

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4612

Appeal PA22-00168

Ministry of Health

February 24, 2025

Summary: An individual asked the Ministry of Health (the ministry) for records, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), related to his employment file with the ministry, including records related to his union's dealings with the ministry, and to harassment and discrimination complaints. The ministry found records responsive to the request but would not release them.

The reason for this decision was that the ministry said that *Act* does not apply to the records since they relate to employment and labour relations (under the exclusions at sections 65(6)1 and 65(6)3 of the *Act*). In this order, the adjudicator upholds the ministry's decision and dismisses the appeal. Since she finds that records responsive to two parts of the request would also be excluded under section 65(6)3, the adjudicator does not consider the issue of reasonable search.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 65(6)1 and 65(6)3.

Orders Considered: Orders M-815, M-832, and PO-1242.

OVERVIEW:

[1] This appeal concerns access to records of an individual who was employed by an institution and represented by a union. The individual seeks access of his personal employee file with the institution and records related to his allegations of harassment and discrimination, and correspondence between his union and employer about these

matters. As this order explains, there is no right of access to any of these requested records under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The *Act* does not apply to any of these records because each record relates to employment or labour relations, under the section 65(6)1 or 65(6)3 of the *Act*.

[2] The requester requested the following from the former Ministry of Health and Long-Term Care (the ministry) under the *Act*:

1. Full and complete copy of ALL pages of the Personal file of [name] – at Ministry of Health and Long-Term Care.
2. Full and completed Final Report of Fact-Finding Allegation of Harassment & Discrimination investigation conducted by [name] (then a Director at Ministry of Health and Long-Term Care) as part of WDHP filed by [name]. This investigation was made a pre-condition for settlement at Arbitration by [name] representing the Ministry of Health and Long-Term Care.
3. A copy of each of ALL MOUs and MOS signed between [a specified union] and Ministry of Health and Long-Term Care as part investigation and any form of agreement relating to the complaint of [name] for wrongful termination of employment at the Ministry of Health and Long-Term Care.
4. All letters and Agreements exchanged between [the union], Ministry of Health and Long-Term Care and the Ontario Grievance Settlement Board relating to the complaint of Wrongful Termination filed by [name].
5. Last official letter by Ministry of Health and Long-Term Care to [the union], Ontario Grievance Settlement Board and to Cabinet Secretary, relating to the complaint of Wrongful Termination filed by [name].

Time period is for [date] to [date].¹

[3] The ministry issued a decision withholding the records under the exclusion at section 65(6) (employment or labour relations) of the *Act*.

[4] The requester (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The ministry later issued a revised decision to the appellant granting partial access to the records requested and provided the appellant with an index of records. In its decision, the ministry advised that 43 records were located in response to three of the five parts of the request, and that no records were located that are responsive to items 2 and 5 of his request. The ministry's decision also explained who was involved in the

¹ Names and dates have been removed from the wording of the request (including names in a professional context) to reduce the chance of identifying the requester.

search for records and more specific information about the exclusions and exemptions it was relying on to withhold the records located.

[6] The IPC appointed a mediator to explore resolution, but mediation did not resolve the dispute. The appellant also added the issue of reasonable search to the appeal regarding items 2 and 5 of his request.

[7] Since no mediation was possible, the file moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[8] I conducted a written inquiry under the *Act* on the issues in the appeal, first inviting and receiving representations from the ministry, then from the appellant. I shared the ministry's representations with the appellant. The appellant's representations contain his views about the background of the situation leading to his request (his former employment with the ministry and issues related to how the union handled his complaints), but not whether the exclusions at section 65(6) that were claimed apply. He asks for the release of all the records, seeking closure. I acknowledge the importance of these underlying issues to the appellant. However, these matters are not relevant to the issues I need to decide in the appeal, and I will refer to them only briefly below.

[9] For the reasons that follow, I uphold the ministry's decision that records 2-7 are excluded from the scope of the *Act* under section 65(6)1 and that records 8-43 are excluded under section 65(6)3. I also find that the two records that the appellant seeks (as set out in items 2 and 5 of the request) would also be excluded under section 65(6)3, and I therefore do not consider whether the ministry conducted a reasonable search for them. As a result, I dismiss the appeal.

