Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4513

Appeal PA20-00694

University of Ottawa

April 26, 2024

Summary: This order involves a request for records relating to the appellant in the context of their employment with the University of Ottawa (the university). The university denied access to records including videos, claiming that they are excluded from the scope of the *Act* under the labour relations and employment exclusion in section 65(6)3. The appellant claims that the records are not excluded from the *Act* due to the doctrine of promissory estoppel, the exception in section 65(7) and that the videos were not made for an employment purpose. In this order, the adjudicator finds that promissory estoppel does not apply, section 65(6)3 applies to all of the records except the videos, and the exception in section 65(7) does not apply. She orders the university to issue a decision letter to the appellant regarding the videos without recourse to section 65(6)3.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31, sections 65(6)3 and 65(7).

Orders Considered: Orders MO-2226, MO-2589, MO-4354, MO-4463-R, P-1242, PO-2613, PO-2683, PO-3391, PO-3572, PO-3777, PO-4428 and PO-4479.

Cases Considered: *Canadian Medical Protective Association v. Loukidelis* 2008 CanLii 45005 (ON SCDC).

OVERVIEW:

[1] This order resolves the issues arising out of an appeal of an access decision made by the University of Ottawa (the university) under the *Freedom of Information and*

Protection of Privacy Act (the *Act*) for access to all records containing the requester's personal information over a specified time frame, including all records relating to the requester's employment at the university. The access request was for records from the university's Faculty of Medicine, Human Resources, Protection Services, and the Human Rights Office.

[2] The university located records, including videos, and issued an access decision to the requester, granting partial access to some of them. It denied access to most of the records in whole, claiming the exclusion in section 65(6) (labour relations and employment) to them.[1] The university also denied access to portions of some records, claiming the mandatory personal privacy exemption in section 21(1) (personal privacy) and to other portions because the university claimed they were not responsive to the request.

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

[4] During the mediation of the appeal, the university clarified that it was relying on the exclusion in section 65(6)3. It also provided additional information about the types of records that it located, and this information was shared with the appellant. After considering this additional information, the appellant advised that they wanted to proceed to adjudication on the issue of whether the records are excluded from the *Act* under section 65(6)3. The appellant also advised the mediator that they were not seeking access to the information that the university withheld under section 21(1), or the information that the university withheld as not responsive to the request.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator assigned to the appeal sought and received representations from the university and the appellant, which were shared in accordance with the IPC's *Practice Direction 7*. The appeal was then transferred to me to continue the inquiry. I determined that I had sufficient evidence from the parties in order to proceed with my decision without seeking further representations from them.

[6] In their representations, the appellant raised the doctrine of promissory estoppel, claiming that it applies to a subset of the records. I address this as a preliminary issue, below. The appellant also clarified that their access request with respect to the videos is for the actual video footage itself and not for any additional records that might have been generated as a direct result of the videos.

[7] As stated above, the access request was for all of the appellant's "personal information" and all records relating to their employment at the university. On my review of the records, I note that some of the records contain information solely about the employment of individuals other than the appellant. As a result, based on the wording of

[1] The university's decision did not specify which subsection of 65(6) applies.

the appellant's access request, which was for records relating to them, I have determined that certain records are outside the scope of the request, and I have removed them from the scope of the appeal.[2]

[8] For the reasons that follow, I find that the doctrine of promissory estoppel does not apply, nor does the exception in section 65(7). I find that all of the records, except the videos, are excluded from the scope of the *Act* under section 65(6)3. I order the university to issue a decision to the appellant regarding the videos, without recourse to section 65(6)3.

RECORDS:

[9] There are approximately 519 records at issue, consisting of emails, job descriptions, evaluations, Excel spreadsheets, notes, videos and a curriculum vitae.

[10] Based on the university's description of the records and my review of them, the records are categorized as follows:

- Category 1 – records relating to workplace harassment and discrimination complaints made by the appellant to the university's Human Rights Office,
- Category 2 - records relating to the appellant and attendance,
- Category 3 – records relating to the appellant's employment status, job description and role clarification,
- Category 4 – records relating to the appellant's workload duties and the performance of employment duties,
- Category 5 – records, including videos, relating to alleged workplace incidents involving faculty members, and
- Category 6 - "leaders' stipend spreadsheets."

[11] I note that there is an extensive amount of duplication of content in the records, particularly in the emails and the job description.

DISCUSSION:

Preliminary Issue:

[12] I must first determine whether an issue raised by the appellant, namely promissory estoppel, applies to preclude the university from claiming the application of section 65(6)3

[2] Records 1-15, 34, 36, 44, 46 and 266.

to a subset of the records.

