



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2212

Appeal PA-030175-1

Management Board Secretariat



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NATURE OF THE APPEAL:

Management Board Secretariat (MBS) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the insured benefits of Ontario Public Service (OPS) retirees. Specifically, the requester sought access to the following information:

- Master Group Insurance Contract for the insured benefits of all Ontario government retirees with respect to all benefits and all amendments to date from the Effective Date of the Master Policy.
- Plan test for uninsured benefits of all Ontario government retirees with respect to all benefits and all amendments from the Effective Date of the Master Policy.
- Financial Report or equivalent prepared by the insurance carrier for Ontario government retiree benefits for the last five complete policy years for both insured and uninsured benefits.
- Great West Life “Ben Reports” for Ontario government retiree benefits for the last five complete policy years by every division or subdivision for the Health and Dental Benefits.
- Underwriting Agreement or equivalent in effect with respect to Ontario government retiree benefits for each of the past five complete years for all benefits, whether insured or uninsured.
- Recommended funding levels (annual renewal letter) for the insurance carrier for Ontario government retiree benefits for each of the last five complete policy years by benefit, whether insured or uninsured.

MBS located a number of responsive records and denied access to all of them on the basis that section 65(6)3 applies and they are outside the jurisdiction of the *Act*.

The requester, now the appellant, appealed the decision.

Mediation was unsuccessful and the appeal was moved to the adjudication stage. I sent a Notice of Inquiry to MBS initially, setting out the facts and issues in this appeal. MBS provided representations in response. I then sent a copy of the Notice along with the representations provided by MBS to the appellant, who also provided representations.

RECORDS:

There are five categories of records at issue in this appeal.

Category 1: The master group insurance contract for the insured benefits of all Ontario government pensioners and all amendments, as well as the plan test for uninsured

benefits of all Ontario government retirees with respect to all benefits and all amendments.

- Category 2: The financial report prepared by the insurance carrier for Ontario government pensioner benefits for the last five complete policy years for both insured and uninsured benefits.
- Category 3: The insurance carrier's summary of benefits for Ontario government retiree benefits for the last five complete policy years by division for the Health and Dental Benefits.
- Category 4: The underwriting agreements between the Ontario government and the insurance carrier for each of the past five complete policy years for all benefits.
- Category 5: The annual group insurance rates review from the Ontario government to the insurance carrier for Ontario government retiree benefits for each of the past five complete policy years by benefit.

DISCUSSION:

Introduction

The sole issue to be addressed by this order is whether the records are excluded from the *Act* by application of section 65(6)3, which reads:

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:

Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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

1. the records were collected, prepared, maintained or used by MBS 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 MBS has an interest.

Section 65(6) is record-specific and fact-specific. If section 65(6)3 applies to the records, and none of the exceptions found in section 65(7) apply, section 65(6)3 has the effect of excluding records from the scope of the *Act*. The appellant has no right of access to records which are outside the ambit of the *Act* pursuant to section 65(6)3.

Part One: collected, prepared, maintained or used

In its representations, MBS addresses the requirements of section 65(6)3 separately for each category of records

Category 1 - Master group insurance contract and plan test for uninsured benefits

MBS states that the records in this category consist of the policy and schedules that provide the terms under which the insurer is required to process and pay out certain benefits to retired members of the OPS. MBS submits that these records are prepared jointly by MBS and the insurer and are subject to frequent revision as employee benefits policies are changed. MBS also submits that both MBS and the insurer use these records to administer the pensioner benefits program.

Category 2 – Financial reports prepared by the insurance company

MBS submits that this category of records consists of the annual accounting of the total benefit claims made by employees and pensioners, amounts expended by the insurer in paying out benefit claims and other administrative costs. MBS submits that “the financial reports are prepared by the insurance company on behalf of [MBS]” and that they are “‘collected’ by [MBS] for the purpose of administering employee compensation programs”.

