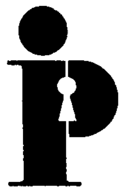


Information and Privacy
Commissioner of Ontario
Commissaire à l'information
et à la protection de la vie privée de l'Ontario

4-OCT-2010

ORDER PO-2915

Appeal PA08-149

University of Ottawa

NATURE OF THE APPEAL:

The University of Ottawa (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to a statement made in a letter sent from a dean at the University to the appellant. The statement in the letter indicated that the University had developed some concerns about the appellant, and the request to the University was for all records that would have allowed the University to have developed those concerns.

The University initially responded to the request by stating that no records responsive to the request exist. The appellant appealed the University's decision.

During mediation, the appellant identified 13 individuals who he believed should have been asked to perform searches for responsive records. As a result of this information, the University conducted further searches for responsive records and located 11 responsive records, all of which are email messages or message strings (including some duplicates).

The University then issued a revised decision in which it indicated that it was denying access to the 11 records on the basis that they fell outside the scope of the *Act* as a result of the exclusion in section 65(6). In the alternative, the University also denied access to these records on the basis of the exemptions in section 19 (solicitor-client privilege) and section 21(1) (personal privacy) of the *Act*. In addition, the University's decision letter identified the further searches that had been conducted for the records relating to the 13 people named by the appellant, and also indicated its position regarding custody and control issues relating to certain records, and its email retention policies.

After receiving the revised decision, the appellant advised that he wished to pursue access to all of the records at issue, and accordingly, sections 65(6), 19 and 21(1) of the *Act* are at issue in this appeal. In addition, the possible application of sections 49(a) and (b) of the *Act* (discretion to refuse requester's own information), was raised.

The appellant also advised that he believed that additional responsive records exist. In support of his position, the appellant stated that additional electronic records should exist, and disputed the University's position, set out in the revised decision, regarding the email retention policies and custody and control issues relating to certain records. Accordingly, the question of whether the University had conducted a reasonable search, as well as issues regarding the custody and control of certain records, were identified as issues in this appeal.

Mediation did not resolve the issues, and this file was transferred to the inquiry stage of the process. This office sent a Notice of Inquiry identifying the facts and issues in this appeal to the University, initially, and the University provided representations in response. The Notice of Inquiry, along with the non-confidential portions of the University's representations, was then sent to the appellant, and the appellant also provided representations in response.

This file was then transferred to me to complete the adjudication process.

RECORDS REMAINING AT ISSUE:

The records remaining at issue consist of 11 emails and/or email strings (including duplicates).

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The University takes the position that the *Act* does not apply to the records because they fall within the exclusion in section 65(6), and provides general representations in support of its position which read:

> The University of Ottawa maintains that the records at issue are subject to the exclusion set out in section 65(6) of [the *Act*]. The records were prepared by employees of the University of Ottawa, on behalf of the University, and represent advice provided to management regarding a labour-relations matter.
>
> More precisely, section 65(6) of the *Act* allows the institution to exclude records related to matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources are at issue [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 98 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)]. With respect to these records, the University of Ottawa was acting as an employer and the terms and conditions of employment are at issue. The records also represent advice provided to management regarding labour relations matters.
>
> The relationship between the University of Ottawa and its full-time professors ("APUO members") is governed by the Collective Agreement between the University of Ottawa and the Association of Professors of the University of Ottawa ("Collective Agreement"). Accordingly, all labour-relations matters between the University of Ottawa and the APUO members are dealt with in accordance with the Collective Agreement. At the time of the appellant's request for information, which is the subject matter of this appeal, the appellant was an APUO member and involved with several labour-relations matters, such as grievances, with the University of Ottawa. These matters are on-going.

The appellant does not directly address the issue of the application of the exclusion to the records at issue; rather, his representations focus on how records that relate to a person's own condition ought to be disclosed to that person. I generally agree with the appellant on this point; however, the first issue I must address is whether these records are excluded from the scope of the *Act*. If the records are excluded from the scope of the *Act*, this office cannot address access issues relating to them.

