

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3320

Appeal PA13-133

McMaster University

March 14, 2014

Summary: The appellant sought access under the *Freedom of Information and Protection of Privacy Act* to reports and/or documents prepared by the university's former Chief Internal Auditor that include any reference to a specific McMaster faculty member. The university located one responsive record and denied access, citing the exclusionary provisions in sections 65(8.1)(a) (record respecting or associated with research) and 65(6)3 (labour relations and employment records). This order upholds the university's decision under section 65(6)3 only and finds that the record is excluded from the application of the *Act*. This order also determines that emails are not responsive to the request, as it was framed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 65(8.1)(a), 65(6)3, 24.

Orders and Investigation Reports Considered: Orders PO-2074-R, PO-3084 and PO-3243.

OVERVIEW:

[1] McMaster University (McMaster or the university) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*).

[2] The request was one of three access requests, submitted by the requester on the same day to the university.¹

¹ The other two requests currently the subject of related appeals in files PA13-160 and PA13-161.

[3] In this request (#2013-003), the requester sought access to the following:

I would like access to any and all reports and/or documents prepared by former Chief Internal auditor [name (the auditor)] that include any reference to McMaster faculty member [name, (the affected person)]. I would like this request to include, but not be limited to, any reports prepared by [the auditor] for the Audit Committee that reference [the faculty member].

[4] The university issued its access decision which indicated that it had identified one record as responsive to the request and that it was denying access to the record. The university cited the exclusions contained in sections 65(8.1)(a) and 65(6) and the exemptions contained in sections 19(a) and (c) (solicitor-client or litigation privilege), 21(1) (personal privacy) and 14(1)(d) (law enforcement) under the *Act*. More particularly, it stated:

- a. The responsive record relates solely to research expense accounts and therefore is excepted from the application of *FIPPA* pursuant to section 65(8.1)(a) on the basis that it is a record respecting or associated with research conducted or proposed by an employee of an educational institution.
- b. The responsive record is further excepted from the application of *FIPPA* pursuant to section 65(6) on the basis that it is a record that was prepared and used by McMaster in relation to meetings, consultation, discussions and communications about employment-related matters in which the institution has an interest.
- c. Even if the responsive record was subject to *FIPPA*, which is not the case:
 - i. The responsive record would be exempt from disclosure pursuant to section 19(a) in its entirety on the basis that the responsive record is privileged, as same was prepared for the purpose of seeking and receiving legal advice.
 - ii. The responsive record would be exempt from disclosure pursuant to section 19(c) in its entirety on the basis that the responsive record was prepared for counsel for use in giving legal advice, as well as in contemplation for use in litigation.
 - iii. Significant portions of the responsive record contain personal information of various individuals, the release of which would constitute an unjustified invasion of privacy pursuant to section 21(1)(f).

- iv. Significant portions of the responsive record are exempt from disclosure pursuant to section 14(1)(d) on the basis that they contain information that was furnished only by a confidential source.

[5] The requester, now the appellant, appealed the university's decision to deny access.

[6] During mediation, it was confirmed that the record at issue in this appeal is an internal audit report prepared by the auditor concerning the research expense accounts of the faculty member.

[7] During mediation, the appellant asserted that there is a public interest in disclosure, thereby raising the public interest override provision in section 23 of the *Act*.

[8] Also during mediation the university advised the mediator that there were emails from the auditor, but that it did not consider these emails to be responsive to the request as they were comprised mainly of email strings, which the auditor had forwarded on. The appellant is of the view that these emails are responsive to the request. Accordingly, the responsiveness of these emails has been included as an issue in the appeal.

[9] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry seeking the representations of the university on the application of the exclusions in sections 65(8.1)(a) and 65(6) to the report and on the responsiveness of the emails to the request.

[10] The university provided representations in response to the Notice of Inquiry and advised that the affected person had reviewed the representations and had consented to sharing the information therein with the appellant. I provided the appellant with a copy of the university's representations. The appellant did not provide representations in response.

[11] In the Notice of Inquiry, I advised the parties that if I determined that the record is not excluded from the application of the *Act*, I will then seek representations on the application of the exemptions claimed by the university to this record.

