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

ORDER P-1253

Appeal P-9600111

Ministry of Agriculture, Food and Rural Affairs

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NATURE OF THE APPEAL:

On October 26, 1995, the appellant made a request to the Ministry of Agriculture, Food and Rural Affairs (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to her personnel file. The appellant is a former temporary employee of the Ministry.

The Ministry was unable to locate this file, and provided the appellant with a decision letter stating that access could not be provided for that reason. The appellant appealed this decision in December of 1995. This appeal was resolved when the Ministry provided the appellant with an affidavit setting out details of the various searches which it undertook to locate the missing personnel file.

During the course of mediating this first appeal, it became evident that the appellant wanted access to records relating to a sexual harassment complaint she had filed with the Ministry. The Ministry informed the appellant that records relating to these types of complaint investigations were not kept in employee personnel files, and advised her to submit a new request. The appellant did so, and her second request was sent to the Ministry on January 30, 1996.

The Ministry located 1,289 pages of responsive records, and denied access to all of them, claiming that they fall within the parameters of paragraphs 1, 2 and 3 of section 65(6) of the Act, and therefore outside the scope of the Act.

The appellant appealed the Ministry's decision, and this second appeal is the subject of my order.

This office sent a Notice of Inquiry to the appellant and the Ministry seeking representations on the jurisdictional issue raised by sections 65(6) and (7). Representations were received from both parties.

PRELIMINARY ISSUE:

Representations were provided by the appellant's husband on her behalf. He states that in October 1995 when his wife submitted her first request, he informed Ministry staff that his wife wanted access to her sexual harassment complaint file, and was told: "All [the appellant] has to do is write a letter asking for a copy of her Personnel File which would contain the sexual harassment information, which would give [the appellant] what she is looking for".

This issue is important for timing reasons. The amendments to the Act creating the current sections 65(6) and (7) were part of what is known as "Bill 7", which was passed by the Legislature in the fall of 1995 and came into force on November 10, 1995. As a result, if the first request for the "personnel file" is properly interpreted to include the sexual harassment investigation records, it would be subject to the law in effect prior to the enactment of Bill 7. On the other hand, if the request for sexual harassment records is properly interpreted to be a new request, filed in January 1996, it would be subject to the new provisions creating sections 65(6) and (7).

In responding to this issue its representations, the Ministry makes the following statement:

> On October 31, 1995, the Ministry received a request from [the appellant] for "a copy of my personnel file." The request was very clear and in subsequent phone conversations with the requester there was no suggestion that she was seeking a record other than her personnel file. As well, there was no reason for the Ministry to suspect that the request was ambiguous. Circumstances indicated the opposite: the requester was a former employee familiar with Ministry records; the requester had made a previous request for records and the request was clearly stated; and, when the Ministry was contacted by a Union official acting on [the appellant's] behalf, the issue of investigation records was never raised. There was no indication that [the appellant] was seeking anything other than the records she specifically stated in her request.

Sections 48 and 24(2) of the Act outlines procedures for making requests, and establish responsibilities of both requesters and institutions. These sections were amended in February 1996 by the Savings and Restructuring Act (Bill 26). The appropriate provisions of sections 48 and 24(2) for the purpose of this discussion are the sections which were in force at the time of the appellant's first request and appeal, both of which predate Bill 26. These sections read as follows:

> 48(1) An individual seeking access to personal information about the individual shall make a request therefor in writing to the institution that the individual believes has custody or control of the personal information and shall identify the personal information bank or otherwise identify the location of the personal information.
>
> 48(2) Subsections 10(2) and 24(2) and sections 25, 26, 27, 28 and 29 apply with necessary modifications to a request made under subsection (1).
>
> 24(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

It is clear that the appellant and the Ministry have different recollections of what took place at the time of the first request. It is not possible to fully reconcile these different positions. In my view, my responsibility is to determine, based on the evidence provided by both parties, whether the various duties and responsibilities outlined in sections 48 and 24(2) have been properly discharged.

It is clear from a number of past orders issued by this office, that if a request is clear and unambiguous on its face, there is no need for an institution to seek clarification from the requester (Orders 33, P-287 and P-743). In my view, the appellant's first request is clear and unambiguous, and it was reasonable for the Ministry to interpret it as it did. According to the Ministry, it was only during mediation of this first appeal that the issue of sexual harassment investigation records was raised, and the appellant agreed at that point to close the first appeal and submit a new request for these specific records.

I find that the Ministry satisfied it's obligations under sections 48 and 24(2) of the Act in responding to the appellant's first request, and that the request was properly interpreted to include only those records located in the appellant's personnel file.

RECORDS:

The records at issue in this appeal consist of 1,289 pages of records concerning the Ministry's investigation into the appellant's sexual harassment complaint. They include the investigation report and summary; internal correspondence between various Ministry officials; interview reports and witness statements; materials submitted by the appellant and the respondent in the complaint; notes made by the investigator during the course of the investigation; and other similar records, all of which deal with various aspects of the complaint investigation.

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.

The Ministry has provided documentation to establish that the appellant filed a grievance under the collective agreement (the collective agreement) between the Ontario Public Service Employees Union (OPSEU) and the government. The appellant was a member of OPSEU when the grievance was filed. The collective agreement was negotiated under the terms of the Crown Employees Collective Bargaining Act (CECBA). Although the grievance initially related to allegations of unjust dismissal, it was later amended to include sexual harassment.

Article 27 of the collective agreement sets out various grievance procedures for OPSEU members, one of which (Article 27.10.1) deals specifically with sexual harassment. The appellant's grievance was filed under Article 27, and related to management's response to an alleged harassment situation.

Section 65(6)1

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

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

The Ministry submits that all of the records in the investigation file were collected, prepared, maintained and used by the Ministry to carry out the investigation and then to respond to the grievance and anticipated grievance hearing before the Grievance Settlement Board. Based on

my review of the records, I agree with the Ministry's position, and the first requirement of section 65(6)1 has been established.

As far as the second and third requirements are concerned, I feel that the interpretations I made in previous orders are equally applicable in this appeal:

> A number of tribunals have been established by statute as part of the administrative justice system in Ontario. The Ontario Labour Relations Board, the Workers' Compensation Board and the Environmental Assessment Board are some of the more well-known examples, but there are dozens of other bodies performing similar functions outside the regular court system. 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 [of the Municipal Freedom of Information and Protection of Privacy Act, which is the equivalent of section 65(6)1 in the provincial Act]. (Order M-815)
>
> 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. (Order P-1223)
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> In my view, to fall within the definition of this 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)
>
> 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)
>
> I find that "labour relations" for the purposes of section 65(6)1 is properly defined as the collection relationship between an employer and its employees. (Order P-1223)

Applying these interpretations to the particular circumstances of this appeal, I make the following findings:

- The Grievance Settlement Board is established by statute (CECBA) as an administrative body with a statutory mandate to resolve conflicts between parties and to render decision which affect legal rights or obligations. Therefore it is properly characterized as a "tribunal" for the purposes 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".

- At the time the records were prepared there was a reasonable prospect that the grievance would proceed to a hearing before the Grievance Settlement Board, and 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.

- The grievance filed was filed by the appellant pursuant to the procedures contained in the collective agreement between OPSEU and the government, and therefore relates to "labour relations".

All of the requirements of section 65(6)1 have thereby been established by the Ministry. 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 Ministry's decision.

Original signed by: September 3, 1996
Tom Mitchinson
Assistant Commissioner