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

ORDER P-1255

Appeal P-9600071

Ministry of Transportation

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NATURE OF THE APPEAL:

The appellant made a request to the Ministry of Transportation (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to human resource, investigation and grievance files concerning himself, held by a number of Ministry employees identified in the request. The appellant, an employee of the Ministry, has been involved in a number of disputes with the Ministry, beginning in 1987 and continuing to the present time.

The Ministry identified 89 responsive records (consisting of 442 pages). They are comprised of memoranda, letters, draft and final reports, handwritten notes, and other similar documents relating to a grievance initiated by the appellant under the terms of the collective agreement between the government and the Ontario Public Service Employees Union (OPSEU) (the grievance records); and similar types of records relating to a refusal to work by the appellant under the Occupational Health and Safety Act (the OHSA) (the OHSA records).

The Ministry denied access to all of these 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.

PRELIMINARY ISSUE

According to the Ministry' representations:

> In the course of the mediation process, the Ministry offered to make all of the records which had been identified as of that date as being responsive to the request (W1 to W20, G1 to G5) freely available to the requester by way of a "Routine Disclosure", outside the formal access process prescribed by the Act, a disclosure advocated in "IPC Perspectives", Volume 5, Issue 2.
>
> However, the Requester refused to accept such a resolution of his request for documents, insisting upon continuation of the formal processes prescribed by the Act, including those for appeals. It appears that the Requester's purpose is to test the effect of Bill 7 on the application of the Act on certain records rather than to obtain copies of those records. Many of them were originated by him, copies of which he presumably retained, and others were supplied to him by the Ministry when they were created. Still others are public documents such as decisions of the Grievance Settlement Board.
>
> It should also be recognized that all of the records in the occupational health and safety file(s) have been and are accessible to the requester through his Joint Health and Safety Committee, from the local Occupational Health and Safety Office and from his manager pursuant to the requirements specified in the Occupational Health and Safety Act (see sections 2(2), 18(d), 25(1), 25(m), etc.).

> I will first consider whether there is any relevance to the fact that many of the records at issue in this appeal were authored by the appellant, previously provided to the appellant in other contexts, or are public documents readily available to the appellant and others.

In my view, on a plain reading of the words, there is nothing in section 65(6) or (7) to support the view that records whose contents are already known to an appellant would be exceptions to the exclusions introduced by these new provisions. However, it is necessary to explore whether there are any principles of statutory interpretation which might produce such a result.

In Order M-444, Inquiry Officer John Higgins found that applying the section 14(3)(b) presumption against the disclosure of personal information in the Municipal Freedom of Information and Protection of Privacy Act and ordering non-disclosure of parts of a record which had actually been authored by the appellant, and another which was a written transcript of a statement he gave, would be an absurd result, and therefore an error in statutory interpretation. The Inquiry Officer commented on this issue as follows:

> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the [Municipal] Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

Inquiry Officer Higgins took a similar approach to the presumption in section 21(3)(d) of the Act in Order P-1014, respecting disclosure of personal information of individuals other than the requester, which would clearly have been well known to him. He stated:

> There is information in the records which would identify what are now previous positions of several individuals. However, this information relates to individuals who worked in the same branch as the appellant at the time of the investigation, and who have moved on to other jobs. While this might fall under this presumption in some cases, it would not be reasonable to apply the presumption here because the appellant was well aware of the job titles of the other individuals working in his branch. Similar considerations apply to the starting and/or termination dates of staff in the branch during the appellant's tenure there. I will not apply this presumption to the job titles or the starting and termination dates of these individuals.

It might appear that a similar approach could be applied, in appropriate circumstances, when considering sections 65(6) and (7) of the Act. However, in my view, there is a significant difference in context which dictates the opposite result when considering these sections. In Orders M-444 and P-1014, there was no question that the Inquiry Officer was dealing with records which **were** subject to the Act. In that situation, the Act presumes a right of access

unless an exemption applies, or the request is frivolous or vexatious, as set out in sections 10(1) and 47(1). Within that statutory context, non-disclosure of the particular information Inquiry Officer Higgins was considering would, indeed, have been absurd and contrary to the legislature's apparent intention, looking at the Act as a whole.

