Information and Privacy
Commissioner/Ontario

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

ORDER P-1560

Appeal P-9700334

Ontario Labour Relations Board

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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ontario Labour Relations Board (the OLRB). The request was for access to all records which relate to the appellant which are in the custody of the OLRB.

The OLRB responded by denying access to the requested records on the basis that, pursuant to sections 65(6)1, 2 and 3 of the Act, the requested records fall outside the ambit of the Act.

The appellant appealed the OLRB's decision.

A Notice of Inquiry was sent to the appellant and the OLRB. Representations were received from both parties.

After these representations were received, a Supplemental Notice of Inquiry was sent to the appellant, the OLRB and the appellant's employer at the time of the request, the Hamilton-Wentworth District School Board (formerly the Board of Education for the City of Hamilton). In the supplemental notice, the parties were asked to consider the application of section 65(6) of the Act where the institution which receives the request is not the employer, as well as where the employer is not an institution under the Act governing the request, but is an institution under the corresponding Act (municipal or provincial). As the issues in this appeal have the potential to affect the interests of other institutions, Management Board Secretariat was invited to submit representations on the issues identified in the supplementary notice as well. Representations were received from the appellant, the OLRB and the Hamilton-Wentworth District Board of Education (the HWDSB). Management Board Secretariat did not submit representations.

RECORDS:

The records at issue include letters sent by the appellant to the OLRB and other agencies, as well as their responses, records relating to several other persons whose complaints had been heard at the same time as the appellant, minutes of meetings, interview questions for a job competition, union records, records used during contract negotiations and records relating to the OLRB's hearing and reconsideration process.

DISCUSSION:

JURISDICTION

Sections 65(6) and (7) 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 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In Order P-1223, Assistant Commissioner Tom Mitchinson found that in order for a record to fall within the scope of paragraph 1 of section 65(6), an institution, in this case the OLRB, must establish that:

1. the record was collected, prepared, maintained or used by the OLRB 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 OLRB.

The OLRB submits that the files sought by the appellant contain information which falls within the ambit of section 65(6)1 of the Act. The OLRB argues that:

1. these records have been collected and/or prepared and/or maintained and/or used by the OLRB;

2. the OLRB is an "institution";

3. the records relate to proceedings or anticipated proceedings before the OLRB;

4. a complaint filed with the OLRB is a "proceeding";

5. the OLRB is a "tribunal" relating to labour relations.

In the proceedings before the OLRB which resulted in the creation of the requested records, the employer was the HWDSB and not the OLRB. The only involvement of the OLRB in this matter was in its role as adjudicator.

In Order P-1345, Inquiry Officer Donald Hale considered a similar appeal involving the OLRB. Inquiry Officer Hale stated:

> Section 65(6)1 refers to the collection, preparation, maintenance or use of records by or on behalf of an institution in proceedings before a court, tribunal or other entity. In my view, this does not extend to situations where the records relate to proceedings where the institution's involvement is in the role of adjudicator. Rather, in order to qualify as a collection, preparation, maintenance or use **by or on behalf of** the [OLRB] as an institution, in relation to the proceedings, it would have to be an entity subject to the processes of the adjudication body (itself), such as a party to the proceedings or a witness called to produce evidence which is relevant to the proceedings. By necessary implication, the institution's role in such proceedings must be in its capacity as an employer or former employer in order to bring the records within the scope of section 65(6)1.
>
> This interpretation is supported by references throughout section 65(6) to proceedings and negotiations relating to the "employment of a person by the institution", and in section 65(6)3, to "labour relations or employment-related matters in which the institution has an interest". In my view, an institution such as the [OLRB], acting as an impartial adjudicator would not "have an interest" in a labour relations or employment-related matter before it, in the sense intended by section 65(6)3. Such an interest would be inconsistent with impartial adjudication.

I agree with Inquiry Officer Hale, and find that the records in this appeal were not collected, prepared, maintained or used by or on behalf of the OLRB in relation to the proceedings before it in the sense intended by section 65(6)1. Additionally, I find that the records were not collected, prepared, maintained or used in relation to negotiations or anticipated negotiations between the OLRB and a person, bargaining agent or party to a proceeding or anticipated proceeding in the sense intended by section 65(6)2. Finally, it is clear that the OLRB's role as independent and impartial adjudicator would be inconsistent with having "an interest" in the appellant's complaint in the sense intended by section 65(6)3.

In Order P-1345, however, Inquiry Officer Hale went on to find that records submitted to the OLRB by the employer, or sent by the OLRB to the employer, were excluded from the scope of the Act under section 65(6)1. Similarly, in the circumstances of this appeal, I am satisfied that any records contained in the OLRB's files which originated with or were sent by the OLRB to the HWDSB were collected, prepared, maintained or used by the HWDSB in relation to proceedings before the OLRB. These proceedings relate directly to labour relations between the HWDSB and its unionized employees.

In Order P-1345, the employer was Ontario Hydro, which is an institution under the Act. In this regard, the wording of the preamble of section 65(6)1 is important; it refers to records collected, prepared, maintained or used by or on behalf of **an** institution, rather than making specific reference to the institution which received the request.

The HWDSB is likely to have submitted or received several of the records at issue. However, while the HWDSB is an institution under the Municipal Freedom of Information and Protection of Privacy Act (the municipal Act), municipal institutions are not expressly included within the definition of "institution" in the Act.