Category 3 – “Ben Reports” prepared by the insurance company

MBS describes the records in Category 3 as “detailed financial reports prepared by the insurance company that provide a line-item accounting of all pensioner benefits claims processed by the insurance company in accordance with the Master Group policy and underwriting agreement.” MBS submits that the records are prepared and maintained on behalf of MBS by the insurer and then “routinely supplied to MBS in order to enable MBS to monitor benefits usage and administer the employee and pensioner benefits programs”.

Category 4 – Underwriting Agreement

MBS submits that the Underwriting Agreement is a contract between the insurance company and MBS that outlines the compensation terms and other conditions under which the insurance company is retained to administer the processing and payment of OPS employee and pensioner benefits.

Category 5 – Annual renewal letter – recommending funding levels

MBS submits:

Each year MBS reviews the previous year's benefits expenditures and projects the upcoming year's benefits costs. Consequently, payments made by MBS to the insurance company are adjusted according to forecast expenditures. MBS communicates the payment adjustments to the insurance company through an annual renewal letter. In this regard, the annual renewal letter is "prepared" by the ministry.

The appellant's representations do not deal directly with the first requirement of section 65(6)3.

I have reviewed all of the records and I am satisfied that MBS has established the requirements of part one. In my view, all of the records were either prepared or collected and then used by MBS for purposes relating to the administration of OPS pensioner benefits.

Part Two: in relation to meetings, consultations, discussions or communications

MBS submits that all five categories of records were collected, prepared or used in relation to meetings, consultations, discussions or communications.

MBS submits that the records in Categories 1 and 4, which are contracts, were necessarily the product of negotiations, discussions, meetings, and communications between the MBS and the insurance company. As far as the Master Group Insurance Contract is concerned, MBS submits that it continues to be the subject of, and is used in, meetings, discussions and communications between MBS and the insurance company when interpretation or application issues arise, and when the agreement is changed to reflect shifts in OPS benefits policy.

With respect to the records in Categories 2, 3, and 5, MBS submits that they are communications. MBS argues that the Category 2 and Category 3 records were prepared by the insurance company and were provided to MBS as communications relaying information about pensioner benefits; and that the records in Category 5 communicate to the insurance company details about the adjusted payments MBS will be providing in order to enable the insurance company to plan for and administer benefits claims. MBS submits that the information contained in these records is the product of consultations and negotiations between the two parties.

The appellant's representations do not deal directly with the second requirement of section 65(6)3.

In Order P-1223, I commented on the interpretation of the phrase "in relation to" in section 65(6):

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 (emphasis added).

Applying this interpretation to the records at issue in this appeal, I find that all of the records were collected, prepared, maintained and/or used by MBS for the purpose of, as a result of, or substantially connected to the various meetings, consultations, discussions or communications between MBS and the insurance company in the context of implementing and administering the retiree benefits plan. Accordingly, the second part of section 65(6)3 has been established.

Party Three: labour relations or employment-related matters in which the institution has an interest

MBS submits that all five categories of records relate to labour relations or employment-related matters in which MBS has an interest:

The compensation package of all Ontario government employees is made up of two components: wages and benefits. In terms of benefits, classified employees are entitled to certain benefits during the time they are employed in the Ontario Public Service (OPS). When OPS employees have contributed to the public service pension plan for ten years, they are also eligible to receive certain health, dental and life insurance benefits after they retire from the OPS. These retirement benefits are known as pensioner benefits and represent a portion of the compensation package of classified OPS employees.

[MBS] is responsible for administering all compensation (wages and benefits) for employees of the [OPS]. Given the size of the [OPS], the processing of employee and pensioner benefits is necessarily a complex and labour-intensive program. For this reason, MBS has contracted with an external insurance underwriter to administer the processing and payment of OPS employee and pensioner benefits. Accordingly, OPS employee and pensioner benefit claims are received, verified, and payments are made by the insurance company on behalf of MBS.

...

