Information and Privacy
Commissioner/Ontario

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

ORDER P-1564

Appeal P-9700369

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a five-part request under the Freedom of Information and Protection of Privacy Act (the Act) from the Ontario Federation of Justices of the Peace Associations, for all documents relating to the Report of the Ontario Justice of the Peace Remuneration Commission, 1995 (the Report). The request identified specific types of records being sought, and made it clear that any and all records dealing with Ministry's consideration, analysis and response to the Report fell within the scope of the request.

The Ministry transferred part (iv) of the request to Management Board Secretariat and part (v) to the Ministry of the Solicitor General and Correctional Services. The Ministry identified a number of records responsive to the first three parts of the request, and denied access to them in their entirety, claiming they fell outside the scope of the Act pursuant to section 65(6)3.

The requester (now the appellant) appealed the Ministry's decision.

There are 42 records at issue in this appeal consisting of briefing notes and related materials, memoranda, notes, meeting summaries, options, analyses and related materials, correspondence, draft correspondence, counsel's notes and draft documents, communications strategies/plans and drafts, totalling approximately 230 pages.

Management Board Secretariat subsequently responded to part (iv) of the request. This decision is the subject of Appeal P-9700368 which I have dealt with in Order P-1563.

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

PRELIMINARY MATTERS:

Adequacy of the decision letter

The appellant submits that the decision letter was inadequate in that it failed to provide any reasons for denying access to the requested information, pursuant to section 29(1)(b)(ii) of the Act. The appellant states that the decision "simply referenced section 65(6)3 as a blanket exemption" and this "has prejudiced the Appellant's ability to make full and meaningful submissions on this matter".

Section 29(1)(b)(ii) of the Act states:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> (b) where there is such a record,
>
> (ii) the reason the provision applies to the record,

In Order M-936, former Inquiry Officer Anita Fineberg addressed this issue in the context of a claim under section 52(3) of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent provision to section 65(6). She stated:

> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). Although these orders dealt with cases in which exemptions were at issue, I feel that their rationale is equally applicable in cases, such as the present, where the institution's decision relates to a jurisdictional issue.
>
> In this case, I agree with the appellants that the decision letter of the Police should have provided him with **reasons** for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the Act. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the Act under which access is refused.
>
> Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations which I have referred to in my disposition of all issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellants.

I agree with Inquiry Officer Fineberg's views, and find them applicable here. I find that, despite the inadequacy of the decision letter as described below, there would be no useful purpose served in requiring the Ministry to issue a new decision letter, and I decline to make such an order.

I remind the Ministry that a re-statement of the language of the legislation is generally not sufficient to satisfy the requirements of section 29(1)(b)(ii). When reasons why a request has been denied are clearly communicated, requesters are in the best position to decide whether to accept the decision or to appeal. It is in the interest of both requesters and institutions, as well as this office, to avoid the costs and delay associated with appeals arising from inadequate decision letters, and I strongly encourage the Ministry to adhere to the letter and spirit of section 29(1)(b)(ii) when responding to requests in which access is denied.

Inquiry process

The appellant argues that Ministry has had ample opportunity to raise discretionary exemptions during the initial stages of this appeal, and has instead "chosen to rely solely on s.65(6)3 in order to deny the Appellant's request". The appellant submits that the request is urgent, and that if I determine that section 65(6)3 does not apply, I should order the disclosure of all responsive records.

Section 65(6) is an exclusionary provision, not an exemption, and as such may be treated differently. In some cases, in denying an access request under the Act, an institution may rely on both section 65(6) and one or more exemptions. On appeal, depending on the circumstances, this

office may conduct an inquiry to determine the application of both section 65(6) and the exemption(s).

However, in the majority of cases where institutions claim the application of section 65(6), no exemption is relied on. If the matter is appealed, this office normally conducts an inquiry solely on this issue and, if the records are found to be within the jurisdiction of the Act, the institution is ordered to make a further decision in accordance with the access procedure under Part II of the Act. If the records are found not to be within the jurisdiction of the Act, the matter is at an end (see, for example, Orders M-936, P-1345 and P-1346).

While the usual practice of institutions and this office in this regard may be departed from in certain circumstances, I am not persuaded that there are sufficient reasons to do so in this case.

Access to representations

During the course of this inquiry, the appellant asked for an opportunity to receive and comment on any representations submitted by the Ministry. I wrote to the appellant advising him that I intended to follow this office's regular procedure for submitting representations, which does not involve the exchange of representations. I also stated that, after receiving all representations, I would determine the most appropriate process for dealing with all outstanding issues, including whether the exchange of representations was necessary or appropriate.

