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

ORDER P-1252

Appeal P-9600100

Ontario Institute for Studies In Education

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NATURE OF THE APPEAL:

The appellant submitted three requests for information from the Ontario Institute for Studies in Education (OISE) under the Freedom of Information and Protection of Privacy Act (the Act). These requests are summarized as follows:

1. A six-part request for correspondence and agreements between the appellant and OISE relating to his retirement as an employee of OISE.

2. A six-part request for correspondence dealing with the appellant's retirement and a study grant which was awarded to the appellant, and documents authorizing the removal of the appellant and certain documents from OISE's premises.

3. A four-part request also dealing with the same incident referred to in the final two parts of Request #2 concerning authorization for the removal of the appellant and certain documents from OISE

OISE identified 14 pages of records responsive to Request #1 and the first four parts of Request #2, and denied access to all of them, claiming that they fall within the parameters of paragraphs 1 and 3 of section 65(6) of the Act, and therefore outside the scope of the Act.

With respect to Request #3 and the final two parts of Request #2, OSIE advised the appellant that no responsive records existed.

The appellant appealed OISE's decisions.

This office sent a Notice of Inquiry to the appellant and OISE, seeking representations on the jurisdictional issue raised by sections 65(6) and (7), as well as the reasonableness of the searches undertaken by OISE to locate responsive records.

DISCUSSION:

JURISDICTIONAL ISSUE

Sections 65(6)1 and 3 and 65(7) of the Act 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.

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 its representations, OISE agrees to disclose pages 10-12 of the records to the appellant. Therefore, these pages are no longer at issue in this appeal.

In Order P-1223, I stated that in order for a record to fall within the scope of paragraph 1 of section 65(6) , a Ministry (or in this case, OISE) must establish that:

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

OISE has provided documentation to establish that the appellant has commenced legal proceedings against OISE in the Ontario Court of Justice (General Division). The Statement of Claim filed by the appellant seeks damages on the basis of the breach of his employment contract with OISE.

1. Were the records collected prepared, maintained or used by OISE or on its behalf?

It is clear from the face of the records that pages 1-3, 5-8 and 13-14 were prepared by employees of OISE on its behalf. They all consist of memoranda or letters sent by OISE staff members to the appellant and deal with the appellant's retirement and/or study leave.

Page 4 has two parts. The top part is a memorandum from an OISE employee to the appellant dealing with the appellant's retirement. The bottom part is the appellant's response. Although both parts were clearly prepared by OISE employees, only the top part can accurately be characterized as having been prepared "by OISE or on its behalf"; the bottom part was prepared by the appellant in his personal capacity, not on behalf of OISE.

Page 9 consists of an unsigned draft Memorandum of Agreement between OISE, the appellant, and the appellant's union. It is not clear who prepared this document.

The current Dean of Ontario Institute of Studies in Education, University of Toronto, who was also the former Director of OISE (the Director) provided an affidavit as part of OISE's representations. In it she explains that, because aspects of the appellant's employment were frequently in dispute, OISE created a centralized employment file for him in 1994. According to the affidavit:

> This centralized employment file was and is maintained by the Director's Office and contains copies of all documents collected, prepared, maintained, or used by any of the Offices of O.I.S.E. relating to [the appellant]. Each Office is under instructions to copy any records pertaining to [the appellant] to the Director's Office, where the records are placed in [the appellant's] centralized employment file.

OISE submits that all of the pages of records which remain at issue in this appeal are maintained in the appellant's employment file.

Based on OISE's representations and my review of the records, I find that all pages of the records were prepared and/or maintained by OISE, thereby satisfying the first requirement of section 65(6)1.

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

In discussing the second requirement of section 65(6)1 in Order P-1223, I made the following comments regarding the proper interpretation of the word "proceedings":

> I am of the view that the context surrounding the appearance of the term "proceedings" in the Act has an important bearing on its meaning. This is

> particularly the case because, as noted in the definition just cited [from the Canadian Law Dictionary], it means different things in different circumstances.
>
> Given the references to proceedings "before a court, tribunal or other entity", 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 purposes of section 65(6)1.

