

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4250

Appeal PA17-343

University of Ontario Institute of Technology

March 31, 2022

**Summary:** A request was made to the University of Ontario Institute of Technology (the university) for information on full-time, permanent faculty; full-time, contract faculty; and part-time, contract faculty, broken down by department for the years 2006-2007 through 2016-2017. After its search, the university issued a decision denying access to the information and claiming the application of the employment or labour relations exclusion in section 65(6)2 and 65(6)3 to the responsive information. The appellant appealed taking the position that section 65(6) did not apply to the information and also claiming that the university did not complete a reasonable search for responsive records. In this order, the adjudicator finds that the exclusion at section 65(6) does not apply to the responsive information in the human resources database. The adjudicator also finds that the university has not completed a reasonable search for other responsive records.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F31, as amended, sections 24, 65(6)2 and 65(6)3.

**Orders and Investigation Reports Considered:** Orders MO-2129, MO-2660, MO-3496, MO-3537, MO-3981, P-50, P-1369, PO-2520, PO-2613, PO-3572, PO-3642, PO-3684, PO-4056 and PO-4095.

**Cases Considered:** *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; *Reynolds v. Ontario* [2006] O.J. No. 4356, 217 O.A.C. 146 (C.A.); *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC); *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII); *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (CanLII).

## OVERVIEW:

[1] The requester, a researcher employed by a union and conducting a research project on the use of contract faculty in Canada, made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Ontario Institute of Technology (the university) for the following information:

1. The number of **full-time, tenured (or tenure-stream) faculty** in each university department for each year from the 2006-2007 academic year through the 2016-2017 academic year (inclusive). For greater clarity, I am seeking the number of individuals in each category, not the number of *full-time equivalents*. Please include faculty from all bargaining units, as well as any non-organized faculty.
2. The number of **full-time sessional or contractually limited appointments** in each university department for each year from the 2006-2007 academic year through the 2016-2017 academic year (inclusive). For greater clarity, I am seeking the number of individuals in each category, not the number of *full-time equivalents*. Please include faculty from all bargaining units, as well as any non-organized faculty.
3. The number of **part-time sessional or contractually limited appointments** in each university department for each year from the 2006-2007 academic year through the 2016-2017 academic year (inclusive). (These appointments are sometimes called adjunct or contingent faculty and are generally employed on a course-by-course basis, receiving limited-term contracts to teach one or more courses.) For greater clarity, I am seeking the number of individuals in each category, not the number of *full-time equivalents*. Please include faculty from all bargaining units, as well as any non-organized faculty.

[2] The university issued a decision denying access to the requested records, claiming the application of the employment or labour relations exclusions in section 65(6)2 and 65(6)3 of the *Act*.

[3] The requester, now the appellant, appealed the university's access decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation of the appeal, the university provided the mediator with additional information regarding which departments within the university house records responsive to the request. The university stated that data from which responsive records could be compiled is housed within the human resources database, and that few other departments keep such records. The university took the position that the responsive records kept by departments other than human resources would also be excluded from the application of the *Act* under section 65(6) of the *Act*.

[5] The appellant indicated that she believes documents may exist in both the sources the university determined are excluded from the application of the *Act*, as well

as other sources. As such, the reasonableness of the university's search was added as an issue in this appeal.

[6] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*. The IPC adjudicator originally assigned to the appeal sought and received representations from the parties. These representations were shared in accordance with the IPC's *Code of Procedure* (the *Code*). The appeal was then assigned to me to continue with the adjudication.

[7] In this order, I find that the information located by the university in its human resources database that would be responsive to the appellant's request is not excluded under section 65(6)2 or section 65(6)3. I order the university to issue another access decision with respect to the responsive record or records that can be produced from the database, without relying on the exclusion.

[8] I also find that the university did not conduct a reasonable search for other responsive records. The university is to issue a fee estimate for completing such a search, to enable the appellant to decide whether she is pursuing access to those records.

## **RECORDS:**

[9] The university did not provide the appellant or the IPC with any responsive records in its human resources database or from other locations of the university. The university provided a description of the records in its representations along with an affidavit provided by its general secretary and legal counsel in its reply representations which addresses the nature of the records in the database and other responsive information outside of this database.

## **ISSUES:**

- A. Does section 65(6) exclude the records from the *Act*?
- B. Did the university conduct a reasonable search for records?

## **DISCUSSION:**

### **Issue A: Does section 65(6) exclude the records from the *Act*?**

[10] The university claims that the records that would be responsive to the request are excluded from the *Act* by sections 65(6)2 and 65(6)3, which 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:

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.

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

[12] The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to."<sup>1</sup>

[13] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by the collective bargaining legislation, or to analogous relationships.<sup>2</sup>

[14] 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.<sup>3</sup>

[15] 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.<sup>4</sup>

### ***Nature of the record***

[16] In support of its position that the *Act* does not apply to the requested information, the university submits that the source of any responsive record is the data contained in its human resources database, and to some extent "faculty records," and claims that both categories of records are excluded from the *Act* by section 65(6).

[17] In this order, I will begin by addressing only whether the section 65(6) exclusion applies to responsive records that can be produced from the human resources database.

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<sup>1</sup> Order P-1223.

<sup>2</sup> 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.).

<sup>3</sup> Order PO-2157.

<sup>4</sup> *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*").

[18] In its initial representations, the university refers to faculty level employee records "faculty records" that might be responsive to the request. The university initially submits that the faculty records are contained in the human resources database. However, in its reply representations, the university clarifies and makes a distinction between its human resources database and "faculty records." In the affidavit provided by the university with its reply representations, the university's secretary and general counsel refers to the faculty records as being created and maintained on the basis of information derived from the human resources database. The university submits that faculty records are compiled by the office of institution research analysis, human resources and/or individual faculties. It submits that the purpose of the faculty records is to administer employee relationships, including budgeting for employees and ensuring that the university can pay for the people required to teach courses.

[19] The university submits that the human resources database is an electronic database that consists of employee-specific records. It submits that the university developed the human resources database and it is used for several human resources management and labour relations purposes by human resources staff at the university. The university submits that the purpose its human resources database is primarily to administer individual employment relationships, including hiring, appointing, reappointing and evaluating employees, and to allow for the communication of information amongst administrators for that purpose.

[20] The university submits that the following processes show how the information is collected and entered into the human resources database:

- When a candidate is selected for employment, the university sends an offer letter to the prospective and the employee indicates if they accept by signing the offer letter and submitting it to the university's HR by email.<sup>5</sup>
- Payroll and tax forms are completed by the candidate containing personal and banking information and generally are submitted by email with signed offer letter.
- Personal demographic information is generally entered into the human resources database using the accepted offer letter and submitted payroll and tax forms.
- A position in the position module is linked to an individual's "person record" based on information in the offer letter. The position information includes, but is not limited to, bargaining unit information (if applicable), full/part time status, contract/continuing, job level compensation and benefit/pension entitlements.
- An onboarding meeting takes place with either human resources (full time continuing employees) or a local manager (limited term employee) where

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<sup>5</sup> The university notes that this process may involve further discussions before the offer letter is signed which would also be included in the database.

personal/demographic information is confirmed and/or entered into the database.

