

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER PO-4481-I

Appeal PA21-00561

Health Sciences North

February 6, 2024

**Summary:** Health Sciences North received a request under the *Act* for information relating to the requester and the centre operated by the requester. HSN located 15 responsive records and issued a decision granting access to some records in their entirety, and denying access to other records in their entirety, claiming they were excluded from the *Act* under the exclusion for employment or labour relations matters at section 65(6). The appellant appealed and also claimed that HSN's search for responsive records was not reasonable. In this interim order, the adjudicator finds that all of the records are excluded from the *Act* pursuant to section 65(6)3 except for one email which he also finds is not excluded under section 65(5)1. He defers his decision on access to this email so that the parties can submit representations on HSN's exemption claim. He also finds that HSN's search for responsive records is reasonable.

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

**Orders Considered:** Order MO-4463-R.

### OVERVIEW:

[1] Health Sciences North (HSN) received the following request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)*:

Please kindly produce all records (including any record of information however recorded, whether in printed form, on film, by electronic means or otherwise) relating to the following:

- All records in the possession or control of HSN relating in any manner whatsoever to [the requester and a named wellness centre].

Without limiting the generality of the foregoing, please include in the productions all of the following records:

- All internal notes or documents prepared by any employees of HSN concerning [the requester and the centre]
- All internal correspondence, and communications between or among any employees of HSN concerning [the requester and the centre]; and
- All correspondence and communications between anyone at HSN and anyone at [a specified insurer] concerning [the requester and the centre].

Without limiting the generality of the foregoing, please include in the production records from all of the following custodians:

- [Seven specified parties]

[2] HSN located 15 responsive records and issued a decision letter, along with an index of records.

[3] In its decision letter, HSN advised that it was granting full access to records 1, 2 and 13, and denying access to the remaining records in their entirety on the basis of the exclusion for records relating to employment or labour relations matters at section 65(6) of the *Act*. HSN explained that the records to which access was denied contain email threads and notes involving an HSN employment matter and are excluded from the *Act*.

[4] In the alternative, HSN advised that it was relying on the personal privacy exemption at section 21(1) and the third party exemption in section 17(1) to withhold certain records.<sup>1</sup>

[5] The requester, now the appellant, appealed HSN's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[6] During mediation, HSN advised that it maintains its position that the exclusion for employment and labour relations information at section 65(6) and the exemptions at sections 21(1) and 17(1)(d) of the *Act* apply to the records that it has withheld.

[7] At the outset of mediation, the appellant advised that he believes that additional records responsive to the request should exist. The issue of reasonable search was therefore included as an issue in this appeal. Specifically, the appellant noted that only

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<sup>1</sup> HSN relied on section 21(1) for records 4-11, 14 and 15 and also relied on section 17(1) for records 3, 5-12, 14 and 15.

15 documents were identified as responsive and there should be additional records dating back to 2015. The appellant questioned the search conducted by HSN and requested further details about it. The mediator facilitated a discussion about the search; however, the appellant remained of the view that further records should have been located.

[8] As a mediated resolution was not reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry into the appeal. The original adjudicator assigned to the appeal decided to conduct an inquiry and sought representations from HSN and the appellant addressing the exclusion at section 65(6) and reasonable search. Representations were received and the adjudicator shared them in accordance with the IPC's *Code of Procedure*. The file was then assigned to me to continue with the adjudication of the appeal.<sup>2</sup>

[9] In this order, I partially uphold HSN's reliance on section 65(6)3 and find that much of the withheld information is excluded from the *Act*. However, I find that one email that appears in record 4 is not excluded from the *Act* and because HSN has also claimed that the exemption at section 21(1) applies to this information, I will defer my findings on this email until the parties will have an opportunity to make submissions on this exemption. I also find that the search for responsive records was reasonable.