Promissory estoppel

[13] The appellant submits that the university is precluded from claiming section 65(6)3 to a subset of the records - the Human Rights Office Records (the HRO records) - due to promissory estoppel. The appellant explains that when they approached the HRO regarding alleged workplace harassment, they completed a complaint form which explicitly stated that the information in the form and in the HRO's processes is collected in accordance with the *Act*. The appellant argues that because the information was collected by the HRO in accordance with the *Act*, the information was also subject to the *Act*, meaning that a reasonable interpretation is that the appellant's information was being collected and maintained "in a manner for which *FIPPA* was applicable."

[14] The appellant goes on to submit that because of the statement about the *Act* on the complaint form, promissory estoppel applies to the HRO records. The appellant cites *Maracle v. Travellers Indemnity Co. of Canada*[3] in which the Supreme Court of Canada defined promissory estoppel in the following way:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[15] The appellant argues that it was clear when they shared their information with the HRO that the *Act* would apply to their dealings with the university, including providing them both the privacy protections and access provisions under the *Act* – not excluding the records from the *Act*. The appellant goes on to submit that had they known that the university would take the position that they could not access the HRO records through the *Act*, they would have altered their position by either not submitting a complaint to the HRO and/or by limiting the information shared in the complaint.

[16] In reply, the university submits that the IPC does not have the jurisdiction to make a finding that appellant's information in the HRO's complaint form amounts to promissory estoppel because the records are excluded from the scope of the *Act*. Promissory estoppel, the university argues, does not overcome the clear wording of the *Act*, which is that the *Act* does not apply to the categories of records listed in section 65(6), unless subject to the exception in section 65(7).

[17] The university goes on to argue that, in any event, the doctrine of promissory estoppel requires proof of a clear and unambiguous promise to induce an individual to perform a certain act, along with reliance on that representation. The HRO complaint

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[3] [1991] 2 S.C.R. 50 at para 13 (S.C.C).

form clearly states that the information is collected in accordance with the *Act*, but this cannot be interpreted as a promise that the university would treat records that are excluded from the scope of the *Act* would nonetheless be subject to the provisions in the *Act*.

[18] The university further submits that the appellant has not provided any evidence that they relied on the reference to the *Act* set in the HRO complaint form such that they altered their behaviour. The university argues that the appellant did not file the complaint with the HRO in order to create records which they could later access through the *Act*, but rather filed the complaint to address alleged harassment and discrimination circumstances.

[19] In sur-reply, the appellant reiterates their position regarding promissory estoppel, stating:

> The confidential nature of the services offered, was a predicate for the Appellant's engagement with the HRO and use of its services. That the use of [their] personal information was further made the subject of an authorization form that [they] had to sign at the time of submitting [their] complaint to the HRO confirmed what the Appellant understood to be a protection of [their] personal information and the transparency/access of the HRO's process.

[20] The appellant then argues that the university has two policies that relate to access to information/protection of privacy, and the handling of privacy complaints that refer to the collection of personal information under the *Act*, without reference to any stated exceptions or exclusions.

Analysis and findings

[21] The appellant's position is that when they shared their information with the HRO that the *Act* would apply to the information, including the access provisions and had they known that they could not access the HRO records through the *Act*, they would have altered their position by either not submitting a complaint to the HRO and/or by limiting the information shared in the complaint.

[22] The university's position, among others, is that the complaint form states that the information is collected in accordance with the *Act*, but this cannot be interpreted as a promise that the university would treat records that are excluded from the scope of the *Act* as nonetheless subject to the provisions in the *Act*.

[23] I agree with the university and find that the wording of the HRO form does not and cannot have the effect of amending or impacting the clear statutory language of the *Act*. The doctrine of promissory estoppel is a doctrine relevant to relationships governed by contract, not the requirements or limitations established by provincial law, such as the *Act*. The statements contained in the form do not represent an agreement on the part of

the university, but merely a statement about the requirements of the *Act* that will apply depending on the records and information being collected. As a result, I find that promissory estoppel is not applicable in these circumstances.

[24] Having found that promissory estoppel does not apply, I will go on to determine whether the exclusion in section 65(6)3 applies to the records.

The exclusion in section 65(6)3

[25] The remaining issue in this appeal is whether the records are excluded from the scope of the *Act* under section 65(6)3. Based on my review of the records and the parties' representations, for the reasons that follow, I find that all of the records, except the videos, are excluded from the *Act* under section 65(6)3, subject to my findings regarding the exception in section 65(7).