- The payroll and tax module is populated based on the tax and payroll forms and compensation information and bargaining unit information (to set up deduction for Union dues) in the position module
- If an employee's position or status at the university changes (e.g. promotion, secondment), this will be documented in a letter to the employee, and their person record will be linked to a different position in the position module, which then feeds the correct compensation information to the payroll module.

[21] The university submits that the human resources database maintains employee-specific records in three "modules" that include: a personal/demographic module; a position module; and, a payroll and tax module.

[22] The university submits that with the exception of its published statistical records<sup>6</sup>, information contained in the human resources database is confidential and only a limited number of approved staff members have access where necessary to perform their duties.

[23] The university submits that sections 65(6)2 and 65(6)3 applies to the information in the human resources database and that none of the exceptions found in section 65(7) applies.

### **Section 65(6)2: negotiations**

[24] For section 65(6)2 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 negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution, and
3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.<sup>7</sup>

### ***Was the record collected, prepared, maintained or used by the university or on its behalf?***

[25] As set out above, the university takes the position the human resources database

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<sup>6</sup> The university refers to statistical reports ("Fact Books") about employment numbers that are available online which includes the numbers of its faculty broken down with reference to gender.

<sup>7</sup> Orders M-861, PO-1648.

is collected, prepared, maintained and used by the university. The appellant does not comment on this requirement.

[26] Having reviewed the representations, I am satisfied that the information in the university's human resources database along with any records derived from it, including the information requested by the appellant, would be considered a record collected, prepared and maintained by the university.

***Was the record collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution?***

[27] The university argues that the records in the database are collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution.

[28] It submits that the human resources database is also used for compiling information that is required to respond to applications for certification of new bargaining units before the Ontario Labour Relations Board, and is a key source of information for collective bargaining with certified bargaining units. It also submits that the human resources database is used for determining which employees are subject to union dues deductions, and for general budgeting and planning purposes.

[29] The university refers to Order PO-2520 and submits that the phrase "relating to" has been interpreted to mean "for the purpose of, as a result of, or substantially connected to." Therefore, the university submits, there only needs to be "some connection" between the collection, preparation, maintenance and use of the records and negotiations or anticipated negotiations relating to labour negotiations.

[30] The university submits that labour-relations negotiations have taken place, and continue to take place, between it and the various unions that represent, and seek to represent, bargaining units at the university. It submits that the human resources database plays a substantive role in the labour-relations negotiation process for the university as it is relied upon as the sole source of information with respect to employment-specific records. It submits that information about the bargaining group, employment numbers, appointment information, job classifications, and promotion or transfer decisions have always been closely guarded by employers and is expressly excluded from the *Act* under s. 65(6).

[31] The appellant, on the other hand, refers to Order PO-2613 where the adjudicator held that a job evaluation system, described as a database of job descriptions, positions, and classification standards, was not excluded from the *Act* pursuant to s. 65(6)2.

[32] In Order PO-2613, the adjudicator stated:

Many different types of records may ordinarily be used to prepare for or assist in various negotiations, including parts of the record in this appeal; however, that does not mean that the entire record is excluded from the scope of the Act. In my view, meeting the definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the negotiations or anticipated negotiations referred to by the Ministry, and the Ministry has not provided sufficient evidence to support such a finding.

### ***Finding***

[33] The issue before me is whether the responsive information in the human resources database – that is, the information that would produce a record or records responsive to the appellant’s access request – is excluded under section 65(6)2. After reviewing the representations of the university, I am not satisfied that the responsive information in the human resources database was collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution.

[34] Considering the university’s representations, including the affidavit of the university’s secretary and general counsel, the information in the database is, in my view, more in the nature of a database of factual information collected by university administration in order to assist it with administering the employee/employer relationship. The university confirms that the record was created to assist it in the management of its workforce and the employment records associated with its workforce, and that it serves many purposes. Although it may be that the record or portions of it will, at some point, assist the university in its labour relations negotiations, this is not enough to establish that the information is used “in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution” for the purposes of section 65(3)2.

[35] The university refers to Order PO-2520 in support of its position that, although a record may not have been created for the purpose of negotiations relating to labour relations, if the record is later used for that purpose it can still meet the “in relation to” requirement. In my view, the facts in that order are distinguishable from those before me. In Order PO-2520, the adjudicator found that the record at issue, which was a two-page contract entered into between the institution and an affected party, was excluded from the scope of the *Act* under section 65(6)2. However, with respect to the issue of whether the record was used “in relation to” negotiations, the adjudicator stated:

Based on the evidence before me, it is clear that the record was provided to the union in the course of settlement negotiations that, in the end, produced Minutes of Settlement. It is also clear that the record was relevant to the subject matter of the grievance, as noted in the College’s reply representations (quoted above). In my view, this is sufficient evidence for me to conclude that it was “used” for the purpose of, and therefore “in relation to”, the negotiations.



[36] In Order PO-2520, the actual record had been used in specifically identified negotiations. That is different from the situation in this appeal, where the university argues that its entire database is excluded because, in addition to being employment information used for administration purposes, it is also used for compiling information that is required to respond to applications for certification of new bargaining units before the Ontario Labour Relations Board, and is a key source of information for collective bargaining with certified bargaining units.

[37] In Order PO-2613, a similar argument was before the adjudicator with the institution claiming that an entire database relating to job positions, descriptions and classifications was prepared, maintained or used "in relation to" negotiations generally (as opposed to specifically identified negotiations). In that order the adjudicator found that although portions of the database were used in negotiating the Essential Services Agreement or other agreements entered into by the institution, this did not mean that the entire record was collected, prepared, maintained or used "in relation to" those negotiations or anticipated negotiations. The adjudicator held that many different types of records may ordinarily be used to prepare for or assist in various negotiations, including parts of the database in dispute but that did not mean that the entire database was excluded from the scope of the *Act*. The adjudicator found that meeting the definition in section 65(6)2 requires more than a superficial connection between the creation, preparation and/or use of the records and the negotiations or anticipated negotiations.

[38] I agree with the finding in Order PO-2613. In this appeal, although the university has indicated that portions of the records are regularly used in negotiations or anticipated negotiations, it has not introduced evidence identifying which portions of the record were used in this manner. Requirement 2 of section 65(6)2, as set out above, requires that the record be collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. I have not been provided with evidence that the database, as a whole, was collected, prepared, maintained or used in this manner. Moreover, if the record at issue is treated as the responsive record or records that can be produced from the database, the connection between records and any negotiations or anticipated negotiations is even more tenuous.

[39] Accordingly, I find that the responsive record or records that can be produced from the human resources database were not collected, prepared, maintained or used "in relation to" negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. In my view, this information is maintained and used by the university in order to properly carry out its mandate as a publicly funded university. The fact that some of the information might at some point be used in labour negotiations is not sufficient for the section 65(6)(2) exclusion to apply.

[40] As a result, I find that the university has not satisfied me that the record falls within the second requirement of section 65(6)2. As all three parts of the test must be

met, section 65(6)2 does not apply to exclude the record from the scope of the *Act*.

***Section 65(6)3: labour relations or employment-related matters in which the institution has an interest***

[41] The university also claims that the responsive information in the human resources is excluded under section 65(6)3 of the *Act*.

