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

ORDER PO-2520

Appeal PA-040337-1

St. Lawrence College of Applied Arts and Technology

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

St. Lawrence College of Applied Arts and Technology (the College) has a mandatory retirement policy which requires academic employees to retire at the end of the academic year in which they turn 65 years old. On May 26, 2003, the union representing certain College employees filed a grievance with the College. The statement of grievance states, in part:

> That the College is violating Article(s) … & the College's policy on retirement specifically not exclusively in that management is eliminating a vacant full-time position by assigning the on-going work to non-full-time employees who are beyond age 65.

An arbitration hearing was scheduled but the parties negotiated a settlement to the grievance and entered into Minutes of Settlement. During the course of the settlement discussions, the College had shown the union's representative a contract document entitled, "Schedule of Service", which was executed by the College and a numbered company relating to teaching and co-ordination services. The College did not permit the union representative to have a copy, and required that the contract be returned. As described below, this contract eventually became the record that is at issue in this order.

NATURE OF THE APPEAL:

On October 15, 2004, the College received a request from the union representative under the *Freedom of Information and Protection of Privacy Act* (*Act*) seeking access of "employment contracts (copies of) for all third parties/companies hired to teach credit courses for the college including but not limited to [two named individuals] for the fall 2004 academic semester."

The College issued a decision letter that provided the requester with access to six records. It stated that no further records responsive to the request existed and informed the requester that, "[i]n accordance with section 29(1)(a)(ii) of the *Act*, you may appeal to the Commissioner the question as to whether further records exist." The requester (now the appellant) appealed the College's decision to this office.

During the intake stage of this appeal, this office sought the appellant's written submissions as to why she believed that additional records exist. The appellant responded that "… at the beginning of October, the College shared with us the contract to a numbered company that reflected the work being performed by [a named individual]. At that time the College would not provide us with a copy and insisted that the contract be returned to them."

The appeal was assigned to a mediator to attempt to settle the issues, but settlement was not achieved. The appeal then advanced to the adjudication stage of the appeal process. I commenced the adjudication by providing a Notice of Inquiry to the College and the numbered company identified in the contract (the affected party), outlining the issues in the appeal and inviting their representations.

In particular, I asked the College to provide representations as to whether the appellant was provided notice as required under section 29(1)(b) of the *Act* (requirements for a decision letter refusing access to records), whether responsive records had been located and whether section

65(6) (which excludes certain labour relations and employment records from the scope of the *Act*) applies. I received representations from the College but not from the affected party. As an attachment to its representations, the College attached the Minutes of Settlement that were entered into by the union and the College to conclude the grievance.

In its representations, the College states the following:

> The College has not provided the appellant with a revised decision letter reflecting its acknowledgement that the record sought by the appellant with respect to the named individual does in fact exist; however, the College does confirm its existence.
>
> In accordance with section 29(1)(b) of the *Act*, access to this record is refused because the College believes the record to be excluded from the scope of the *Act* under the provisions of sections 65(6)(1), section 65(6)2 and section 65(6)3 of the *Act*.

The appellant was provided with the Notice of Inquiry and a copy of the College's representations (including attachments), subject to minor severances, and invited to provide representations. The College's representations included its acknowledgement that the contract exists and its claim that section 65(6) applies to exclude it from the scope of the *Act*. Accordingly, although the College did not comply with section 29(1)(b) when it issued its initial access decision, the necessary information for the purposes of this appeal has now been shared with the appellant and I do not intend to address this issue further.

In response to the Notice of Inquiry and the College's representations, the appellant provided representations as to whether section 65(6) of the *Act* applies, and responded to the College's representations. The appellant did not suggest in her representations that further records in addition to the contract ought to exist. Accordingly, it is not necessary for me to consider that issue further.

After receiving the appellant's representations, I provided them to the College and the affected party and invited their reply representations. The College responded with reply representations but the affected party did not. I then provided the College's reply representations to the appellant and invited her sur-reply representations, which she provided in response.

RECORD:

The record at issue in this appeal is a two-page contract entitled "Schedule of Service" entered into by the College and the affected party.