[26] Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest….

[27] 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*.

[28] For the collection, preparation, maintenance or use of a record to be "in relation to" the subject referred to in section 65(6)3, it must be reasonable to conclude that there is "some connection" between them.[4]

[29] 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 is not enough to meet the "some connection" standard.[5]

[30] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-

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[4] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[5] Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

employee relationships.[6]

[31] he 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.[7] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[8]

[32] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[9]

[33] 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.

[34] The phrase "labour relations or employment-related matters" has been found to apply in the context of, for example, a job competition,[10] an employee's dismissal,[11] a grievance under a collective agreement,[12] and a review of "workload and working relationships."[13]

[35] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of an organizational or operational review,[14] and litigation in which the institution may be found vicariously liable for the actions of its employee.[15]

[36] The phrase "in which the institution has an interest" means more than a "mere

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[6] *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.
[7] Order PO-2157.
[8] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[9] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[10] Orders M-830 and PO-2123.
[11] Order MO-1654-I.
[12] Orders M-832 and PO-1769.
[13] Order PO-2057.
[14] Orders M-941 and P-1369.
[15] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

curiosity or concern," and refers to matters involving the institution's own workforce.[16]

[37] The university submits that all of the records meet the three-part test in section 65(6)3 and are therefore excluded from the scope of the *Act*. The appellant submits that the records are either not "employment-related" or fall within the exception in section 65(7).

[38] Concerning the approach taken in determining the application of section 65(6)3 to records, I find Order PO-3572 instructive. In that Order, Adjudicator Jenny Ryu states:

> [The IPC] has consistently taken the position that the exclusions at section 65(6) of the *Act* (and the equivalent section in *MFIPPA*) are record-specific and fact-specific.[17] This means that in order to qualify for an exclusion, the record is examined as a whole. The question of whether the exclusion applies to a whole record, based on the inclusion in the record of an excluded portion, has been addressed in previous orders. In those orders, this office has applied the record-specific and fact-specific analysis to consider whether the record, as a whole, qualifies for the claimed exclusion.

[39] I agree with and adopt the approach taken in Order PO-3572. As a result, my findings regarding whether section 65(6)3 applies to the records will refer to each record as a whole.

Part 1 – the records were collected, prepared, maintained or used by or on behalf of the university.

[40] Concerning part 1 of the test, the university submits that all of the records were collected, prepared, maintained and/or used by the university and its employees or on behalf of the university.

[41] The appellant does not refer to records other than the videos, agreeing that they were collected by "Protection Services" on behalf of the university, meeting part 1 of the test.

[42] I have reviewed all of the records.[18] I find that all of the records, including the videos were collected, prepared, maintained and/or used by the university, thus meeting part one of the three-part test. In particular, I find that the records were prepared either by employees of the university such as human resources, protection services, faculty and administrative employees, or were prepared by university students which were collected by the university.

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[16] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[17] See Orders M-797, P-1575, PO-2531, PO-2632, MO-1218, PO-3456-I and many others.
[18] 78 of the records remaining at issue are in French. I reviewed records 52-54, 65, 82, 84, 91, 122-126, 132, 193, 197, 201-202, 267, 272-273, 278, 323, 326, 330-332, 370-375, 393, 403, 405, 434, 438, 464-481, 483-493, 495-499, 501-503, 507, 511 and 516-517 with an adjudicator who is fluent in French.

Part 2 – the records are "in relation to" meetings, consultations, discussions or communications.

Representations

[43] Turning to part 2 of the test, the university argues that the evidentiary burden it must meet in part 2 is only to establish that *a* purpose for collecting, preparing, maintaining or using the records – not *the* primary, sole or initial purpose - was in relation to meetings, consultations, discussions or communications.[19]

[44] The university submits that all of the records were collected, prepared, maintained or used in relation to meetings, consultations, discussions and/or communications, including for example, communications between employees at the university, and that the records in categories 1 through 5 are largely analogous to records that were found to be excluded from the *Act* in Order PO-3391.

[45] The university provided more detail regarding the records, submitting that the category 1 and 5 records relate to meetings, consultations, discussions or communications concerning workplace harassment and discrimination complaints brought forward by the appellant about the university. The university includes videos that were taken in a classroom/laboratory in category 5 of the records, submitting that its surveillance system consistently records over footage. These videos still exist, the university argues, because human resources made a request to protection services to capture certain portions of the video footage in relation to the appellant, which were then were used in subsequent discussions and/or communications about an ongoing employment-related matter involving the appellant.