[42] 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.

***Was the record collected, prepared, maintained or used by the university or on its behalf?***

[43] The university submits that section 65(6)3 applies because the records contained in the human resources database were collected prepared, maintained and used by the university in relation to meetings, consultations, discussions or communication about labour relations and employment related matters in which the university has an interest.

[44] As I found above, I am satisfied that the responsive information in the human resources is record collected, prepared and maintained by the university.

***Part 2: Was this collection, preparation, maintenance or use in relation to meetings, consultations, discussions or communications?***

[45] The university submits that after its employees collect, prepare and maintain information contained in the human resources database, that information is then used by university administrators to administer the university's employment relationships, some of which involve unionized employees.

[46] The university submits that the human resources database is a means of sharing information between its administrators who administer employment and union relationships. The university submits that the information in the database is used in evaluative meetings and consultations regarding hiring and appointments. The university provides two examples:

- After entering information into the human resources database from an offer letter, university personnel have an onboarding meeting with the employee in order to confirm the accuracy of the information. The university's collection and maintenance of the human resources database and the records in the human

resources database is substantially connected to the onboarding meetings, discussions and communications.

- Records contained in the human resources database are aggregated for budget and planning purposes. On this basis, information contained in the human resources database is collected, prepared, maintained and used in meetings and consultations with respect to budget.

[47] After reviewing the university's explanation of the information in its human resources database, I do not accept that part 2 of the test has been met. From my review of the representations, the information in the human resources database is made up of information provided by a successful candidate when they sign the offer letter and submit same along with payroll and tax forms. The university refers to the onboarding meeting where this information is confirmed and suggests that this qualifies as a "meeting" for the purposes of part 2 of the test.

[48] In reviewing the representations, I am not satisfied that the university has met part 2 of the section 65(6)3 test with regard to the responsive information in its human resources database. The appellant does not seek offer letters or similar records. Rather, what the appellant seeks is a record, or records, that it would appear can be produced from the "position" information in the database, that the university describes above as:

A position in the position module is linked to an individual's "person record" based on information in the offer letter. The position information includes, but is not limited to, bargaining unit information (if applicable), full/part time status, contract/continuing, job level compensation and benefit/pension entitlements.

[49] For the second requirement to be satisfied, I must find there is *some connection* between the collection, preparation, maintenance or usage of the records and the meetings, consultations, discussions or communications about labour relations or employment matters.<sup>8</sup> However, the responsive information in the database, which the university submits is entered from information in and attached to signed offer letters, and also information resulting from a change in an employee's status, appears to be information that can be used by the university for many purposes, most of which are related to its mandate as a public institution of teaching and research, not its status as an employer.

[50] In my view, it is not enough to say that the information in a database conveys employment information that can be used in certain ways. If that were the test, the legislature could simply have said that the exclusion at section 65(6)3 applies to all employment related records or information. Rather, the legislature has carefully chosen its words to encompass only records "collected, prepared, maintained or used ... *in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.*"

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<sup>8</sup> *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII)

[51] In Order P-1369, for example, the adjudicator found that section 65(6)3 did not apply to a report of a review of the Liquor Control Board of Ontario because any connection between the contents of the record and "meetings, consultations, discussions or communications about labour relations or employment-related matters" was considered too remote to find that the collection, preparation, maintenance or use of the record was *in relation to* such meetings, consultations, discussions or communications. In addition, the adjudicator was not persuaded that the record itself represented a consultation or discussion *about* labour relations or employment-related matters. Instead, the adjudicator found that the record was a broadly-based organizational review "which touches occasionally, and in an extremely general way, on staffing and salary issues."

[52] In contrast, in Order PO-4056 the adjudicator found that a portion of a presentation containing information about the staffing mix of its laundry services satisfied part 2 of the test where it was contained in a presentation:

The hospital states that page 406 is part of a presentation it prepared along with its consultants regarding the streamlining of the hospital's laundry and linen services. It states that this presentation was delivered by hospital staff and the hospital's consultants. It states that page 406 contains plans with respect to the staffing mix responsible for the provision of laundry and linen services to the various hospital sites, and the structure of the hospital's distribution program. The hospital submits that page 406 directly addresses conditions of employment for employees working for the hospital.

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I agree with the hospital, and I find, that parts 1 and 2 of the test have been met as page 406 is part of a presentation prepared by the hospital in relation to meetings, consultations, discussions or communications regarding the hospital's laundry and linen services.

[53] However, as discussed below, the adjudicator went on to find that part 3 of the test was *not* met for this portion of the record and, consequently, it was *not excluded* from the application of the *Act* by reason of section 65(6)3.

[54] The circumstances of this appeal stand in contrast to the adjudicator's part 2 finding in Order PO-4056. The university describes the human resources database as consisting of employee-specific records which was developed so it could be used for several human resources management and labour relations purposes including administering the university's employment relationships and using the information for budget purposes. In my view, the responsive information in the database cannot be characterized as being collected, prepared, maintained or used by the university *in relation to meetings, consultations, discussions or communications* about any of the matters listed by the university above. While the same information may potentially be used in other records relating to those matters – and thereby become the subject of

meetings, consultations, discussions or communications in that context – those are not the circumstances before me in this appeal.

[55] Consequently, I am not satisfied that the university has met part 2 of the section 65(6)3 test with regard to the responsive information residing in its human resources database.

[56] Although all three parts of the test must be met for the exclusion at section 65(6)3 to apply, and I have found that the second part has not been met, I will, nevertheless, discuss if the third part of the test has been met.

***Part 3: Are the communications about labour relations or employment-related matters in which the institution has an interest?***

[57] I have found above that the responsive information in the database is not collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications. However, if it were, I find that such communications are not about labour relations or employment-related matters.

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

- a job competition<sup>9</sup>
- an employee’s dismissal<sup>10</sup>
- a grievance under a collective agreement<sup>11</sup>
- disciplinary proceedings under the *Police Services Act*<sup>12</sup>
- a “voluntary exit program”<sup>13</sup>
- a review of “workload and working relationships”<sup>14</sup>
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.<sup>15</sup>

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

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<sup>9</sup> Orders M-830, PO-2123.

<sup>10</sup> Order MO-1654-I.

<sup>11</sup> Orders M-832, PO-1769.

<sup>12</sup> Order MO-1433-F.

<sup>13</sup> Order M-1074.

<sup>14</sup> Order PO-2057

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

- an organizational or operational review<sup>16</sup>
- litigation in which the institution may be found vicariously liable for the actions of its employee<sup>17</sup>
- 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.<sup>18</sup>

[60] The records 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. Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 65(6).<sup>19</sup>

### ***Representations***

[61] The university submits that the database relates to matters in which it is acting as an employer and includes information such as the terms and conditions of employment and information related to human resources. It submits that the “position” related information that is being requested is stored on the human resources database and is derived from, relates to, or is comprised of, information from contracts of employment between the university and its workforce. With respect to the faculty records, the university submits that they are primarily to administer employment relationships, including budgeting for employees.

