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

ORDER PO-2952

Appeal PA09-409

Landlord and Tenant Board

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

NATURE OF THE APPEAL:

The appellant in this appeal was a party that appeared before the Landlord and Tenant Board (the Board) in 2005. She submitted the following 6-part request to the Board under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to a named individual (the affected person):

1. How long was the original term of [affected person's] contract? When did it start and when was it initially intended to end? (I know he left before his term of office was to end.) May I please see a copy of the duties and responsibilities that were required of him specifically as his paid employment? Please remove any compensation reference.

2. Other than [an identified case] that [the affected person] decided should be evicted from a substandard basement, were there other serious complaints about [the affected person's] behaviour as chairperson in various rulings in the Landlord and Tenant Tribunal?

3. Did [the affected person] resign voluntarily?

4. If he resigned voluntarily what was the date of his letter? This is important as it may demonstrate why he showed so little concern in his hearing room to how I was being treated.

5. If he did not resign voluntarily, on what date was he informed that his services would no longer be required? Again this may explain his seeming indifference to what was going on round him.

6. Whether he resigned voluntarily or not, some of his earlier weird rulings should have raised some concerns. As of the date of his termination were all his subsequent rulings reviewed by an independent person such as [a named individual]?

In response, the Board located responsive records and issued two decision letters in which it addressed each of the six parts outlined above. The appellant appealed the Board's initial decision.

In its decisions, the Board granted partial access to responsive records, indicating that access was denied to the remaining records or parts of records pursuant to the exclusionary provision in section 65(6) (labour relations and employment records), and the mandatory exemption in section 21(1) (personal privacy) of the *Act*. The particulars of the two decisions are set out below.

In its initial decision, the Board granted access to records responsive to part 1 of the request; accordingly part 1 is not at issue in the appeal. The Board denied access to the other records that it located.

In its second decision, the Board clarified that it was refusing to confirm or deny the existence of records consisting of complaints against the affected person (part 2), referring to section 21(5) (refuse to confirm or deny the existence of records/personal privacy) of the *Act* with respect to this part of the request. In the alternative, it also applied the exclusion in section 65(6) of the *Act* to any such responsive records, if they existed. In addition, the Board amended its initial decision and granted access to one of the record's previously withheld (relating to part 5). The Board also clarified that it was denying access to the two remaining records (responsive to part 3) pursuant to section 21(1), with reference to the presumption in section 21(3)(d)(employment or educational history) of the *Act*, in the alternative to a finding that section 65(6) does not apply.

With respect to part 6 of the request, although the Board initially denied access to responsive records, the Board stated in its supplementary decision that, "[the named member's decisions] were not reviewed by an independent person subsequent to his resignation. As such, there are no records related to this question."

The appellant indicated that she believes that an independent review took place and that responsive records must exist to part 6 of the request. Accordingly, reasonable search was raised as an issue in this appeal, only with respect to part 6 of the request. The appellant is pursuing the Board's denial of access with respect to parts 2, 3, 4 and 5 of the request.

As mediation could not resolve all of the issues on appeal, the file was forwarded to the adjudication stage of the appeal process. I sought and received representations from the Board and the appellant. I note that the appellant was provided with a complete set of the Board's submissions.

RECORDS:

The records at issue consist of correspondence (2 pages) and four sets of Orders of the Ontario Rental Housing Tribunal issued under the *Tenant Protection Act, 1997* in 2005 and 2006. The Board has refused to confirm or deny the existence of any other records that might be responsive to the appellant's request.

As well, the appellant believes that more records exist that are responsive to part 6 of her request.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Board takes the position that the records (and any other responsive records that might exist) are excluded from the *Act* pursuant to section 65(6)3.

General Principles

Section 65(6) states:

> 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.

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*.

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]. Meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings [Order MO-2024-I].

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. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

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].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*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].

Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

Section 65(6)3: matters in which the institution has an interest

Introduction

For section 65(6)3 to apply, the institution must establish that:

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

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 institution has an interest.

Part 1: collected, prepared, maintained or used

The Board points out that the request was for records relating to serious complaints made about a member's behaviour concerning various rulings he made, and to records relating to his resignation from the Board. The Board indicates that any records that are or would be responsive to the appellant's request were or would be either collected or prepared by the Board (formerly known as the Ontario Rental Housing Tribunal at the time covered by the request). In addition, the Board submits that any such records would be maintained and used by it.

The appellant did not specifically address this issue.

Having considered the nature of the appellant's request and based on my review of the records that have been identified as responsive to the request, I find that any records that exist or might exist that are or would be responsive to the appellant's request would have been collected,

prepared, maintained and used by the Board. Accordingly, I find that the first part of the test has been met.

Part 2: meetings, consultations, discussions or communications

The Board submits that any responsive records were or would be maintained and used by the Board in relation to consultations, discussions and communications within the Board.

The appellant did not address this issue.