## **RECORDS:**

[10] In his representations, the appellant indicates that if HSN's description of records 3 and 12 relate to a claim made by the appellant's spouse about a breach of her privacy by HSN staff, he does not seek access to this information. After reviewing records 3 and 12, I confirm that they do relate to a claim made by the appellant's spouse as described. As a result, these records are removed from the scope of this appeal.

[11] There are 10 records remaining at issue. They are described on HSN's index of records, in part, as follows:

- Record 4: internal email thread re: employment matter, 20153
- Record 5: internal email thread re: employment matter with 2 attachments (1 with personal information, 2 with third party information), May 3, 2021
- Record 6: internal email thread re: employment matter, May 3 to 10, 2021
- Record 7: email thread with third party re: employment matter, May 10, 2021

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<sup>2</sup> I reviewed the representations submitted by the parties and have decided that I do not require further representations to issue this interim order.

<sup>3</sup> Although HSN described this record as emails from October 14, 2015 to June 23, 2021, my review shows that all emails in this record were created in 2015.

- Record 8: internal email thread re: employment matters with 1 attachment provided by a third party, May 14, 2021
- Record 9: email thread with third party re: employment matter, May 3 to 17, 2021
- Record 10: email thread with third party re: employment matter, June 7 to 8, 2021
- Record 11: internal email thread re: employment matter, June 16, 2021.
- Record 14: handwritten notes of HSN staff re: employment matter, May 20, 2021
- Record 15: electronic notes of HSN staff re: employment matter, Jun 2 to 4, 2021.

## **ISSUES:**

- A. Does the section 65(6) exclusion for records relating to labour relations or employment matters apply to the records?
- B. Did the HSN conduct a reasonable search for records?

## **DISCUSSION:**

[12] The appellant provided some background to his request.

[13] The appellant explains that he was informed that in 2015 an HSN employee sent an email to all HSN employees that was intended to go to a small group of coworkers, encouraging the recipients to use the appellant's wellness centre. According to the appellant, an employee who received the email complained about the email, leading HSN's Human Resources department to become aware of it and contacting the employee's supervisor. According to the appellant, the initial email became the basis for a request by HSN to its benefits insurer to review the claims made by HSN employees in respect of services provided by the appellant.

[14] The appellant submits that his access request is aimed at obtaining the records and documentation relating to HSN's original audit request to the insurer and any subsequent communication and correspondence concerning the audit and the appellant's practice.

### **Issue A: Does the section 65(6) exclusion for records relating to labour relations or employment matters apply to the records?**

[15] HSN takes the position that all of the records are excluded from the *Act* by both

sections 65(6)1 and 65(6)3.

[16] Section 65(6) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.<sup>4</sup>

[17] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.<sup>5</sup>

[18] Section 65(6) states, in part:

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

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

...

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

[19] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) apply, the records are excluded from the scope of the *Act* and the appellant has no right of access to them under the *Act*.

[20] I will first examine if section 65(6)3 applies to exclude the records.

[21] 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.<sup>6</sup>

[22] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations

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<sup>4</sup> Order PO-2639.

<sup>5</sup> *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

<sup>6</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

is not enough to meet the “some connection” standard.<sup>7</sup>

[23] 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>8</sup>

[24] 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>9</sup>

[25] 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.<sup>10</sup>

[26] 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.<sup>11</sup>

[27] For section 65(6)3 to apply, HHS 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 use 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.

[28] For section 65(6)1 to apply, HSN must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

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<sup>7</sup> Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

<sup>8</sup> Order PO-2157.

<sup>9</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.

<sup>10</sup> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

<sup>11</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

### ***Representations***

[29] HSN takes the position that all of the withheld responsive records are employment-related and are excluded from the scope of the *Act* based on the exclusion at section 65(6)3.

[30] HSN addressed the records at issue, however, most of these representations were withheld from the appellant because they met the confidentiality criteria as disclosure of the information would reveal the substance of the record claimed excluded. HSN also provided the records to the IPC, as required, to support its claim that they are excluded.