[62] The university submits that the meetings, consultations, discussions or communications relate to hiring, classification, appointment and promotion (job competition), as well as to a review of budget and employee numbers (workload). The university submits that in Order PO-2613 the adjudicator found that job competition and workload fall within the phrase “labour relations and employment-related matters.”

[63] The university also refers to *Ontario (Solicitor General) v. Mitchinson*<sup>20</sup> where it was confirmed that the phrase “in which the institution has an interest” refers to more than a “mere curiosity or concern,” and includes matters involving the university’s own workforce. It submits that the records in the human resources database were created to assist it in the management of its workforce and in the management of employment records associated with its workforce. On this basis, the university submits that the records in the human resources database relate directly to the management of its own workforce.

[64] The university refers to Order MO-3537 and submits that it provides support for

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<sup>16</sup> Orders M-941, P-1369.

<sup>17</sup> Orders PO-1722, PO-1905.

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

<sup>19</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

<sup>20</sup> 55 OR (3d) 355 (ONCA).

its position that the records in its human resources database are excluded by section 65(6)3. In MO-3537, an institution received a request for access to the names and salaries of employees working from it which the institution denied because the records were stored in its human resources system and were therefore excluded by section 52(3)3 (the municipal equivalent to section 65(6) of the *Act*). The university notes that the adjudicator agreed that information taken from the human resources system is excluded under section 52(3)3. The university submits that the adjudicator stated that information taken from records contained in a human resources information system are, almost by definition, maintained for the purpose of routine human resources administration.

### ***The appellant's representations***

[65] The appellant submits that the requested records do not fall within the labour relations and employment exclusions set out in section 65(6). She submits that the limited information requested, being only the number of persons employed in certain categories, is properly characterized as a "new record" within the meaning of section 2(1) of the *Act*.

[66] The appellant states that the university has provided the same or similar information in the past in response to a request under the *Act* and submits that it may be presumed that the university is able to fulfil the request using computer hardware, software and technical expertise and that it would not unreasonably interfere with its operations.<sup>21</sup>

[67] The appellant submits that the human resources database is not properly characterized as falling within the exceptions in section 65(6)2 and 65(6)3 for all intents and purposes, without further analysis. She submits that it is not evident on the record provided that the entire database is excluded from the *Act* in all scenarios.

[68] The appellant relies on *Ontario (Ministry of Correctional Services) v. Goodis*,<sup>22</sup> where she submits the Divisional Court held that section 65(6) must be interpreted narrowly in light of the purpose of the *Act*, and applies to exclude only those records that actually relate to collective bargaining or employment matters.

[69] The appellant also refers to Order PO-2613, discussed above, where the adjudicator held that a job evaluation system, described as a database of job descriptions, positions, and classifications standards, was not excluded from the *Act* pursuant to section 65(6)2 (I note, however, that the adjudicator found that section 65(6)3 applied to exclude that database from the *Act*).

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<sup>21</sup> The appellant refers to a research project by Jamie Brownlee in 2010 (see Jamie Brownlee, "Contract Faculty in Canada: Using Access to Information Requests to Uncover Hidden Academics in Canadian Universities," *Higher Education*, Vol. 70, 2015, pp. 787-805). The Brownlee research was based on similar access requests for ten years of data from faculties of humanities and social sciences. According to the appellant, the university in this matter released records in response to Brownlee's request.

<sup>22</sup> Cited above.

[70] The appellant submits that in this appeal, the university has taken the position that the confidential nature of the source documents subjects the entire database to the labour relations and employment exclusions. However, the appellant submits that the source documents in the human resources database are not within the scope of documents requested. The appellant submits that the requested record is nothing more than numbers – numbers of people hired into specific jobs – with no additional information. The appellant refers to the numbers requested as no more than generic operational numbers.

[71] The appellant submits that it has been held that records that are prepared “in the course of routine procedures” or concern “generic operational issues,” do not normally fall within the scope of section 65(6)3.<sup>23</sup>

[72] The appellant submits that adjudicators have clearly indicated that it is not permissible for public bodies to structure their database in a manner that would, by design or effect, defeat the right of public access. She refers to Order PO-2904 where the adjudicator stated:

... this office has also stated that institutions have an obligation to maintain their electronic records in formats that ensure expeditious access and disclosure in a manner or form that is accessible by all members of the public. In the electronic age, this is essential for an open and transparent government institution. [See Order M0-2199]. Furthermore, in the postscript to Order P-1572, former Assistant Commissioner Mitchinson emphasized that as parts of government become increasingly reliant on electronic database to deliver their programs, it is critically important that public accessibility considerations be part of the decision-making process on any new systems design.

[73] The appellant submits that as digital records replace paper, freedom of information and access obligations should not be easily defeated by an institution that “seeds, or even liberally salts” a database with confidential records. She submits that it is incumbent upon the IPC to ensure that freedom of information legislation is interpreted in a manner that maximizes public access to digital records and information if at all possible.

### ***The university's reply representations***

[74] The university submits that it does not dispute that there are machine readable records that are responsive to the request and that the information can be extracted and produced, but repeats that the records are excluded under section 65(6)2 and 65(6)3.

[75] The university submits that its reliance on the exclusions is consistent with the

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<sup>23</sup> Order PO-3029-I.



legislative intent. It also refers to the Divisional Court decision in *Ontario v. Goodis*<sup>24</sup> (*Goodis*) where, it submits, the Court found that the purpose of the amendment (adding section 65(6) to the *Act*) was to “ensure the confidentiality of labour relations information.” The university submits that the Divisional Court noted that

... the type of records excluded from the *Act* by s. 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.

[76] The university also notes that the Divisional Court in *Goodis* referred to *Reynolds v. Ontario*<sup>25</sup> where the Court of Appeal determined that the intention of the section 65(6) amendment was “to protect the interest of institutions by removing public rights of access to certain records relating to their relations with their own workforce.”

[77] The university clarifies that the human resources database is an electronic database that consists of employee-specific records developed primarily for the purpose of administering employment relationships at the university while “faculty records” are derived primarily from that database and are also created and used primarily for the same purpose. It submits that both of these sources contain the kind of employee and labour relations information pertaining to its own workforce that adjudicators have identified as excluded under section 65(6).

[78] The university also provided an affidavit sworn by its secretary and general counsel who oversaw the university’s response to the appellant’s access request. The university’s secretary confirms the earlier representations of the university with regard to the records in the human resources database and also provides a more thorough explanation of the “faculty records.” The secretary explains that faculty records are compiled by the office of the institutional research analysis, the office of human resources and/or individual faculties. She provides an example, referring to the process of planning to ensure the university will have the requisite number of employees in future semesters, administrators will normally prepare and update “head counts” and/or organization charts. The secretary submits that the primary source for this information is the human resources database, information is in some cases also gathered from employee personnel files maintained by individual faculties. The secretary submits that faculties do not keep separate reports of the number of individuals employed as course instructors, except as part of an annual workload distribution process in which work is allocated to employees of the university. The secretary submits that like the human resources database, the purpose of faculty records is to administer employment relationships.

[79] The secretary submits that the primary purpose of the human resources database is to assist the university administrators in managing its workforce by sharing employee information that is relevant and necessary for the processes of hiring,

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<sup>24</sup> Cited above.

