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

ORDER P-1314

Appeals P_9600283 and P_9600382

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was made by a former employee seeking access to a copy of his personnel file, his "fact" file, any other written records relating to the quality of his work and an organizational chart of the institution where he was employed. The Ministry granted access to the organizational chart requested by the appellant and denied access to the contents of the appellant's personnel file, claiming that, under section 65(6), they are not subject to the Act.

The appellant appealed the Ministry's decision. This office opened Appeal P-9600283 and provided a Notice of Inquiry to the Ministry and the appellant. During the inquiry stage of the appeal, the Ministry located an additional 46 pages of records (the "fact" file) which it identified as responsive to the request. It advised the appellant that, under section 65(6), these records were also not subject to the Act. The appellant appealed this second decision and our office opened Appeal P-9600382. A second Notice of Inquiry was also sent to the parties.

As the issues in both appeals are identical, the Ministry chose to submit representations in response only to the first Notice of Inquiry. The appellant made submissions responding to both appeals.

PRELIMINARY ISSUE:

TIMING OF THE REQUEST

The appellant submits that because he originally made a request under the Act for access to his personnel records prior to the enactment of the amendments to the Act on November 10, 1995 which include section 65(6), the appeal should proceed on the basis of the law as it existed at that time. The original request was made in June 1995 to the Superintendent of the facility where the appellant was employed and was followed up by a second request in July 1995. The appellant received no response to these requests. He did not communicate this lack of response to this office, however.

In March 1996, subsequent to the passage of the amendments to the Act contained in Bill 7, the appellant submitted another request under the Act for this information to the Superintendent. However, on this occasion, the appellant contacted this office on June 6, 1996 regarding the Ministry's lack of response. As a result, the Ministry responded to the request and Appeal P-9600283 was opened.

With respect to the appellant's 1995 requests, it is my view that the Ministry's lack of response should have been communicated to this office so that a "deemed refusal" appeal could have been opened by this office at that time. I find that by taking no further steps to enforce his right of access until his letter of June 6, 1995, the appellant abandoned his appeal rights with respect to

the 1995 requests. Accordingly, for this reason I find that the effective date of the request which gives rise to the appeal before me is March 1996. The request and subsequent appeals are, therefore, subject to the amendments to the Act enacted by Bill 7, including section 65(6).

DISCUSSION:

The sole remaining issue in this appeal is whether the records contained in the appellant's personnel and "fact" file 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 Ministry submits that the records at issue in these appeals are outside the scope of the Act under sections 65(6)1 and 3.

Section 65(6)1

In Order P-1223, former Assistant Commissioner Tom Mitchinson held that:

> [I]n order for a record to fall within the scope of this provision, 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 Ministry submits that the appellant has filed a grievance under the provisions of Article 27 of the collective agreement which governs the relations between his employer and the bargaining agent, the Ontario Public Service Employees Union (OPSEU) of which he was a member. This grievance is now before the Grievance Settlement Board (the GSB). The appellant has also initiated a complaint of discrimination pursuant to the Ontario Human Rights Code with the Ontario Human Rights Commission (the OHRC).

The Ministry argues that the records at issue in these appeals are presently being used and maintained by the Ministry for the purpose of responding to the appellant's grievance and the OHRC complaint. It submits that the records are and will continue to be, used and maintained by the Ministry in relation to proceedings before the GSB and the OHRC which are tribunals within the meaning of section 65(6)1. Finally, the Ministry states that these proceedings relate to labour relations or to the employment of the appellant by the Ministry.

The appellant argues that the records which are at issue in these appeals were prepared prior to the institution of his grievance or his OHRC complaint. For this reason, he submits that the collection, preparation, maintenance and use of the records by the Ministry was not in relation to either proceedings or any anticipated proceedings before the OHRC or the GSB.

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

I accept the submissions of the Ministry that the records at issue are presently being used and maintained by the Ministry and that they were originally collected and prepared by Ministry staff during the time that the appellant was employed by the Ministry. Part one of the test has, accordingly, been met.