Based on the nature of the records that the appellant is seeking and the Board's submissions, I am satisfied that any responsive records (if they exist) would be maintained and used by the Board in relation to meetings, consultations, discussions and communications relating to the issues to which they pertain. Accordingly, I find that the second part of the test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

The records collected, prepared maintained or used by the Board … are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

The first issue to determine is whether records pertaining to a former member of the Board, who was an Order-In-Council (OIC) appointee, are about labour relations or employment-related matters. The Board submits that members of this tribunal are "employees" for the purposes of section 65(6) of the *Act*, in the context of issues involving the relationship between members and the Board, such as a member's resignation. The Board submits:

> [Members] might not be employees in the traditional sense because they enjoy considerable independence with respect to their decision-making and the conduct of hearings. Nevertheless, Members' duties are closely superintended and subject to the direction and control of the Chair. Their duties are regulated by rules of conduct and legislation.

The Board refers to the *Tenant Protection Act, 1997*, which was the legislation in force at the time of the appellant's dealings with the Board, and the *Residential Tenancies Act, 2006*, which replaced the *Tenant Protection Act, 1997*, and the *Code of Conduct* that had been enacted pursuant to both pieces of legislation. It goes on to submit that its members "are subject to considerable direction and control with respect to the performance of their duties, though they enjoy adjudicative independence in their decision-making and conduct of a hearing."

Citing the Court of Appeal decision in *Ontario (Minister of Health and Long-Term Care v.v Ontario (Assistant Information and Privacy Commissioner)* 2003 CanLII 16894 (C.A.), the Board submits that a consistent finding would include board members as "employees" for the purposes of section 65(6). In that case, the Court of Appeal stated that "the phrase [labour

relations] is not defined in [the *Act*], and its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining." The Court found further that the term "labour relations" should not be restricted to employer/employee relationships as that would render the phrase "employment-related matter" redundant. The Court found that physicians are "employees" of the Government of Ontario for the purposes of section 65(6) on the basis that "the relationship between the government and physicians, and the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, fall within the phrase 'labour relations'…"

The Board submits that in the current case, any complaints about the member's conduct, if they exist, relate to human resources matters in which the Board would be acting as an employer and the member an employee.

The appellant did not specifically address this issue. Her submissions, however, reflect her confusion regarding the role of an independent decision-maker and the role of the Board in situations where a complaint is made against a member. It appears that her confusion stems from the Board's ability to address complaints in some instances but not in others, namely where the complaint relates to the member's decision-making.

Findings

The Board acknowledges that its members are not "employees" in the traditional sense. Rather, members are appointed through a political appointments process, for a specified duration of time. A letter written to the appellant from the Chair of the Board and included as part of the appellant's submissions, makes it very clear that the Board cannot interfere with an on-going adjudication, and that the complaint process is not intended to serve as an avenue for review of an adjudicative decision.

Previous orders of this office have considered different types of "employment-like" relationships. In Order PO-2501, senior adjudicator John Higgins considered whether certain records pertaining to deputy judges fall within the exclusion in section 65(6). He stated:

> The Court of Appeal's judgment in *Minster of Health and Long-Term Care* indicates that finding a group of professionals not to be involved in "labour relations" with the government, because they are not its employees, is reading section 65(6)3 too narrowly. The Court also indicates that "labour relations" has a meaning that goes beyond the confines of collective bargaining. The Court's comments on this point bear repeating:
>
> > … the Assistant Information and Privacy Commissioner and the Divisional Court read the phrase "labour relations" in s. 65(6)3 of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 ("the Act"), too narrowly. The phrase is not defined in that Act, and *its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour*

> *relations" to employer/employee relations*; to do so would render the phrase "employment-related matters" redundant. [Emphasis added.]

In my view, this part of the judgment strongly suggests that the correspondence and proposed meeting between the ODJA and the Ministry, both of which relate to the Deputy Judges' collective concerns about remuneration and working conditions, are about "labour relations" as that phrase is interpreted by the Court of Appeal. These concerns were expressed on the Deputy Judges' behalf by the ODJA. The records themselves consist of communications about the concerns expressed by the ODJA, and they are about a proposed meeting on this subject. I therefore find that these communications and the proposed meeting were about "labour relations" within the meaning of section 65(6)3. Because the Ministry is the source of the Deputy Judges' income as such, and changes to their remuneration would have impact on the Ministry and the financial underpinnings of Ontario's Small Claims Court system, and in view of the Ministry's obvious involvement in the administration of justice in Ontario, it is evident that this is also a matter in which the Ministry "has an interest" within the meaning of section 65(6)3.

These conclusions are reinforced by the fact that, in *Minister of Health and Long-Term Care*, the Court was also considering the role of a committee that represented non-employees with respect to issues such as remuneration. Again, the Court's conclusion bears repeating:

> The relationship between the government and physicians, and *the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, falls within the phrase of "labour relations"*, and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in s. 65(6)3. [Emphasis added.]