[12] In this order, I uphold the university's decision that the record is excluded from the application of the *Act* by reason of section 65(6)3. I also find that the emails are not responsive to the request.

RECORD:

[13] The record at issue is the internal audit follow up report prepared by the university's Chief Internal Auditor concerning the expenditures of the faculty member.

ISSUES:

A. Does the section 65(8.1)(a) exclusion for records respecting or associated with research exclude the record from the *Act*?

B. Does the section 65(6)3 labour relations and employment records exclusion exclude the record from the *Act*?

C. Are the emails responsive to the request?

DISCUSSION:

A. Does the section 65(8.1)(a) exclusion for records respecting or associated with research exclude the record from the *Act*?

[14] Section 65(8.1)(a) states:

(8.1) This Act does not apply,

(a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution; or

[15] Sections 65(9) and (10) create exceptions to the exclusion found at section 65(8.1). These sections state:

(9) Despite subsection (8.1), the head of the educational institution shall disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection.

(10) Despite subsection (8.1), this Act does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49(c.1)(i).

[16] The university describes the record as an audit report prepared by the university's internal audit department relating to the research expense accounts of the affected person in seven research specific projects.

[17] The university submits that section 65(8.1)(a) applies to exclude the record as it directly relates to the expenditures of funds in research expense accounts designated solely for research activities to be carried out by the affected person, who is employed by McMaster. It states that disclosure would be inconsistent with the purposes of the *Act*, the purpose of section 65(8.1)(a) (namely, to protect the principles of academic freedom and foster competitiveness), and would have a chilling effect on academic freedom, competitiveness and research at Canadian universities.

[18] The university states that there is "some connection" between the record and the research on the basis that the subject matter of the record relates solely to an audit of expense accounts that are directly respecting or associated with research.

[19] The university states that as was the case in Order PO-3084, the responsibility for research funds begins with the person to whom a research grant or contract is awarded. It states that the record is concerned with the affected person's use of research funds held in expense accounts, which accounts are solely to be used for research purposes. No funds in the research accounts in question are designated towards ineligible expenses unrelated to research.

[20] According to the university, the record arises from and is directly related to the affected person's research as it is related to the expenditure of research funds and grants. Therefore, the university states that the record has "some connection" to research.

Analysis/Findings

[21] Research is defined as "... a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." The research must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution.²

[22] This section applies where it is reasonable to conclude that there is "some connection" between the record and the specific, identifiable "research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution."³

[23] The records excluded in Order PO-3084 referred to by the university in its representations included expense claim forms and receipts for research undertaken by a professor. In this appeal, based on my review of the record, I find that it does not contain references to expense claim forms and receipts connected with the affected

² See Order PO-2693.

³ Order PO-2942; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

person's research projects. Therefore, I do not agree with the university that the expense accounts being audited in the auditor's report solely relate to the affected person's research projects identified in the university's representations and, therefore, establish "some connection" between the record and these research projects.

[24] In Order PO-3243, Adjudicator Stella Ball considered the application of section 65(8.1)(a) to emails that were associated with research conducted or proposed by an employee of the university or by a person associated with it. In determining that section 65(8.1)(a) did not apply to the records, she stated:

Previous orders of this office have established that records must relate to specific, identifiable research projects in order to be excluded under section 65(8.1)(a) of the *Act*.⁴ In adopting this approach, I note that the email records in this appeal are communications aimed at organizing the preparation of future research project proposals in compliance with certain timelines. The emails discuss possible research initiatives, potential research partnerships and prospective avenues of research funding. While the emails refer to academic disciplines and related research funding options, they do not refer to any "specific, identifiable research projects that have been conceived."⁵ Because the records do not reveal any specific, identifiable and conceived research project, they do not satisfy the requirement that the research be "conducted or proposed" in order to qualify for exclusion under section 65(8.1)(a). Therefore, I find that the records are not excluded from the *Act* by section 65(8.1)(a).

