



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1828

Appeal PA-000040-2

Ministry of Finance



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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Finance (the Ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following records created from May 1, 1998 to the date of this request (January 31, 2000):

- a) All records showing a decision or direction by the Minister of Finance, the Deputy Minister of Finance, or an Assistant Deputy Minister of Finance regarding Pay Equity legislation and specifically regarding Proxy Pay Equity. Without limiting the generality of this request, this request includes any records showing a decision or direction by the Minister of Finance, the Deputy Minister of Finance, or an Assistant Deputy Minister of Finance related to either or both of the following:
 - i) ongoing Pay Equity or Proxy Pay Equity adjustments
 - ii) any communications between the Ministry of Finance and the Ministry of Health regarding Pay Equity or Proxy Pay Equity.
- b) A copy of the report created by KPMG (1998/99) for the Ministry of Finance regarding how to respond to the court decision to reinstate Proxy Pay Equity.
- c) This request is intended to gain information regarding this government's plan to comply with the following court decision which reinstated Proxy Pay Equity legislation:

[1997] O.J. No. 3563
Court File No. RE 7248/96
Ontario Court of Justice (General Division)
Justice I. O'Leary
Heard: April 7 - 11, 1997
Judgement: September 5, 1997.

Therefore, any information pertinent to the government's response to this judgement is also requested.

In a decision letter dated April 3, 2000, the Ministry denied access to the responsive records, pursuant to section 65(6)3 of the *Act*. The appellant appealed the Ministry's decision.

I decided to seek the Ministry's representations, initially. The Ministry made submissions and agreed to share them, in their entirety, with the appellant. In response to the Notice of Inquiry provided to him, the appellant also made representations, which were shared with the Ministry. The Ministry chose not to make any submissions in reply.

There are six records at issue in this appeal consisting of:

- a memorandum dated November 10, 1998 from the Deputy Minister of Finance to the Minister;
- a memorandum dated December 17, 1998 from the Deputy Minister of Finance to the Secretary of the Cabinet;
- a document entitled “Application and Report to Management Board” dated January 11, 1999;
- a Report from the Ministry to MBC dated January 26, 1999;
- a Report from the Ministry to MBC dated February 9, 1999 to which is attached a 16-page table;
- a Consultant’s Report dated May 1998.

DISCUSSION:

JURISDICTION

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.

Requirements One and Two of the Test

The Ministry submits that:

[A]ll the records at issue were either collected, prepared, maintained or used by the [Ministry] to assist Management Board of Cabinet (MBC) in making decisions and providing directions in respect of the government’s commitment to provide pay equity funding to employers in the broader public sector. Where records are used in the [IPC Order PO-1828/October 31, 2000]

“decision-making process” they are “clearly collected and used” by the institution under section 65(6)(3). See Order MO-1190.

...

[A]ll the records were collected, prepared, maintained or used for the purposes of and in connection with Cabinet meetings and discussions regarding the government’s commitment to provide pay equity funding to employers in the broader public sector.

Based on my review of the records, I agree that the records were collected, prepared, maintained or used by the Ministry in relation to meetings, consultations, discussions or communications between the Ministry and other entities within the government as contemplated by section 65(6)3. Accordingly, I find that the first two requirements of section 65(6)3 have been met.

Requirement Three of the Test

Were These Meetings and Discussions About Employment-Related Matters?

The Ministry submits that the records at issue concern the government’s commitment to assist employers in the broader public sector in fulfilling their statutory obligations under the *Pay Equity Act* to achieve pay equity for their female employees. It goes on to state that “pay equity is a quintessential employment-related matter since its purpose is to redress inequities in employee compensation”.

The Ministry relies on the dictionary definition of the terms “employment” taken from the *Dictionary of Canadian Law, Second Edition, Carswell, 1995* which includes “any activity for which a person receives or might reasonably be expected to receive valuable consideration” to argue that “[S]ince the records at issue relate to wages that the female employees in the broader public sector receive for their work, the records fall within the definition of >employment’; wages are an essential component of >employment’.”

The Ministry also submits that regardless of the fact that the employees who are to be affected by the inclusion of pay equity in their workplaces are not employees of the Ministry, they are employed by employers in the broader public sector who are funded by the government. As a result, the records address “employment-related matters” notwithstanding the fact that the individuals involved are not employed by the Ministry *per se*.

The Ministry also refers to my decision in Order P-1471 which held that records maintained by the Ministry of Education and Training regarding its decision to suspend or cancel a teacher’s teaching certificate fell within the ambit of section 65(6)3 despite the fact that the teacher was employed by a board of education and not the institution in that case. The Ministry argues that the fact that there was no employment relationship between the Ministry of Education and Training and the teacher did not preclude the application of section 65(6)3 as the records related to what was clearly an “employment-related matter”. In my view, my findings in that appeal are distinguishable from the circumstances present in this appeal. While the

Ministry of Education and Training did not employ the teacher, the provisions of the *Education Act* regarding the certification of teachers empowered it to take certain steps which would ultimately impact on the teacher's ability to work in that profession. While the Ministry of Education and Training did not directly employ the teacher, it possessed the ability to make it impossible for a teacher to be employed by a school board in situations where the teacher's certification was denied by the Ministry. I found that because the Ministry of Education and Training had the right to affect the teacher's ability to work in that profession, there existed the requisite "employment-related" component in the records addressing the issue of the teacher's qualifications. There is nothing in the present appeal which would indicate that the Ministry has a similar degree of power to influence the employment situation of the employees of the broader public sector employees who may be eligible for pay equity funding through the government. Rather, I find that the records pertain to the provision of funding from the government to the individuals employers, not directly to the employees.

