



Information and Privacy  
Commissioner/Ontario

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

## **ORDER PO-1770**

Appeals PA-990425-1 and PA-990440-1

Ministry of the Solicitor General



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## **NATURE OF THE APPEAL:**

The Ministry of the Solicitor General (the Ministry) received two requests under the Freedom of Information and Protection of Privacy Act (the Act). The requests were for access to:

1. A copy of the Workplace Discrimination and Harassment Prevention (WDHP) complaint filed against the requester by a named individual on or about June 20, 1998; and
2. A copy of a memo entitled “[the appellant’s] Workplace Restoration Request” dated November 4, 1999 along with the attached Issue Note from [the Ministry’s Anti-Racism and Human Rights Coordinator] to the Deputy Solicitor General.

The Ministry located the requested records and denied access to them, in their entirety, claiming that because of the operation of section 65(6) of the Act, the records do not fall within the ambit of the Act.

The requester, now the appellant, appealed the Ministry’s decision to deny access to the records. The Commissioner’s office designated the appeal arising from the first request as Appeal Number PA-990425-1 and the second appeal as PA-990440-1. This order will dispose of the issues raised in both appeals.

I provided a Notice of Inquiry to the Ministry seeking its representations on the question of the application of section 65(6) to the records. It provided submissions and consented to their complete disclosure to the appellant. Accordingly, the appellant was also provided with a Notice of Inquiry and was asked to comment on the submissions of the Ministry. The appellant also made submissions.

## **RECORDS:**

The record at issue in Appeal Number PA-990425-1 consists of a five-page summary of events which comprise the complaint against the appellant. The records at issue in Appeal Number PA-990440-1 consist of a one-page briefing note and a one-page covering memorandum.

## **DISCUSSION:**

### **JURISDICTION**

In these appeals, the sole issue to be decided is the interpretation of sections 65(6) and (7) of the Act. These amendments to 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 right of access under the Act.

### **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 records 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]

### **Parts One and Two of the Test**

A complaint was made against the appellant under the Ministry's WDHP policy. The complaint was investigated in accordance with the then-existing Ontario Public Service WDHP Operating Policy by staff of the Ministry's Independent Investigations Unit (the IIU) at the request of the Ministry's Manager of Staff Relations, Human Resources Branch. The summary of events which comprises the record in Appeal Number PA-990425-1 was forwarded by the Human Resources Branch to the IIU on June 24, 1998 with an attached memorandum. The appellant has received a copy of the covering memorandum only.

The memorandum/briefing note which comprise the records in Appeal Number PA-990440-1 were prepared by IIU staff following its investigation into the complaint against the appellant and after a meeting involving the appellant and the Ministry's Anti-Racism and Human Rights Co-ordinator, Organizational Development. This meeting sought to address the appellant's request for "workplace restoration" in accordance with the WDHP Operating Policy.

In my view, the records responsive to both requests were collected, prepared, maintained and used by the Ministry in relation to communications, discussions, meetings and consultations into the substance of the complaint against the appellant and the Ministry's reaction to the appellant's concerns once the investigation was completed. I find that requirements 1 and 2 of the section 65(3) test have, accordingly, been satisfied.

### **Part Three of the Test**

The Ministry relies upon the findings of Assistant Commissioner Tom Mitchinson in Order P-1242 in which he considered the issue of whether an investigation into a harassment complaint under the Ministry of Community and Social Service's WDHP policy in accordance with an earlier Ontario Public Service WDHP Directive was an "employment-related matter" within the meaning of section 65(6)3. In particular, the Ministry relies on the following comments by the Assistant Commissioner:

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The government's WDHP Directive is one of a series of Human Resources Directives and Guidelines issued by MBS [Management Board Secretariat]. Directives explain human resource practices that must be followed across the Ontario public service, and Guidelines outline best practices and procedures to help human resource professionals manage effectively.

One of the objectives of the WDHP Directive is "to provide the principles and mandatory requirements essential to creating a work environment that is free from discrimination and harassment." The Directive applies to all employees appointed under the Public Service Act, and covers all "employment-related discrimination and harassment, except systemic discrimination." According to the Guidelines which accompany the Directive, "the [Directive] applies to discrimination in any aspect of employment . . . ."

In my view, the WDHP program is, by definition, designed to address an employment-related concern, and I find that any investigation which takes place under the terms of the program is properly characterized as an "employment-related matter" for the purposes of section 65(6)3 of the Act.

I agree with the conclusion reached by Assistant Commissioner Mitchinson and adopt his reasoning for the purpose of the present appeals. I find that the WDHP investigation which is the subject of the records at issue in these appeals is an "employment-related matter" under section 65(6)3.

The Ministry also relies on the findings of the Assistant Commissioner in Order P-1242 with respect to the meaning of the term "has an interest." In that decision, he held that:

Taken together, these 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.

The Ministry takes the position that its legal interest has been engaged through the operation of the Human Rights Code, the Ombudsman Act and the Public Service Act, as well as its own WDHP Operating Policy and general common law principles regarding employee/employer relations. While the Ministry's submissions make it clear that it considers the investigation into the complaint against the appellant to be closed, it is equally clear from the appellant's submissions that he does not agree. The appellant is currently pursuing various remedies to have his concerns about the manner in which the WDHP investigation was conducted and the Ministry's reaction to the investigation results addressed.

The Ministry indicates that it has recently received a number of letters from the appellant and his counsel requesting that the Ministry deal with the issues addressed by the WDHP investigation, particularly those which relate to the appellant's request for workplace restoration. The appellant has also initiated a  
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complaint to the office of the Ombudsman under the Ombudsman Act. On December 21, 1999, the Deputy Solicitor General was formally notified of the Ombudsman's intention to investigate the appellant's concerns in respect of the WDHP investigation and his request for workplace restoration.

The Ombudsman's investigation remains ongoing and may result in findings that the WDHP investigation was improperly conducted, along with recommendations to rectify any flaws in the WDHP investigation process. This in turn may result in the WDHP investigation being reopened and the appellant's request for workplace restoration being revisited. The events which have given rise to the Ombudsman's investigation occurred in the reasonably proximate past. In my view, the Ministry's legal interest in the subject matter of the WDHP investigation and the appellant's request for workplace restoration continues to be engaged at this time.

In summary, I find that the records at issue in these appeals were collected, prepared, maintained and/or used by or on behalf of the Ministry, in relation to meetings, discussions, communications and consultations about employment-related matters in which the Ministry has an interest. All of the requirements of section 65(6)3 of the Act have thereby been established by the Ministry. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal, and I find that the records fall within the parameters of this section, and therefore are excluded from the scope of the Act.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_

Donald Hale  
Adjudicator

\_\_\_\_\_  
March 23, 2000