In the present case, if the employer was an institution expressly under the Act, it is clear that the section 65(6) exclusion would be available, as found by Inquiry Officer Hale in Order P-1345. The only difference between the facts in Order P-1345 and the present case is that the employer who provided records to the OLRB is a municipal institution, not a provincial one.

In Order P-1422, former Inquiry Officer John Higgins considered an appeal where the employer was an institution under the municipal Act and the institution receiving the request was an institution under the Act. In that case, an appellant had made a complaint about a police service (a municipal institution). The internal review found no wrongdoing, so he sought a review by the Police Complaints Commissioner (at the time a provincial institution). Then he made a request under the Act to the Police Complaints Commissioner (the PCC). The PCC did not assert the application of section 65(6) to itself, because it was not the employer. Former Inquiry Officer John Higgins agreed. The PCC transferred the request to the police under section 25, in respect of records sent to the PCC by the police. In Order M-962 (released concurrently), Inquiry Officer Higgins dealt with the transferred request. He agreed with the police that section 52(3) (the equivalent of section 65(6)) applied to the records, and found they were outside the scope of the municipal Act.

In the present case, if the OLRB had exercised its discretion to transfer the request to the HWDSB, it is clear that the section 52(3) exclusion in the municipal Act would be available, as

found by Inquiry Officer Higgins in Order M-962. The only difference between the facts in Order M-962 and the present case is that the institution receiving the request exercised its discretion not to transfer the request.

These different outcomes may be regarded as an "absurd" result, as that term is understood in law. Driedger in Driedger on the Construction of Statutes (3rd edition, 1994 (Butterworths) at page 79) says "consequences judged to be unjust or unreasonable are regarded as absurd." There are different categories of absurdity, including:

> **Irrational distinctions.** A proposed interpretation is likely to be labelled absurd it if would result in persons or things receiving a different treatment for inadequate reasons, or for no reason at all. This is one of the most frequently recognized forms of absurdity.

In my view, the Act and the municipal Act are intended to function as a single, coherent, logical legislative scheme, with certain express distinctions based on variations in how local and provincial government operate. For example, there is an exemption for "closed meetings" in the municipal Act and a "Cabinet records" exemption in the Act. As well, Part I of the Act, which sets out the administration of the office of the IPC is not repeated in the municipal Act, because they are meant to be read together.

If the Act and the municipal Act are to be read together as a coherent scheme, would the Legislature intend that the section 65(6) exclusion would be available to the OLRB when the employer is a provincial institution, but not available when the employer is a municipal institution? In my view, the question arises whether a municipal institution can be considered as an institution for the purposes of section 65(6) of this Act.

The word "institution" is defined in section 2(1) of the Act as follows:

> "institution" means,
>
> (a) a ministry of the Government of Ontario, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

According to Pierre-Andre Cote, in The Interpretation of Legislation in Canada, definitions can be inclusive or exhaustive:

> A first reading is usually sufficient to indicate whether a definition is exhaustive or not: if it is introduced by the word "means" it is deemed to be exhaustive. But a definition introduced by the word "includes" serves only to extend the ordinary meaning or to illustrate certain applications.

Accordingly, it appears that the definition of the word "institution" in the Act was intended to be exhaustive. Additionally, when the municipal Act became law, the Legislature amended sections 25, 39, 41, 50 and 58 specifically to refer to the municipal Act. There is no indication that the

Legislature intended that municipal institutions be included in the Act except to the extent that the municipal Act is specifically referenced in the Act. However, at the time the municipal Act became law, section 65(6) was not included in the Act. In my view, it is arguable that had section 65(6) been in the Act at the time the municipal Act became law, additional amendments may have been made.

If the institution receiving the request uses section 25 to transfer the request to another institution with a greater interest in the records, the "different treatment for inadequate reasons" can be avoided. In my view, the situation reviewed by Inquiry Officer Higgins in Orders P-1422 and M-962 is a clear example of how the Act and the municipal Act work in harmony. However, the use of section 25 is discretionary. In my view, the Legislature could not have intended that a question of jurisdiction would be determined by the whim of the institution receiving the request, and I disagree with Inquiry Officer Higgins' finding in Order P-1422 that, where the employer is an institution under the municipal Act, but not an institution for the purposes of section 65(6) of the Act, the fact that the employer may have received (and hence "collected", "used", etc.) some of the records is irrelevant for the purpose of deciding whether section 65(6) applies.

If the meaning of "institution" in section 65(6) was extended to include institutions as defined in the municipal Act, both provincial and municipal government employers providing records to the OLRB would enjoy the "protection" of that provision. Inconsistent treatment between them is avoided. In my view, this interpretation is more consistent with the Legislature's approach to exclusions in the rest of section 65, which are not location specific but record specific. Accordingly, I find that, in the circumstances of this appeal, the meaning of the word "institution" in section 65(6) should be extended to include the HWDSB, an institution under the municipal Act. As a result, the OLRB records which were sent by or to the HWDSB are excluded from the scope of the Act. The remaining records, however, do not qualify for exclusion under section 65(6), and the OLRB must make a decision respecting the appellant's access to them under the Act.

ORDER:

1. I order the OLRB to issue a decision letter to the appellant regarding access to the records which were not sent by or to the HWDSB, treating the date of this order as the date of the request.

2. I order the OLRB to provide me with a copy of the decision letter referred to in Provision 1. It is to be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

3. I find that the records which were sent by or to the HWDSB are excluded from the scope of this appeal under section 65(6), and I dismiss this aspect of the appellant's appeal.

Original signed by: May 11, 1998
Holly Big Canoe
Adjudicator
(formerly Inquiry Officer)