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

"court, tribunal or other entity"

The GSB and OHRC are established by their enabling statutes (the Crown Employees Collective Bargaining Act and the Ontario Human Rights Code respectively) as administrative bodies with powers to determine matters affecting rights. As such, I find that both are properly characterized as "tribunals" for the purpose of section 65(6)1.

"proceedings"

In Order P-1223, Assistant Commissioner Mitchinson defined the term "proceedings" as:

> 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.

I find that the hearings before the GSB and the complaint investigation/resolution process of the OHRC constitute a dispute and complaint resolution process which has, by law, the power to decide grievances or adjudicate human rights complaints and, as such, both properly constitute "proceedings" within the meaning of section 65(6)(1).

"in relation to"

The Ministry submits that the use and maintenance of the appellant's personnel records are clearly in relation to his ongoing grievance and human rights complaint.

The appellant argues that the records contained in his personnel and "fact" file do not relate to the issues which are the subject of the grievance and the OHRC complaint. He submits that the records in this appeal were not prepared or maintained in relation to the GSB and OHRC proceedings, but rather, in relation only to his employment.

In my view, while the records were created prior to the institution of the appellant's grievance and OHRC complaint, they are now being used and maintained by the Ministry in relation to the continuing proceedings before the GSB and OHRC. For this reason, I find that these documents

are being "used and maintained" in relation to these proceedings within the meaning of section 65(6)1.

Accordingly, the second part of the section 65(6)1 test has been met.

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

Again, in Order P-1223, Assistant Commissioner Mitchinson made the following findings with respect to the application of section 65(6)1 to records prepared following the initiation of a grievance by a Ministry employee. He found that:

> Section 65(6)1 uses the phrase "relating to labour relations **or** to the employment of a person by the institution" (emphasis added). Consequently, in my view, the legislature must have intended the terms "labour relations" and "employment" to have separate and distinct meanings and application. My view is supported by the presumption of consistent expression in statutory interpretation, one of whose tenets is that "it is possible to infer an intended difference in meaning from the use of different words or a different form of expression" (Driedger on the Construction of Statutes, 3rd ed., p.164).
>
> The term "labour relations" also appears in section 17(1) of the Act. In this context, Inquiry Officer Holly Big Canoe discussed the term "labour relations information" in Order P-653, and made the following statements:
>
> > In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the **collective** relationship between the employer and its employees.
>
> Given the particular wording of section 65(6)1, I find that Inquiry Officer Big Canoe's interpretation of the term is equally applicable in the context of paragraph 1. Therefore, I find that "labour relations" for the purposes of section 65(6)1 is properly defined as the collective relationship between an employer and its employees.
>
> In the circumstances of this appeal, the Ministry has established that the appellant, who was a member of OPSEU at the time, filed her grievance under the procedures contained in Article 27 of the collective agreement between the government and OPSEU. The collective agreement contains provisions which outline the role of the Grievance Settlement Board in hearing and resolving grievances filed by members of OPSEU. Therefore, I find that the anticipated proceedings before the Grievance Settlement Board which existed at the time the grievance was filed by the appellant related to labour relations, and the third requirement of section 65(6)1 has been established.

I adopt the approach taken by Assistant Commissioner Mitchinson and find that, for the reasons expressed above, the proceedings involving the appellant's grievance before the GSB relate to labour relations within the meaning of section 65(6)1. Accordingly, the third requirement of section 65(6)1 has been established in the present appeals.

In summary, I find that the records at issue in these appeals are used and maintained by the Ministry in relation to proceedings before two tribunals, the GSB and the OHRC, and that the proceedings before the GSB relate to labour relations. As all of the requirements of section 65(6)1 of the Act have been satisfied by the Ministry, I find that the records fall within the parameters of this section and are, therefore, excluded from the scope of the Act. Because of the manner in which I have addressed the application of section 65(6)1 to the records, it will not be necessary for me to address the application of section 65(6)3 to them.

ORDER:

I uphold the Ministry's decision.

Original signed by: December 9, 1996
Donald Hale
Inquiry Officer