PRELIMINARY ISSUE:

IMPACT OF GRIEVANCE MINUTES OF SETTLEMENT

Throughout the mediation and adjudication process, the College has maintained that the appellant's request under the *Act* for the record at issue violates the Minutes of Settlement. The College explains that the Minutes of Settlement signed between the College and the union representative on October 5, 2004 stipulate that "[t]he parties agree that there will be no further action with regard to the non-bargaining unit individual referred to in the grievance currently teaching [the credit course]...."

In response, the appellant submits that at no time during the grievance or settlement process did the union waive its rights to request the record under the *Act*. I also note that when the College responded to the initial request by asking for an assurance that it was not in violation of the Minutes, a union representative responded that the union was not "taking any action" with regard to the affected party.

The College's arguments in this regard may be summarized as follows: (1) it is possible to "contract out" of the *Act* in a document such as the Minutes of Settlement; (2) such "contracting out" either removes the record from the scope of the *Act* and/or from the scope of the Commissioner's authority; (3) the College did, in fact, "contract out" of the *Act* via the Minutes of Settlement in this case, and (4) in the alternative, the College appears to argue that the Commissioner should somehow enforce the Minutes of Settlement. As outlined below, I reject arguments (1), (2) and (4), and it is therefore not necessary to resolve argument (3).

Section 10(1) creates an express and unambiguous right of access to records "in the custody or under the control" of an institution such as the College, subject to exceptions that do not include the provision of a contract. In my view, therefore, the *Act* applies in the circumstances of this appeal regardless of the contents of any agreement to the contrary, and the right of access in section 10(1) must be decided within the four corners of the statute. The Commissioner's authority is unaffected. If the Minutes of Settlement ending the grievance in this case in fact include an express provision contracting out of the right of access created by the *Act* (and I expressly decline to find that they do), any violation of that provision would be a matter of contract law, employment law or labour law, and enforceable in that context. I also note, in that regard, that the Minutes of Settlement provide that the Board of Arbitration "… shall remain seized for the purposes of enforcing these minutes". There is nothing in the *Act* or the Minutes that would empower the Commissioner or her delegates to, in effect, enforce the Minutes of Settlement.

In the circumstances, I will proceed to determine whether section 65(6) applies to the record and will not consider this issue further.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

As stated above, the College claims that the responsive record falls within the scope of sections 65(6)1, 65(6)2 and 65(6)3, and therefore is outside the jurisdiction of the *Act*. If the responsive record falls within the scope of section 65(6) of the Act, it would be excluded from the scope of the *Act* unless it is a record described in section 65(7). The appellant claims that the record falls within the exception set out in section 65(7)3 of the *Act*. Section 65(6) and 65(7)3 state:

> 65(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.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.
>
> 65(7) This Act applies to the following records:
>
> 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.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

I will begin my analysis with section 65(6)2.

Section 65(6)2: negotiations

For section 65(6)2 to apply, the College must establish that:

1. the records were collected, prepared, maintained or used by the College or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the College; and

3. these negotiations or anticipated negotiations took place or were to take place between the College and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[Orders M-861, PO-1648]

The initial representations of the College state:

> … the record was used and was provided to the appellant during the negotiation of a settlement. The appellant returned the document to the College at the conclusion of the negotiations which culminated in the Minutes of Settlement … These negotiations were in relation to proceedings before a tribunal. These proceedings related to labour relations in that they were the result of a grievance process set out in a Collective Agreement … negotiated under the *Colleges Collective Bargaining Act*.

The appellant's representations focus to a significant degree on the exception from the exclusion at section 65(7)3. The appellant's initial representations state:

> The record is a contract for services provided by the [named individual]. As such, the record in question falls under subsection 3 of section 65(7) as related to employment matters which causes an exemption from the [College's] representation that section 65(6) applies (P-1545).
>
> …
>
> … There indeed was a grievance as outlined in the College's submission. The grievance however was not about the employment contract but about the vacancy that was created with the departure of a full-time employee. Unlike the College we are of the opinion that the employment contract was not crucial or necessary for the settlement of the particular issue. The record was not prepared for the grievance or arbitration proceeding. The record was created to provide employment to the individual in question and is a culmination of negotiations

> between the College and the individual. The record in question was created at least 2 months after the grievance had already been filed and it was created for the sole purpose of establishing the employment terms and conditions for [the named individual].
>
> …
>
> Contrary to the College's submissions the employment contract was never shared with the Union through any of the stages of the grievance process. The first that this document was shared was in the settlement discussions. However, in our opinion, it was not paramount to the issue at hand. The record was created as an employment contract as a result of negotiations between the College and [the named individual] two months after the grievance was filed and as such is exempted by virtue of section 65(7)(3).

