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

ORDER P-1302

Appeal P_9600221

Ministry of Transportation

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NATURE OF THE APPEAL:

The appellant is an employee of the Ministry of Transportation (the Ministry). He submitted a request to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the findings of a consulting company which the Ministry had engaged to study the classification levels of human resources consultants at the Ministry. The Ministry identified a document entitled "Ministry of Transportation Review of Human Resources Service Delivery Generalist Consultant Positions" (the Report) as the record responsive to the request. The Report is dated November 30, 1995.

The Ministry denied access to the Report, claiming that it falls 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.

Prior to considering whether the Report falls within the scope of section 65(6) or (7) of the Act, I will outline the relevant background facts which lead to the creation of the Report.

BACKGROUND:

In a memorandum dated January 23, 1995, the Director of the Ministry's Human Resources Branch explained the upcoming consultant's review to staff as being conducted "... to respond to a perceived disparity in classification levels" which became apparent after the integration of the service delivery programs of the Ministry's Central Region and head office. The consultants were to also conduct a review of the positions in the Ministry's other regional offices.

In its representations, the Ministry indicates that the consultant's review was conducted as a result of complaints about classification levels, submitted by affected staff in June and August of 1994. The Ministry continuously states that these "complaints" were not "formally classified" as grievances. However, it submits that they are "in effect" grievances under section 51 of Regulation 977 under the Public Service Act (the PSA) and that, in commissioning the Report, the Deputy Minister was meeting his obligations under section 51(1) of Regulation 977.

The Ministry has also advised that, in April 1996, one of the appellant's colleagues filed a grievance relating to classification levels. The Ministry states that the nature of the grievance is "substantially similar" to the earlier complaints received by the Deputy Minister which triggered the preparation of the Report. This grievance is currently being considered by the Deputy Minister as the first stage in a section 51 process. In the Ministry's view, if the grievor is not satisfied with the decision of the Deputy Minister, there is a "strong possibility" that the decision may be appealed to the Classifications Rating Committee, which the Ministry describes as "an adjudicative body established under the PSA".

DISCUSSION:

The sole issue in this appeal is whether the Report falls 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.

In its representations, the Ministry claims that paragraphs 65(6)1 and 65(6)3 apply to exclude the Report from the Act.

In his submissions, the appellant appears to accept the Ministry's position that the Report falls within paragraph 65(6)3, but argues that paragraph 65(7)3 applies thus making the Report subject to the provisions of the Act. As section 65 goes to the jurisdiction of this office, I will independently review the Ministry's claim that the Report falls within the scope of paragraphs 65(6)1 or 65(6)3.

I will first consider the Ministry's arguments on the application of section 65(6)3.

Section 65(6)3

In Order P-1242, former Assistant Commissioner Tom Mitchinson 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.

I agree with this analysis and will apply it in the present appeal.

Requirements 1 and 2

The Ministry states that the Report was prepared on its behalf by the consultants retained to address the complaints received by the Deputy Minister with respect to employee classification. Having reviewed the Report, I find that it was clearly prepared on behalf of the Ministry by the consultants.

I will next consider whether this preparation was in relation to meetings, consultations, discussions or communications.

In Order P-1223, former Assistant Commissioner Mitchinson 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)

The activities listed in section 65(6)3 are "meetings, consultations, discussions or communications". It is the Ministry's position that the "... Report **was** a consultation or communication" (my emphasis). In this regard, it makes the following submissions:

> The Consultants Report was a consultation involving Generalists in the DCSC [Downsview Corporate Services Centre] Human Resources Branch to assess whether or not they were correctly classified. The Consultants met with the Generalist in the DCSC Branch and in Regional offices, gathered information about the alleged discrepancy in classifications, and based a report on the basis of these consultations. The Consultants Report, in the opinion of the Ministry, constituted a consultation.
>
> It is also the submission of the Ministry that the Consultants Report constituted a communication. The word 'communication' broadly denotes the imparting of any kind of information between two or more parties. In this instance, the Consultants Report is a form of communication between the Ministry and the consultants.

In my view, these submissions indicate that the Ministry has misunderstood the relationship which must exist between the Report and the activities set out in section 65(6)3 prior to the Report being excluded from the Act on this basis.

It is not the record itself, the Report in this case, which must constitute a "meeting, consultation, discussion or communication". Rather the issue in this case is whether the Report was prepared "in relation to" one of these activities.

The Ministry states that the Report was prepared **as a result of** the complaints submitted by affected staff in June and August of 1994. These complaints were submitted in writing directly to the Deputy Minister by two Ministry employees. The Report represents the results of the Deputy Minister's response to these complaints. In my view, it is these complaints which constitute the "communications" which are a prescribed activity under section 65(6)3.

Accordingly, I find that the Report was prepared on behalf of the Ministry in relation to communications. Therefore, the first and second requirements of section 65(6)3 have been established.

Requirement 3

I must next determine whether the communications were about employment-related matters.

The employee complaints which resulted in the commissioning and creation of the Report were initiated by Human Resources Generalists who maintained that they were improperly classified. It is the Ministry's position that the issue of classification, which is dependent upon the nature of the Generalists' employment and rate of pay, is an integral part of that employment. On this basis, the Ministry submits that classification is an employment-related matter.

I agree and find that the complaints, i.e. the communications, were about an "employment-related matter" for the purposes of section 65(6)3 of the Act.

The question remains whether this "employment-related matter" is one in which the Ministry "has an interest".

In Order P-1242, former Assistant Commissioner Mitchinson reviewed a number of legal sources regarding the meaning of the term "has an interest", as well as several court decisions which considered its application in the context of civil proceedings. He 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.

In my view, it is clear that the Ministry has such an interest in ensuring fair and equitable classification levels for individuals performing similar employment functions within the Ministry, and indeed amongst government ministries based on Ontario Public Service standards. Moreover, failure to respond adequately to issues relating to classification can result in the filing of a grievance by an employee who disputes his or her classification. Classifications impact on the salaries which the Ministry must pay to affected employees. In my view, therefore, the classification of Ministry employees has the potential to affect the Ministry's legal rights and/or obligations, and is thus properly characterized as a matter "in which the institution has an interest" for the purposes of section 65(6)3 of the Act.

To summarize, I find that the Report at issue in this appeal was prepared on behalf of the Ministry in relation to communications about employment-related matters in which the Ministry has an interest. All of the requirements of section 65(6)3 of the Act have thus been established by the Ministry.

Section 65(7)3

Section 65(7)3 states:

> This Act applies to the following records:
>
> > 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.

It is the appellant's position that there was an agreement between the Ministry and the human resources consultants to gather the information contained in the Report and rely on the results to negotiate equitable job classifications. He states that, in fact, the results of the Report formed the basis of the reclassification of certain DCSC positions.

In my opinion, these assertions are not relevant to the application of section 65(7)3. The section requires that the record itself be an "agreement" before the Act will apply. It is clear that the Report does not constitute an agreement between the Ministry and any of its employees. Rather it is, as its title suggests, a "**Review** of Human Resources Service Delivery Generalist

Consultants Positions". It sets out the process of the review, the information gathering and data analysis findings and recommendations.

Therefore, I find that the Report does not fall within the exception in section 65(7)3. Section 65(6)3 applies to the Report and it is thus excluded from the scope of the Act.

ORDER:

I uphold the decision of the Ministry.

Original signed by: November 22, 1996
Anita Fineberg
Inquiry Officer