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

ORDER P-1242

Appeal P-9600142

Ministry of Community and Social Services

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NATURE OF THE APPEAL:

The appellant is an employee of the Ministry of Community and Social Services (the Ministry). He made a complaint of harassment by his supervisor (the supervisor) under the Workplace Discrimination and Harassment Prevention Program (WDHP). An employee of Management Board of Cabinet (MBS) conducted a WDHP investigation and submitted a final report to the Ministry. As part of the WDHP process, the appellant received a copy of his own statements and the final report. However, he wanted to receive more information, and submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) for specific records from the investigation file.

The appellant submitted his request to MBS. MBS considered the Ministry to have a greater interest in the records, and transferred the request to the Ministry pursuant to section 25(2) of the Act.

The Ministry denied access to all responsive records, claiming that they fall within the parameters of paragraphs 1, 2 and 3 of section 65(6) of the Act, and therefore outside the scope of the Act.

The appellant appealed the Ministry's decision. In his letter of appeal, the appellant also objected to the transfer of his request based on an alleged conflict of interest at the Ministry. However, the appellant subsequently agreed that this issue was appropriately deferred until I determine if I have jurisdiction to consider his appeal.

This office sent a Notice of Inquiry to the appellant and the Ministry, seeking representations on the jurisdictional issue raised by sections 65(6) and (7). Representations were received from both parties.

RECORDS:

The records at issue in this appeal are:

1. The supervisor's signed statements and other documents that were submitted to the investigator, including records of meetings, correspondence, interoffice memoranda, respondent's comments on the WDHP investigation report, memoranda and charts pertaining to salary expenditures.

2. Signed witness statements and other notes of witness comments in the WDHP investigation.

3. A letter written by the Ministry's Assistant Deputy Minister of Corporate Services to the Assistant Deputy Minister in charge of Employment Equity at the MBS, relating to the WDHP investigation.

4. An interoffice memorandum from the Ministry's WDHP Co-ordinator to the Ministry's Manager of Contingency Planning, relating to the WDHP investigation.

DISCUSSION:

The only issue in this appeal is whether the records fall within the scope of sections 65(6) and (7) of the Act. These provisions read:

(6) 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.

(7) This 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.

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 65(6) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are

present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.
The appellant submits that because the Ministry has made a decision under the WDHP which has an impact on him, it should not be allowed to deny him access to his personal information that was utilized in reaching its conclusions. The appellant states that the amendments to the Act reflected in section 65(6) were intended to apply to the Ministry's information not to an individual's own personal information.

The wording of section 65(6) does not distinguish records on the basis of whether they contain personal information. In fact, the types of records described in both sections 65(6) and (7) would by their very nature frequently contain personal information. In my view, the interpretation put forward by the appellant is not supported by the wording of section 65(6).

In its decision letter, the Ministry claims that all three paragraphs of section 65(6) apply to exclude the records from the Act. I will first consider whether the requirements of paragraph 1 are present in the circumstances of this appeal.

Section 65(6)1

In Order P-1223, I stated that in order for a record to fall within the scope of paragraph 1 of section 65(6) , the Ministry must establish that:

1. the record was collected, prepared, maintained or used by the Ministry or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

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

The appellant in Order P-1223 was a member of the Ontario Public Services Employees Union (OPSEU) who had filed a grievance under the procedures contained in Article 27 of the collective agreement between the government and OPSEU. She subsequently made a WDHP complaint. An investigation report was prepared and considered in the context of her grievance. In the circumstances of that appeal, I found that the WDHP investigation report was prepared by the Ministry of Agriculture, Food and Rural Affairs in relation to anticipated proceedings before a tribunal (the Grievance Settlement Board), and that these anticipated proceedings related to labour relations. Therefore, the record at issue in that appeal fell within the parameters of paragraph 1 of section 65(6) and was excluded from the scope of the Act.

The circumstances of this appeal are somewhat different. The appellant is not a member of OPSEU or any other trade union, nor was the WDHP investigation initiated in the context of a grievance proceeding.

In discussing the second requirement of section 65(6)1 in Order P-1223, I made the following comments regarding the proper interpretation of the word "proceedings":

> I am of the view that the context surrounding the appearance of the term "proceedings" in the Act has an important bearing on its meaning. This is particularly the case because, as noted in the definition just cited [from the Canadian Law Dictionary], it means different things in different circumstances.
>
> Given the references to proceedings "before a court, tribunal or other entity", I am of the view that a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide the matters at issue would constitute "proceedings" for the purposes of section 65(6)1.

The context surrounding the creation of the records in this appeal was the WDHP investigation arising from a complaint made by the appellant. As with all WDHP investigations, the investigator's authority derives from an appointment by the Deputy Minister pursuant to the Directive on Workplace Discrimination and Harassment Prevention in the "Human Resources Directives and Guidelines" issued by MBS. In my view, the investigator's power is not conferred by law, binding agreement or mutual consent. Moreover, the authority to impose a sanction, where a complaint is substantiated by the investigation, resides with the Deputy Minister, not the investigator. As such, I find that the investigator does not have the power to decide the matter at issue. Therefore, in my view, the WDHP investigation does not qualify as "proceedings ... before a court, tribunal or other entity" for the purposes of section 65(6)1.