In Order MO-1264, the [Commissioner’s Office] found that compensation is an integral part of the “employment” relationship and it is of “vital importance in defining this relationship”. Records that relate to employee compensation plans were found to “clearly relate to and are about labour relations or employment-related matters”. Accordingly, MBS respectfully submits that matters relating to the administration and payment of employee benefits (compensation) are also fundamentally about labour-relations and employment related matters.

MBS also submits that as the employer of record of the OPS, it is required to administer OPS employee and pensioner benefits programs and, therefore, it has a significant employment-related interest in the records because they all relate to the ongoing planning, administration, and monitoring of the benefits program and to the retention of the insurer hired to administer a significant portion of that program.

The appellant's position is that the requirements in section 65(6) have not been met because the records do not relate to labour relations or to the employment of a person by the Ministry. The appellant submits that the information that he requested consists of:

Information with respect to the benefits provided to retirees from the Ontario government. There is no request with respect to benefits issues or any other matters for current employees of the Ontario government or for any matter that relates to ongoing labour relations with any of the employees or bargaining agents of the Ontario government. All that is being requested is information related to individuals who are no longer employed by the Ontario government and who are not party to or represented by any organization that has a collective bargaining relationship or engages in other forms of labour relations with the Ontario government.

“Employment-related” matters

In Order PO-2106, Adjudicator Bernard Morrow found that appointments, promotions, transfers and resignations were all employment-related matters because each of those events would engage the employer and the employee in transactions that are significant to their employment relationship. In addition, this office has consistently held that job competitions are “employment-related” matters for the purposes of section 65(6)3 or the municipal equivalent (Orders M-830, PO-1950, and PO-2123). Past orders have also established that the complete hiring process is considered to be an employment-related matter, and that records concerning recruitment, screening and interviewing satisfy the requirements of the term “employment-related” matter, regardless of the fact that a requester may not ultimately be the successful candidate and therefore “employed” (Orders P-1627, P-1685-F, PO-1760, MO-1291).

The records at issue in this appeal relate to the provision of benefits to former employees who have retired from the OPS. In my view, the fact that the records relate to individuals who are no longer employed by the OPS and do not have a current employment relationship with the Ontario government does not mean that the records are not “employment-related” for the purposes of section 65(6)3. The only reason the records exist is because the pension beneficiaries had an employment relationship with the OPS. Applying similar reasoning from past orders where records created prior to the establishment of an employment relationship such as job competition records concerned “employment-related matters”, I find that records stemming directly from a previously existing employment agreement also concern “employment-related matters”, regardless of the fact that the employment relationship has terminated.

Therefore, I find that the records at issue in this appeal were collected, prepared or used by MBS in relation to meetings, discussions, communications or consultations about an employment-related matter, specifically the administration of pensioner benefits.

“Has an interest”

The only remaining issue is whether MBS “has an interest” in this employment-related matter.

A number of previous orders have addressed the issue of whether or not an institution “has an interest” in a matter for the purposes of section 65(6)3. In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 509), the Ontario Court of Appeal specifically addressed the meaning of the phrase “in which the institution has an interest”. The Court stated that “interest” must be more than a “mere curiosity or concern”, though not necessarily a “legal” interest. In addition, the court stated that the “matter” must relate to an institution’s own workforce and once records are excluded from the operation of the *Act*, they remain excluded.

In my view MBS has more than a mere curiosity or concern about the pensioner benefits program. Pensioner benefits form part of the compensation package provided to employees of the OPS. The fact that some of those benefits continue after an employee retires from the OPS does not alter the fact that the records relate to MBS’s management of its “own workforce.” In the circumstances, I find that MBS has an “interest” in all of the information at issue, and that the second part of the third requirement has been established.

In summary, I am satisfied that MBS has provided me with sufficient evidence to establish all three components of the test under section 65(6)3. None of the exceptions in section 65(7) are present, and I find that all of the records at issue in this appeal are excluded from the scope of the *Act*.

ORDER:

I uphold MBS’s decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

December 10, 2003 _____