[25] I adopt this analysis of Adjudicator Ball in Order PO-3243 and find that the record in this appeal is not excluded from the application of the *Act* by reason of section 65(8.1)(a). The record is an audit of the expenses of a particular university faculty member.⁶ Although the faculty member may have used funds that were held in a general research expense account, the record does not refer to any specific identifiable research projects. Therefore, I conclude that it does not satisfy the requirement that the research be "conducted or proposed" in order to qualify for exclusion under section 65(8.1)(a).

[26] In conclusion, I find that the record is not associated with research conducted or proposed by the affected person, a faculty member at the university. Accordingly, I find that the record is not excluded by reason of section 65(8.1)(a) of the *Act*.

⁴ Orders PO-2693, PO-2694, PO-2942, PO-2946, PO-2947 and PO-3084.

⁵ Orders PO-2693 and PO-3084.

⁶ The affected person.

B. Does the section 65(6)3 labour relations and employment records exclusion exclude the record from the *Act*?

[27] Section 65(6)3 states:

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

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

[28] 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*.

[29] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.⁷

[30] 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. The meaning of "labour relations" is not restricted to employer-employee relationships.⁸

[31] 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].

[32] 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.⁹

[33] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the

⁷ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁸ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

⁹ *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.

records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.¹⁰

[34] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees¹¹

[35] 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.¹²

[36] 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.

[37] The university states that the record was:

(i) Collected, Prepared, Maintained or Use By Institution:

It is submitted that the record is an audit report prepared by McMaster's internal audit department and was used by McMaster as part of its audit of the affected [person].

(ii) Related to Meetings, Consultations, Discussions or Communications:

The record was used in relation to meetings, consultations, discussions and communications with McMaster's internal audit department, legal counsel and the affected [person].

(iii) Labour Relations or Employment Related Matters:

The record is an internal audit report related to an employment related matter in respect of the affected [person], namely an audit of the affected

¹⁰ Orders P-1560 and PO-2106.

¹¹ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

¹² *Ministry of Correctional Services*, cited above.

[person] employee's use of funds contained in research expense accounts maintained by the institution on the employee's behalf. Although the record relates to expense accounts and funds for research projects funded by parties other than McMaster and the expenses related to the record were not incurred in the course of the employee's employment per se, McMaster employees conducting research are nonetheless subject to McMaster's research integrity policy and, in turn, may be subject to discipline if found to be in breach of same. Moreover, the affected [person's] continued employment with the institution is directly dependent on [him] receiving and maintaining external funding for his research. Hence, the record is related to the employment of the affected third party.

Analysis/Findings

Part 1: collected, prepared, maintained or used

[38] I agree with the university that the record was prepared and used by it as part of its audit of the affected person's expenses. Therefore, part 1 of the test has been met.

Part 2: meetings, consultations, discussions or communications

[39] I agree with the university that the record was used in relation to meetings, consultations, discussions and communications with McMaster's internal audit department, legal counsel and the affected person. Therefore, part 2 of the test has been met.

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

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

- a job competition¹³
- an employee's dismissal¹⁴
- a grievance under a collective agreement¹⁵
- disciplinary proceedings under the *Police Services Act*¹⁶

¹³ Orders M-830 and PO-2123.

¹⁴ Order MO-1654-I.

¹⁵ Orders M-832 and PO-1769.

¹⁶ Order MO-1433-F.

- a “voluntary exit program”¹⁷
- a review of “workload and working relationships”¹⁸
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.¹⁹

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

- an organizational or operational review²⁰
- litigation in which the institution may be found vicariously liable for the actions of its employee.²¹

[42] 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.²²

[43] Records collected, prepared maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions.²³

[44] This record in this appeal is similar to the record in Reconsideration Order PO-2074-R. In Reconsideration Order PO-2074-R, the record was an audit report prepared by the Audit and Quality Assurance Branch of the Ministry of the Attorney General. The audit resulted from a pilot project initiated by the Criminal Injuries Compensation Board (the board) to determine the most efficient method to obtain investigative services. During the review, unexplained discrepancies were discovered between actual and reported investigations completed by one investigator. As a result, the individual was suspended with pay pending the completion of the audit. The individual subsequently resigned his position.