General Principles

Section 65(6) of the *Act* 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:
>
> 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.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

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

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 [Order PO-2157].

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 [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507, ("*Solicitor General*")].

Section 65(6)3: matters in which the institution has an interest

Introduction

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

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

Requirement 1: Were the records collected, prepared, maintained or used by the University or on its behalf?

The University takes the position that the records were collected, prepared, maintained and used by the University. The records consist of email exchanges between the University legal counsel, officers or employees of the University, and/or a consultant retained by the University. In my view, it is clear that the records were collected, prepared, maintained and/or used by the University.

Requirement 2: Were the records collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

In support of its position that the records were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications, the University states the records are internal emails prepared and maintained in relation to consultations, discussions and communications. On my review of these records, I am satisfied that they were prepared, maintained or used in relation to consultations, discussions or communications. More specifically, the records themselves consist of email communications and consultations, and all of the records relate to the communication eventually sent to the appellant by the dean.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest?

The type of records excluded from the *Act* by section 65(3) 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 in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context. (See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 Div. Ct.)

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

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]

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

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

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 [*Solicitor General* (cited above)].

In support of its position that the records fall within the exclusion in section 65(6)3, the University states:

> The information found in the records relates to communications between [University] Human Resource employees, legal counsel, the Consultant, the Vice President Academic and Provost and the Dean of the faculty involved in the labour relations issue. In particular, [the University] prepared and maintained these records with regard to consultations and communications concerning a disciplinary matter as well as a grievance filed against one of its professors.

With respect to the issue of whether the University has an interest in the labour-relations or employment-related matters, the University states;

> The University had an interest in this matter involving its workforce [*(Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.); Order PO-2626]. For any employer, disciplinary actions and grievances filed under the Collective Agreement are serious matters which must be solved as efficiently as possible. Grievances as well as any form of tension in the workplace will affect the working environment.... Therefore, [the University] has a definite interest in this matter.

Findings

Previous orders of this office, including the decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), have consistently found that disciplinary actions involving an employee are employment-related matters. In addition, a number of previous orders have established that grievances initiated pursuant to the procedures contained in the collective agreement are, by their very nature, about labour relations matters (Orders PO-1223, PO-1769).

With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis* (2008) that:

> In *Reynolds v. Ontario (Information and Privacy Commissioner*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,
>
>> It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "(w)hether or not a particular record is 'employment related' will turn on an examination of the particular document."

I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

In this appeal, the records at issue are communications between University human resource employees, legal counsel, a consultant, the Vice President Academic and Provost and the dean of the faculty involved in the labour relations issue regarding the appellant. At the time of the request, the appellant was an APUO member, and was involved with several labour-relations matters, such as grievances, with the University.

The University has stated that it prepared and maintained these records with regard to consultations and communications concerning a disciplinary matter as well as a grievance filed against one of its professors. On my review of the records at issue in this appeal, I am satisfied that they were prepared and maintained by the University with regard to consultations and communications concerning a disciplinary matter as well as a grievance filed against one of its professors. Accordingly, these records relate to the University's relations with its own

workforce, and the University has an interest in these records. In these circumstances, I am satisfied that the exclusionary wording in section 65(6)3 applies to the records, and they fall outside the scope of the *Act*.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the University has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the University will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Background and representations

As identified above, during mediation, the appellant identified 13 individuals who he believed should have been asked to perform searches for responsive records. As a result of this information, the University conducted further searches and located 11 responsive records, all of which are email messages or message strings (including some duplicates). The University's

subsequent decision letter identified the further searches that had been conducted for the records relating to the individuals identified by the appellant.

Also during mediation, the University's Freedom of Information Coordinator referred to a document entitled "Email Practices at the University of Ottawa" and advised that, with respect to emails, no back-ups are kept for recently departed employees; once their emails are deleted, they are gone forever. She provided this document to the appellant.