The appellant has been provided with a copy of the Notice of Inquiry which includes a general description of the records, explains the jurisdictional issue raised by the Ministry, and the onus requirements of the Act. Having received and reviewed all representations, in my view, the appellant has been provided with sufficient information to enable him to address the issues in this appeal.

DISCUSSION:

JURISDICTION

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegates to continue an inquiry on the substantive issue of whether or not a record is exempt. If the requested records fall within the scope of section 65(6), it would be excluded from the scope of the Act unless it is a record described in section 65(7). Section 65(7) lists exceptions to the exclusions established in section 65(6).

Sections 65(6) and (7) read as follows:

> (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.

Sections 65(6) and (7) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 65(6) falls within one of the exceptions enumerated in section 65(7), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in the Act apply.

The Ministry's representations state:

> It is conceded that justices of the peace are not, in the strictest sense, in an employee/employer relationship with the Crown. When performing their functions, they must be completely independent from the Crown. They must enjoy complete independence in their decision making.

The appellant also submits that justices of the peace are independent judicial officers, and not employees, and refers me to a number of court decisions which support this position (Reference re: Public Sector Pay Reduction Act (P.E.I.), s. 10 (1997), 150 D.L.R. (4th) 577 (S.C.C.); R. v. Valente, [1985] 2 S.C.R. 673; and Currie v. Ontario (Niagara Escarpment Commission) (1984), 46 O.R. (2d) 484 (H.C.)). [I note that Currie was reversed by the Court of Appeal in a decision reported at (1984), 48 O.R. (2d) 609, but on other grounds]. The appellant has also included with its representations a copy of a decision of an Adjudicator under the Employment Standards

Act (Re Devine, [1996] O.E.S.A.D. No. 41 dated February 14, 1996) in which it was held that justices of the peace are not employees as that term is defined in section 1 of the Employment Standards Act.

I concur with the parties, and find that no employer/employee relationship exists between justices of the peace and the Government of Ontario.

However, the Ministry submits that, because section 65(6)3 refers to "employment-related matters" it does not require that the institution "employ" the individuals in order for the section to apply. In support of its position, the Ministry points to the different phrases "employment of a person by the institution" in sections 65(6)1 and 2, and "employment-related matters in which the institution has an interest" in section 65(6)3. The Ministry also submits that "salary is quintessentially an 'employment-related' matter, and that the records, which deal with remuneration, are thus communications about employment-related matters for the purpose of section 65(6)3. The Ministry maintains that the additional hyphenated word "related" enhances the general application of the term "employment", and that "if 'employment-related matters' means nothing more than 'employment matters', then the added hyphenated word 'related' would be meaningless", which could not have been the legislative intent.

In the Ministry's view, the phrase "employment-related" refers to more than simply employment matters and includes records that would be related to or like those typically found in an employment relationship.

The appellant points out that the terms of reference of the Ontario Justices of the Peace Remuneration Commission make it clear that the Government of Ontario recognizes that financial compensation of justices of the peace must be kept separate from employment or labour related issues, in order to ensure the impartiality and independence of judicial officers. The appellant submits that "[o]n this basis alone, section 65(6)3 is not applicable.". The appellant relies on Order P-1545, where I found that a contract between an institution and an individual who was not an employee was not covered by section 65(6), even though the contractual arrangement was "similar to employment".

Having carefully reviewed the detailed representations of both parties and the records, I find that section 65(6)3 is not applicable in the circumstances of this appeal. I acknowledge that section 65(6)3 includes different wording ("employment-related matter") than sections 65(6)1 and 2 ("employment of a person"), but I am not persuaded that the use of these different words means that the Legislature intended section 65(6)3 to apply to relationships outside the employment context. As I found in Order P-1545, an employer/employee relationship must exist in order to trigger the application of section 65(6) and, as both parties acknowledge, no such relationship exists between justices of the peace and the government.

I find that the records responsive to the appellant's request were not collected, prepared, maintained or used by or on behalf of the Ministry in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which it has an interest. Therefore, section 65(6)3 does not apply, and the records are subject to the provisions of the Act.

ORDER:

1. I order the Ministry to issue a decision letter to the appellant, in accordance with the provisions of section 29 of the Act, regarding access to the requested records, treating the date of this order as the date of the request.

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

Original signed by: May 12, 1998
Tom Mitchinson
Assistant Commissioner