I feel that the situation is different where non-disclosure results from an exclusion of records from the whole statutory access and privacy scheme. In my view, when a record is, on its face, outside the Act because of the application of section 65(6), there is no "presumptive" right of access against which to measure a result of non-disclosure and declare it absurd or unreasonable.

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.

Having reviewed the records and the Ministry's representations, it is clear that the appellant filed a grievance under the terms of the collective agreement between OPSEU and the government. This grievance was the subject of a hearing before the Grievance Settlement Board, which issued a decision in January 1992. It is also clear that the appellant refused to work, pursuant to the OHSA, which triggered an investigation under that statute.

GRIEVANCE RECORDS

The Ministry submits that all of the grievance records were prepared, maintained and/or used in the context of the various stages of the grievance process.

The appellant submits that many of the requested records relate to correspondence generated after labour issues were resolved and are not part of any labour issue. The appellant contends that correspondence between individuals who were not connected to any labour issues represent the opinions of these non-participating parties and are not relevant to any labour issues.

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.

On a plain reading of section 65(6)1, there is nothing to support the appellant's suggestion that the completion of a "proceeding" would, in and of itself, terminate the application of this section. The qualifying verbs used in the introductory wording of section 65(6) ("collected, prepared,

maintained or used") are all in the past tense and, in my view, it must be assumed that the legislature did not intend to re-include proceeding-related records in the Act once a proceeding is completed.

Based on my review of these records, I agree with the Ministry's position that the grievance records were prepared, maintained and/or used by or on behalf of the Ministry, 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 interpretations I made in Order P-1223 are equally applicable in this appeal. Applying these interpretations to the grievance records at issue in 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 decisions 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" for the purposes of section 65(6)1.

- The grievance records were prepared, maintained and/or used for the purpose of responding to the appellant's grievance. As such, they are sufficiently connected to the grievance to properly be characterized as being "in relation to" it.

- The grievance 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 grievance records fall within the parameters of section 65(6)1, and therefore are excluded from the scope of the Act.

OHSA RECORDS

The Ministry submits that:

> Concerns shared by the Ministry/employer and its enforcement officer employees, including the Requester as an active participant, related to their safety in the work place was reflected in meetings, consultations, discussions and communications about labour relations and employment-related matters in which the Ministry had and continues to have a keen interest . . .

The appellant's representations outline his views on how the Ministry has approached safety issues in the work place, but do not specifically address the requirements of section 65(6) of the Act.

Section 65(6)3

In Order P-1242, I stated that in order for a record 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 all of the OHSA records:

> . . . pertain to [the appellant's] concern with his employment, working conditions and personal safety as expressed to his employer, the Ministry, dating from 1987 and continuing to the present time. The Requester continues to pursue these matters and has indicated his intention to file a fresh grievance, in the hearing of which the records herein are expected to be relevant.

Having reviewed the OHSA records, I find that all of them, with the exception of records W12, W16 and W20, were prepared by various Ministry employees or Ministry of Labour employees on the Ministry's behalf, in response to the appellant's refusal to work. All of these records have also been maintained by the Ministry in the same context.

I find that the remaining three records, which consist of training materials for "Vehicle Stops" (W12), a workplace hazard analysis and health and safety plan (W16), and a copy of the January 1992 Grievance Settlement Board decision involving the appellant, were similarly maintained by the Ministry in the context of the appellant's refusal to work.

