



Information and Privacy  
Commissioner/Ontario

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

# **ORDER PO-1760**

Appeal PA-990291-1

Ministry of the Attorney General



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## **BACKGROUND AND 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 all records relating to a job competition for the position of Legal Counsel with the Ministry of Consumer and Commercial Relations (MCCR). This position was advertised on the Association of Law Officers of the Crown (ALOC) job transfer list. The appellant was an unsuccessful candidate for this position.

The request included the job description, questions used at the appellant's interview, model answers used to assess the answers provided by the applicant for the job transfer, answers provided by the applicant as recorded by the interview panel, a model draft factum, a model draft legal opinion used to assess the draft factum and a draft legal opinion submitted by the applicant for the job transfer.

The Ministry initially identified 35 pages of responsive records 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 (hereafter the appellant) appealed this decision (Appeal P-9800120). Subsequently, I issued Interim Order P-1627, in which I found that section 65(6)3 did not apply and that the records were subject to the Act. I ordered 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.

In addition, because I was not convinced that all responsive records had been identified by the Ministry, I included a provision in the interim order requiring the Ministry to conduct a further search for additional responsive records and to communicate the results of this search to the appellant. If additional responsive records were located, I ordered the Ministry to provide the appellant with an access decision within the time frame included in the order provisions.

Shortly after the issuance of Interim Order P-1627, the Ministry made an application to the Divisional Court for judicial review of the order, and also asked me to stay the provisions of Interim Order P-1627 pending the final disposition of the application for judicial review. I denied the request for a stay and required the Ministry to comply with the provisions of the interim order. My refusal to grant a stay was upheld by the Divisional Court (Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), [1998] O.J. No. 5015).

The Ministry, subsequently and without prejudice to its position that the records are excluded from the Act pursuant to section 65(6)3, issued a decision to the appellant. The Ministry stated that it was not claiming any exemptions for the records but that the records were being withheld pending a determination by the Divisional Court on judicial review of Interim Order P-1627.

The Ministry also stated that it had conducted another search for additional responsive records, and located a draft outline and fact situation, the draft legal memorandum and draft factum the appellant provided at his interview, one undated letter and one letter to the appellant dated January 15, 1998. The Ministry denied access to these records in their entirety, also claiming that they fell outside the scope of the Act pursuant to

section 65(6)3. The Ministry added that it was not claiming any exemptions for these records, but they were also being withheld pending a determination by the Divisional Court on judicial review of Interim Order P-1627.

The appellant appealed this decision (Appeal PA-980339-1). I subsequently issued Order PO-1685-F in which I found that section 65(6)3 did not apply to these records and ordered the Ministry to disclose them in their entirety. However, I stayed the provisions of Order PO-1685-F pending the disposition by Divisional Court of the judicial review of Interim Order P-1627.

The appellant also claimed, in the context of Appeal PA-980339-1, that the following further additional records should exist: a briefing note prepared with respect to this matter, notes taken by representatives of the government in attendance at the appellant's mediation session, and the appellant's performance appraisals as a lawyer which he had provided at the interview. During mediation, the Ministry agreed to conduct another search for further records, including those identified by the appellant; to issue an affidavit describing the steps taken by the Ministry in conducting the search by a specified date; and to provide a decision letter on any additional records that were located.

As a result of the search, the Ministry located the following additional records:

- one letter with attachments dated October 15, 1997 from the appellant
- a Lawyer's Compensation Plan Merit Increase Form
- the appellant's previous performance appraisals
- one letter dated June 15, 1995, addressed to the appellant
- one letter dated March 11, 1991, addressed to the appellant
- one memorandum dated October 21, 1990, addressed to the appellant
- hand written notes by Director of Legal Services, Consumer and Commercial Relations dated November 13, 1998 and January 13, 1999
- one undated memorandum from the Director of Legal Services, Consumer and Commercial Relations
- one letter dated January 16, 1998, from the Board of Directors of ALOC
- an advertisement regarding the position of Counsel Legal Services Branch, Ministry of Consumer and Commercial Relations
- one briefing note dated February 17, 1998
- hand written notes taken by various individuals who attended a mediation meeting

The Ministry provided the appellant with an affidavit sworn by the Ministry's Assistant Freedom of Information and Privacy Co-ordinator setting out the steps she took in conducting the search.

