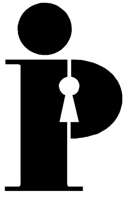

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1223

Appeal P-9600117

Ministry of Agriculture, Food and Rural Affairs

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NATURE OF THE APPEAL:

The Ministry of Agriculture, Food and Rural Affairs (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a Workplace Discrimination and Harassment Prevention Investigation Report (the WDHP Report) which had been prepared by the Ministry in response to a complaint made by the requester. The requester is a former employee of the Ministry.

The Ministry denied access to the report, claiming that it falls 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 requester (now 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 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.

My analysis of paragraph 1 of section 65(6) indicates that, in order for a record to fall within the scope of this provision, 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 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). 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.

The Ministry submits that the WDHP Report was prepared, maintained and used to respond to the appellant's sexual harassment grievance, and also that it was prepared and maintained in anticipation of proceedings before the Grievance Settlement Board.

The Ministry also submits that the grievance process under the terms of the collective agreement and CECBA constitutes "proceedings" for the purposes of section 65(6)1, and that these proceedings relate to both labour relations and the employment of a person by the Ministry. The appellant's representations do not address the specific requirements of section 65(6).

I will now consider whether the Ministry has established the three requirements of section 65(6)1, as outlined above.

1. Was the record collected, prepared, maintained or used by the Ministry or on its behalf?

It is clear from the face of the record that it was prepared by an employee of the Ministry on its behalf. This person was appointed under the provisions of the WDHP directive to act as an impartial investigator and to report his findings to the Deputy Minister and the WDHP Co-ordinator. Therefore, I find that the record was prepared by the Ministry.

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

"proceedings or anticipated proceedings"

The words "proceedings" and "anticipated proceedings" appears in section 65(6)1 in the context of the phrase "proceedings or anticipated proceedings **before a court, tribunal or other entity**". In my view, the words I have highlighted in bold must be considered in defining the words "proceedings" and "anticipated proceedings".

Turning first to "proceedings", in its legal sense, this word has been given a wide variety of meanings, as can be seen from the following definitions.

In Black's Law Dictionary (6th ed.), the definition begins as follows:

> In a general sense, the form and manner of conducting business before a court or judicial officer. Regular and orderly progress in form of law, including all steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus and the like.

The Canadian Law Dictionary definition reads as follows:

> The form and manner of conducting an action or other judicial business.
>
> An act necessary to be done for carrying into effect a legal right. Thus an advertisement of a proposed sale by a mortgagee by virtue of the powers of sale contained in his mortgage is a proceeding, as is the sale of the land itself. ...
>
> The meaning of the term varies according to the circumstances in question. It has been defined to include any steps in an action.

As noted above, 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, 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.

In terms of determining what constitutes "anticipated" proceedings, in my view, this is largely a question of fact which must be considered in the circumstances of a particular case.

Former Commissioner Sidney B. Linden faced an analogous situation in Order 52 in determining what constituted "in contemplation of litigation" under section 19 of the Act. While acknowledging that each case turned on its particular facts, Commissioner Linden found that to qualify as being "in contemplation of litigation", one common requirement was that "there must be a reasonable prospect of such litigation at the time of the preparation of the document - litigation must be more than just a vague or theoretical possibility". I feel that a similar approach is appropriate in considering the term "anticipated proceedings". In my view, to fall within the definition of this term, 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.

"in relation to"

The phrase "in relation to" can be interpreted in a number of ways. The Oxford Concise Dictionary, 8th ed., defines "in relation to" to mean "as regards". This definition does not offer much assistance in determining the meaning of the phrase in the context of section 65(6). However this phrase has a long history of interpretation by the courts, stemming from its inclusion in section 92 of the Constitution Act, 1867. The preamble of this section, which specifies powers assigned to the provinces, reads as follows:

> In each Province the Legislature may exclusively make Laws **in relation to** matters coming within the Classes of Subjects next herein-after enumerated, that is to say, ... (emphasis added)

One of the leading cases which discusses this phrase and is cited in many later judgments, is Gold Seal Ltd. v. Dominion Express Co. and A-G Alberta (1921) 62 S.C.R. 424, 62 D.L.R. 62, 3 W.W.R. 710 (S.C.C.). This case deals with the federal government's power to pass temperance legislation. In a much-quoted discussion of the meaning of "in relation to", Duff J. states:

> The fallacy lies in failing to distinguish between legislation **affecting** civil rights and legislation "in relation to" civil rights. Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation "in relation to" the subject matter of "property and

> civil rights" within the province, within the meaning of section 92 of the British North America Act, then that is no objection ...