The Ministry also relies upon the decision in Order M-1127 in which I rejected the arguments of the appellant to the effect that records relating to a job competition in which he was not ultimately the successful candidate did not fall within the ambit of section 52(3)3, the equivalent provision in the municipal *Act* to section 65(6)3. In that case, the appellant was under consideration for employment by the institution but was ultimately not hired. I found that regardless of the fact that the appellant was not the successful candidate for the position, the records relating to the hiring process were "employment-related" for the purposes of section 52(3)3. In that case, the records clearly dealt with an employment-related matter between the institution and the appellant. Such is not the case in the present appeal.

The Ministry also indicates that interpreting the term "employment-related" so as to require the existence of an employment relationship would result in an inconsistent interpretation of the *Act* as records relating to pay equity for Ministry employees would fall outside the scope of the *Act* while records about the same issue relating to employees in the broader public sector would not.

The appellant submits that the phrase "employment-related matters" contained in section 65(6)3 requires that the matter concern a relationship between an employee and *the institution as the employer* [his emphasis]. The appellant refers to the decision of Assistant Commissioner Tom Mitchinson in Order PO-1721 where he quoted from his earlier decision in Order P-1545 and held that:

In Order P-1545, I made the following findings regarding the interpretation of section 65(6):

In order to qualify under any of the paragraphs of section 65(6), a record must either relate to "labour-relations or to the employment of a person", or be "about labour relations or employment related matters."

Hydro [the institution in that appeal] and the affected person state quite specifically that the affected person is not an employee. The record itself includes provisions which make it clear that the contract does not create an

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employment relationship between Hydro and the affected person. However, Hydro submits that in carrying out his responsibilities under the contract “it could be argued that this is similar to >employment’, and the record could thus be described as related to employment matters.”

I do not accept Hydro’s position. Section 65(6) has no application outside the employment context, and ... I find that no employment relationship exists between Hydro and the affected person. Accordingly, the record does not fall within the parameters of section 65(6) and is, therefore, subject to the *Act*. ...

I applied this same reasoning in determining that section 65(6)3 did not apply to the relationship between the Government of Ontario and Justices of the Peace, which also fell outside the employment context (see Orders P-1563 and P-1564).

The Ministry acknowledges in its representations that physicians are not directly employed by the Ministry, and I find that no employer/employee relationship exists between physicians and the Government of Ontario. Following the same reasoning I applied in Orders P-1545, P-1563 and P-1564, I find that the work of the PSC and the records produced by the PSC in discharging its responsibilities under the terms of the agreement between the Ministry and the OMA is not an employment-related matter for the purposes of section 65(6)3. No employer-employee relationship exists between the Government of Ontario and the members of the OMA and, in my view, it necessarily follows that the records are not “about labour relations” for the purpose of section 65(6)3 of the *Act*.

Therefore, I find that the meetings, consultations, discussions and/or communications reflected in Records 1B-10B, 12B-18B, 20B, 22B, 24B-26B and 5C are not about labour relations or employment-related matters in which the Ministry has an interest, and section 65(6)3 has no application to these records.

The appellant submits that his request deals generally with pay equity as it applies to the “broader public sector” only and points out that the employees who will ultimately be affected by the subject matter of the records are not employees of the government, but rather, they may be the recipients of some pay equity funding from the government.

In the present appeal, the employees who are to be affected by the subject matter of the records are employed by employers from what the Ministry describes as the “broader public sector” who receive funding from the government. In accordance with the reasoning described above in the decisions of the Assistant Commissioner in Orders PO-721 and P-1545, I find that no employee-employer relationship exists between the government and the “broader public sector” employees. Accordingly, I find that the records are not about “employment-related matters” as contemplated by section 65(6)3.

The Ministry has not argued that the records are about “labour relations” matters in which the Ministry has an interest. In Order PO-1721, Assistant Commissioner Mitchinson also addressed this aspect of section 65(6)3 as follows:

The term “labour relations” appears in section 17(1) of the *Act*. In that context, Adjudicator Holly Big Canoe discussed the term “labour relations information” in Order P-653, and made the following statements:

In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the **collective** relationship between the employer and its employees. [emphasis in original]

I find that Adjudicator Big Canoe’s interpretation of the term is equally applicable in the context of section 65(6)3. Therefore, I find that “labour relations” for the purposes of this section is properly defined as the collective relationship between an employer and its employees.

I adopt the approach taken by former Adjudicator Big Canoe and Assistant Commissioner Mitchinson and find that because the employees are not employed by the Ministry or the Government of Ontario, it cannot be said that the records relate to “labour relations” matters as contemplated by section 65(6)3.

Accordingly, I find that the records which are at issue in this appeal are subject to the provisions of the *Act*, and I will include a provision in this order requiring the Ministry to issue a decision to the appellant regarding access to them.

ORDER:

1. I order the Ministry to issue a decision letter to the appellant, in accordance with the provisions of sections 26, 28 and 29 of the *Act*, regarding access to the 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.

October 31, 2000

Donald Hale

Adjudicator