[46] The university further submits that the Category 3 and 4 records primarily relate to the appellant's disputes with the university regarding their employment status, job description, workload duties and the performance of those duties, and that these records were collected, prepared, maintained or used in relation to consultations, meetings, discussions or communications.[20]

[47] Regarding the category 6 records, the university submits that they were collected, prepared, maintained or used in relation to consultations, meetings, discussions or communications about the planning and scheduling of the Undergraduate Medical Education program's leadership roles.

[48] The appellant refers specifically to the videos, submitting that that part 2 of the test is not met because they are not in relation to meetings, consultations or discussions or communications about a labour relations or employment-related matter, but are rather

[19] See Order MO-2589.
[20] The university goes on to submit that these records meet part 2 of the test for similar reasons given by the IPC in Order MO-2226, in which the records related to a draft job description.

for the purpose of security assessments.

Analysis and findings

[49] I find that all of the records, with the exception of the videos, were collected, prepared, maintained or used in relation to meetings, consultation, discussions or communications. I find that the majority of the records are emails in which consultations, discussions and communications among university staff take place and that these discussions are directly in relation to the appellant's employment with the university. I also find that the other records, consisting of job descriptions, evaluations, Excel spreadsheets, notes and a curriculum vitae are attached to emails that form part of these consultations, discussions and communications. As a result, I find that part 2 of the test has been met.

[50] Concerning the videos, I find that they do not meet part two of the test and that even if they did meet part 2 of the test, they do not meet part 3 of the test. For that reason, the discussion of the three-part test with respect to the videos is set out below.

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

Representations

[51] The university submits that all of the records are about labour relations or employment-related matters in which it has an interest.

[52] The university further submits that the records in categories 1, 3, 4 and 5 in this appeal closely resemble the records in Order PO-3391. In that order, the records related to:

> . . . matters concerned with the appellant's employment with the university including complaints she filed regarding her treatment by other university employees, her workplace relationships, her employment status and her workload, including teaching responsibilities.

[53] The university argues that the IPC found in Order PO-3391 that the records described above related to workplace harassment/discrimination complaints and their associated investigations, and that they were about employment-related matters in which the institution (a university) had an interest, thus meeting part 3 of the test. The university goes on to argue that the approach taken in Order PO-3391 can be directly applied to the category 1 and 5 records in this appeal in particular, as the IPC has found that it is an employment-related matter for an employer to investigate complaints of

workplace harassment.[21] The university further submits that these records are analogous to the records in Order PO-3777, in which the IPC found that records relating to an investigation into workplace harassment complaints were excluded from the scope of the *Act* because they were about an employment-related matter. The university includes videos that were taken in a classroom/laboratory in category 5 of the records, submitting that its surveillance system consistently records over footage. These videos still exist, the university argues, because human resources made a request to protection services to capture certain portions of the video footage in relation to the appellant, which were then were used in subsequent discussions and/or communications about an ongoing employment-related matter involving the appellant.

[54] With respect to the category 2 records, the university submits that part 3 of the test is met because the records relate to a leave taken by the appellant from the university, which fall within the university's role as the appellant's employer.[22]

[55] Concerning the category 3 records, the university submits that they relate to the appellant's job description and role clarification process pursuant to a collective agreement, and that these types of records were found to have met part 3 of the test in Order PO-2613, where the records related to the development, classification and evaluation and review of job descriptions.

[56] Turning to the category 4 records, the university argues that they relate to the appellant's workload duties and the performance of employment duties and are therefore clearly employment-related or about labour relations.[23]

[57] The university also submits that the category 6 records, which track stipend payments to "Leaders" from the university, fall within the scope of section 65(6)3, even though many of the leaders are not employees of the university. Relying on the Ontario Court of Appeal's decision in *Ontario (Minister of Health and Long-Term Care) v. Mitchinson,*[24] the university argues that the Court held that the phrase "labour relations" was not restricted to employees. Applying this finding to the category 6 records, the university states:

> It is clear that the University's relationships with non-employee Leaders falls within the scope of "labour relations" for the purposes of s.65(6)3 for which

[21] See, for example, the approach taken in Order MO-3854 in which the IPC found that an employer's investigation of a workplace harassment complaint directly relating to the employment relationship is part of an employer's responsibilities.
[22] The university relies on Order MO-3398 in which records relating to annual leave and vacation time qualified as an employment-related matter and Order PO-3462 where records relating to an employee's administrative leave met part there of the test.
[23] The university relies on Order PO-2057 in which records relating to a review of workload and workforce issues were found to be employment-related and Order PO-3548 where the IPC concluded that records consisting of or relating to an employee's job performance, including a performance development plan, were subject to section 65(6)3.
[24] 2003 CanLii 16894 (ON CA), Tab 23, at paras 1-2.