The Ministry denied access to these newly located records, claiming they fell outside the scope of the Act pursuant to section 65(6)3. Again, without prejudice to its position that the records are excluded from the Act pursuant to section 65(6)3, the Ministry added that access was denied to the three-page briefing note dated February 17, 1998 pursuant to sections 13(1), 19 and 49(a) of the Act, and no exemptions were

claimed for any of the other records. As in the previous appeal, the Ministry withheld these records pending a determination by the Divisional Court on judicial review of Interim Order P-1627.

As a result of the efforts of the Ministry in conducting the various searches for responsive records, the search issue has been resolved to the appellant's satisfaction.

The appellant appealed the Ministry's decision to deny access to the last group of records.

I sent a Notice of Inquiry to the Ministry and the appellant. Both parties submitted representations and also stated that they were relying on the representations provided in the previous appeal. The Ministry also withdrew its reliance on sections 13(1) and 19 as the basis for denying access to the briefing note.

Therefore, the only remaining issue is whether the last group of records identified by the Ministry falls within the scope of section 65(6) and therefore outside the jurisdiction of the Act.

## **DISCUSSION:**

### **JURISDICTION**

Sections 65(6) and (7) of the Act 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.

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 Act does not apply to the record.

### **Section 65(6)3**

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

1. they were 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.

[Order P-1242]

### **Requirements 1 and 2**

In Interim Order P-1627 and Order PO-1685-F, I found that the first two requirements of section 65(6)3 had been established. For the same reasons, I find that these two requirements are established in the present appeal.

### **Requirement 3**

Similarly, I found in Interim Order P-1627 and Order PO-1685-F that a job competition is an employment-related matter, and the appellant has acknowledged that the “employment of a person is [IPC Order PO-1760/February 29, 2000]

relevant to this appeal". I found that the complete hiring process, including the screening of potential candidates, must be considered to be an employment-related matter, regardless of the fact that the person may not ultimately be the successful candidate. My reasoning in these orders applies to the newly located records, and I find that this part of the third requirement has been established.

The only remaining issue is whether this is an employment-related matter in which the Ministry "has an interest".

In Interim Order P-1627, I stated the following in reaching my conclusion that the Ministry did not have a legal interest in the records:

The appellant explains that ALOC, of which he is a member, is not a trade union and does not act or represent employees pursuant to the Labour Relations Act or any other statutory scheme. He adds that in 1995 a "Job Security Agreement" was negotiated with Management Board of Cabinet which covered a limited number of matters, one of which was "job transfer" or "Internal Transfer Policy". The appellant points out that as an employee he has no legal rights to initiate any legal proceeding against Management Board, the Crown, its employees, agents or representatives under this agreement. In fact, the appellant states, the only form of dispute resolution available to him under the agreement was "discussion" before the Dispute Resolution Committee, which he unsuccessfully availed himself of in February 1998.

The appellant argues that there is no grievance process available to him under the agreement or any other agreement or arrangement between ALOC and Management Board or the Ministry. He further argues that the grievance procedures under the Public Services Act are not applicable in this type of situation, and he is not aware of any other statutory provisions or principle of common law that would provide a basis for any cause of action. According to the appellant, there is no evidence to support any complaint under the Employment Standards Act or the Ontario Human Rights Code, nor has he made a complaint to either of these bodies.

Finally, the appellant states:

If there is any legal basis for any proceeding whatsoever (other than this appeal and any legal proceeding arising therefrom), I have no knowledge of it. Furthermore, if any cause of action had existed (and I do not believe there was any), it would now be statute-barred pursuant to the Proceedings Against the Crown Act and the Public Authorities Protection Act.

Therefore, the appellant submits, there are no binding legal obligations on the Ministry in the fact situation of this appeal, there are no interests of the Ministry, and there are no legal interests arising from the Job Security Agreement.

As stated earlier, the Ministry's representations provide no reference to any of the more recent orders dealing with the interpretation of the third requirement of section 65(6)3.

I have examined the Job Security Agreement between ALOC and Management Board of Cabinet. Article 4(5) under Part H of the agreement states:

The parties agree that issues arising out of the application, interpretation and administration of this Agreement that are not subject to arbitration by the MAG Designate may be brought to the Dispute Resolution Committee for discussion to ascertain whether a resolution satisfactory to the parties and the affected lawyer is possible. Subsection (5) does not affect any rights the associations or lawyers may have to enforce such issues in the courts.