RECORDS:

[10] The responsive records are outlined in the ministry's Index of Records that was shared with the appellant. Records 2-43 remain at issue in this appeal.

[11] The ministry describes records 2-7 as requests for hearings at the Grievance Settlement Board submitted by the union in relation to the appellant's grievance and subsequent Notices of Proceedings. The ministry withheld these records under the exclusions at section 65(6)1 and 65(6)2 of the *Act*.

[12] The ministry describes records 8-43 as containing labour relations and employment-related files concerning the appellant, for which the ministry has an interest as the appellant's former employer. It says that these records range from internal employee action requests to termination notices and records of employment. The ministry

withheld each of these records under the exclusion at section 65(6)3 of the *Act*.²

DISCUSSION:

[13] The only issue in this appeal is whether the section 65(6) exclusion for records relating to labour relations or employment matters apply to the records. Below, I explain why I uphold the ministry's decision under section 65(6)1 over records 2-7 and section 65(6)3 over records 8-43.

[14] Section 65(6) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act's* access scheme.³

[15] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.⁴

[16] Section 65(6) states, in part:

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[.]

[17] 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*.

[18] If section 65(6) applied at the time the record was collected, prepared, maintained

² In the alternative, the ministry also withheld records 12 and 15 under exemptions of the *Act* that I do not discuss, due to my findings that these records are excluded from the scope of the *Act* under section 65(6)3.

³ Order PO-2639.

⁴ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

or used, it does not stop applying at a later date.⁵

What types of records are covered by this exclusion?

[19] The type of records excluded from the *Act* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.⁶

[20] Section 65(6) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.⁷

"In relation to"

[21] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.⁸

[22] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.⁹

"Labour relations"

[23] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.¹⁰

"Employment of a person"

[24] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human

⁵ *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. 509.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

⁷ *Ministry of Correctional Services*, cited above.

⁸ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁹ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

¹⁰ *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.

resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.¹¹

Undisputed context of the records at issue

[25] Although the appellant's representations do not specifically address either the test for section 65(6)1 or 65(6)3, it is clear from the background information that he provides – and from the wording of his request itself – that any records responsive to his request would be related to his employment with the ministry and the union's handling of his issues there. That is, I do not read the appellant's representations as disagreeing that the context of any responsive records is the unionized employee-employer relationship, the difficulties that ensued in it, and the fact that the ministry has at the very least maintained these records in its possession, as employer.

[26] In my view, it is open to me to find that many if not all of the ministry's representations about each of the three-part tests is not disputed.

[27] Given this acknowledged context and my review of the records, I have no difficulty finding that records 2-7 meet the three requirements of section 65(6)1 and records 8-43 meet the three requirements of section 65(6)3, as I explain below.

Section 65(6)1: court or tribunal proceedings relating to labour relations or employment

[28] The ministry applied section 65(6)1 to records 2-7.

[29] For section 65(6)1 to apply, the ministry must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use 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 institution.

[30] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity that has the power, by law, binding agreement, or mutual consent, to decide the matters at issue.¹²

[31] "Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity," the body or person must have the authority to conduct proceedings and the

¹¹ Order PO-2157.

¹² Orders P-1223 and PO-2105-F.

power, by law, binding agreement or mutual consent, to decide the matters at issue.¹³

[32] As the ministry submits, the IPC has previously held that an arbitrator of the Grievance Settlement Board are properly characterized as “proceedings” for the purpose of section 65(6)1 and that an arbitrator has the authority to conduct “proceedings” and the power to decide grievances.¹⁴ More specifically, the ministry states, and I accept, that the Grievance Settlement Board has, by law, binding agreement or mutual consent, the power to decide the matters at issue and the ability to impose a penalty or sanction against the ministry in response to the union’s application on the appellant’s behalf.¹⁵

[33] The ministry describes records 2-7 as requests for hearings at the Grievance Settlement Board submitted by the union in relation to the appellant’s grievance and subsequent Notices of Proceedings.