> the University has an interest above "mere curiosity." Non-employee Leaders perform teaching duties for the University in exchange for teaching stipends, such that they are remunerated for their work/labour. . .

[58] The university further argues that past IPC Orders have found that information about remuneration falls within part 3 of the test.[25]

[59] The appellant submits that the changes to their job description have been "justified" by the university as a result of an "organizational review process," and that it is the university's burden to establish that the organizational review (and resulting records) relating to the appellant's job position were substantially linked to a labour relations concern, rather than an efficiency review of the institution.[26] In other, words, the appellant's position is that the records relating to the appellant's job position are not sufficiently employment-related as to be excluded from the scope of the *Act* under either section 65(6)3 or 65(6)1.

[60] With respect to the videos, the appellant submits that part 3 of the test is not met because they are not about a labour relations or employment-related matter, but are rather for the purpose of security assessments. The appellant further submits that their request is for the original video, not the copy that was sent to human resources.

[61] With respect to the HRO records, the appellant submits that they records do not qualify as labour relations or employment-related matters *per se*, contrary to the university's position, and that Order PO-3391, relied on by the university, adopts the position of the Divisional Court that an inquiry as to whether records are "employment-related" turns on the examination of the particular record.[27]

[62] The appellant goes on to argue that there is distinction to be made between records that are generated by a particular department and those that form the subject of the appellant's communication with the HRO and the HRO's synthesis and analysis relating to those records. The appellant's position is that they are seeking access to the records collected by the HRO, which is not an arm of a university department or faculty, but is a parallel mechanism of addressing complaints that caters to the entire university community. The appellant submits that the university has its own human resources department and that they are not seeking records from that department.

[63] The appellant further submits that if the records are subject to the exclusion in section 65(6), the exception to the exclusion in section 65(7) applies to them.

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[25] See, for example, Orders MO-1264, MO-3537, PO-2497 and PO-3932.

[26] The appellant relies on Order PO-2683 in which the IPC found that the record, a program review, was not outside the scope of the Act under section 65(6) because it was substantially connected to an overall examination of a program even though aspects of it touched on labour relations or employment-related matters.

[27] *Goodis*, see note 7.

[64] In reply, the university submits that the records arising from and in the possession of the HRO have been collected, maintained and used predominantly for employment-related purposes in response to the harassment and discrimination complaints filed by the appellant.[28]

[65] With respect to the videos, in reply the university submits that the appellant is attempting to distinguish between multiple copies of the same videos, namely those which were maintained for the original purpose in relation to security matters. The university goes on to argue that the category 5 records (which the videos are part of) were created for an employment-related purpose and that even if they had been created for security purposes and later used in connection with an employment-related matter, the appellant's position is based on the unreasonable assertion that section 65(6) may apply only to some copies of a record and not others. The university states:

> Multiple copies of video recordings may be made – this does not result in the creation of new and distinct records, some of which are subject to s. 65(6) and some of which are not. They are simply multiple copies of the same records. If one copy of the record is excluded under s. 65(6), all copies are excluded.

[66] sur-reply, the appellant submits that there is no evidence that the videos were created for an employment-related purpose, stating "Protection Services records are created for security purposes and not for human resources reasons."

Analysis and findings

[67] I find that part 3 of the test is met with respect to all of the records at issue except the videos because I am satisfied that the meetings, consultations, discussions or communications referred to above are about labour relations or employment-related matters in which the university has an interest.

[68] In that regard, in *Ontario (Ministry of Community and Social Services) v. Doe* (*John Doe*),[29] the Divisional Court found that the dictionary definition of the word "about" in section 65(6)3 of the *Act* requires that the record do more than have some connection to, or some relationship with, a labour relations or employment related matter. It stated that "about" means "on the subject of" or "concerning."[30] This means that to qualify for the section 65(6)3 exclusion, the subject matter of the record must be a labour relations or employment-related matter.[31]

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[28] See Order PO-3572 where the IPC found that where there are multiple purposes for a record's collection, preparation, maintenance or use, the question of whether the excluded purposes is a predominant or primary purpose is relevant.
[29] 2014 ONSC 239, appeal dismissed *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107
[30] The Divisional Court referenced the Concise Oxford English Dictionary, 11th ed., 2004, s.v. "about".
[31] At paragraph 29.