The reply representations of the College state:

> It is the College's position [that] the document was used by the College in relation to a scheduled arbitration hearing that resulted in the … Minutes of Settlement…. The document was both crucial and necessary to the grievance since it was, in fact, directly related to the work that was being claimed by the Union in the grievance and, therefore, was central to the settlement of the grievance. We do not agree with the appellant's view [that] the document was created for the sole purpose of establishing the employment terms and conditions for the named party since the named party was not, in the fall of 2004, an employee of the College.

The College goes on to state:

> The reference in the statement of grievance to "non-full-time employees who are beyond age 65" is, specifically, a reference to the named individual and to the work performed, albeit at a different period of time, through a third party contract for service entered into, under similar conditions, between the College and the named party.
>
> …
>
> In the College's view, it is clear the grievance related not only to a claim the College had eliminated a position, but also to the assignment of work to non-full-time employees. The only work being performed by the named party prior to his retirement on June 30, 2003, that was later being assigned to other than full-time employees was the work being performed under the third party service contract now being requested by the appellant (or other similar contracts relevant to different time-periods). ...

> The appellant in her representations claims the requested record falls under the exclusions set out in section 65(7)3 of the *Act* because it relates to employment matters. … To ensure there is no confusion or misunderstanding with respect to the College's position in this circumstance, we are making no claim of exemption under 65(6) on the basis of "employment-related" reasons since it is our position that the named party was not an employee of the College at the time the information request was filed.

The sur-reply representations of the appellant state:

> The College's position on section 65(6) is that once a document – no matter how significant or insignificant is used in a proceeding, negotiations, and or discussion that document becomes exempt from the Act for all purposes forever. Certainly this broad interpretation was not the intent, nor the purpose of this section of the Act. That would mean that any document ever used in a meeting, proceeding or negotiation with the College would be exempted from this Act for all purposes, forever. With all due respect, that just doesn't make sense. Otherwise, a publicly funded institution such as the College can hide any information by having used it in a proceeding.

Analysis and Findings

Requirement 1

Requirement 1 is met if the records were collected, prepared, maintained or used by the College or on its behalf. On the evidence before me, it is clear that the record at issue was in the custody of the College and was shown to a union representative during a successful attempt to settle the grievance. These facts are not in dispute. On this basis, I am satisfied that the record was both maintained and used by the College, meeting requirement 1.

Requirement 2

For requirement 2 to be established, the College must demonstrate that the maintenance and/or use of the record was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. The parties agree that negotiations, which the appellant describes as "settlement discussions," took place. Broadly speaking, the College takes the position that the record was "used" in the negotiations, while the appellant focuses on the original purpose for which the record was created, arguing that this was not for the purpose of negotiations.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. The College submits that the record is directly connected to the grievance because it relates to the work that, according to the union, the College was assigning to a non-full-time employee beyond the age of 65. The appellant submits that the

grievance is not about the contract but about the vacancy that was created with the departure of a full-time employee. The appellant further submits that the record was created to provide employment to the "named party" and not contemplated to be used at negotiations.

While I agree with the appellant that the record was not created for the purpose of the negotiations, this does not resolve the issue. Requirement 2 derives from the statutory wording that applies the provision to records that were "collected, prepared, maintained or used by an institution in relation to … negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution …." where requirements 1 and 3 are also met. In order to meet this requirement, it is sufficient if, for example, the record was used in relation to negotiations about labour relations. It need not have been created for that purpose.