OISE submits, and I agree, that the lawsuit initiated by the appellant against OISE constitutes "proceedings ... before a court" as those terms are used in section 65(6)1.

OISE acknowledges in its representations that the records at issue in this appeal were not initially prepared "in relation to" the appellant's current court proceedings, but goes on to state that they are currently maintained by OISE in relation to these proceedings. OISE submits that:

> ... in order for a record to be maintained "in relation to" a proceeding, it is not necessary to establish that the sole purpose nor even the primary purpose or initial purpose for maintaining the record is related to the proceeding. It is sufficient to demonstrate that, at some point in time, a record became related to (or substantially connected to) a proceeding (or an anticipated proceeding).

I agree with OISE's position.

In Order P-1223, I made the following statement regarding the proper interpretation of the phrase "in relation to":

> 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.

OISE submits that the records are substantially connected to the subject matter of the legal proceedings initiated by the appellant. The appellant's Statement of Claim includes allegations concerning the improper calculation of retirement entitlements and the relationship between his retirement date and the study leave. Having reviewed the records, I find that they contain information which is substantially connected to the appellant's claim against OISE.

Therefore, I find that the maintenance of the records is in relation to proceedings before a court, thereby satisfying the second requirement of section 65(6)1.

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

Order P-1223 defines "labour relations" as the "collective relationship between an employer and its employees."

OISE submits that:

> In this case, [the appellant's] action against OISE involves damages flowing from the alleged breach of the collective agreement between OISE and [the appellant's] union, OISEFA. Specifically, it involves articles 9 (study leave), and 26 (flexible retirement).
>
> While [the appellant's] legal proceeding has not been commenced pursuant to the dispute resolution mechanism established under the collective agreement (Article 17 - Grievance and Arbitration Process) his claim is based upon his alleged rights under the collective agreement. Because the claim is based upon damages flowing from an alleged breach of the terms of the collective agreement, OISE submits that the proceeding is intimately "related to" labour relations.

In the circumstances of this appeal, I find that the proceedings initiated by the appellant are sufficiently connected to the rights and obligations outlined in the collective agreement between OISE and the appellant's union to qualify as "labour relations" activities. Therefore, the third requirement of section 65(6)1 has been established.

In summary, I find that pages 1-9 and 13-14 were maintained by OISE in relation to proceedings before a court, and that these proceedings relate to labour relations. All of the requirements of section 65(6)1 of the Act have thereby been established by OISE. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal, and I find that these pages of records fall within the parameters of this section and therefore are excluded from the scope of the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the institution (in this case OISE) indicates that further records do not exist, it is my responsibility to ensure that OISE has made a reasonable search to identify any records which are responsive to the request. The Act does not require OISE to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, OISE must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

As noted earlier, OISE maintains a centralized employment file containing all documents relating to the appellant. OISE submits that the practice of having its various offices copy any documents pertaining to the appellant to this file provides assurance that all relevant records would be located in this file. The affidavit provided in support of OISE's representations outlines that the Director conducted a five-hour search of this file to locate all responsive records. The 14 pages of records were identified as a result of this search.

Based on OISE's representations and accompanying affidavit, I am satisfied that the searches for records responsive to Request #1 and the first four parts of Request #2 were reasonable in the circumstances of this appeal.