[69] I find that the records directly relate to the appellant's employment with the university. In particular, based on the parties' representations and my review if the records, I find that they relate to:

- the workplace harassment and discrimination complaint made by the appellant to the university's Human Rights Office,
- a workplace leave involving the appellant,
- the appellant's employment status, job description and role clarification,
- the appellant's workload duties and the performance of employment duties,
- alleged workplace incidents of misconduct identified by the appellant involving faculty members, and
- leaders' stipend (remuneration) spreadsheets, including the appellant's stipend information, used for scheduling teaching.

[70] Based on the parties' representations and my review of the records, I am satisfied and find that the records regarding the appellant's workplace leave, employment status, workload duties and performance, alleged workplace incidents of misconduct, and leaders stipend spreadsheet document meetings, consultations, discussions or communications about labour relations or employment-related matters in which the university has an interest, namely various aspects of the appellant's employment with the university.

[71] With respect to the records relating to alleged workplace incidents of misconduct identified by the appellant involving faculty members, I note that the records are similar to those found in Order PO-3391. In that order, Adjudicator Catherine Corban found that records relating to matters concerned with an appellant's employment with a university including complaints she filed regarding her treatment by other university employees and her workplace relationships, clearly related to the university's management of its own workforce and that the university had more than a mere curiosity or concern with respect to those matters. Adjudicator Corban found that the records were about labour relations or employment-related matters in which the university had an interest. I agree with and adopt the approach taken in Order PO-3391. I find that the records relating to alleged workplace incidents of misconduct identified by the appellant involving faculty members are about labour relations and employment-related matters in which the university has an interest.

[72] Turning to the records relating to the appellant's job description and role clarification, the appellant's position is that the university claims these records were the result of an organizational review, and it is the university's burden to establish that the organizational review (and resulting records) relating to the appellant's job position were substantially linked to a labour relations concern, rather than an efficiency review of the institution. The appellant relies on Order PO-2683 in which the IPC found that the record,

a program review, was not outside the scope of the *Act* under section 65(6) because it was substantially connected to an overall examination of a program, even though aspects of it touched on labour relations or employment-related matters.

[73] I have reviewed job description and role clarification records and I find that the circumstances in this appeal differ from those in Order PO-2683, and are instead similar to those found in Order PO-2613. In Order PO-2613, the record consisted of a complete database maintained by the Ministry of Government Services (the ministry), containing all of the job positions, job descriptions, classification standards and evaluations in the Ontario Public Service (the OPS), relating directly to the OPS's workforce. Adjudicator Frank DeVries found that the subject matter (job descriptions) necessarily involved the employees of the ministry and were about labour relations or employment-related matters.

[74] I agree with and adopt the approach taken in Order PO-2613. I find that the records relating to job descriptions and role clarifications are not the product of an organizational review, but are about the development and classification of the appellant's specific job description, involving university employees about labour relations or employment-related matters in which the university has an interest.

[75] Regarding the HRO records, the appellant's position is that they do not qualify as "employment related" as contemplated in section 65(6)3 because the HRO is not an arm of a university department or faculty, but is a parallel mechanism of addressing complaints that caters to the entire university community.

[76] In Order PO-3777, Adjudicator Justine Wai found that records relating to a complaint of workplace harassment met part 3 of the test under section 65(6)3, finding that they were about an employment-related matter in which the institution had an interest, despite the fact that the institution had decided to hire an external consultant to investigate the complaint. She found support for her finding in Order P-1242, where the adjudicator considered whether and found that an investigation under a Workplace Discrimination and Harassment Prevention Program was an employment related matter in which the institution had an interest.

[77] I agree with and adopt these conclusions, and find that the university's investigation, through its HRO, into the complaint alleging workplace harassment is about a labour relations or employment-related matter in which the university has an interest. The records before me relate to an investigation in response to the appellant's complaint alleging workplace harassment and discrimination in their workplace. It is clear to me that the records have more than some connection to allegations relating to workplace harassment at the university. Based on my review of the records, I am satisfied that they relate to the university's work environment and this information relates to or is about labour relations or employment-related matters in which the university has an interest.

[78] For all of these reasons, I find that the three-part test in section 65(6)3 has been

met with respect to all of the records except the videos. Subject to my findings regarding the exception in section 65(7), I find that section 65(6)3 applies, and the records are excluded from the scope of the *Act*, again with the exception of the videos, which I discuss below.

