



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

ORDER P-1243

Appeal P-9600194

Liquor Control Board of Ontario



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NATURE OF THE APPEAL:

The appellant requested access to records from the Liquor Control Board of Ontario (the LCBO) under the Freedom of Information and Protection of Privacy Act (the Act). The records relate to a sexual harassment investigation undertaken by the LCBO in response to a complaint made by the requester, an employee of the LCBO. The appellant also filed a complaint with the Ontario Human Rights Commission (OHRC) involving the same subject.

The LCBO identified 11 responsive records, consisting of a schedule of persons interviewed during the course of the harassment investigation; correspondence among various staff of the LCBO, the OHRC and the appellant; an unsigned memorandum of settlement between the LCBO and the appellant; and a report and preliminary assessment of the appellant's harassment complaint.

In its decision letter, the LCBO denied access to all responsive records, claiming that they fall within the parameters of paragraphs 1 and 3 of section 65(6) of the Act, and therefore are outside the scope of the Act.

The appellant appealed the LCBO's decision.

This office sent a Notice of Inquiry to the appellant and the LCBO seeking representations on the jurisdictional issue raised by sections 65(6) and (7). Representations were received from LCBO. The appellant did not submit representations, but requested that I refer to the material she had provided to this office during the course of the appeal.

DISCUSSION:

The only issue in this appeal is whether the records fall within the scope of sections 65(6) and (7) of the Act. These provisions 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.
 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.

(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.

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

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 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In Order P-1223, I found that in order for a record to fall within the scope of paragraph 1 of section 65(6), an institution, in this case the LCBO, must establish that:

1. the record was collected, prepared, maintained or used by the LCBO 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 LCBO.

The LCBO has provided documentation to establish that the appellant filed a grievance under the collective agreement between the Ontario Liquor Boards Employees Union (OLBEU) and the LCBO and Liquor Licence Board of Ontario. Article 2 of the collective agreement prohibits discrimination or harassment practices in the workplace, and Article 27 sets out various

grievance procedures available to OLBEU members. Unresolved grievances proceed to a hearing before the Grievance Settlement Board. The appellant's grievance was filed under Article 27.

1. Was the record collected, prepared, maintained or used by the LCBO or on its behalf?

It is clear from the contents of the records that most are authored by employees of the LCBO. One record is authored by an employee of the OHRC and copied to the LCBO, and one is a letter sent by the appellant to an employee of the LCBO.

The LCBO submits that all of the records:

were prepared, maintained or used in relation to a grievance proceeding filed [by the appellant] in July of 1995 and an anticipated human rights proceeding which was filed [by the appellant] in March of 1996.

Having reviewed the records, I agree with the LCBO's position. I find that they were all prepared and/or maintained by the LCBO, and the first requirement of section 65(6)1 has been established.

2. Was this preparation and/or maintenance in relation to proceedings or anticipated proceedings before a court, tribunal or other entity?

In previous orders involving section 65(6) (or its equivalent, section 52(3) in the Municipal Freedom of Information and Protection of Privacy Act), I made the following interpretations of some of the terms used in the section:

I am of the view that a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide the matters at issue would constitute "proceedings" for the purpose of section 65(6)1. (Order P-1223)

In my view, in order to fall within the definition of [the term anticipated proceedings], there must be a reasonable prospect of such proceedings at the time of the preparation of the record - the proceedings must be more than just a vague or theoretical possibility. (Order P-1223)

What distinguishes these bodies as "tribunals" is that they have a statutory mandate to adjudicate and resolve conflicts between parties and render decisions which affect legal rights or obligations. In my view, this is the appropriate definition for the term "tribunal" as it appears in section 52(3)1. (Order M-815)

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. (Order P-1223)

Applying the interpretations to the records at issue in this appeal, I find that:

- The Grievance Settlement Board has a statutory mandate to adjudicate and resolve conflicts between the LCBO and members of OLBEU, and to render decisions which affect the legal rights and obligations of these parties. As such, I find that it is properly characterized as a “tribunal” for the purpose of section 65(6).
- Hearings before the Grievance Settlement Board constitute a dispute and complaint resolution process which has, by law, the power to decide grievances and, as such, properly constitute “proceedings”.
- The records in this appeal were all created following the filing of a grievance by the appellant under the terms of the collective agreement. I find that at the time the records were prepared and/or maintained there was a reasonable prospect that the grievance would proceed to a hearing before the Grievance Settlement Board, and that this constitutes “anticipated proceedings”.
- The records were prepared and/or maintained for the purpose of responding to the appellant’s sexual harassment grievance. As such, they are sufficiently connected to the grievance to properly be characterized as being “in relation to” it.

Accordingly, I find that the answer to question 2, posed above, is “yes”.

3. Do these anticipated proceedings relate to labour relations or to the employment of a person by the LCBO?

In Order P-1223, I adopted the following interpretation of the term “labour relations” in the context of section 65(6)1 of the Act:

I find that “labour relations” for the purposes of section 65(6)1 is properly defined as the collective relationship between an employer and its employees.

In the circumstances of this appeal, the LCBO has established that the appellant, who is a member of OLBEU, filed her grievance under the procedures contained in Article 27 of the collective agreement between the LCBO and OLBEU. The collective agreement contains provisions which outline the role of the Grievance Settlement Board in hearing and resolving grievances filed by members of OLBEU. Therefore, I find that the anticipated proceedings before the Grievance Settlement Board which existed at the time the grievance was filed by the

appellant relate to labour relations, and the third requirement of section 65(6)1 has been established.

In summary, I find that the records at issue in this appeal were prepared and/or maintained by the LCBO in relation to anticipated proceedings before a tribunal, the Grievance Settlement Board, and that these anticipated proceedings relate to labour relations. All of the requirements of section 65(6)1 of the Act have thereby been established by the LCBO. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal, and I find that the records fall within the parameters of section 65(6)1, and therefore are excluded from the scope of the Act.

ORDER:

I uphold the LCBO's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ August 8, 1996