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

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

The Ministry states that, in response to the appellant's refusal to work, an investigation was undertaken by an inspector appointed by the Ministry of Labour. This investigation was

pursuant to section 43 of the OHSA, which reads, in part, as follows:

> (7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).
>
> (8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the workplace or part thereof it likely to endanger the worker or another person.
>
> (9) The inspector shall give his or her decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

In the context of this investigation, an ad hoc committee was established by the Ministry, with the appellant as a member, to investigate safety issues associated with the Ministry's "Vehicle Stop" process. This committee produced a draft report, which was presented to the appellant both as a member of the committee and as the instigator of the investigation.

In the context of a refusal to work situation, it is clear that the records are prepared and/or maintained in the context of meetings, consultations, discussions and/or communications which together comprise the investigation stemming from the refusal to work. The question is whether this preparation and/or maintenance was **in relation to** these activities.

In Order P-1223, I stated:

> 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 OHSA records, I find that they were all prepared and/or maintained for the purpose of or as a result of the meetings, consultations, discussions and/or communications which comprised the investigation stemming from the appellant's refusal to work. I also find that all of the records are substantially connected to these activities, and therefore the preparation and/or maintenance was "in relation to" them.

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

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

I am satisfied that the appellant was an employee of the Ministry at the time of his refusal to work. I also believe it is self-evident that the investigation of the appellant's refusal to work pursuant to the OHSA is an employment-related matter. Therefore, in the circumstances of this appeal, I am satisfied that the meetings, consultations, discussions and/or communications which comprised the investigation were "about" an employment-related matter.

In my view, the only real issue under the third requirement is whether or not the investigation stemming from a refusal to work is a matter 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 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.

In this case, the appellant's refusal to work resulted from concerns about the adequacy of the training and equipment provided by the Ministry as his employer. Sections 25(2)(a) and (h) of the OHSA impose certain requirements on employers relating to worker safety. They state:

> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker.

Under section 57(1) of the OHSA, an inspector appointed under section 43 has the power to order an employer to comply with the requirements of the OHSA. Section 57(1) states:

> Where an inspector finds that a provision of this Act or the regulations is being contravened, the inspector may order, orally or in writing, the owner, constructor, licensee, employer, or person whom he or she believes to be in charge of a workplace or the person whom the inspector believes to be the contravener to comply with the provision and may require the order to be carried out forthwith or within such period of time as the inspector specifies.

The Ministry, as employer, is also subject to the penalty provisions of section 66 of the OHSA, which states:

> (1) Every person who contravenes or fails to comply with,
>
> (a) a provision of this Act or the regulations;
>
> (b) an order or requirement of an inspector or a Director; or
>
> (c) an order of the Minister,

> is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than twelve months, or to both.
>
> (2) If a corporation is convicted of an offence under subsection (1), the maximum fine that may be imposed upon the corporation is $500,000 and not as provided therein.
>
> . . .
>
> (4) In a prosecution of an offence under any provision of this Act, any act or neglect on the part of any manager, agent, representative, officer, director or supervisor of the accused, whether a corporation or not, shall be the act or neglect of the accused.

These provisions, and the rest of the OHSA, apply to the Crown by virtue of section 2(1) of that statute, which states:

> This Act binds the Crown and applies to an employee in the service of the Crown or an agency, board, commission or corporation that exercises any function assigned or delegated to it by the Crown.

In my view, these various sections of the OHSA, taken together, indicate that the refusal to work and the resulting investigation relates to the Ministry's obligations under that statute. If the investigator had found that the Ministry did not comply, he could have made an order against the Ministry under section 57(1). Also, if the Ministry contravened or failed to comply with the OHSA, the penalty provisions of section 66 would apply. Therefore, in my view, the "matter" (i.e. the investigation) had the capacity to affect the Ministry's legal obligations, and I find that it is a matter in which the Ministry "has an interest" within the meaning of section 65(6)3.

Accordingly, the third requirement of section 65(6)3 has also been established in this case.

All of the requirements of section 65(6)3 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 OHSA records fall within the parameters of section 65(6)3, and therefore are excluded from the scope of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: September 6, 1996
Tom Mitchinson
Assistant Commissioner