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

ORDER P-1258

Appeals P-9600027 and P-9600028

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant made two requests to the Ministry of the Attorney General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to separate job competitions (Request 1 and 2). The appellant was an unsuccessful candidate for both positions. At the same time, the appellant requested access to all records relating to an investigation into her allegations of harassment, favouritism and improper management practices relating to the two job competitions and other employment-related matters (Request 3). This investigation was conducted by the Ministry's Workplace Discrimination and Harassment Prevention office.

This order will deal with appeals stemming from Requests 1 and 2 only.

In response to Requests 1 and 2, the Ministry identified a number of responsive records in each job competition file. They consist of the job postings, position specifications, selection criteria and rating sheets, interview questions, marking sheets, interview schedules, applications, resumes and interview score sheets for the appellant and other candidates, reference letters for the appellant, and letters to the successful and unsuccessful candidates.

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:

In her representations, the appellant states that her dealings with the Ministry regarding the subject matter of her three requests began in August 1995. She outlines her recollection of a series of discussions which took place with a senior Ministry official between August 1, 1995 and the date she received the response to her formal requests under the Act on November 28, 1995. The appellant submitted these requests on November 27, 1995.

This issue is important for timing purposes. 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 appellant made her requests prior to November 10, 1995, they would be subject to the law in effect prior to the enactment of Bill 7. On the other hand, if the requests were not made until after this date, they would be subject to the new provisions creating sections 65(6) and (7).

Having reviewed the appellant's representations, I find that she has not provided any evidence to suggest that the records identified by the Ministry as responsive to Requests 1 and 2 were the subject of discussions prior to the November 27, 1995 formal access request. In my view, the

appellant's position on the timing issue relates only to records responsive to Request 3, which are not the subject of this order.

I find that Requests 1 and 2 were made on November 27, 1995, after Bill 7 came into force. Therefore, these requests and subsequent appeals are subject to sections 65(6) and (7) of the Act.

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.

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.

Requirements 1 and 2

In my view, it is clear that job competition records are either collected, prepared, maintained or used by the employer, and in many cases, all four. Therefore, Requirement 1 has been established.

I also find that in the context of a job recruitment process:

- an employment interview is a "meeting";
- deliberations about the results of a competition among the panel are "meetings, discussions or communications", and sometimes all three; and
- applications, reference letters and letters to the applicants are "communications".

Moreover, the records generated with respect to these activities would either be for the purpose of, as a result of, or substantially connected to these meetings, discussions or communications, and therefore properly characterized as being "in relation to" them (Order P-1242). Therefore, Requirement 2 has also been established

Requirement 3

The Ministry submits that the meetings, discussions and communications are about employment-related matters.

I am satisfied that the appellant was an employee of the Ministry at the time of the two competitions. I also believe it is self-evident that a job competition is an employment-related

matter. The only real issue is whether or not a job competition 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 [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.

It would appear that employment law, as it applies generally (including the Employment Standards Act), does not impose any requirement of fairness with respect to the selection of candidates in competitions, nor to the documentation required in connection with job competitions. I also reviewed the provisions of the Public Service Act and its regulations, and I was unable to find any provisions imposing special requirements for job competitions relating to appointments to the Ontario Public Service.

However, I must also consider whether there are any external requirements which may bring job competition activities within the realm of "interest" as I have defined it in Order P-1242.

The Ontario Human Rights Code (the Code) applies to the Ministry, and includes the following sections which are relevant to the issue of the institution's legal obligations and the possible effects of failing to observe them:

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.
>
> 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. [Note: section 5(1) is in "this Part" - i.e. Part I of the Code.]
>
> 41(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or

> recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

From these sections, it is clear that, if an employer engages in discrimination in selecting an employee in a job competition, the employer has committed a direct breach of section 5(1) of the Code, and, as a party to a Board of Inquiry proceedings, could be liable in damages. Thus, in my view, it can properly be said, that the job competition process involves legal obligations which the employer must meet.

I discussed other provisions of the Code in Order P-1242, which dealt with whether the Ministry of Community and Social Services "had an interest" in records prepared or used in the context of an investigation conducted under the Ontario government's Workplace Discrimination and Harassment Prevention policy (the WDHP). In that case I concluded that:

> ... if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the 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".

Similarly, I find that if the employer conducts a proper job competition and avoids discriminatory practices, it would avoid liability under the Code, and therefore, on this basis, the competition is properly characterized as a matter "in which the institution has an interest".

For these reasons, I find that job competitions are matters in which the Ministry "has an interest", and Requirement 3 is met.

In summary, I find that the records at issue in these appeals were collected, prepared, maintained and/or used by 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 these appeals, and I find that the 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 decisions.

Original signed by: September 10, 1996
Tom Mitchinson

Assistant Commissioner