Similarly, I find that the activities contemplated for the Deputy Minister in the WDHP process do not qualify as "proceedings ... before a court, tribunal or other entity". The Deputy Minister's powers arise from the Directive mentioned above, and not from any law, binding agreement or mutual consent. Also, because the investigator, not the Deputy Minister, hears the evidence, it cannot accurately be said that the process takes place "before" the Deputy Minister.

Therefore, I find that the second requirement of section 65(6)1 has not been established, and this section does not apply to the records at issue in this appeal.

Section 65(6)3

In order to fall within the scope of paragraph 3 of section 65(6), my analysis indicates the Ministry must establish that:

1. the record was collected, prepared, maintained or used by the Ministry or on its behalf; **and**

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 Ministry has an interest.

1. Were the records collected, prepared, maintained or used by the Ministry or on its behalf?

The Ministry states that the information contained in the records relates to a formal investigation into allegations of harassment made by the appellant against his supervisor. The investigation was conducted by MBS staff on behalf of the Ministry.

The Ministry submits that some of the records were collected by the WDHP investigator during the course of her investigation into the complaint, and that the investigator created other records such as interview notes and analyses of interviews.

The MBS investigator was appointed under the provisions of the WDHP Directive to act as an impartial investigator and to report her findings to the Assistant Deputy Minister, Corporate Services Division of the Ministry. Having reviewed the records, I find that they were clearly collected, prepared and/or used by employees of the Ministry or an employee of MBS on behalf of the Ministry.

2. Was the collection, preparation or usage in relation to meetings, consultations, discussions or communications?

The Ministry states that the records were used in relation to meetings with the appellant, his supervisor, various witnesses, and the manager of WDHP at MBS.

In the context of a WDHP investigation, it is clear that records are collected, prepared and/or used in the context of meetings, consultations, discussions and/or communications. The question is whether this collection, preparation or usage was **in relation to** these activities.

In Order P-1223, I stated:

> In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was **for the purpose of, as a result of, or substantially connected to** an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity. (emphasis added)

Having reviewed the records, I find that all but two of them were either collected or prepared for the purpose of or as a result of meetings related to the harassment complaint, or used for the purpose of communicating the results of the investigation to the Assistant Deputy Minister.

The other two records (the letter and the inter-office memorandum, listed earlier as Records 3 and 4), were not part of the investigation process per se, but I find that they were both prepared and used for the purpose of communications between certain employees of the Ministry and an employee of MBS about the process the investigation was to follow, and therefore are substantially connected to this activity.

Accordingly, I find that the answer to Question 2, posed above, is "yes".

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

Section 65(6)3 uses the phrase "about labour relations **or** employment-related matters". As stated in Order P-1223, in my view, these terms should be interpreted as having separate and distinct meanings and application.

Order P-1223 defines "labour relations" as "the collective relationship between an employer and its employees." Based on the evidence presented in this appeal, it is clear that both the appellant and his supervisor are not members of any union. Accordingly, I find that the meetings and/or communications which are reflected in the records do not relate to the employer's collective relationship with its employees, and therefore are not "about labour relations" for the purpose of section 65(6)3.

I am satisfied that both the appellant and his supervisor were employees of the Ministry at all relevant times. I will now consider whether the harassment investigation is properly characterized as an "employment-related matter", and if so, whether it is a matter "in which the Ministry has an interest".

"employment-related matter"

The government's WDHP Directive is one of a series of Human Resources Directives and Guidelines issued by MBS. Directives explain human resource practices that must be followed across the Ontario public service, and Guidelines outline best practices and procedures to help human resource professionals manage effectively.

One of the objectives of the WDHP Directive is "to provide the principles and mandatory requirements essential to creating a work environment that is free from discrimination and harassment". The Directive applies to all employees appointed under the Public Service Act, and covers all "employment-related discrimination and harassment, except systemic discrimination". According to the Guidelines which accompany the Directive, "the [Directive] applies to discrimination in any aspect of employment ..."

In my view, the WDHP program is, by definition, designed to address an employment-related concern, and I find that any investigation which takes place under the terms of the program is properly characterized as an "employment-related matter" for the purposes of section 65(6)3 of the Act.

"in which the Ministry has an interest"

In my view, the phrase "has an interest" could have more than one meaning, ranging from having mild curiosity about something to having a major stake in it. Therefore, it is appropriate to refer to interpretative aids for assistance in determining its meaning.