Based on the evidence before me, it is clear that the record was provided to the union in the course of settlement negotiations that, in the end, produced Minutes of Settlement. It is also clear that the record was relevant to the subject matter of the grievance, as noted in the College's reply representations (quoted above). In my view, this is sufficient evidence for me to conclude that it was "used" for the purpose of, and therefore "in relation to", the negotiations.

It is also clear that negotiations between the College and the union about a grievance concerning allegations that a position has been eliminated, or other staffing issues as raised by the College in its representations, are negotiations relating to labour relations. The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

As the record was used in relation to negotiations relating to labour relations, I find that the second requirement is met.

Requirement 3

Requirement 3 is satisfied if the negotiations were between the College and a person, bargaining agent or party to a proceeding or anticipated proceeding. Based on the evidence, it is clear that the negotiations were between the College and a bargaining agent, namely the union. That is sufficient to meet requirement 3, but it is also clear that the union is not only a bargaining agent but also a party to the grievance proceeding. I find that requirement 3 is met.

All three requirements are met, and I therefore find, subject to the discussion of section 65(7)3, below, that the record is excluded from the scope of the *Act* under section 65(6)2.

Section 65(7)3

The appellant has claimed that the exception in section 65(7)3 of the *Act* applies to the record and argues that the record is a employment contract. In effect, section 65(7)3 of the *Act* creates an exception to an exclusion from the *Act* that would otherwise apply under section 65(6). It provides that 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 is subject to the *Act*.

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

The College's position is that section 65(7)3 does not apply to the record as the affected party is not an employee but an independent contractor. The appellant relies on Order P-1545 and submits that the requested record is an employment contract between the College and the affected party resulting from negotiations about employment-related matters.

Order P-1545 deals with whether section 65(6) applies to exclude a contract for personal services, entered into between an institution and an individual who was not an employee, from the scope of the *Act*. Former Assistant Commissioner Tom Mitchinson found that section 65(6) "has no application outside the employment context," and he concluded that the *Act* applied to the contract for that reason. He rejected the institution's argument that its relationship with the affected person was similar to 'employment' and stated:

> The record is the written contract between Hydro and the affected person. Both Hydro and the affected person state in their representations that the affected person is not an employee of Hydro. The contract itself includes a number of provisions which support this position, and specifically describes the affected person as an "independent contractor". I accept that no employment relationship exists between Hydro and the affected person, and that the nature of his relationship with Hydro is accurately described as that of an independent contractor.

In my view, the former Assistant Commissioner's conclusion is equally pertinent to the question of whether the contract in this case between the College and the affected party is 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" as required to fit within the section 65(7)3 exception to the section 65(6)2 exclusion. In my view, it is not, because the contract is not between the College and an employee.

To begin with, the record is a contract between the College and a numbered company (the affected party). On its face, it is therefore not a contract between an institution and an employee. Even if it were a contract with the named individual rather than the numbered company, I would still not find it to be between an institution and an employee. There is nothing in the record describing the named individual as an "employee" or suggesting that he has this status. In fact, the individual alleged to be an "employee" is not even mentioned in the agreement, in which the numbered company is described as an "external supplier". In my view, the contractual terms (which I cannot disclose without communicating the contents of the record), and the description, "external supplier" are consistent with the numbered company being an independent contractor, and this would also be the case if the named individual had signed the contract instead of the numbered company. The record is therefore not an agreement between an institution and an employee, and I find that section 65(7)3 does not apply. The record is therefore excluded from the scope of the *Act* under section 65(6)2.

As a final comment, I would like to respond to the appellant's submission that the intent and purpose of section 65(6) does not support the College's position that once a record is used in negotiations that record becomes excluded from the *Act* forever. That position in fact originates in the Ontario Court of Appeal's judgment in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507. The Court stated as follows (at para. 38):

> The Act "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, i.e. when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the Act, the records remain excluded. The subsection makes no provision for the Act to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.

To summarize, I have found that section 65(6)2 applies to the record at issue, and because section 65(7)3 does not apply, the record is excluded from the scope of the *Act*. It is therefore not necessary for me to consider sections 65(6) 1 and 3.

ORDER:

I uphold the College's decision.

Original Signed By: November 6, 2006
John Higgins
Senior Adjudicator