[31] HSN submits that the emails in record 4 were collected, prepared, maintained, and used by its staff to notify the HR department about an issue and was used to provide guidance. HSN submits that it has an inherent interest in this record as the employer of the individuals involved. HSN submits that what is at issue by its very nature is employment-related and this record was created by it for the purpose of responding to an employee's concern. It submits that this record was also created and maintained to report the matter. HSN submits that it has an interest in this record because it relates to issues involving its own workforce.

[32] With regard to records 5-11, 14 and 15, HSN submits that these records were collected, prepared, maintained and used in relation to the investigation of allegations. It explains that these records consist of emails, email attachments and investigation interview notes that have been collected in order to investigate allegations concerning HSN staff. HSN submits that the matter at issue was employment-related in which it has an interest and that it has a responsibility to investigate the allegations.

[33] In addressing the exclusion claimed, the appellant refers to the Divisional Court decision in *Ontario (Ministry of Correctional Services) v. Goodis*<sup>12</sup> where the Court held:

... 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. Employment-related matters are separate and distinct from matters related to employees' actions.

[34] The appellant notes that the Court cautioned against an interpretation that would have the effect of limiting accountability of public institutions when it stated:

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<sup>12</sup> *Ibid.*

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.

[35] The appellant submits that the Court's caution applies in this appeal regarding the interpretation of the exclusion. He suggests that where the conduct of HSN's HR department is at issue and relates to a court action that may have resulted in harm to his client and his business, the application of the exclusion must be approached with caution to ensure it does not frustrate accountability of public institutions.

[36] With regard to record 4 (i.e. a string of emails), the appellant notes that based on the information provided in HSN's index, this is the only record that contains information that dates back to 2015. The appellant surmises that given his request the original email sent by the employee encouraging others to use his services is therefore included in record 4. The appellant submits that nothing in HSN's description of this record suggests that this email was in any way related to a labour or employment issue. The appellant suggests that the email may have prompted actions by the HR department but that does not mean that the original email, by itself, is subject to the exclusion under section 65(6). The appellant suggests that at an absolute minimum, the original email is not excluded and should be disclosed.

[37] The appellant submits that to the extent the original 2015 email or any correspondence with the specified insurer is reflected in this chain, HSN is not permitted to rely on the exclusion as a basis to shield itself from accountability for potentially wrongful acts committed by its employees. He suggests that *Goodis* forecloses such an approach.

[38] Further, the appellant submits that HSN must show that the entire record is subject to the exclusion and bears the burden of demonstrating that every email within the chain is properly subject to a claim under section 65(6). The appellant suggests that if a portion of the email chain does not relate to any of the three enumerated circumstances to which the exclusion may apply, then partial disclosure is warranted and should be ordered.

[39] Regarding records 5-11, 14 and 15, the appellant submits that based on the description of the records provided by HSN, a number of the records refer to a "confidential report provided by a third party." Although the third party has not been identified, the appellant submits it may be the specified insurer.

[40] The appellant submits that records or portions of records that pertain to HSN's dealings with the insurer in relation to the audit or delisting of the appellant's practice,



and the harm caused to him as a result, must be disclosed. He submits that such records are distinct from those that pertain to the terms and conditions of employment of HSN employees or human resources questions.

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

#### *Part 1: collected, prepared, maintained or used*

[41] Based on my review of the records and the representations, I find that the records at issue, which are emails, some with attachments, and also handwritten and electronic notes of HSN staff were collected, prepared, maintained or used by HSN. As a result, the first part of the test under section 65(6)3 is met.

#### *Parts 2 and 3: in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest*

[42] In order for the exclusion to apply, the records must be in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which HSN has an interest.

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

- a job competition<sup>13</sup>
- an employee's dismissal<sup>14</sup>
- a grievance under a collective agreement<sup>15</sup>
- a "voluntary exit program"<sup>16</sup>
- a review of "workload and working relationships"<sup>17</sup>

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

- an organizational or operational review<sup>18</sup>

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<sup>13</sup> Orders M-830 and PO-2123.