After reviewing various legal sources regarding the meaning of the term "has an interest", I have concluded that the most appropriate analogy to the way in which the term is used in section 65(6)3, is the requirement in civil procedure that in order to be added as a party to a proceeding a party must "have an interest" in the subject matter of the proceeding.

In Law of Intervention: Status and Practice (1989) by Paul R. Muldoon, the author makes the following statements regarding the rights to be added as a party in a law suit:

> Traditional law, which is supportable today, holds that an applicant will be permitted to intervene if that person's presence is necessary to ensure that all matters in dispute in the cause may be effectually and completely determined and adjudicated upon. When would an intervener be considered a necessary party? A necessary party is a person with a direct interest in the subject matter of the litigation.
> ...
>
> As a general rule then, the interest or claim must be a substantial, legally protectable interest (such as a claim to ownership) or, at times, a lesser interest (such as a lien or an equitable claim).

In Re Starr and Township of Puslinch et. al. (1976), 12 O.R. (2d) 40 (Div. Ct.), the court stated at page 46 that the test for whether a party has a sufficient interest to be added as a party to a proceeding, is whether the determination of the dispute "will directly affect a third person in his legal rights or in his pocket."

In Re Crittenden and City of Vancouver (1984), 14 D.L.R. (4th) 599 (B.C.S.C.), Justice McLaughlin, as she then was, stated at p. 601:

> At law, the word "interest" is typically used to connote legal concern, title or right in property, rather than in the larger sense of concern or curiosity. The objectors in the case at bar claim no legal interest, title or right in property, although as neighbours, they are generally concerned in the outcome of this application. In my opinion, they are not "parties interested" ...

In terms of a more general definition of the term "interest", the Canadian Law Dictionary defines "interest", in part, as:

> In relation to being objectively concerned in something, by having a right or title to, a claim upon, or a share in. Legal concern in a thing; especially right or title to property.

Taken together, these authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

The Ontario Human Rights Code (the Code) contains several provisions which are relevant to the issue of whether the Ministry "has an interest" in the WDHP investigation within the meaning of section 65(6)3 of the Act.
Section 5(2) of the Code states:

> Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, **marital status, family status** or handicap. (emphasis added)

The harassment allegation made by the appellant pertains to marital status and family status.

Section 9 of the Code states:

> No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. [Note: section 5(2) is in "this Part" - i.e. Part I of the Code.]

Section 41(1) of the Code states:

> Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

As indicated by a number of board of inquiry cases under the Code, where an employer is aware of a harassment situation and does not take adequate steps to remedy or prevent it, if the harassment allegation is sustained, the employer has "indirectly" breached Part I of the Code within the meaning of section 9, and may be found liable under section 41(1) of the Code.

For instance, in Shaw v. Levac (1990), 14 C.H.R.R. D/36, the board of inquiry found a corporate party liable for acts of sexual harassment by an employee, on the basis that management was aware of the harassment and failed to take proper steps to remedy it. The board of inquiry states:

> In my opinion, a person who, whether as employer or supervisor, has the authority and duty to prevent wrongful conduct in the workplace, which conduct happens to

> constitute an infringement of the Code, and without lawful excuse fails to do so, thereby indirectly infringes the right in question. ... [B]y facilitating, permitting or acquiescing in (or "authorizing, condoning, adopting or ratifying") wrongful conduct which (whether he knew it or not) constituted such an infringement, he did something indirectly which infringed the right.

In Persaud v. Consumers Distributing Ltd. (1991), 14 C.H.R.R. D/23, the board of inquiry dealt with a situation where the employer was aware of the alleged harassment and took steps to remedy it, and for this reason, the employer was relieved of liability which it might otherwise have borne. The board of inquiry states:

> For Consumers to be liable for [a named individual's] harassment, management must have had actual knowledge of it or should reasonably have had such knowledge. Secondly, Consumers must have failed to reasonably act upon such knowledge, such that it can be said Consumers approved of or condoned such acts of discrimination with the result that management allowed a poisoned work environment to be created or the discriminatory acts to be a condition of employment. ...
>
> Where an employer has knowledge, either actual or constructive, of racial harassment, reasonable steps in the circumstances must be taken to remove such harassment. ...
>
> Management of Consumers had knowledge of the racial slurs used by [the named individual] on September 3 and October 5, as reported to management, but management did not authorize, condone, adopt or ratify these actions of harassment. Management disciplined [the named individual] in respect of the September 3 incident and brought the two employees together quickly on October 18 to resolve the continuing feud ...

On the basis of these board of inquiry decisions, I conclude that if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the Code, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as matter "in which the institution has an interest".

In summary, I find that the records at issue in this appeal were collected, prepared and/or used by or on behalf of the Ministry, in relation to meetings, discussions and consultations about employment-related matters in which the Ministry has an interest. All of the requirements of section 65(6)3 of the Act have thereby been established by the Ministry. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal, and I find that the records fall within the parameters of this section, and therefore are excluded from the scope of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 2, 1996
Tom Mitchinson
Assistant Commissioner