



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1863

Appeal PA-000204-1

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

The Ministry of the Solicitor General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to thirteen different job competitions. Specifically, the requester asked for “copies of the interview questions and the anticipated answers to the questions with the associated maximum scores.”

The Ministry denied access to all of the requested records on the basis that they were excluded from the scope of the *Act* by virtue of section 65(6).

The requester, now the appellant, appealed the Ministry’s decision.

Mediation of the appeal was not successful. This office sent a Notice of Inquiry to the Ministry initially, setting out the facts and issues in this appeal. The Notice of Inquiry was then sent to the appellant, together with the non-confidential portion of the Ministry’s representations. The appellant also submitted representations.

RECORDS:

The thirteen records at issue consist of interview questions, scoring grids and, in some cases, answers to interview questions for thirteen different job competitions. All the records, except record 12, relate to a named office within the Ministry. Record 12 pertains to a job competition involving another office within the Ministry.

DISCUSSION:

Jurisdiction

The Ministry claims that the records fall within the scope of sections 65(6)1 and 3, and that therefore the *Act* does not apply to them.

Sections 65(6)1 and 3 and section 65(7) 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.

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) is present, then the record is excluded from the scope of the *Act*.

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 Ministry 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 Ministry.

Requirement one:

The Ministry submits, and the appellant does not dispute, that the records were collected, prepared, maintained or used by the Ministry in relation to the recruitment process and to the application of employment. Based on previous orders of this office, I am satisfied that the first requirement has been established [Orders P-1242, P-1442, P-1258].

Requirements 2 and 3:

The Ministry states in its representations that all of the responsive records, except record 12, “are being maintained and used by the Ministry in relation to an ongoing anticipated proceeding before the Grievance Settlement Board which relates to labour relations and the employment of individuals by the Ministry.” In support of this assertion, the Ministry provided a copy of the grievance that was filed by an employee in July 2000, alleging discriminatory recruitment practices by a named office within the Ministry.

Previous orders of this office have established that the Grievance Settlement Board is properly characterized as a “tribunal”, and that hearings before it properly constitute “proceedings”, for the purposes of section 65(6)(1) (see Order P-1223). These orders have also found that the term “labour relations”, as used in section 65(6), refers to the collective relationship between an employer and its employees.

On considering the representations of both Ministry and the appellant, I am satisfied that there is a reasonable prospect that the grievance is of a systemic nature which is likely to involve records 1 to 11 and record 13, and that the grievance would proceed to a hearing before the Grievance Settlement Board. As all the requirements under section 65(6)1 have been established with respect to records 1 to 11 and record 13, and none of the exceptions contained in section 65(7) are present, I find that these records are excluded from the scope of the *Act*.

The Ministry concedes that information relating to record 12 was not collected, maintained and/or used by the Ministry for the purpose of anticipated proceedings before a court, tribunal or other entity. Therefore, the second requirement has not been met and section 65(6)1 does not apply to record 12.

Because of my conclusion that section 65(6)1 applies to records 1 to 11 and record 13, I will consider only record 12 in relation to section 65(6)3.

Section 65(6)3

For record 12 to qualify under section 65(6)3, the Ministry must establish that:

1. The record was 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:

The Ministry states, and the appellant does not dispute, that the records were collected, prepared, maintained and used by the Ministry in relation to meetings, consultations, discussions and communications

with respect to applications for employment with the Ministry. Previous orders of this office have also found, in the context of a job competition, that such records are collected, prepared, maintained or used “in relation to” communications which take place around the job recruitment process (Orders P-1258, P-1242, P-1442 and P-1590). Based on the foregoing, I am satisfied that record 12 meets the first and second requirements of section 65(6)3.

Requirement 3:

Job competitions, by their very nature, are clearly employment-related matters (Orders P-1258, P-1442, P-1590 and P-1627). In Interim Order P-1627-I and Order PO-1685-F, Assistant Commissioner Tom Mitchinson 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.

I agree with these conclusions and 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.”

“has an interest”

The Ministry submits that the responsive records reflect discussions and communications about labour relations and/or employment matters in which the Ministry has an “interest”. Its representations refer to Order P-1242 in which 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.

Previous orders have stated that an “interest” for the purposes of section 65(6) of the *Act* means more than a mere curiosity or concern. In addition to a “legal interest” as stated by Assistant Commissioner Mitchinson in the above order, 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 a legal interest in the records. 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 (Ont. Div. Ct.); leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.). Where there has been a settlement of an employment-related matter, for instance, a legal interest no longer exists (see Order MO-1215).

In its representations, the Ministry asserts that it periodically re-uses questions and answers in competitions for identical or similar positions. It submits that there are significant labour relations implications if the answers to interview questions are made known in advance to some, but not to all of the applicants. The

Ministry further notes that it is bound by the *Ontario Human Rights Code* (the Code) with respect to job competitions and recruitment activity.

However, the Ministry does not direct its comments specifically to record 12 in this appeal. Rather, it relies on its general responsibilities and potential liabilities with respect to the recruitment process as set out above. In other words, the Ministry takes the position that because there is a possibility that an individual involved in the recruitment process may bring a complaint under the *Code* or that it may, on a theoretical level, be liable for hiring an unqualified individual, it will always have a legal interest in these employment-related matters.

In his representations, the appellant refers to Order PO-1718 in which Adjudicator Holly Big Canoe made the following comments on the “possibility of legal action arising in a matter”:

The Ministry refers to the possibility of some legal action being taken as a result of the audit or disclosure of the audit, and relies on the due performance of its ongoing responsibilities to establish that its legal interests are engaged. In my view, the mere possibility of future legal action, which may be said to arise out of many kinds of audit or regulatory activities of government, is insufficient to engage a reasonable anticipation of such action actually occurring or, therefore, to engage an active legal interest. Further, the due performance of supervisory activities in setting clear standards and procedures, even with a view to avoiding exposure in possible future legal proceedings, is also insufficient to engage an active legal interest. In my view, unless there is something that arises to give reality to the prospect or anticipation of such action, government’s “interest” in the record relates to the normal course of its affairs, and the requisite legal interest is not established.

In my view, these comments are consistent with the reasoning in the recent line of decisions concerning this issue which, as I noted above, were upheld on judicial review. I accept that, in the recruitment process, there is a possibility that an applicant may engage the Ministry’s legal interests through a complaint to the Ontario Human Rights Commission. However, in the circumstances of the current appeal, there is no evidence before me that either the appellant or a Ministry employee is contemplating making a complaint. Also, the Ministry has not indicated that the grievance process is available to the appellant nor has it referred to other statutory provisions or principle of common law that would provide a basis for any cause of action (Order MO-1193).

With respect to record 12, I find that the Ministry has failed to establish a legal interest in this employment-related matter that is reasonably capable of being engaged. Therefore, the third requirement has not been established.

In conclusion, with regard to records 1 to 11 and record 13, I am satisfied that all the requirements of section 65(6)1 have been established. Since none of the exemptions contained in section 65(7) apply, I find that these responsive records are excluded from the scope of the *Act*.

Concerning record 12, I find that the Ministry has not met the second and third requirements in section 65(6)1, nor has it met the third requirement in section 65(6)3. I therefore find that this responsive record falls within the scope of the *Act*.

ORDER:

I uphold the Ministry's decision to deny access to records 1 to 11 and 13.

1. I order the Ministry to issue a decision letter to the appellant with respect to record 12, in accordance with Part I of the *Act*, treating the date of this order as the date of the request.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material sent to the appellant.

Original signed by: _____

Dora Nipp
Adjudicator

_____ February 1, 2001