In its representations, the University provides significant information identifying the searches it conducted for responsive records. The University begins by reviewing the request and stating that the request was for records upon which a statement made by a dean in a letter to the appellant was based. The University states that, upon initially receiving the request, the Freedom of Information Coordinator contacted the dean to determine whether the dean had any records responsive to the request. The dean advised that, apart from the letter itself, he had no other records responsive to the request. The dean confirms this in an affidavit attached to the University's representations.

The University then identifies that, during mediation, a further and more extensive search for responsive records was conducted. It indicates that the coordinator sent email messages to nine individuals, asking that searches be conducted for records responsive to the request. These individuals included an associate vice-president of an identified department, a vice-president of another department, the deans of two identified departments, the former president of the University, the secretary of the University, the assistant director of an identified department, the secretary to an identified dean and the assistant to an identified dean. It then identifies that manual searches of the files maintained by these individuals were conducted, and that searches of electronic records were also conducted. The searches for electronic records used a number of key words including the appellant's name, as well as a number of the phrases referred to in the letter and in the appellant's request. The University states that, as a result of the additional searches, the 11 responsive records (some of which are duplicates) were located. The University also provides nine separate affidavits sworn by either the nine identified individuals themselves, or the staff members who conducted the searches for responsive records on behalf of these individuals. These affidavits confirm the nature of the searches conducted, as well as the results of the searches.

With respect to the other four individuals, the University confirmed that all of these individuals were no longer employed by the University. Three of these individuals had left the employ of the University within the last few years. The fourth, identified by the University as a labour relations consultant (the consultant), had retired from the University a number of years earlier, but was contracted to provide advice as a consultant.

The University then indicated that, with respect to the three individuals who had left the employ of the University within the last few years, the University had conducted searches of the paper records of these individuals. The University provided affidavit evidence in support of this, including an additional affidavit confirming the searches for hard-copy records of the office of the vice president of another department.

With respect to the electronic records of these four individuals, the University advised that it was unable to search these records as the individuals had left the employ of the University more than 30 days prior to the date of the request, and also stated that any such records of the consultant fell outside its custody or control. The University indicated the dates that these individuals left the employ, and then stated:

> In accordance with the University of Ottawa's email practices, no email back-ups are kept for departed employees of the University of Ottawa more than thirty (30) days after their departure.

The University then summarizes its position by stating:

> The searches were conducted by experienced employees of the University of Ottawa who are familiar with the operation of, and filing systems within, their respective offices, and that they had expended reasonable efforts in conducting a search for records reasonably related to the request. [Order M-909]
>
> The University of Ottawa cannot determine if records responsive to the request existed but no longer exist. Retention of paper records at the University of Ottawa is governed by the policy "Archives of the University 20-4" and email retention is governed by the practice set out in the document entitled "Email Practices at the University of Ottawa." [documents attached]
>
> The University of Ottawa is of the view that, given the nature and scope of the request, it has provided sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

The appellant does not provide information regarding the issue of whether or not additional responsive records exist, rather, his representations focus on his view that two aspects of the searches conducted by the University are not adequate. One of the appellant's concerns relate to issues regarding the contractor, and the appellant argues that the University has custody and control of electronic records of this individual, and also states that the University ought to provide copies of the contract entered with this individual to support its position. The appellant's second main concern is that the University has not provided sufficient evidence to establish that all emails of employees no longer in the employ of the University are deleted. In this regard, the appellant focuses on the 30-day electronic backup issue, and he disputes the University's claim that all electronic records disappear within 30 days from when an individual leaves the University's employ. He reviews the material he received from the University, including the "Email practices" document and the information he was provided with during mediation, and also states: "No document provided by the University states unambiguously that the backups themselves are deleted."

Analysis and Findings

As a preliminary matter, I wish to point out that the issue of the reasonableness of the searches for responsive records relates to whether additional responsive records exist. In response to the request for records, 11 responsive records were identified.

