



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1783

Appeal PA-990158-1

Ministry of the Attorney General



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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 Ministry of the Attorney General (the Ministry). The request was for access to records relating to allegations the appellant made in 1997 about a Ministry employee. The appellant asked the Ministry to confirm that the complaint was investigated, and to provide him with the findings of the investigation and information about what action has been taken by the Ministry.

The Ministry indicated that the records were excluded from the scope of the Act by virtue of section 65(6).

The appellant appealed the Ministry's decision.

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

RECORDS:

The records at issue consist of notes, memos and correspondence. Pages 19-27 of the records are duplicates of pages 5-13 and have been eliminated from the scope of this appeal.

ISSUES:

JURISDICTION:

In this appeal, the first issue to be decided is the interpretation of sections 65(6) and (7) of the Act. These sections of the Act may apply to the records requested by the appellant.

If section 65(6) applies, and none of the exceptions found in section 65(7) apply, section 65(6) has the effect of excluding records from the scope of the Act.

The Ministry claims that the records are excluded from the scope of the Act under section 65(6)1 and 3.

Section 65(6)1

In order for a record to fall within the scope of section 65(6)1, 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 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 institution.

In Order P-1223, Assistant Commissioner Tom Mitchinson reviewed several possible interpretations of the phrase “in relation to” and concluded:

... in my view, the case law does provide a clear indication that in order to be “in relation to” something, the activity or object in question must do more than merely “affect” that thing; there must be a substantial connection between the activity and the thing to which it is supposed to be “in relation.”

Applying this interpretation to the particular circumstances of this appeal, in order for me to find that the WDHP report was prepared in relation to the grievance proceedings, it would not be sufficient that this activity had an impact on the grievance proceedings. In my view, in order for the preparation to have been “in relation to” the proceedings, a more substantial connection would be required. The question is, how substantial does this connection have to be?

Following the approach taken in the constitutional cases, the connection must be fairly substantial. In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be “in relation to” that activity.

I agree with Assistant Commissioner Mitchinson.

The Ministry submits that section 65(6)1 applies to the records as they are directly related to the serious allegations made by the appellant and were collected, prepared, maintained and used by the Ministry for the purpose of investigating the allegations made regarding the conduct of the Ministry employee.

The Ministry submits that it undertook to investigate the allegations pursuant to the Public Service Act to determine whether a breach of conduct occurred. It indicates that the program area “went as far as to seek legal advice from its lawyers” with a reasonable expectation that if violations were committed, civil, criminal and/or disciplinary action may have been initiated against the employee. The Ministry indicates that the complaint was fully investigated by the Ministry and it was concluded that the complaint was unfounded.

Having reviewed the records at issue in this appeal, it is my view that there is an obvious and substantial connection between the Ministry’s collection, preparation, maintenance and use of the records and the meetings, consultations, discussions and communications about the appellant’s allegations of on-the-job misconduct by a Ministry employee.

However, the records and the Ministry's representations fail to establish that there is or was a reasonable prospect of proceedings related to the employment of a person. In my view, such proceedings were and are just a vague or theoretical possibility, and section 65(6)(1) does not apply.

Section 65(6)3

In order to fall within the scope of paragraph 3 of section 65(6), 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 meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

In Order P-1242, Assistant Commissioner Mitchinson stated the following regarding the meaning of the term "has an interest":

Taken together, these [previously discussed] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

A number of orders have considered the application of section 65(6)3 in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged. Specifically, this line of orders has held that an institution must establish an interest, in the sense that the matter has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has the requisite interest. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner) (March 21, 2000), Toronto Docs. 681/98, 698/98, 209/99.

The appellant submits that the incident referred to in the complaint had nothing to do with labour relations and was not an "employment-related" matter. He submits that he believes that the actions he complained about were illegal, and therefore not in accordance with the person's duties as an employee.

The facts of this appeal establish that records were prepared as a consequence of a complaint made by the appellant in 1997. Although an internal investigation was launched, there is no indication that the Ministry disagrees with or disputes the position of its employees as reflected in the various records, or that the employees and the Ministry have different interests at stake. In this appeal, I find that the Ministry has failed to establish a legal interest in this employment-related matter that is reasonably capable of being engaged. The fact that the appellant has continued to write letters to the Ministry regarding his original complaint suggests that there is a dispute between the appellant and the Ministry. However, the Ministry has not received a letter giving notice of an intent to commence any proceedings against the Crown concerning its response to his complaint.

In Order P-1772, Assistant Commissioner Mitchinson stated:

In my view, section 65(6) has no application outside the employment or labour relation context (see Orders P-1545, P-1563 and P-1564). Therefore, unless the Ministry establishes that the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records do not relate to “labour relations or to the employment of a person by the Ministry”, and section 65(6)1 does not apply. Similarly, unless the Ministry establishes that the meetings, consultations and/or discussions concerning the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records are not “labour relations or employment-related matters in which the Ministry has an interest”, and section 65(6)3 does not apply.

If legal action is initiated by the appellant, the Ministry will undoubtedly defend itself. If successful in its defence, in my view, there is little likelihood that the Ministry would take any subsequent employment-related action against its employee. Even if unsuccessful, it does not necessarily follow that the Ministry would take any actions that would put it in a position of conflict with its employees.

Accordingly, I find that the records are not maintained by the Ministry in relation to anticipated proceedings relating to labour relations or the employment of a person by the Ministry; nor are the activities for which the Ministry is maintaining the records about labour relations or employment-related matters in which the Ministry has an interest. Therefore, I find that requirement three of sections 65(6)1 and 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 to the appellant regarding access to the remaining records in accordance with sections 26, 29 and 48(2) of the Act, 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 a copy to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____
Holly Big Canoe
Adjudicator

_____ May 11, 2000