

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4506

Appeal PA21-00376

University of Toronto

April 9, 2024

Summary: The appellant made a request under the *Act* to the University of Toronto (the university) for access to records related to the compensation paid to an external law firm for a report regarding the cancellation of the recruitment process for a Director of the International Human Rights Program at the university's Faculty of Law. The appellant also sought access to records regarding the retention of a communications consultant in relation to the cancelled hiring process. The university denied access to the records claiming that they were excluded from the scope of the *Act* under section 65(6)3 (labour relations or employment-related matters). In this order the adjudicator finds that all the records are excluded from the scope of the *Act* and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 65(6)3.

Orders Considered: Orders MO-3664 and PO-2933.

Cases Considered: *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

OVERVIEW:

[1] In 2020, the Dean of the Faculty of Law at the University of Toronto (the university) terminated a recruitment process for the Directorship of the International Human Rights Program (IHRP) that was already underway. The decision to terminate the recruitment process caused significant controversy and was the subject of allegations

that the hiring process was interfered with externally. The university retained the Honourable Thomas Cromwell who was working at an external law firm to conduct an independent review of the search process for the directorship. The university also retained a communications consultant to assist the university in its responses to the public regarding the matter.

[2] The independent review report was made public¹, as was the university's response.² The specific report and response are not at issue in this appeal.

[3] What is at issue in this appeal is a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to the following:

1. Any emails and documents related to whether the University of Toronto has retained a crisis communications consultant (or functional equivalent) in relation to the aborted hiring process for the Director of the International Human Rights Program at the Faculty of Law. If there has been such an arrangement, please include any documents related to the mandate, terms, and compensatory structure of the arrangement.
2. Any records or documents pertaining to the compensation paid to the Honourable Thomas Albert Cromwell [...] by the University of Toronto to investigate the aforementioned aborted hiring and draft the [report entitled] "Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law" [...]

Date period: September 1, 2020 - May 29, 2021.

[4] The university identified seven responsive records and denied access to them, in full, claiming that they were excluded from the scope of the *Act* under 65(6) (employment or labour relations records). The appellant appealed the university's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] At mediation, the appellant advised the mediator that he was no longer seeking access to one of the records (record 2) but that he continued to seek access to the other responsive records. Accordingly, record 2 is no longer at issue in the appeal.³

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage

¹ <https://ultravires.ca/wp/wp-content/uploads/2021/05/Report-of-the-Hon-Thomas-A-Cromwell-CC-%E2%80%93-March-15-2021.pdf>.

² <https://www.people.utoronto.ca/wp-content/uploads/2021/05/Presidents-Response-to-the-Report-of-Hon.-Thomas-A.-Cromwell-CC.pdf>

³ At mediation the university also indicated that if record 1 was not found to be excluded from the *Act* by operation of section 65(6), then it would claim record 1 to be exempt under section 19 (solicitor-client privilege) of the *Act*. As I have found in this order that section 65(6)3 applies to all the remaining records at issue it is not necessary to address any potential application of section 19 or any procedural steps in relation to that claim.

of the appeals process where an adjudicator may decide to conduct an inquiry under the *Act*.

[7] I sought representations from the parties but only received submissions from the university.

[8] In this order, I find that the records fall within the scope of the section 65(6)3 exclusion and that the *Act* does not apply to them. I uphold the university's decision to deny access to the records and dismiss the appeal.

RECORDS:

[9] The records remaining at issue consist of an email relating to the retention of a communications consultant to support the university in its response to public interest and scrutiny in the IHRP matter (record 1⁴), a letter with respect to retaining the Honourable Thomas Cromwell (record 3) and four legal invoices from the external law firm where the Honourable Thomas Cromwell worked (records 4, 5, 6 and 7) detailing the work performed. The university did not provide a copy of record 1 although requested to do so but provided a detailed affidavit describing the record.⁵ A non-confidential version of the affidavit was shared with the appellant, who provided no representations in response.⁶

DISCUSSION:

[10] The sole issue in this decision is whether the records are excluded from the scope of the *Act* under section 65(6). Based on the following reasons, I find that they are. While the university claimed that both paragraphs 1 and 3 of section 65(6) apply, given my finding below, I only consider the application of section 65(6)3.

[11] Section 65(6) of the *Act* excludes from the scope of the *Act* 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.⁷

[12] The university submits that section 65(6)3 applies to the records, which states:

⁴ The university did not provide a copy of Record 1 for my review and consideration.

⁵ The university provided the affidavit in response to my request for the record or a detailed affidavit explaining the basis for its possible section 19 claim.

⁶ Portions of the university's affidavit were withheld as they met the criteria for withholding representations in Practice Direction 7.

⁷ Order PO-2639.

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

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

[13] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*. None of the exceptions apply in the circumstances of the appeal before me.

[14] The type of records excluded from the *Act* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.⁸

[15] Previous court decisions have stated that section 65(6) must be read in context and in light of its legislative history and the purposes of the *Act*. It should not be interpreted in a manner that has the effect of shielding government officials from public accountability.⁹

[16] 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 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.

[17] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.¹⁰

[18] The "some connection" standard must involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context.

[19] The term "labour relations" refers to the collective bargaining relationship between

⁸ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

⁹ See *Ontario (Ministry of Community and Social Services) v. Doe (John Doe)*, 2014 ONSC 239. See also *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

¹⁰ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.¹¹

[20] 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.¹²

Representations

[21] The university provided confidential and non-confidential representations in support of its position.¹³

[22] The university explains that record 1 is an email from university staff to legal counsel as well as an external communications consultant, retaining the consultant to provide services in relation to the human resources issue.