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the University has conducted a reasonable search for the records as required by section 24 of the *Act*. In this appeal, if I am satisfied that the University's search for responsive records was reasonable in the circumstances, the University's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

I adopt the approach taken in the above orders for the purposes of the present appeal. I also note that, in order to make a finding that a reasonable search was conducted, it is not necessary that every individual named in a request or identified during an appeal be contacted [Order MO-2143-F].

It is clear from the University's representations that it has spent considerable time and effort in searching for responsive records. It has also specifically responded to a number of the points made by the appellant in the course of this appeal. The University has also provided separate affidavit evidence from ten individuals who conducted searches for responsive records, including a number of the individuals who were directly involved in the creation of the records.

Based on the information provided by the University, I am satisfied that the University's search for records responsive to the request was reasonable in the circumstances.

Regarding the University's search for hardcopies of records, based on the evidence provided by the University and on the content of the ten affidavits filed in support of its searches, I am satisfied that the University's searches for paper records was reasonable. The affidavits confirm the nature of the searches and the results of those searches. Furthermore, the searches were conducted by individuals familiar with the records or the record-keeping practices of the University, and resulted in a number of records being located. The affidavits also confirm that no other records were located.

With respect to the searches for electronic records, I have carefully reviewed the affidavits provided in support of the University's position that these searches were reasonable. I find that the specific search terms used to conduct the searches, as identified in the affidavits, were appropriate, and am satisfied that the University's search for electronic records was reasonable.

The appellant's representations on the searches for electronic records focus on issues regarding the searches for electronic records of individuals who are no longer employed by the University, particularly regarding the backup files. The positions of the parties regarding these records are set out above. I have carefully reviewed this issue and am satisfied that the University has provided sufficient evidence to satisfy me that a reasonable search was conducted. In particular, the document entitled "Email Practices at the University of Ottawa" reviews in some detail the email systems in place, including the manner in which the system is backed-up, the fact that there is no system in place to "archive" email, and the specific treatment of email accounts of staff who leave the University. With respect to the back-ups, the document also states: "... the absolute maximum that an email file will be retained is 30 days." In these circumstances, I am satisfied that the University has provided sufficient evidence to satisfy me that a reasonable search was conducted.

Finally, I have also carefully reviewed the material provided by the parties relating to the emails of the consultant. I note that the appellant's request is for records that would have allowed the University to have developed certain concerns identified in a statement made in a letter. As indicated above, the University has identified the responsive records and the searches conducted for these records. Furthermore, the University's representations on the search issue confirm that any emails received from or sent to the consultant in the email accounts of current employees of the University "were identified and indicated on the Index of Records."

Some of the records at issue (all of which are emails) are indeed email messages between the consultant and the employees of the University who were involved in the matter. Because of the nature of the appellant's request (records relied on by the dean to make a statement in a letter which, by definition, would have to have been received by the University), and because it is only the consultant's email correspondence that is at issue (which, by definition, is between two or more parties), I am satisfied that the searches conducted by the University, as evidenced by the affidavits, are sufficiently broad that they also captured email messages between employees of the University and the consultant that formed the records relied on by the dean. Accordingly, I am satisfied that the searches conducted for records of this consultant are reasonable.

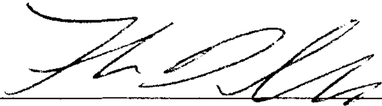
Having found that the searches conducted for responsive records were reasonable, in the circumstances, it is not necessary for me to consider the issues regarding custody or control, or whether any additional records would, in any event, have been excluded from the scope of the *Act* under section 65(6)3. (See Order PO-2105-F)

Accordingly, based on all of the evidence provided to me, and as particularized above, I am satisfied that the University's searches conducted for responsive records were reasonable.

ORDER:

1) I uphold the University's decision that the records are excluded from the scope of the *Act* as a result of section 65(6)3.

2) I uphold the University's search for responsive records, and dismiss the appeal.



Frank DeVries
Adjudicator

September 29, 2010