<sup>25</sup> [2006] O.J. No. 4356, 217 O.A.C. 146 (C.A.).

appointing, reappointing and evaluating employees. She refers to a secondary purpose of the human resources database being to provide university administrators with information that will allow them to prepare financial budgets. She submits it is also used for compiling information that is required to respond to applications for certification of new bargaining units before the Ontario Labour Relations Board, and is a key source of information for collective bargaining with certified bargaining units.

[80] In her sur-reply representations, the appellant argues that the responsive records are not excluded by section 65(6) because they are collected and maintained for a variety of different purposes, not only for employment or labour relations.

[81] The appellant relies on Order PO-3572, where the adjudicator held that where the requested records are used for a variety of different purposes "the question of whether the excluded purpose is a predominant or primary purpose is relevant."

[82] The appellant submits that consistent with the *Act's* purpose, the section 65(6) exclusions must be interpreted narrowly and exclude only those records that actually concern terms and conditions of employment "relating to the institutions' own workforce where the emphasis has shifted from employment of a person to employment-related matters."<sup>26</sup>

[83] The appellant submits that the courts have rejected a categorical approach to the exclusions, and the rule is that in each case, "(w)hether or not a particular record is 'employment related' will turn on an examination of the particular document."<sup>27</sup>

[84] The appellant submits that in this appeal, the data requested does not include any personal or proprietary information, and records that are prepared "in the course of routine procedures" or concern "generic operational issues" do not fall within the scope of the section 65(6)(3) exclusion.<sup>28</sup>

### ***Analysis and finding***

[85] For the following reasons, I find that part 3 has not been met with regard to the information in the human resources database.

[86] The phrase "employment related matters 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.<sup>29</sup> In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*<sup>30</sup>, the Ontario Court of Appeal stated that section 65(6)3:

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<sup>26</sup> *Ontario (Solicitor General) v. Ontario (Information and Privacy Commission)*, (2001) 2001 CanLII 8582 (ON CA), 55 O.R. (3rd) 355 paras. 30, 38, 39 (C.A.); leave to appeal refused [2002] S.C.C.A No. 509.

<sup>27</sup> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), cited above.

<sup>28</sup> *Ontario (Alcohol and Gaming Commission) (Re)*, 2011 CanLII 83521 (ON IPC) and Order P0-3029-1.

<sup>29</sup> *Solicitor General* (cited above).

<sup>30</sup> *Ibid.*

. . . deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted [footnote omitted], and the wording of the subsection as a whole, the words, "in which the institution has an interest" in subclause 3 *operate simply to restrict the categories of excluded records to those relating to the institution's own workforce* where the focus has shifted from "employment of a person" to "*employment-related matters*". (emphasis added)

[87] The decision of the Divisional Court in *Ontario (Ministry of Correctional Services) v. Goodis* went on to confirm that section 65(6)3 must be interpreted narrowly in light of the purposes of the *Act* so as to exclude only those records that actually relate to employment matters in which the institution has an interest. The Divisional Court stated:

Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest.<sup>31</sup>

[88] The Court stated that "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.*"<sup>32</sup> The Divisional Court also noted that whether or not a particular record is employment-related would depend on an examination of the particular record.<sup>33</sup>

[89] Applying this reasoning in Order MO-2660, the adjudicator found that an organizational review did not qualify for the exclusion, noting:

All institutions operate through their employees. Employees are the means by which all institutions provide services to the public. In this appeal, the record was not created to address matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue, in the sense intended by section 52(3). The record is an operational review of the Toronto Fire Service's dispatch system focusing on the efficient and timely response to communications from an operational standpoint.<sup>34</sup>

[90] I agree with the reasoning in *Ontario (Ministry of Correctional Services) v. Goodis*

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<sup>31</sup> *Ontario (Correctional Services) v. Goodis*, (cited above).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> This reasoning has been followed in subsequent orders, including, most recently, in Order PO-4095.

and Order MO-2660. In my view, the issue in this appeal is not whether the records simply include information relating to the university's workforce but whether the records address matters in which the university is acting as an employer, and the terms and conditions of employment or human resources questions are at issue.

[91] In support of its position that the human resources database falls within the exclusion in section 65(6)3, the university submits that the instructor information in the database is compiled in order to communicate, to its administrative employees and others, as necessary, functional employment information essential to the university's effective operation. The appellant submits that according to the university's own representations, the information is collected and stored to provide information for various purposes, some of which are not employment-related.

[92] The flaw in the university's argument is essentially the same flaw identified in my analysis under part two of the test above. The responsive instructor information in the database may potentially be incorporated into a record that is used in relation to a communication about a specific employment related matter or matters in which the university has an interest. However, that is not the case before me, as illustrated by the authorities outlined below.

[93] After considering the pertinent authorities along with the university's representations, I do not accept the university's submission that the responsive instructor-related information in the human resources database is information that qualifies for the exclusion in section 65(6)3.

[94] As described by the university throughout its representations, the data concerning the university's instructors in its human resources database is developed primarily in order to assist university administrators to administer the employment relationship. It also submits that it is a key source of information for its collective bargaining and provides administrators with information to allow it to create budgets. In my view, the information in this database appears to assist the university in fulfilling its mandate as a public institution in the area of post-secondary education, in general. Although the responsive information in the database concerns the university's staff positions, I am of the view that the information, when taken in its entirety, cannot be said to have been created or used by the university in circumstances where the terms and conditions of employment or human resources questions are at issue such that the university has the requisite interest as employer.

[95] I find that the information at issue, as described, is similar to the type of information that is sometimes found in records in which an organizational review is undertaken and should be similarly treated. In her affidavit, the secretary on behalf of the university submits that information from the human resources database can be used to assist the university in its planning by preparing "head counts" and/or organizational charts. As my discussion of Order P-1369 above indicates, the IPC has previously found that records relating to an organizational review are generally not excluded from the *Act* under the labour relations exclusion at section 65(6) (or its equivalent in section 52(3) of the *Municipal Freedom of Information and Protection of*

*Privacy Act*), unless the focus of such a review is on employment related matters in which the institution has an interest.

[96] I would emphasize here that it does not appear that the information in the university's database or the numerical information aggregated in a record or records responsive to the appellant's request rises to the level of an organizational review. The information is not itself an organizational review nor is there any evidence before me to indicate that the university has conducted such a review or used the information to prepare an organizational review document. My analysis of the authorities dealing with organizational reviews, below, illustrates that while the numbers of staff in the various categories of positions could potentially be used in another document, the presence of that information – standing alone - would generally not be sufficient to meet the test at section 65(6)3.<sup>35</sup> Even where this type of information appears in such a document, it will not qualify under part 3 of the test unless the review in question is *about* an employment related matter or matters in which the institution has an interest.

[97] In my discussion of Order PO-4056 under part 2 of the test, I observed that a portion of the record at issue in that case containing information about the staffing mix of hospital's laundry services satisfied part 2 of the test, but that *part 3 of the test was not met*. The hospital's submission, at paragraph 120, is reproduced again here, along with the adjudicator's part 3 finding, at paragraph 128:

The hospital states that page 406 is part of a presentation it prepared along with its consultants regarding the streamlining of the hospital's laundry and linen services. It states that this presentation was delivered by hospital staff and the hospital's consultants. It states that page 406 contains plans with respect to the staffing mix responsible for the provision of laundry and linen services to the various hospital sites, and the structure of the hospital's distribution program. The hospital submits that page 406 directly addresses conditions of employment for employees working for the hospital.