[79] The university's position is that the videos at issue exist only because human resources made a request to protection services to preserve the video footage at issue for a labour relations or employment-related purpose relating to the appellant. In the ordinary course of business, the university has submitted, the videos are recorded over. The university also takes the position that multiple copies of video recordings may be made but this does not result in the creation of new and distinct records, some of which are subject to s. 65(6) and some of which are not. They are simply multiple copies of the same records. If one copy of the record is excluded under s. 65(6), all copies are excluded.

[80] Similar issues were considered in Orders PO-4428 and MO-4354, which I find instructive. In Order MO-4354, Adjudicator Steven Faughnan dealt with a request for security footage depicting an interaction between a teacher and a school's principal. Adjudicator Faughnan found that the video was not excluded from the scope of the municipal equivalent of section 65(6)3 because the school board had not made an argument that the security camera's initial collection of the video was for the purposes of an employment-related matter – in this case a discipline investigation. He stated that the security video footage would have existed whether or not the investigation occurred.

[81] After Order MO-4354 was issued, the institution – a school board - requested a reconsideration of the order. In Reconsideration Order MO-4463-R, Adjudicator Faughnan denied the reconsideration request. He reiterated that the video security footage in that appeal was a record created by the board in the normal course of its day-to-day activities. A copy of the video security footage was then "collected" by the board after it was created and subsequently "maintained or used" by it in relation to discipline proceedings involving an employee. As Adjudicator Faughnan had explained in Order MO-4354, this did not mean that the original records were excluded from the *Act* by section 52(3)3 - the municipal equivalent of section 65(6)3 - from the moment of their collection. In other words, they were routine operational records that were created and became part of the record holdings at the board irrespective of their possible inclusion or review in subsequent investigations and/or other proceedings.

[82] Adjudicator Faughnan went on to find that the board had essentially argued that because section 52(3)3 applied to records that were "collected," this meant that it implicitly applied to records which may have been created for a completely non-employment purpose, but which were "collected" by, and were now being "used" by the board for the purpose listed in section 52(3)3. He found that this approach has been

rejected in many IPC orders which better reflect the accountability purposes of the *Act*.[32]

[83] In Order PO-4428, the access request included a surveillance video of a segregation unit hallway in a detention centre. The institution – the Ministry of the Solicitor General (the ministry) - denied access to the video, claiming the exclusion in sections 65(6)1 and 65(6)3. The ministry's position was that if it was not going to use a surveillance video for employment-related purposes, the recording that it captured of the segregation unit would have been automatically overwritten. Adjudicator Colin Bhattacharjee found that the video was not excluded from the scope of the *Act* under either section 65(6)1 or 65(6)3. He found that the video was an "operational record" that was created by the ministry in the course of its day-to-day business as part of its core

[84] mandate and not created for a labour relations or employment-related matter, stating:

> The ministry's interpretative approach to the application of section 65(6)1 does not draw a distinction between operational records created and kept in accordance with an institution's core mandate and copies of those records that are collected and used for a different purpose in a different file or location. It submits, for example, that if it were not going to "use" the surveillance video of the segregation area, the recording that it captures would have been automatically overwritten, as is the case with other video footage taken in correctional institutions that is not required for proceedings and other purposes. In essence, the ministry is suggesting that the only reason this surveillance video was retained is because it was collected and used by the ministry in relation to anticipated proceedings before the GSB relating to the employment of a person by the ministry.
>
> I do not find this line of argument to be persuasive in establishing whether the records are excluded from the *Act* by section 65(6)1. The fact that the ministry has a retention policy that overwrites or deletes surveillance videos taken inside a correctional centre after a period of time does not negate the fact that they are operational records first created in connection to the ministry's core mandate. . .

[85] With respect to section 65(6)3 in particular, Adjudicator Bhattacharjee found that the purpose of a surveillance video in a correctional facility is not simply to protect the security of the facility, but also to document what transpires in that facility, and neither of these purposes on its face was an employment-related matter. He further found that the video, an operational record, would have been created and brought into existence whether or not the ministry decided to discipline staff, and the fact that a copy of it was later used in a disciplinary process did not change the fact that it was an operational record created in connection with its core mandate and not created for the purpose of an

[32] See, for example, Orders MO-4119 and MO-4149.

employment-related matter.