As noted above, the appellant stated that this was the only avenue available to him under the agreement. I have examined the agreement and it would appear that the appellant is correct. As far as avenues outside the agreement are concerned, the appellant concedes that the grievance procedures under the Public Services Act are not applicable in this type of situation; there are no apparent grounds for a complaint under the Employment Standards Act or the Ontario Human Rights Code; and I have been provided with no evidence of any other statutory right or common law basis for redress available to the appellant.

I accept that the Ministry's responsibilities as an employer to adhere to the requirements of the Ontario Human Rights Code during the recruitment process constituted a legal interest in an employment-related matter at the time of the job competition. However, the recruitment process has been completed, and the appellant has provided convincing arguments that there are no outstanding interests in this job competition process that have the capacity to affect the Ministry's legal rights or obligations.

Accordingly, I find that, in the circumstances of this appeal, there is no employment-related matter pending or reasonably foreseeable which has the capacity to affect the Ministry's legal rights or obligations, and I find that the Ministry has not demonstrated that it has sufficient legal interest in the records to bring them within the ambit of section 65(6)3.

The Ministry disagrees with my findings in Interim Order P-1627 and Order PO-1685-F. The Ministry argues that there is nothing to prevent the appellant from commencing a civil action, laying a complaint with the Ombudsman of Ontario and/or laying a complaint with the Ontario Human Rights Commission.

The Ministry states:

It may be that none of the above courses of action would be successful for the appellant. However, it is impossible to say that the Ministry has no legal interest in this matter unless and until the appellant follows one or more of these courses of action and the outcome is known. As long as these remedies are available to the appellant, it is impossible to say that the Ministry's legal rights and obligations are not affected.

We would note that our position on this matter would likely be different if the appellant were prepared to provide us with a release and an agreement not to take any further action with regard to this matter.

We would also point out that the Ministry is entitled to assume that the appellant has some further action in mind which would provide him with a remedy by the mere fact of his having pursued this request for these records.

The appellant reiterates that all possible avenues to challenge the outcome of his competition were exhausted in 1998 when the dispute resolution scheme under the Job Security Agreement was completed.

As I noted in Order PO-1685-F, the parties appear to agree that the Job Security Agreement dispute resolution provisions have been exhausted, and the Ministry does not dispute my prior finding that any grievance procedures under the Public Services Act are not available to the appellant at this point. As far as any potential civil lawsuit or complaint to the Ombudsman or Ontario Human Rights Commission are concerned, the following comments made in Order M-1128 by Adjudicator Laurel Cropley are relevant:

... In considering whether the Police have a "legal interest" in the matter, that is, the appellant's application for employment and subsequent hiring, in my view, there must be a reasonable prospect that this interest will be engaged.

The appellant has expressed no intention to commence a civil action or file a complaint with either the Ontario Human Rights Commission or the Ombudsman. In fact, he has stated quite clearly in his representations that:

All possible legal challenges have been exhausted. I am aware of no legal proceedings that I could take with respect to the decision taken by the Ministry. I am aware of no statutory or common law rights on which to base a lawsuit. All possible "grievances" have been exhausted. There is no employment-related issue or process engaged or that could be engaged. If you require an affidavit or undertaking to that effect, I will provide it.

I have been provided with no evidence or argument to persuade me that I should make a different finding on this issue from the ones I made in Interim Order P-1627 and Order PO-1685-F with respect to comparable records.



Accordingly, for the reasons outlined in Interim Order P-1627 and Order PO-1685-F, and referred to in this order, in my view, there is no employment-related matter pending or reasonably foreseeable which has the capacity to affect the Ministry's legal rights or obligations. Accordingly, I find that the Ministry has not demonstrated that it has sufficient legal interest in the records to bring them within the ambit of section 65(6)3.

As stated earlier, section 65(6) is record-specific and fact-specific. I find that the specific records requested by the appellant in the circumstances of this particular appeal are within the scope of the Act. Because the Ministry has claimed no exemptions for any of the records, I will order them disclosed to the appellant in their entirety.

**ORDER:**

1. I order the Ministry to disclose the records in their entirety, to the appellant.
2. My order for disclosure of records under Provision 1 of this order is stayed pending the disposition by the Superior Court of Justice (Divisional Court) of the current judicial review of Interim Order P-1627.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

February 29, 2000