...

However, *part 3 of the test is not met*. Page 406 [i.e., containing the staffing mix] is part of a general review of the hospital's laundry and linen services, which appears at pages 352 to 423 and 455. Based on my review of the content of the review including page 406, I find that the record that includes this page does not fall within section 65(6)3 as the meetings, consultations, discussions or communications were not about labour relations or employment-related matters in which the institution has an interest for the purpose of part 3 of the test under section 65(6)3. *This is because the review as a whole does not relate to employment-related matters and the hospital's relationship with its workforce*. Rather,

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<sup>35</sup> Order P-1369.

it is an overall operational review of the hospital's operations. (emphasis and square parentheses added)

[98] Similarly, in Order PO-4095, the adjudicator rejected the ministry's claim that records implementing an Ontario First Nations Policing Agreement were excluded "because they contain 'communications about staffing and other human resource matters' that the OPP has an interest in as an employer." The adjudicator stated:

It is accurate, as argued by the ministry, that the records contain components that deal with labour relations or employment related topics, including information about what the ministry has referred to as "human resources considerations." However, when viewed against the entirety of the records, I find that this information is incidental to a separate matter, the ministry's obligations and possible options in relation to the provision of police services to First Nations communities in Ontario.

...

The application of the exclusions in the *Act* is based on a review of the record at issue. It is also carried out on a record-by-record basis, which emphasizes that the focus of the analysis is whether the record as a whole is in relation to meetings or discussions about labour relations or employment issues. That a record contains information that deals with labour relations or employment topics is not sufficient to attract the exclusion in section 65(6) without other evidence that the record as a whole was created or used for, in this case, a labour relations or employment related matter.

As the adjudicator in Order MO-2660 observed when finding that an organizational review did not qualify for the exemption, "[a]ll institutions operate through their employees. Employees are the means by which all institutions provide services to the public." *The issue is not whether the records include information pertaining to employees but whether the records were created to address matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue.*

In my view, the records at issue were prepared to assist and advise ministry decision makers regarding the matter of provision of police services to First Nations communities, which is not a labour relations or employment purpose. Although some of the records may touch on employment matters, I am of the view that none of the records at issue, when viewed in its entirety, was created or used for a labour relations or employment purpose. Accordingly, I find that section 65(6)3 does not apply to exclude the records from the scope of the *Act*. (emphasis added)

[99] In contrast, records which "directly engage the institution's role as an employer

and relationship with its workforce ... are ... properly excluded under section 65(6)."<sup>36</sup> In Order MO-3496, for example, the record was distinguished from a simple organizational or operational review where it did more than touch "occasionally, and in an extremely general way" on staffing and other employment related issues. The adjudicator found that the bulk of the report considered the organizational structure of the municipality in terms of employment positions, staffing issues, the working environment and compensation. The adjudicator observed that it was clear from a review of the record as a whole that it had the requisite connection with meetings, consultations, discussions or communications about labour relations and employment-related matters.

[100] Similarly, in Order PO-3684, the adjudicator described the report at issue as a "review of a university department," and in light of this description addressed the issue of whether the report could be considered an operational or organizational review:

While the mandate of the report at issue suggests a broad organizational or operational type review, as noted above, the university says that one of the purposes the report was used for was in making a decision regarding the reappointment of the chair. *I am satisfied that a key function of the report and, in context, a good deal of the purpose of its creation was to inform discussion about the reappointment of the chair. This distinguishes the report from organizational or operational reviews.* (emphasis added)

[101] Also, the record in *Reynolds v. Ontario*<sup>37</sup>, referenced by the university, was compiled by Justice Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop union station. The record was compiled by interviewing a former employee and was found to be a kind of performance review.

[102] In contrast, the responsive records in this appeal are not compiled or maintained in relation to any meetings consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. Although the information at issue in the database appears to concern faculty positions, it does not appear to relate to any communications about the university's relationship with its workforce nor does it involve employment-related matters such as staffing issues, the working environment or compensation.

[103] Also, in my view, the mere numbers of staff in various categories themselves do not relate to specific communications about employment-related matters in which the university has an interest or the university's "relationship with its workforce." While the responsive information in the database may, at some point, incidentally be used for employment-related purposes, its function is primarily, as the university appears to acknowledge, to fulfill its mandate to operate as a publicly-funded institution of post-secondary teaching and research. In my view, this type of information is not the type of information section 65(6) is designed to remove from the operation of the *Act*. Moreover, the *Act's* purpose of shedding light on the operations of institutions would be

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<sup>36</sup> Order PO-4056.

<sup>37</sup> Cited above.

undermined if this type of information were to be excluded in its entirety from the operation of the *Act*.<sup>38</sup>

[104] This brings me to a consideration of the countervailing transparency purposes of the *Act* and confidentiality purposes of the exclusion at section 65(6). The purposes of the *Act* and the exclusion, as recognized by Ontario's Divisional Court, were recently discussed in Order MO-3981:

... the Ontario courts have said that the exclusions are designed to preserve the confidentiality of *sensitive* labour relations and employment related information. Further, the exclusions are not designed to remove all records involving the institution's employees from the scope of the *Act*. For example, as explained in *Ontario (Ministry of Community and Social Services) v. John Doe*, it is not intended to exclude operational records where the institution is engaged in a capacity calling for public accountability.

In *Ontario (Ministry of Community and Social Services) v. John Doe*, the Divisional Court observed that the scope of section 65(6) was informed by the legislative history indicating that "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":

Section 65(6) was added to the *Act* by the Bill 7, An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations, 1st Sess., 36th Leg., Ontario, 1995. The explanatory note in respect of Bill 7 provided that the Act will not apply to "certain" records relating to labour relations and employment matters.

On first reading of the Bill, the Honourable David Johnson, then Chair of the Management Board of Cabinet, stated that the proposed amendments to the Act were "to ensure the confidentiality of labour relations information": see Ontario, Legislative Assembly, Official Report of Debates (Hansard), (4 October 1995) (Hon. Allan K. McLean). On proclamation of Bill 7, the Management Board of Cabinet responded with the following comments to the question of whether labour relations documents will be exempt from disclosure under the changes to the Act:

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<sup>38</sup> As mentioned above, even if the exclusion does not apply, the institution may still be able to claim the application of one or more exemptions from the right of access to the database, in whole or in part. However, the application of any exemptions is not an issue before me because the university did not claim any exemptions in the alternative to its position that the exclusion applies.



Yes. This change brings us in line with the private sector. Previously, orders under the *Act* made some *internal labour relations information* available (e.g. grievance information, confidential information about labour relations strategy, and other sensitive information) *which could impact negatively on relationships with bargaining agents*. That meant that unions had access to some employer labour relations information while the employer had no similar access to union information: see Ontario, Management Board Secretariat, Bill 7 Information Package, Employee Questions and Answers, (10 November 1995).