¹⁷ Order M-1074.

¹⁸ Order PO-2057.

¹⁹ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

²⁰ Orders M-941 and P-1369.

²¹ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

²² *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

²³ *Ministry of Correctional Services*, cited above.

[45] In Reconsideration Order PO-2074-R, Senior Adjudicator David Goodis found that section 65(6)3 excluded the audit report from the application of the *Act*. He concluded that the board's interest in the record was more than "a mere curiosity or concern", and that the matter giving rise to the record related to the board's own workforce where the focus had shifted from "employment of a person" to "employment-related matters".

[46] I adopt these findings of Senior Adjudicator Goodis in Reconsideration Order PO-2074-R and find that part 3 of the test has been met in the present appeal. The record in this appeal is a communication about an employment-related matter in which the university has an interest. The record is an internal audit follow up report written by the Chief Internal Auditor for the university's Audit Committee members. It is a review of an audit report to address issues which relate to human resources and other matters about the affected person's employment. The university's interest in the record is more than "a mere curiosity or concern". The matter giving rise to the record relates to the university's own workforce where the focus had shifted from "employment of a person" to "employment-related matters".

[47] As none of the exceptions to section 65(6) in section 65(7) apply, I find that the record in this appeal is excluded from the *Act* by reason of section 65(6)3.

C. Are the emails responsive to the request?

[48] 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;

...

- (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).

[49] 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.²⁴

[50] To be considered responsive to the request, records must "reasonably relate" to the request.²⁵

[51] The university submits that the appellant's request provided sufficient detail to identify the record responsive to the request. It states that as the request sufficiently described the record sought and was not considered ambiguous by McMaster, McMaster did not inform the appellant of any defect or offer assistance in reformulating the request, as same was unnecessary. The university states that:

While it is accurate to state that McMaster interpreted the scope of the request unilaterally and did not outline any limits of the scope of the request to the requester, as McMaster did not interpret the request as ambiguous or requiring clarification from the requester, McMaster did not consider it necessary to address or seek further information from the requester with respect to the scope of the Request.

[52] The university submits that it did not respond literally to the request, but rather reasonably considered the wording of the request, particularly in contrast to two other requests submitted by the appellant on the same day. It states that in both of those other requests, the appellant expressly sought correspondence, whereas in the present request, correspondence was not expressly requested.

[53] The university states that the use of the phrase "documents prepared" in the request was reasonably interpreted by it to suggest that the appellant was seeking more than mere email correspondence between the auditor and third parties. The university states that an email that is forwarded by a party or an email chain that includes communications between two or more parties would not reasonably be considered as being a "document prepared by" the auditor.

Analysis/Findings

[54] As stated above, the request in this appeal was for the following:

I would like access to any and all reports and/or documents prepared by former Chief Internal auditor [name (the auditor)] that include any reference to McMaster faculty member [name, (the affected person)]. I would like this request to include, but not be limited to, any reports

²⁴ Orders P-134 and P-880.

²⁵ Orders P-880 and PO-2661.

prepared by [the auditor] for the Audit Committee that reference [the faculty member].

[55] The university has not included emails as responsive to this request. I find that the appellant's request was for reports or documents prepared by the auditor and that if the appellant wanted access to email correspondence exchanged between the auditor and other individuals, that he should have specifically requested that type of information.

[56] I also note that the university's decision letter indicates that there is only one record responsive to the request. The appellant did not indicate when he received that letter that he was seeking emails exchanged between the auditor and other individuals. I find that the appellant should have informed the university at that time if he objected to the scope of the request as defined by the university. Section 24(1)(b) requires a requester to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the responsive records.

[57] In this appeal, the request provided sufficient detail to identify the record responsive to the request. I find that emails are not responsive to the request. If the appellant still seeks access to emails exchanged between the auditor and other individuals, he is able to pursue access to them in a separate request.

ORDER:

I uphold the university's decision and dismiss the appeal.

Original Signed By: _____

Diane Smith
Adjudicator

_____ March 14, 2014