

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4568

Appeal PA21-00289

Toronto Metropolitan University

November 5, 2024

Summary: In response to further searches ordered by the IPC, the university located responsive records but claimed that most of them could not be disclosed under the *Freedom of Information and Protection of Privacy Act* because of the employment and labour relations exclusion at section 65(6). In this order, the adjudicator upholds the university's claim and dismisses the appeal.

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

Orders Considered: Orders PO-4109-I and PO-4195-F.

OVERVIEW:

[1] The Toronto Metropolitan University (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to emails and other correspondence between a specified staff member and any other person that mentions the requester or a specified First Nation.

[2] The university partially disclosed some information to the requester (now the appellant). The appellant then appealed the decision to the Information and Privacy Commissioner of Ontario (IPC). This appeal was addressed in IPC Orders PO-4109-I and PO-4195-F. In Order PO-4109-I, the university was ordered to conduct further searches in the university's Human Resources department about matters relevant to the appellant's request. These further searches yielded 49 responsive records, which are the subject of

the current appeal.

[3] The university granted access to some of the records but stated that the rest are excluded from the application of the *Act* because of the labour relations or employment exclusion at section 65(6). (The university made other alternative exemption claims, including that some of the records are subject to the section 19 solicitor-client privilege exemption.)

[4] The IPC attempted to mediate the appeal, but it remained unresolved and was transferred to the adjudication stage of the appeal process. I conducted a written inquiry in which I invited and received representations from the parties about the university's exclusion claim, as well as the other alternative exemption claims. The parties' representations were shared with each other in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[5] In this order, I uphold the university's exclusion claim and therefore dismiss the appeal.

RECORDS:

[6] The records consist of email correspondence (including attachments) between university officials regarding a complaint made by the appellant about a specified university employee.

[7] The university provided the IPC with copies of some of the records and an affidavit describing the remainder of the records for which it alternatively claims contain solicitor-client communication privileged information. (Providing an affidavit in these circumstances is contemplated in the IPC's *Protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC*.)

DISCUSSION:

[8] The sole issue in this appeal is whether the records are excluded from the *Act* due to section 65(6), the exclusion for records relating to labour relations or employment matters.

[9] The university submits that all of the records at issue are excluded from the *Act* under the labour relations or employment exclusion at section 65(6)3. As explained below, I agree with the university. Because of this finding, it is not necessary to address the alternative exemption claims made by the university in its access decision.

[10] 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*. The purpose of this exclusion is to protect some

confidential aspects of labour relations and employment-related matters.¹

[11] Section 65(6)3 states:

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

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

[12] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) apply, the records are excluded from the scope of the *Act*, meaning that a requester cannot obtain access to records pursuant to the general right of access in section 10(1) of the *Act*. (None of the circumstances in section 65(7) are relevant to the records at issue in this appeal.)

[13] 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.² Section 65(6) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.³

[14] 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.⁴ The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context.⁵

[15] For section 65(6)3 to apply, the institution must establish that the records were collected, prepared, maintained or used by an institution or on its behalf in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[16] 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.⁶ The phrase "in which the

¹ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107.

² *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.) (*Ministry of Correctional Services*).

³ *Ministry of Correctional Services* cited above.

⁴ Order MO-2589; see also *Ministry of the Attorney General v. 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.

⁶ Order PO-2157.

institution has an interest” means more than a “mere curiosity or concern,” and refers to matters involving the institution’s own workforce.⁷

Discussion

[17] The university submits that the records were collected, prepared and maintained on the university’s behalf by various university officials in a variety of departments for use in meetings, consultations, discussions and communications about its investigation into to a complaint of possible misconduct made about a university employee by the appellant.

[18] The university explains that the investigation required consideration of the facts, applicable university policies, such as its Discrimination and Harassment Prevention Policy, and the university’s obligations as an employer and public institution. The university says that these actions were taken in its capacity as an employer and that the records would not have been created if it had not been acting as an employer. Further, the university says that the investigation could have resulted in discipline to its employee. The university argues that therefore the records are “related to” an employment-related matter. The university says that it has more than a mere curiosity or concern in the investigation because of its legal and ethical responsibilities as an employer and that it had, in fact, a responsibility to assess and determine whether the employee’s actions were worthy of discipline.

[19] The appellant did not address the university’s arguments about the labour relations exclusion. He focuses on the university’s alternative claim that some of the records are exempt under the section 19 exemption for solicitor-client privilege. He submits that there is reason to find that the university’s evidence about solicitor-client privilege is not reliable. These arguments are not addressed in this order because they are not relevant to the possible application of the labour relations exclusion.

[20] Giving the appellant’s representations a broad reading, it may be that he is arguing that there is reason for me to find that the university’s representations and evidence, overall, are not reliable for the reasons stated in his representations. I have considered these reasons and reject them. The university’s arguments correlate with the content of the records themselves and I find them to be credible.

[21] Based on the records and evidence provided by the university, I agree with the university and find that the records were collected, prepared and maintained on behalf of the university by several of its officials in relation to a complaint about potential misconduct of one of its employees. The main and only topic of these emails is to assess and investigate alleged misconduct on the part of a university employee. The records stem entirely from the employment relationship between the university and its employee and are therefore employment-related matters in which the university has an interest in

⁷ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

as an employer. Whether resulting in discipline or not, the university's interest the investigation is as an employer.

[22] I find that section 65(6)3 applies to the records at issue. Because section 65(6)3 of the *Act* applies to the records, the general right of access in section 10(1) is not available for the records at issue in this appeal.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Valerie Jepson
Adjudicator

_____ November 5, 2024