In *Ministry of Community and Social Services*, the Court went on to distinguish the operational role the institution plays in discharging its institutional mandate from its role as employer:

Accordingly, a purposive reading of the Act dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals, rather than in the context of the institution discharging its mandate qua employer, the s. 65(6)3 exclusion does not apply. *Excluding records that are created by government institutions in the course of discharging public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act.* The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the Act, but not under s. 65(6).

Similarly, in its decision in Ontario (*Ministry of Correctional Services*), the Divisional Court held that the exclusion does not extend to records related to the actions of its employees that may give rise to claims against the institution in its capacity of defendant based on vicarious liability. As the Court said, this would undermine the public accountability purpose of the *Act*:

The exclusion in s. 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....

The interpretation suggested by the Ministry in this case would seriously curtail access to government records and thus undermine the public's right to information about government. If

the interpretation were accepted, it would potentially apply whenever the government is alleged to be vicariously liable because of the actions of its employees. Since government institutions necessarily act through their employees, this would potentially exclude a large number of records and undermine the public accountability purpose of the Act. (emphasis added; footnotes omitted)

[105] The courts have recognized that it is appropriate to take into account the transparency purposes of the *Act* when interpreting and applying section 65(6) (or its municipal counterpart, section 52(3)). In *Brockville (City) v. Information and Privacy Commissioner, Ontario*,<sup>39</sup> the Divisional Court recently endorsed the adjudicator's approach in applying the "labour relations" component of the exclusion in light of these competing purposes, again citing the passages from *Ontario (Ministry of Community and Social Services)* referred to above:

In my view, the adjudicator's reasons demonstrate an intelligible and justifiable approach to her analysis and interpretation of the statute in this case. As noted by the city, the purpose of the exclusion recognized by Sachs J. in *Ontario (Ministry of Community and Social Services) v Doe* involves an assessment of whether the provision in issue might upset the delicate balance of labour relations by impacting negatively on employers' relationships with bargaining agents.

However, in the same case Sachs J. went on to note a countervailing statutory purpose. She wrote:

...Excluding records that are created by government institutions in the course of discharge of public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act. The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the *Act*, but not under [the analog to s. 52(3).]

Ensuring accountability for public expenditures is a core focus of freedom of information legislation. In the *Ministry of Community and Social Services* case, this court upheld the decision of an adjudicator *declining* to apply the labour relations exclusion to documents where doing so would undermine the goal of enhancing fiscal transparency and the disclosure sought would not cause any identifiable harm to labour relations. In this case, the adjudicator dealt with both the purpose of the labour relations

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<sup>39</sup> 2020 ONSC 4413 (CanLii).

exclusion and the overriding policy under the statute favouring transparency concerning government expenditures of public funds.

[106] In *City of Brockville*, the Court went on to observe that the institution was unable to show how any identifiable labour relations interest would be adversely affected by disclosure of the information at issue.

... It is very significant that there was no evidence adduced before the adjudicator that would help her understand how the release of legal fee figures from negotiations would have any effect on labour relations, let alone an unbalanced or destabilizing effect. Counsel's invocation before us of phrases such as "the hearts and minds of the public" and "knowledge is power", while interesting and emotive, are not a substitute for admissible evidence establishing an actual, identifiable risk of prejudice to labour relations.

[107] While the expenditure of public funds is not directly in issue before me, the interest of transparency with respect to records arising in the context of a provincial institution's operational mandate is squarely raised. Excluding the responsive information from the database from the scope of the *Act* could have the effect of shielding university officials from public accountability. Against this interest, the university has advanced no evidence regarding the sensitivity of the records relative to its role as employer or otherwise explained how release of the records would affect how it conducts its relationship with its employees. Simply asserting that the records are employment-related and could be used for the purposes the university had listed above is insufficient to satisfy me that they relate to communications about employment related matters in which the university has an interest in its capacity of employer.

[108] As a result, I find that the third part of the test for the application of section 65(6)3 has not been met for the responsive information stored in the human resources database. Since all three parts must be met for the exclusion to apply, section 65(6)3 does not apply to the information contained in the human resources database.

[109] Before closing, I will address two previous IPC orders relied on by the university. In Order PO-2613, an order released in 2007, the record at issue was a job evaluation system, described as a database of job descriptions, positions, and classification standards. In brief reasons, the adjudicator found that the record was created or prepared "for the purpose of" or "as a result of" labour relations or employment-related matters. The record at issue was found to relate directly to the workforce of the OPS and to have been created to assist it in the management of the OPS workforce. The adjudicator found that the ministry created and used the record with regard to meetings, consultations and communications about the subject matter of the record - the development, classification, evaluation and review of job descriptions.

[110] The circumstances in Order PO-2613 were different from those that are before me. In Order PO-2613, the record at issue was the entire job evaluation system database. That is not the situation in the present appeal. Above, I have explained why

the *responsive record*, which can be produced from the database but does not consist of the entire database, is not excluded under section 65(6). I make no finding on whether the entire human resources database, if that were the record at issue, would be excluded under section 65(6).

[111] The university also relies on Order MO-3537, where the request was for the names and salaries of employees working for the Toronto Parking Authority (TPA) where the employee's salary was over \$100,000. The information at issue was salary information taken from the TPA's payroll and human resources information system. In that order, the adjudicator found that the responsive information was excluded from the *Act* under section 52(3)3 (the municipal equivalent to section 65(6)3 of the *Act*).

[112] However, Order MO-3537 is distinguishable because the information at issue is different. The information at issue in Order MO-3537 was salary information. In the appeal before me, and as I observed above, although the responsive information in the database concerns faculty positions, it does not appear to relate to any communications about the university's relationship with its workforce, nor does it involve employment-related matters such as staffing issues, the working environment or compensation. While the responsive information may, at some point, incidentally be used for employment-related purposes, its function is primarily to fulfill its mandate to operate as a publicly-funded institution of post-secondary teaching and research.

[113] As I have found that the responsive information stored in the human resources database is not excluded under section 65(6)3, and the university has confirmed its ability to create a responsive record from same, I find that it should issue another access decision relating to this information.

### ***Faculty records***

[114] The university also claims that faculty records that were derived from the human resources database and located in other parts of the university's record holdings are responsive to the appellant's request but are also excluded by section 65(6)2 and/or 65(6)3 because their purpose, like the human resources database, is to administer employment relationships.

[115] The university submits that faculty records are compiled by the office of the institutional research analysis, the office of human resources and/or individual faculties. The university did not provide the faculty records to the IPC; however, it referenced an example of these records when it referred to head counts and organizational charts created in the process of future planning to ensure the university will have requisite numbers of employees.

[116] Previous decisions issued by this office have held that section 65(6) requires a record-specific and fact-specific analysis.<sup>40</sup> In addition, when determining whether the exclusion applies, the record is examined as a whole rather than by individual pages,

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<sup>40</sup> Orders P-1242 and MO-3163.

paragraphs, sentences or words. This whole record method of analysis has also been described as the "record by record approach".<sup>41</sup> In that regard, this office has emphasized that in addressing the possible application of the 65(6) exclusion, the whole record is considered.<sup>42</sup>

[117] The question before me, therefore, is whether each faculty record (as a whole) relates to employment-related matters in which the university has an interest. However, the university has not provided a copy of these records and it appears from its representations it has not identified all possible responsive faculty records that may exist. Unlike the human resources database itself, I have not been provided with sufficient information about any faculty records to make a determination on the application of section 65(6) to them. As a result, I am unable to determine if any of these faculty records are excluded from the *Act* by section 65(6)3 as claimed.