<sup>14</sup> Order MO-1654-I.

<sup>15</sup> Orders M-832 and PO-1769.

<sup>16</sup> Order M-1074.

<sup>17</sup> Order PO-2057.

<sup>18</sup> Orders M-941 and P-1369.

- litigation in which the institution may be found vicariously liable for the actions of its employee.<sup>19</sup>

[45] 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>20</sup>

[46] For the following reasons, I find that with the exception of one email, the remaining emails and notes at issue are about employment-related matters and are excluded under section 65(6)3.

[47] Most of the emails contained within record 4 were collected, prepared, maintained and used by HSN in relation to a complaint about the improper use of IT and investigation of allegations made about HSN employees – employment-related matters in which HSN has an interest.

[48] After reviewing the withheld information, and HSN’s confidential representations, I confirm that most of the emails in record 4 relate to a potential breach of its information technology resources policy and also relate to an investigation into allegations made about HSN employees, and not the appellant. As noted by HSN, and included as attachments to its representations, it has a policy for IT and email usage that all staff are expected to abide by and this was at issue with regard to the emails in record 4.

[49] I also find that HSN has an interest in these emails because they relate to issues involving its own workforce, responding to a concern raised by one of its employees and, consequently, a potential breach of its information technology resources policy which may result in disciplinary action as per the policy. Without confirming the details of record 4, the 2015 emails were clearly collected by HSN and used in relation to meetings about employment-related meetings.

[50] However, I find that the original email in the chain in record 4 alone does not concern employment-related matters and the exclusion at section 65(6)3 does not apply to it. Nor would the exclusion at section 65(6)1 apply to the email, as this email clearly does not relate to a proceeding or anticipated proceeding before a court, tribunal or other entity relating to the employment of an individual. Despite this email appearing in a chain in record 4, it is obvious that it would have been sent prior to any employment-related matter or proceeding.

[51] I am aware of IPC orders where adjudicators have found that information is not excluded from the *Act* if it is day to day information that was created and then subsequently collected by an institution and used for employment-related purposes.<sup>21</sup> I find this line of reasoning convincing and applicable in this appeal concerning the originating email in record 4. In my view, at the time this email was drafted, no

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<sup>19</sup> Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

<sup>20</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

<sup>21</sup> See for example Order MO-4463-R.

employment-related matter existed. Accordingly, I find that this email is not excluded by section 65(6).

[52] Also, after reviewing records 5-11, 14 and 15, I confirm that they consist of information relating to the investigation of allegations concerning HSN employees as described by HSN in its representations. The records are emails, an attachment, handwritten and electronic notes. I agree that these were all records that were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about employment-related matters in which HSN has an interest.

[53] As a result, I find that part of record 4, and records 5-11, 14 and 15 are excluded from the *Act* by section 65(6)3. Regarding the original email in record 4, HSN has also claimed an exemption. I will defer my findings on this email until the parties have had an opportunity to address this issue in representations.

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

[54] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.<sup>22</sup> If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[55] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.<sup>23</sup>

[56] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;<sup>24</sup> that is, records that are "reasonably related" to the request.<sup>25</sup>

[57] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.<sup>26</sup>

### ***Representations***

[58] HSN submits that its manager of privacy and information security (the manager) is responsible for receiving and processing access requests. The manager organized the search for records responsive to the appellant's request by contacting all the named

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<sup>22</sup> Orders P-85, P-221 and PO-1954-I.

<sup>23</sup> Order MO-2246.

<sup>24</sup> Orders P-624 and PO-2559.

<sup>25</sup> Order PO-2554.

<sup>26</sup> Orders M-909, PO-2469 and PO-2592.

individuals in the request and other relevant areas within HSN that she concluded would hold most of the related records. The manager also concluded that given the subject matter of the request it was reasonable to assume that HR held most, if not all, of the records. However, the manager also extended the search to other areas of the hospital including the director of quality patient safety as this department deals with litigation and the appellant's request was submitted by his legal counsel.