[34] Based on my review of records 2-7, I confirm that these records are as described by the ministry and I find that all three parts of the test for section 65(6)1 are met for each record:

- that the ministry collected, maintained and used records 2-7 (part one of the test for section 65(6)1)).
- this collection, maintenance, and use was in relation to proceedings or anticipated “proceedings” before an “other entity” (the arbitrator at the Grievance Settlement Board), given the power to make binding rulings against the ministry in hearings related to the appellant’s grievances (part two of the test), and
- the proceedings relate to the appellant’s disputes alleging violation of the union Collective Agreement (which are labour relations or employment matters, meeting part three of the test).

[35] Since I uphold the ministry’s decision under section 65(6)1 of the *Act*, I do not need to consider its claim that section 65(6)2 of the *Act* also applies to records 2-7. Next, I will consider its claim that section 65(6)3 applies to records 8-43.

Section 65(6)3: labour relations or employment-related matters in which the institution has an interest

[36] For section 65(6)3 to apply, the ministry must establish that:

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

¹³ Order M-815.

¹⁴ The ministry cites Order M-832.

¹⁵ The ministry cites Order PO-1242.

2. this collection, preparation, maintenance or use 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.

[37] The phrase "labour relations or employment-related matters" has been found to apply in the context of, for example: a job competition,¹⁶ an employee's dismissal,¹⁷ and a grievance under a collective agreement.¹⁸ 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.¹⁹ The records 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.

[38] Here, again, the context of the creation of records 8-43 is acknowledged by the appellant: he was employed by the ministry, made certain employment-related allegations, and had grievances that his union was to be handling for him. This acknowledged context is consistent with the ministry's description of records 8-43 as containing labour relations and employment-related files concerning the appellant, for which the ministry has an interest as the appellant's former employer. The ministry further explains that the records range from internal employee action requests to termination notices and records of employment. Based on my review of the records, I confirm that they are as described by the ministry.

[39] Given this acknowledged context, the ministry's description of the records, and my review of the records, I find that it is clear that records 8-43 meet the above three-part test for section 65(6)3:

- the ministry collected and/or used records 8-43 on its own behalf as the appellant's employer (part one of the test for section 65(6)3,
- that collection and/or use of the records was in relation to associated meetings, consultations, discussions or communications (part two of the test), and
- records 8-43 relate to the ministry's collective bargaining relationship with its employee and are, therefore, related to employment management or labour relations for the purposes of section 65(6)3 (part three of the test).

[40] Since all the records at issue in this appeal (records 2-43) qualify for a section 65(6) exclusion under the *Act*, the *Act* does not apply to them, so there can be no right

¹⁶ Orders M-830 and PO-2123.

¹⁷ Order MO-1654-I.

¹⁸ Orders M-832 and PO-1769.

¹⁹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

of access to any of these records through the *Act*.

No exceptions to the exclusions apply to any records at issue

[41] Although there are some exceptions to the section 65(6) exclusions found at section 65(7) of the *Act*, these exceptions relate to agreements or expense accounts. Since none of the records at issue in this appeal are agreements or expense accounts, none of the exceptions to the exclusions apply. As a result, there is no right of access to any of the records because either the exclusion at section 65(6)1 or the exclusion at section 65(6)3 of the *Act* applies to each of them.

Records responsive to items 2 and 5 of the request would also be excluded

[42] This appeal also involved the issues of reasonable search regarding items 2 and 5 of the request, which say:

2 - Full and completed Final Report of Fact-Finding Allegation of Harassment & Discrimination investigation conducted by [name] (then a Director at Ministry of Health and Long-Term Care) as part of WDHP filed by [name]. This investigation was made a pre-condition for settlement at Arbitration by [name] representing the Ministry of Health and Long-Term Care.

5 - Last official letter by Ministry of Health and Long-Term Care to [the union], Ontario Grievance Settlement Board and to Cabinet Secretary, relating to the complaint of Wrongful Termination filed by [name].

[43] Given the wording of items 2 and 5, it is clear that these records, if they exist, would also be excluded from the *Act* under section 65(6)3 for the same reasons that I found records 8-43 to be excluded, and that none of the section 65(7) exceptions would apply. As a result, there is no right of access to these records, if they exist, through the *Act*, so I will not consider whether the ministry conducted a reasonable search for them.

[44] For these reasons, I uphold the ministry's decision and dismiss the appeal.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: _____
Marian Sami
Adjudicator

February 24, 2025 _____