[118] For these reasons, I am unable to uphold the university's decision that the faculty records, as described in its representations, are excluded under section 65(6)3. It is open to the university to consider whether those specific records are excluded from the *Act* once it completes its search for them.

### **Issue B: Did the university conduct a reasonable search for records?**

[119] Although I have found that the exclusion does not apply to the responsive information in the human resources database and the university should issue a new access decision, I am also asked to decide if the university's search was reasonable.

[120] To satisfy me that the search carried out was reasonable in the circumstances, the university must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>43</sup> To be responsive, a record must be "reasonably related" to the request.<sup>44</sup> The IPC has consistently found that a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>45</sup>

[121] The IPC has found that 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.<sup>46</sup>

### ***Representations***

[122] The university submits that after receiving the request, it promptly commenced a search for reports as outlined in the request. It informed the appellant that no existing

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<sup>41</sup> See, for example, Orders M -352, MO-3798-I, MO-3927, MO-3947, MO-4071, PO-3642 and PO-3893-I.

<sup>42</sup> See Order PO-3642, for example.

<sup>43</sup> Orders P-624 and PO-2559.

<sup>44</sup> Order PO-2554.

<sup>45</sup> Orders M-909, PO-2469 and PO-2592.

<sup>46</sup> Order MO-2246.

reports were located and directed the appellant to information related to staffing levels that was published online.

[123] The university provided further submissions to the IPC during mediation, after consulting with its institutional research personnel, knowledgeable in the subject matter of the records and familiar with the technical aspects of the electronic record systems. The university submits that it conducted another search to determine if there were additional responsive records. The university notes that its consultations occurred at both the institutional and faculty levels, and included:

- AVP, planning and analysis
- Institutional research analyst
- Director, employee and labour relations
- Manager, HR systems
- Faculty planning and budget officers

[124] The university submits that it did not identify further responsive records apart from those which are derived from the human resources database.

[125] The appellant submits that the university, in stating that responsive records do not exist, and then later in stating that the only source for the records was the human resources database, did not discharge its obligation to conduct a reasonable search.

[126] In the appellant's affidavit, she references an official count report which she discovered (during the mediation process) that the university produces. The appellant submits that this report would be responsive to her request. The appellant also submits that in a submission to the IPC (referenced by the university in its representations) the university notes that faculty-level employee records can be compiled from sources other than the office of human resources and she believes responsive records could exist. The appellant submits that in the same submission, the university refers to its office of institution research analysis and she believes responsive records could be located there.

[127] The appellant further submits that she believes responsive records could be located based on the following sources:

- i. Records from the university's library, concerning faculty lending privileges
- ii. Records regarding access to other university services, including parking passes, fitness facilities, and other recreational services
- iii. Reports to the respondent's Board of Governors or Faculty Senate.

[128] The appellant also submits that she is aware that the university routinely responds to requests for information from other bodies including Statistics Canada and

the Council of Ontario Universities. In particular, she submits that Statistics Canada collects an annual count of full-time academic staff at universities and attaches a copy showing numbers for 2016-2018 along with a document from Statistics Canada explaining how data is collected. The appellant also submits that in 2015, the university participated in a survey conducted by the Council of Ontario Universities in which it disclosed exactly the kind of information that is being requested. The appellant also attached a copy of the Council's Report on this survey to her affidavit.

[129] In its reply representations, the university reiterates that all of the responsive records are exempt pursuant to sections 65(6)2 and 65(6)3, and therefore it is not required to produce these records, or provide a fee assessment for extracting and producing them.

[130] The university refers to the appellant's argument concerning the submissions it provided to Statistics Canada and the Council of Ontario Universities. The university appears to suggest that this information, would be excluded and submits that prior disclosure does not prejudice its decision in this case.

[131] In the affidavit of the university's secretary, the secretary submits that notwithstanding its position that the database fall within the section 65(6) exclusion, the university conducted another search to determine whether there were any alternate sources of responsive records, as mentioned in their earlier submission. The university's secretary confirmed that in this second search, the university did not identify further records that were responsive to the request, apart from those which are derived from the human resources database and faculty records, which the university maintains are also excluded.

### ***Analysis and finding***

[132] After reviewing the parties submissions, I find that the university's search for responsive records was not reasonable and further responsive records may exist that were not located.

[133] In her representations, the appellant refers to the university's submission to Statistics Canada and also to the Council of Universities. It is evident from the university's reply that it had not located these submissions. After reviewing the attachments to the appellant's affidavit, it is clear that the university as an institution was required to provide information to Statistics Canada so that it could complete its survey. There is no indication in the survey that the university did not provide information. Also, after reviewing the attachment to the appellant's affidavit,<sup>47</sup> it is clear that the university provided information to the Council of Universities in 2015. In its response to the appellant's submission concerning the documents, the university indicated that it was "reviewing the accuracy of the appellant's statements" with respect to the university's having provided this information to Statistics Canada and the COU.

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<sup>47</sup> The appellant attached "A Technical Report on the Composition and Activities of the Academic Workforce at Ontario Universities", completed by Council of Ontario Universities

This indicates to me that this information was not found in the university's search, and in my view, the university has not provided a reasonable explanation as to why it did not locate this information when the evidence suggests that this information should exist.

[134] Also, the appellant refers to an official count report that she indicated the university disclosed existence of during the mediation process. However, the university does not address this issue in its reply representations. In my view, the appellant has provided a reasonable basis to conclude that this official count report exists and the university has not provided an explanation as to why it was not located in its search.

[135] As a result, I find that the university's search was not reasonable as the appellant has indicated precisely which records the institution has not identified and the university has not provided sufficient evidence to show that it has made a reasonable effort to identify and locate this information.

[136] Although the issue of fees was raised by the appellant, it is not before me and I cannot, therefore, make a finding in this regard, the university is reminded of the fee provisions of the *Act* and the regulations, including the requirement to provide a fee estimate in certain circumstances. The university should issue a fee estimate along with an interim access decision. This will enable the appellant to decide which record(s) she wishes to pursue access to.<sup>48</sup>

## **ORDER:**

1. I find that section 65(6) has no application to the information sought from the human resources database and that information is, therefore, subject to the *Act*.
2. I order the university to respond to the appellant's access request treating the date of this order as the date of the request for the purposes of those procedural requirements. The university is to issue a fee estimate and interim access decision in accordance with the relevant provisions of the *Act*.

Original Signed by: \_\_\_\_\_

Alec Fadel  
Adjudicator

March 31, 2022 \_\_\_\_\_

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<sup>48</sup> See the IPC's "Fees, Fee Estimates and Fee Waivers" for more information on the fee estimate and interim access decision process: [https://www.ipc.on.ca/wp-content/uploads/2018/06/fees-fee\\_estimates-fee\\_waivers-e.pdf](https://www.ipc.on.ca/wp-content/uploads/2018/06/fees-fee_estimates-fee_waivers-e.pdf)