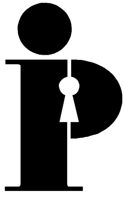
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1260

Appeal P-9600227

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The appellant is an employee of the Ministry of the Solicitor General and Correctional Services (the Ministry). She made complaints about the conduct of her supervisor, who she believed was undermining her professional credibility and acting in a manner which constituted harassment. In response to these complaints, the Ministry appointed an investigator to review the situation and submit a report to the Ministry. This investigation was completed, and the Ministry provided the appellant with a letter outlining the recommendations of the investigator. The Ministry also offered the appellant the opportunity to meet with the investigator to discuss her concerns about certain elements of the investigation.

In response to one of the recommendations included in the investigation report, the Ministry conducted a Health Care review of the correctional facility where the appellant works. The results of this review were provided to all relevant staff at the facility, who were given an opportunity to provide their comments. The Ministry provided the appellant with a letter stating the outcome of this review.

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) for records relating to the investigation and subsequent review. She specifically wanted to know what investigative measures were taken in each case, and the findings and recommendations of the two investigators.

The Ministry identified 66 pages of responsive records. They consist of a chronological summary of events surrounding the investigation and the review, the investigation report, memoranda from the investigator and Ministry staff regarding the investigation, the review report and related memoranda, and a summary of the staff comments received in response to the review.

The Ministry denied access to all responsive records, claiming that they fall within the parameters of section 65(6) of the Act, and therefore outside the scope of the Act.

The appellant appealed the Ministry's decision. 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.

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:

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

The appellant states that because the investigation was carried out in response to her complaint, she should have access to all of the information which relates to it. Although the appellant does not specifically say so, she appears to believe that she should be given access to the records because they relate to matters in which she has a personal interest and include her personal information.

In Order P-1242, I made the following comments on the effect of section 65(6) when a record might contain the appellant's personal information.

> The wording of section 65(6) does not distinguish records on the basis of whether they contain personal information. In fact, the types of records described in both sections 65(6) and (7) would by their very nature frequently contain personal information.

The appellant also states that the matter does not involve labour relations because she did not choose to involve the union in the complaint. I will address the issue of "labour relations" in my discussion of section 65(6).

Section 65(6)3

In Order P-1242, I found that in order to fall within the scope of paragraph 3 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 meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Ministry has an interest.

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

The Ministry submits that the records were:

> prepared, maintained and used by the Ministry as a result of and for the purpose of responding to the appellant's allegations of professional and personal discreditation and workplace harassment by another Ministry employee.

Having reviewed the records, I find that they were clearly prepared, maintained and/or used by employees of the Ministry on behalf of the Ministry. Therefore, the first requirement of section 65(6)3 has been established.

2. Was the preparation, maintenance and/or usage in relation to meetings, consultations, discussions or communications?

The Ministry states that the records:

- document various meetings, discussions and interviews which took place in the context of the investigation and the review; and
- contain comments in response to the investigation and the appellant's complaint made by the individuals who conducted the investigation and the review, and other Ministry staff

In Order P-1223, I made the following comments regarding the interpretation of the phrase "in relation to" in section 65(6):

> 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. (emphasis added)

Having reviewed the records, I find that they were all prepared, maintained and/or used in the context of meetings, consultations, discussions and/or communications, and that these meetings, consultations, discussions and/or communications were for the purpose of, as a result of, or substantially connected to the investigation and/or the review. Therefore, the second requirement of section 65(5)3 has also been established.

3. Are these meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest?

Section 65(6)3 uses the phrase "about labour relations **or** employment-related matters". In Order P-1223, I stated that:

> . . . [I]n my view, the legislature must have intended the terms "labour relations" and "employment" to have separate and distinct meanings and application. My view is supported by the presumption of consistent expression in statutory interpretation, one of whose tenets is that "it is possible to infer an intended difference in meaning from the use of different words or a different form of expression" (<u>Dreidger on the Construction of Statutes</u>, 3rd ed., p.164).

I went on in that same order to find that "labour relations" for the purposes of section 65(6) is properly defined as "the collective relationship between an employer and its employees".

In her letter of appeal, the appellant states: "This is not a Labour Relations issue; the Union is not involved." She repeats this view in her representations.

The Ministry submits that the meetings, consultations, discussions or communications reflected in the records were about employment-related matters, specifically the appellant's complaint about actions of her workplace supervisor. The Ministry does not claim that these meetings, consultations, discussions or communications were about labour relations.

Although the appellant is a member of a union, her complaint was not made under the terms of any collective agreement with the government. As such, I agree that all of the records at issue in this appeal are not properly characterized as being about "labour relations" as I have defined the term.

However, as stated above, section 65(6)3 is not restricted to labour relations matters. It also deals with meetings, consultations, discussions or communications about employment-related matters. There is no dispute that the appellant is an employee of the Ministry, and was so at all relevant times. It is clear that the investigation was undertaken in response to complaints about treatment she received from her supervisor. In my view, this brings the records squarely within the employment context. Similarly, the review flowed directly from this investigation and was

an attempt to address employment-related concerns identified in the earlier investigation, and I find that this too was an employment-related matter.

I will now consider whether these two "employment-related matters" are ones "in which the Ministry has an interest".

In Order P-1242, I reviewed a number of legal sources regarding the meaning of this term, as well as several court decisions which considered its application in the context of civil proceedings. I concluded by stating:

> Taken together, these [previously discussed] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

The records at issue in Order P-1242 were prepared, collected, maintained and/or used by the Ministry of Community and Social Services in the context of a harassment investigation conducted under the government's Workplace Discrimination and Harassment Prevention policy (the WDHP). In considering the third requirement of section 65(6)3 in that order, I made the following findings:

> As indicated by a number of board of inquiry cases under the [Ontario Human Rights] Code, where an employer is aware of a harassment situation and does not take adequate steps to remedy or prevent it, if the harassment allegation is sustained, the employer has "indirectly" breached Part I of the Code within the meaning of section 9, and may be found liable under section 41(1) of the Code.
>
> . . .
>
> On the basis of these board of inquiry decisions, I conclude that if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the [Ontario Human Rights] Code, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as matter "in which the institution has an interest".

Although the harassment investigation and subsequent review in the appeal before me were not conducted under the WDHP policy, the investigation and the review both stemmed from workplace harassment allegations made by the appellant. In my view, the reasoning I followed in Order P-1242 is equally applicable to a harassment investigation outside the WDHP process, and I find that the investigation and the review were both employment-related matters in which the Ministry has an interest.

Therefore, the third requirement of section 65(6)3 has also been established.

In summary, I find that the records at issue in this appeal were prepared, maintained and/or used by or on behalf of the Ministry, in relation to meetings, discussions and consultations about

employment-related matters in which the Ministry has an interest. All of the requirements of section 65(6)3 of the Act 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 this section, and therefore are excluded from the scope of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: September 13, 1996
Tom Mitchinson
Assistant Commissioner