[23] It states that record 3 is a retainer letter prepared by an external law firm and provided directly to the university to establish the terms of the Honourable Thomas Cromwell's mandate to conduct a review of the hiring process on behalf of the university. It also provided the Honourable Thomas Cromwell with the authority to meet, consult, discuss and communicate with university faculty and staff. The university states that the scope of Honourable Thomas Cromwell's mandate was limited to reviewing the IHRP Director hiring process, including reviewing any relevant hiring practices and policies at the university.

[24] Records 4 to 7 are invoices prepared by the external law firm for services rendered to the university in relation to Honourable Thomas Cromwell's review. The university submits that records 4 to 7 are for time spent meeting, consulting, discussing and communicating with university faculty and staff about the issue being reviewed. These records include detailed docket entries of the steps and time taken in the course of his work on the labour relations or employment related matters into which he was inquiring.

[25] The university states that the IHRP Director candidate search, together with the issues and controversy that arose, became the basis for two grievances filed by the University of Toronto Faculty Association (UTFA). The university states that the IHRP job competition became the subject of scrutiny because of allegations of external interference in the process, which raised the possibility of, and subsequently resulted in, labour relations issues, including these grievances. The university submits that the subject of

¹¹ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

¹² Order PO-2157.

¹³ Although I do not refer to the university's confidential representations and confidential portions of the supplied affidavit in this order, I have taken them all into consideration.

the grievances relates to the employment of a person and encompasses the university's processes and decisions to hire or not hire a specific individual. Accordingly, the university submits that the records were prepared and maintained in relation to a labour relations or employment related matter.

[26] With respect to record 1, the university submits that the communications consultant was retained because of the nature and sensitivity of the issues. The university explains that all statements and communications made by the university about the matter had the potential to further inflame labour relations and issues respecting the matter as well as expose the university to legal liability with respect to privacy and employment obligations. The university states that the communications consultant was retained to assist the university and its legal counsel in formulating communications on the hiring decision given the possible employment and labour relations consequences and to respond to the highly public discourse surrounding the hiring decision and the related grievances. The university submits that records 3 to 7 were prepared after the filing of the UTFA association grievances.

[27] The university submits that the nature of the request at issue and the context in which record 1 was created are substantially similar to those set out in Order PO-2933. In that case the adjudicator found that an email record between York University and an external consultant hired to assist York in a hiring decision for the role of Dean of their Faculty of Liberal Arts and Professional Studies, arising from concerns about the selected candidate, was excluded from the *Act* pursuant to section 65(6)3.

[28] The university submits that record 3 was created to establish the terms of the university's retainer of Honourable Thomas Cromwell to review the specified IHRP Director hiring process, which is itself an employment-related matter.

[29] It asserts that the invoices comprising records 4 to 7 represent the logs of the activities and timing of the Honourable Thomas Cromwell's meetings, consultations, discussions and communications with university faculty and staff involved in the hiring process. It explains that the docketing setting out the time and action taken is highly detailed, naming specific individuals involved, specifying precisely when they were communicated with, and the topics of various memos that were drafted. The university submits that the information contained in records 4 to 7, some of which is financial in nature, does not change the nature and purpose of the records, which are about a review of a hiring decision of an official.

[30] The university submits that the records relate to no issue other than the specified hiring process and subsequent grievances. It submits that the records were maintained or used only in relation to communicating with the university community and public more broadly regarding the allegations made about the specified hiring process and coordinating an independent review of the specified hiring process.

[31] For these reasons, the university submits that the records at issue relate to labour

relations or employment matters and that both the initial hiring process and the subsequent controversy and review are employment-related and labour relations matters in which the university has an interest.

Analysis and findings

[32] Based on my review of the university's representations and the records, I find that all of the records are excluded from the scope of the *Act* under section 65(6)3.

[33] With respect to part 1 of the section 65(6)3 test, I accept that all the records at issue were collected, prepared, maintained or used by the university or on its behalf. Accordingly, I find that part 1 of the section 65(6)3 test has been satisfied.

[34] With respect to parts 2 and 3 of the test, I agree that the collection, preparation, maintenance or use of all the records was in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[35] This is because all the records related to, or arose out of, challenges to the hiring process. In my view, they directly relate to employment-related matters and, more specifically, to the university's obligation to appropriately manage its own workforce and its hiring practices as well as the investigation of a workplace related matter. These are matters in which the university has an interest as an employer.

[36] In that regard, although records 4 to 7 are legal invoices, they are very detailed and set out specific steps in the Honourable Thomas Cromwell's investigation. I find that these records are distinguishable from the redacted invoice setting out the bottom-line dollar figures ultimately sought by the requester in Order MO-3664, which was upheld by the Ontario Divisional Court in *Brockville (City) v. Information and Privacy Commissioner, Ontario*.¹⁴ I find that the content of the invoices in the appeal before me is sufficient to meet the "some connection" standard required to come within the scope of the exclusion in paragraph 3 of section 65(6). Had the request been simply for the bottom-line dollar figures I may not have reached the same conclusion.

[37] In the result, I find that the records are excluded from the scope of the *Act* and that the *Act* does not apply to them.¹⁵

ORDER:

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

¹⁴ 2020 ONSC 4413 (Div Ct.).

¹⁵ As I have found that the records fall within the scope of the section 65(6)3 exclusion it is not necessary for me to also consider whether section 65(6)1 applies.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ April 9, 2024