[86] I agree with and adopt the findings in both orders. In this case, the university's position is that the videos were "created, used, and maintained solely for an employment-related purpose." While I accept that the videos that were preserved by protection services at the request of human resources may have been used or will be used in addressing the appellant's workplace complaint, I do not accept and agree with the university that they were created for an employment-related purpose. In applying the findings in both MO-4354 and PO-4428, I find that these videos were created as part of the university's daily operations - not for an employment-related purpose but for a security purpose. I also find that, as was the case in Order PO-4428, the fact that the university overwrites videos taken inside the classroom/laboratory does not negate or change the fact that they are operational records first created in connection to the university's mandate and not in connection to a labour relations or employment-related matter. As a result, I find that the videos are not in relation to meetings, consultations, discussions or communications (part 2 of the test) about labour relations or employment-related matters in which the university has an interest (part 3 of the test), and are therefore not excluded from the scope of the *Act* under section 65(6)3.

The section 65(7) exception

[87] The appellant submits that the exception in section 65(7) applies to the records.[33] If the records fall within any of the exceptions in section 65(7), the records are not excluded from the application of the *Act*. Section 65(7) states that the *Act* applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Representations

[88] The appellant submits that they are entitled to access any agreement between the university and the appellant's "de facto" union (the SSUO) and/or the Association of

[33] The appellant does not specifically refer to a particular subsection of section 65(7).

Professors of the University of Ottawa (the APUO). Further, the appellant submits that paragraph 1 of section 65(7) is not limited to only collective agreements, but rather to agreements which may encompass a settlement or other form of mutual agreement between the SSUO/APUO and the university with respect to the appellant's position. In particular, the appellant argues that the following agreements fall within section 65(7) of the *Act*:

- An agreement to review their job description and abolish a specified position,
- An agreement between the university, the SSUO and/or the APUO to remove job responsibilities from the appellant,
- An agreement between the university and the SSUO to assign a particular individual to supervise the appellant,
- An agreement between the university and the SSUO through a particular committee regarding the content and title of the appellant's job title and description, and
- An agreement between the university and the SSUO relating to the terms of a specified letter that the appellant received from the university.

[89] In response, the university submits that it appears that the appellant's position is that any agreement between the university and the trade unions fall within the exception in section 65(7). The university goes on to submit that none of the records responsive to the access request consist of agreements as described by the appellant. In addition, the university submits that discussions between the university and its bargaining agents/trade unions, whether formal or informal, that do not result in a negotiated agreement do not fall within section 65(7), and that the IPC has consistently interpreted the term "agreement" in section 65(7) to mean the end product of a negotiation process,[34] and that none of the records consist of these types of records.

[90] In sur-reply, the appellant submits that they have a copy of a job description relating to their position, and that any record consisting of the terms of agreement for that job (and its subsequent iterations), classification and change in terms of their employment fall within the exception in section 65(7) because they are agreements that were the product of negotiations between a trade union and an employer.

[91] Lastly, the appellant submits that any records of settlement between the SSUO and the university relating to grievances are subject to the exception in section 65(7).

Analysis and Findings

[92] I find that the exception in section 65(7) does not apply to the records. The

[34] See Order PO-3619.

appellant's position is that a number of "agreements" as well as records of settlement (described above) are subject to the exception in section 65(7). The IPC has interpreted the term "agreement" as the product of a negotiation process,[35] but not including records that may flow from an "agreement."[36] In *Canadian Medical Protective Association v. Loukidelis*,[37] the Divisional Court applied this same definition to the term as it appears in section 65(7), stating:

> The Legislature has made it clear in s. 65(7) that while documents relating to labour relations negotiations are excluded from [the *Act*], the product of such negotiations is not to be excluded.[38]

[93] On my review of the records, I find no reason to conclude any of them comprise an agreement of any sort, formal or not, between the university and either the SSUO or the APUO. I am not persuaded by the appellant that the records they describe above amount to "agreements" as contemplated in section 65(7). Accordingly, I find no basis to conclude that any of the records are agreements within the meaning of section 65(7)1. I have also considered whether any of the other exceptions at section 65(7) applies, and find that none do.

ORDER:

1. I find that all of the records, except the videos, are excluded from the scope of the *Act* under section 65(6)3.

2. I order the university to issue a decision to the appellant regarding the videos, without recourse to section 65(6)3, by **May 27, 2024**.

Original Signed By: April 26, 2024
Cathy Hamilton
Adjudicator

[35] See Orders P-1104, M-1143 and PO-1902-F.
[36] See P-1488.
[37] 2008 CanLii 45005.
[38] 2008 decision (see footnote 12), at para. 35.