



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

ORDER PO-1648

Appeal PA-980202-1

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of the "Job descriptions for all O.P.S.E.U. employee positions that were declared essential during the 1996 strike at the Walkerton court house." The requester represents the Ontario Public Service Employees Union (O.P.S.E.U.).

The Ministry identified 28 pages of responsive position specifications, and denied access to all of them on the basis that they fall outside the scope of the Act pursuant to section 65(6).

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

During mediation, the Ministry clarified that it was relying on paragraphs 2 and 3 of section 65(6).

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

DISCUSSION:

I am somewhat puzzled that the appellant would need to make a formal access request for the records at issue in this appeal. The position specifications themselves are presumably accessible to the union outside the Act. As far as the 1996 essential service designations are concerned, it is my understanding that O.P.S.E.U. negotiated location-specific agreements with the government, and would also presumably have access to these contract documents without recourse to the Act.

That being said, this matter is before me as an appeal of the Ministry's decision under the Act, and I will proceed to make a determination regarding whether the records fall under the jurisdiction of the statute.

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).

- (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.

Section 65(6)2

In order for the records to fall within the scope of paragraph 2 of section 65(6) of the Act, the Ministry must establish that:

1. the record was collected, prepared, maintained or used by the institution or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; **and**

[IPC Order PO-1648/December 23, 1998]

3. these negotiations or anticipated negotiations took place or will take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[See Order M-861]

Requirement 1

The Ministry submits that the records were collected, prepared, maintained or used by the Ministry in connection with making staffing decisions and directing its workforce. I find that position specifications are prepared, maintained and used by the Ministry, thereby satisfying the first requirement of section 65(6)2.

Requirement 2

In Order P-1223, I found that the preparation, collection, maintenance, or use of a record must be “for the purpose of, as a result of, or substantially connected to” an activity listed in sections 65(6) in order to be “in relation to” that activity.

The appellant submits that the records do not relate to current negotiations, but are the result of past negotiations which took place in 1995-96. The appellant states that a number of staffing changes have taken place at the Walkerton court house, and that the number of employees deemed essential at this location now would be different from the 1996 essential services agreement. He adds that in order to determine how many positions should be essential, he requires access to the position specifications for essential service positions in 1996, so he can compare them to the current membership list and new position specifications.

The Ministry states that the government and the union have different views of what services are “essential” in the event of a strike, and that this issue is currently before the Ontario Labour Relations Board for resolution. The Ministry submits that if it were to provide essential service position specifications to O.P.S.E.U., they could be used to support the union’s position, which could undermine the government’s current negotiation strategy.

The representations of both parties appear to indicate that the records, which resulted from past and concluded negotiations, “form part of the material currently being negotiated”. Although I have some difficulty in accepting the Ministry’s suggestion that disclosure of position specifications, which are widely available throughout the government, could in some way undermine a negotiation strategy, I nonetheless find that the Ministry has established that the use of these records is substantially connected to the current negotiations, thereby satisfying the second requirement of section 65(6)2.

Requirement 3

The Ministry states that the “government is currently in the midst of negotiating a collective agreement, which includes an essential services agreement with O.P.S.E.U., a recognized bargaining agent for certain employees within the Ontario Public Service.” The appellant concurs that such negotiations are currently ongoing.

I accept that the government and O.P.S.E.U. are currently in negotiations, and that a new essential services agreement will emerge from this process. Accordingly, I find that the third requirement of section 65(6)2 has also been satisfied.

As stated earlier in this order, section 65(6) is record specific and fact specific. In the circumstances of this appeal, the records at issue are currently being used by the Ministry in relation to ongoing negotiations relating to labour relations. Therefore, I find that the Ministry has demonstrated that the records fall within the ambit of section 65(6)2 and are excluded from the Act.

ORDER:

I uphold the Ministry’s decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ December 23, 1998