Parts five and six of Request #2 and all parts of Request #3 do not relate directly to the retirement arrangements and study leave which form the subject matter of the appellant's lawsuit. Rather, they concern the appellant's physical departure from OISE and the subsequent transfer of certain personal property from his office. In an attempt to assist OISE in responding to the reasonable search issue, the Notice of Inquiry provided to OISE described the scope of these parts of the requests as follows:

> Request #2, paras. 5 and 6 as well as Request #3: The appellant states that on or around June 8, 1995 he was packing up to leave OISE. According to the appellant, he was taken by several individuals, including [two named individuals] as well as two hired security guards to the Director's office and then escorted off the premises. The appellant contends that there must be records, such as financial documents, which show the hiring of the outside security/enforcement officers, and which show their authorization to carry out this function. The appellant also
>
> states that part of Request #3 refers to the shipment of material to him in the U.S. In order to transport the material over the border, the appellant states that copies of customs documents and a manifest prepared by [on of the named individuals] should be at OISE.

The only submissions included in OISE's representations which respond to this portion of the Notice of Inquiry are the following:

> In addition, [the appellant] claims, in the Notice of Inquiry, that O.I.S.E. has not responded to paragraph five and six of Request #2 or to any of the paragraphs of Request #3. Specifically, he claims that:
>
> (a) "there must be records, such as financial documents, which show the hiring of the outside security/enforcement officers." Any such documents, if they exist, are not in the least responsive to any of [the appellant's] Requests, dated January 21, 1996.
>
> (b) there must be documents "which show their authorization to carry out this function." No such documents exist.
>
> (c) "copies of customs documents and a manifest prepared by [a named individual] should be at O.I.S.E. Any such documents, if they exist, are not in the least responsive to any of [the appellant's] Requests, dated January 21, 1996.

In my view, the steps taken by OISE in responding to Request #3 and the final two parts of Request #2 are not sufficient to discharge its responsibility to make reasonable efforts to identify and locate responsive records. I find that the description provided in the Notice of Inquiry, together with the actual wording of these parts of the two requests, provide a reasonable basis for

concluding that responsive records might exist. I also find that any such records, if they exist, would be responsive to the appellant's requests.

In normal circumstances, I would order OISE to conduct a further search for records responsive to Request #3 and the final two parts of Request #2, and to issue a new decision letter to the appellant within a prescribed time frame. However, I have determined that this process would not be appropriate in the circumstances of this appeal, for the following reasons.

The Ontario Institute for Studies in Education Act, which established OISE, was repealed by the Ontario Institute for Studies in Education Repeal Act, 1996 (the OISE Repeal Act), which came into force on July 1, 1996.

The OISE Repeal Act provides that all property rights and powers of the OISE's Board of Governors (the Board) vest in the University of Toronto (section 2(1)), and that OISE is integrated with the Faculty of Education, University of Toronto, as an academic unit of the university under the control and management of the university (section 4(1)). The statute also provides that the Board is dissolved as of July 1, 1996 (section 5).

The University of Toronto, like all other universities in the province, is not covered by the Act. Because OISE is now a part of the University of Toronto, it too is removed from Ontario's access and privacy scheme. Although Regulation 460 under the Act continues to include OISE as a listed institution, this will no doubt be changed at the next available opportunity. In my view, for all practical purposes, OISE ceased to be covered by the Act when the OISE Repeal Act came into force on July 1, 1996. The "head" of the institution, who has statutory responsibility to adhere to the provisions of the Act was the Chair of the Board. The Board, as well as the OISE corporation was dissolved by the OISE Repeal Act.

In this situation, it is clear that any responsive records which may exist are now in the custody of the University of Toronto, an organization which is not bound by the Act. Because section 2(1) of the OISE Repeal Act vests all of OISE's property rights in the University of Toronto, it is clear that such records are also under the control of the University. In order to come within the scope of the Act, a record must be in the custody or under the control **of an institution,** and these records, if they exist, no longer meet this requirement.

Consequently, in my view, no useful purpose would be served in ordering OISE to conduct further searches and to issue a new decision letter, and I have decided not to include any such provisions in this order.

ORDER:

I uphold OISE's decision not to disclose pages 1-9 and 13-14 to the appellant.

August 30, 1996

Tom Mitchinson
Assistant Commissioner