Courts have also often turned to the so-called "pith and substance" of a statute in deciding whether it is "in relation to" an area of jurisdiction exclusively conferred on the provinces by section 92 of the Constitution Act, 1867. If the "pith and substance" of the enactment does not fall within the area assigned to the provinces in section 92, then the enactment is not considered to be "in relation to" that area even if the enactment affects it.

For instance, in Re Dunne, [1962] O.R. 595 (Ont. H.C.J.), which dealt with the validity of a requirement imposed on municipalities under the Juvenile Delinquents Act, Schatz J. quotes the above passage from Gold Seal and says:

> The Juvenile Delinquents Act is not in its pith and substance **in relation to** municipal institutions or property and civil rights even if it does affect them. (emphasis added)

In a later case, R. v. Steinberg's Ltd. (1977), 17 O.R. (2d) 559, 80 D.L.R. (3d) 741, the constitutional question related to the federal government's power to enact the Consumer Packaging and Labelling Act, under which Steinberg's had been charged. Harris, Prov. Ct. J. quotes this same passage from Gold Seal, and states:

> In my opinion, the legislation in question certainly affects property and civil rights, but is not an enactment "in relation to" that subject. It is the true nature and character of the legislation, and not the ultimate result which must be taken into account.

I recognize that the context of the phrase "in relation to" in section 92 of the Constitution Act, 1867 and in section 65(6) of the Act is different. However, in my view, the case law does provide a clear indication that in order to be "in relation to" something, the activity or object in question must do more than merely "affect" that thing; there must be a substantial connection between the activity and the thing to which it is supposed to be "in relation".

Applying this interpretation to the particular circumstances of this appeal, in order for me to find that the WDHP report was prepared in relation to the grievance proceedings, it would not be sufficient that this activity had an impact on the grievance proceedings. In my view, in order for the preparation to have been "in relation to" the proceedings, a more substantial connection would be required. The question is, how substantial does this connection have to be?

Following the approach taken in the constitutional cases, the connection must be fairly substantial. 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.

Applying my various interpretations under the second requirement of section 65(6)1 to the circumstances of this appeal, I make the following findings:

- The Grievance Settlement Board is established by statute (CECBA) as an administrative body with powers to determine matters affecting rights. As such, I find that it is properly characterized as a "tribunal" for the purpose 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".

- The grievance was filed by the appellant one day before she made her WDHP complaint. In my view, at the time the record was prepared there was a reasonable prospect that the grievance would proceed to a hearing before the Grievance Settlement Board, and that this constitutes "anticipated proceedings".

- The record was prepared for the purpose of responding to the appellant's sexual harassment grievance. As such, it is sufficiently connected to the grievance to properly be characterized as being "in relation to" it.

Accordingly, I find that the answer to Question 2, posed above, is "yes".

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

Section 65(6)1 uses the phrase "relating to labour relations **or** to the employment of a person by the institution" (emphasis added). Consequently, in 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" (Dreidger on the Construction of Statutes, 3rd ed., p.164).

The term "labour relations" also appears in section 17(1) of the Act. In this context, Inquiry Officer Holly Big Canoe discussed the term "labour relations information" in Order P-653, and made the following statements:

> In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the **collective** relationship between the employer and its employees.

Given the particular wording of section 65(6)1, I find that Inquiry Officer Big Canoe's interpretation of the term is equally applicable in the context of paragraph 1. Therefore, I find

that "labour relations" for the purposes of section 65(6)1 is properly defined as the collective relationship between an employer and its employees.

In the circumstances of this appeal, the Ministry has established that the appellant, who was a member of OPSEU at the time, filed her grievance under the procedures contained in Article 27 of the collective agreement between the government and OPSEU. The collective agreement contains provisions which outline the role of the Grievance Settlement Board in hearing and resolving grievances filed by members of OPSEU. Therefore, I find that the anticipated proceedings before the Grievance Settlement Board which existed at the time the grievance was filed by the appellant related to labour relations, and the third requirement of section 65(6)1 has been established.

In summary, I find that the record at issue in this appeal was prepared by the Ministry in relation to anticipated proceedings before a tribunal, the Grievance Settlement Board, and that these anticipated proceedings relate to labour relations. All of the requirements of section 65(6)1 of the Act have thereby been established by the Ministry, and I find that the record falls within the parameters of this section and therefore is excluded from the scope of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by ______________________ ______________ July 10, 1996
Tom Mitchinson
Assistant Commissioner