The senior adjudicator found that the circumstances before him were analogous to those in the *Ministry of Health* case referred to above. In arriving at his decision in this case, the senior adjudicator conducted an extensive analysis on the issue of judicial independence as a distinguishing factor in the circumstances. He ultimately determined that excluding the records at issue from the scope of the *Act* under section 65(6) has no impact on judicial independence.

The cases cited above discuss whether non-employees can still fall within the phrase "labour relations" only. They do not specifically address whether the relations between non-employees and an institution could fall within the phrase "employment-related."

Other decisions of this office have concluded that individuals working in non-traditional employment situations, such as Ontario Provincial Police (OPP) officers (PO-2106) and municipal police officers (Orders M-835 and M-899) fall within the scope of section 65(6) and its municipal equivalent (section 52(3)) because they are "employment-related." In Order PO-

2106, adjudicator Bernard Morrow found that records relating to OPP officers' appointments, re-appointments, postings, promotions and transfers convey information about these officers as "employees". Moreover, he concluded that since they relate to status, position and career development, they are similar to human resources records and are thus "employment-related."

In contrast to these findings, in Order MO-2188, adjudicator Colin Bhattacharjee found that the Mayor of Haldimand County was not a County employee in any sense of the word and that records relating to the Mayor's conduct did not concern employment-related matters. He stated:

> The Mayor's dual role as head of council and chief executive officer does not fit within the definition of an employee. The Mayor was not hired by Haldimand County; she was elected by the voters. By virtue of being elected mayor, she became both head of council and chief executive officer.
>
> Haldimand County, which employs County staff, can provide the Mayor with advice. However, it did not "hire" the Mayor and does not have the right to control the details of her work performance. Moreover, it cannot fire the Mayor or remove her from these positions. As a general principle, she can only be removed or 'fired" by the voters of Haldimand County. In my view, it is clear, therefore, that the Mayor is not a County employee.

In my view, the circumstances before me are similar to those dealt with by senior adjudicator Higgins in PO-2501 and adjudicator Morrow in PO-2106.

The *Code of Conduct* referred to by the Board in its submissions governs the relationship between the Board and its members and establishes the rules of conduct of members from the start of their term and continuing even after completion of their term. The *Code of Conduct* is to be applied by the Chair and Vice Chairs "in setting objectives for Members, reviewing their performance, recommending re-appointment and in determining appropriate action in cases where the behaviour of a Member has been questioned." The *Code of Conduct* also specifies that members of the Board are subject to the *Public Service of Ontario Act, 2006* and its regulations.

In my view, regardless of the process through which board members attain their positions and the importance of maintaining independence in their decision-making, all of the trappings of employment are evident through adherence to the *Code of Conduct*; including performance reviews and discipline, all of which fall within the responsibility of the Board. The request in the current appeal was for records relating to performance issues, complaints and the manner in which the member's appointment was terminated. In my view, the records at issue and any other records that might be responsive to this request relate to matters which fall within the purview of the Board as an "employer." I find that these types of records relate to human resources issues and thus qualify as "employment-related" records. Similar to the senior adjudicator's findings in Order PO-2501, I also conclude that excluding the records at issue from the scope of the *Act* under section 65(6) has no impact on adjudicative independence.

Having found that the consultations, discussions and communications relate to employment-related matters, I must now consider whether the institution has an interest in these matters. The Board submits that it does, stating:

> When the [Board] received a complaint about a Member's conduct, the [Board's] immediate interest was to determine whether or not the complaint warranted taking any disciplinary action. The results of investigations into complaints made about a Member were also considered by the [Board] when evaluating a Member's performance and when deciding whether or not to recommend renewing the Member's OIC appointment…
>
> The [Board] has an ongoing interest in evaluating the performance of its Members both individually and collectively…This interest relates to ensuring the overall quality of the [Board's] decisions and preserving the integrity of the [Board] as an adjudicative body.

The appellant does not address this issue.

Findings

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above].

In my view, the Board clearly has more than a mere curiosity or concern about complaints and resignations involving its OIC appointed members. These issues impact the credibility and integrity of the Board and its members. Moreover, I am satisfied that the records relate to the Board's management of its "own workforce". In the circumstances, I find that the Board has an "interest" in all of the information at issue, and any other records that might exist, and that the second part of the third requirement has been met.

Conclusion

I find that Board has established all of the requirements of section 65(6)3. In addition, I find that none of the exceptions in section 65(7) applies. I conclude that all of the records at issue, and any other records that might exist that would be responsive to the request, are excluded from the scope of the *Act* by operation of section 65(6)3.

Because of this decision, it is not necessary for me to consider the possible application of the exemptions claimed by the Board. The appellant maintains that records relating to an independent review of the affected person's decisions should exist. In my view, any records responsive to part 6 of the appellant's request, if they exist, would be excluded from the scope of the *Act* for the reasons set out in this decision. Accordingly, I find no useful purpose in examining the steps taken by the Board to search for responsive records. Consequently, I will not address the Board's search for records in this order.

ORDER:

I uphold the Board's decision.

Original signed By: January 17, 2011
Laurel Cropley
Adjudicator