submits that Hydro did not conduct a reasonable search for responsive records. In his representations, the appellant provides detailed descriptions of the records or types of records which he believes Hydro should have identified as responsive to his request. In my view, these records, whether or not they exist or should have been identified by Hydro, would fall within the scope of section 52(3)3, for the reasons outlined above. Accordingly, no useful purpose would be served by making a determination on this issue and, therefore, I will not do so.

[41] Former Assistant Commissioner Tom Mitchinson applied this same approach in Order PO-2105-F. After referring to the above quotation from Order MO-1412, the former Assistant Commissioner stated:

> It is clear from this quotation from Order MO-1412 that a decision to absolve an institution of its responsibilities to conduct searches for all responsive records is dependent on the specific fact situation presented in a particular appeal. In Order MO-1412, Senior Adjudicator Goodis was satisfied, based on his treatment of records that had been identified as responsive, that any other records that might exist would, by definition, be treated in the same manner. In my view, I am faced with a similar situation in this appeal.
>
> As a result of its extensive search efforts, the Ministry identified one record … that was created by one of the individuals in attendance at the [identified meeting]. For reasons outlined in this order, I determined that this record falls within the scope of section 65(6)1 and is excluded from the *Act*. In my view, any records created by other individuals in attendance at [the same meeting] would, by definition, also be excluded, for the same reasons. Accordingly, no useful purpose would be served by determining whether the Ministry's searches for other records created at [the meeting] were reasonable, and I will not consider the search issue further in this appeal.

[42] I adopt the approach taken in Orders MO-1412 and PO-2105-F, and apply them to the circumstances of this appeal.

[43] The university conducted extensive searches for responsive records and located the records identified above. On my review of the request, the representations of the university and the information contained in the records themselves, I am satisfied that any additional records responsive to the request, if they exist, would also fall within the scope of section 65(6)3 for the reasons outlined in my discussion under the section 65(6)3 analysis above. Accordingly, no useful purpose would be served by determining whether or not the university's searches for any additional records responsive to the request were reasonable, and I will not consider the search issue further in this appeal.

ORDER:

I uphold the university's decision that section 65(6)3 applies to the records, and that they are excluded from the scope of the *Act*.

Original Signed by: October 20, 2011
Frank DeVries
Adjudicator