[59] HSN submits that it was unaware that the appellant took issue with its search until the mediation stage at the IPC when it was first raised. HSN submits that its search was reasonable because all of the seven named individuals named in the request were asked to conduct a search as they would best know where records were located. HSN notes that after several conversations about the request with the individuals asked to conduct the searches, the manager was satisfied that the employees understood what was expected when they conducted their searches.

[60] The manager notes that for the email searches, selected HSN staff were asked to search their active emails (inbox, sent and deleted). She notes that the parameters of HSN's emails system is set for sent messages to be automatically moved to the delete folder after a year and then purged after 30 days, whereas emails in the inbox are managed by the individual staff.<sup>27</sup>

[61] The manager notes that with regard to the appellant's concern that there should have been records as far back as 2015, record 4 is an email thread with multiple dates, starting in 2015. She submits that if any further emails were expected to be found by the search, they may not exist and/or may have been deleted. She submits that if the records were relevant to the incident/matter that HR was aware of, the records would be retained as required by its policy involving employee investigations and discipline.

[62] The manager notes that concerning the request, since the appellant is not affiliated with HSN, it was reasonable to begin the search for records by asking the seven individuals identified in the request. The manager noted that it quickly became apparent from the records that there was a matter involving the appellant and his clinic that was well known to the HR department, more specifically, the compensation and benefits specialists and the human resources business partner. The manager notes that based on their experience and knowledge with the matter, they were able to involve other HR staff who were asked to search for responsive records.

[63] The appellant submits that his concern about the reasonableness of the search is that there should have been more records going back to 2015. He suggests that HSN be required to provide information concerning any back-up or archiving system that may exist for historical emails that may have been deleted. The appellant states that many IT systems provide for such archiving or back-ups.

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<sup>27</sup> This policy is described in HSN's *Retention and Destruction of Records* policy, attached to HSN's representations.

[64] The appellant submits that before a finding that a full search has been conducted, he would like confirmation from HSN that no back-up or archiving of emails exists that could contain responsive records. To the extent it does, he submits that such back-ups or archives should also be searched.

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

[65] For the following reasons, I find that HSN's search was reasonable.

[66] The search was conducted by an experienced employee, the manager of privacy and information security. It is apparent from the representations that the manager was knowledgeable in the subject matter of the request and made reasonable efforts to locate records that are reasonably related to the request.<sup>28</sup> This included contacting the seven individuals named in the request and asking them to perform a search for responsive records. It is also apparent that the manager extended the search to other areas of the hospital including the director of quality patient safety as this department deals with litigation and the appellant's request was submitted by legal counsel.

[67] In my view, the steps taken by the manager were sufficient to establish a reasonable search.

[68] The appellant takes issue with HSN's search because HSN has not provided information concerning any back-up or archiving of emails that were potentially destroyed but may still be retrievable. He suggests that this back-up, if it exists, should be searched. As I understand the appellant's argument, his main concern is that searches should have yielded additional records from 2015.

[69] I considered whether the appellant's concerns about 2015 emails gives rise to a reasonable basis to nevertheless order further searches. Unbeknownst to the appellant, record 4 contains many emails from 2015. With the benefit of reviewing the withheld information, I find that there is no reasonable basis to conclude that further records would be located if HSN was ordered to conduct a further search.

[70] As a result, I find that HSN's search was reasonable.

### **ORDER:**

1. I do not uphold HSN's decision that the first email in the chain of record 4 is excluded under section 65(6) of the *Act*. I remain seized of the appeal to deal with the remaining issue of HSN's exemption claim for this record.

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<sup>28</sup> Orders M-909, PO-2469 and PO-2592.

2. I uphold HSN's decision that the remaining records are excluded from the *Act* under section 65(6)3.
3. I uphold HSN's search as reasonable.

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

Alec Fadel  
Adjudicator

February 6, 2024 \_\_\_\_\_