

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3323

Appeal PA13-160

McMaster University

March 19, 2014

Summary: The appellant sought access under the *Freedom of Information and Protection of Privacy Act* to correspondence related to an internal auditor report regarding 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 and finds that the record is excluded from the application of the *Act*.

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

Orders and Investigation Reports Considered: Orders PO-3320, PO-3324, 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

[3] In this request (#2013-002), the requester sought access to the following:

I would like access to any and all correspondence sent from [Dean and Vice-president, (name of faculty)] to [name (university faculty member)], between [dates].

[4] The requester then amended the request to relate to only correspondence that relates to any matters pertaining to the report referenced in request #2013-003.

[5] The university located one letter responsive to the request and also confirmed that the report referenced in respect of request #2013-003 is an internal audit report prepared by the former Chief Internal Auditor (the auditor) relating to the named faculty member and that the report concerned an audit of research expense accounts. The university further stated that it was denying access to any and all correspondence between the individuals named in the request which related to the report, based on the exclusions contained in sections 65(8.1)(a) and 65(6). 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.

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

[7] 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 letter, which is the sole record at issue in this appeal.

¹ The other two requests were the subject of related appeals in files PA13-133 and PA13-161, in which the records were ordered excluded in Orders PO-3320 and PO-3324.

[8] 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.

[9] In this order, I find that the record is excluded from the application of the *Act* by reason of section 65(6)3.

RECORD:

[10] The record at issue is a two-page letter with a four-page attachment.

DISCUSSION:

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

[11] 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.

[12] 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*.

[13] 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.²

[14] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.³

[15] 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.⁴

[16] 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.⁵

[17] 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 records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.⁶

[18] 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 employees.⁷

[19] 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.⁸

[20] 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 *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.

⁴ Order PO-2157.

⁵ *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.

⁶ Orders P-1560 and PO-2106.

⁷ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁸ *Ministry of Correctional Services*, cited above.

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

[21] The university states that the record was:

(i) Collected, Prepared, Maintained or Used by Institution: It is submitted that the record is a letter prepared by the Dean of Health Sciences on behalf of the institution for delivery to the affected [person], who was an employee of the institution.

(ii) Related to Meetings, Consultations, Discussions or Communications: The record is a letter from the Dean to the employee is, by its very nature, "a communication" from the institution to an employee of the institution.

(iii) Labour Relations or Employment Related Matters: The record is a letter related to an employment related matter of the affected [person], namely an audit of the addressee, namely a request for information relating to the employees 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 [person].

Analysis/Findings

Part 1: collected, prepared, maintained or used

[22] 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

[23] 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

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

- a job competition⁹
- an employee’s dismissal¹⁰
- a grievance under a collective agreement¹¹
- disciplinary proceedings under the *Police Services Act*¹²
- a “voluntary exit program”¹³
- a review of “workload and working relationships”¹⁴
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.¹⁵

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

- an organizational or operational review¹⁶
- litigation in which the institution may be found vicariously liable for the actions of its employee.¹⁷

[26] 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.¹⁸

⁹ Orders M-830 and PO-2123.

¹⁰ Order MO-1654-I.

¹¹ Orders M-832 and PO-1769.

¹² Order MO-1433-F.

¹³ Order M-1074.

¹⁴ Order PO-2057.

¹⁵ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

¹⁶ Orders M-941 and P-1369.

¹⁷ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

¹⁸ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[27] 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.¹⁹

[28] This record in this appeal is similar to the record which was the subject of Reconsideration Order PO-2074-R. In that case, 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.

[29] 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".

[30] 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 a letter containing information about an internal audit undertaken for the university's Audit Committee members. It is a review of the internal audit 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".²⁰

[31] 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 section 65(6)3. As I have found that the record is excluded from the application of the *Act* by reason of section 65(6)3, it is not necessary for me to consider whether it is also excluded from the application of the *Act* by reason of section 65(8.1)(a).

¹⁹ *Ministry of Correctional Services*, cited above.

²⁰ See Order PO-3320, where I found the internal audit follow up report excluded by reason of section 65(6)3.

ORDER:

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

Original signed by: _____
Diane Smith
Adjudicator

_____ March 19, 2014