



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

ORDER P-1345

Appeal P_9600351

Ontario Labour Relations Board



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NATURE OF THE APPEAL:

The Ontario Labour Relations Board (the Board) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the records contained in two specified Board files. The requester was a party to a proceeding before the Board which is the subject of one of the files. He was an employee of Ontario Hydro (Hydro), which is also an institution for the purposes of the Act. The institution in this appeal is, however, the Board. The Board responded to the request by informing the requester that by virtue of section 65(6), the Act has no application to the records sought. The requester, now the appellant, appealed this decision.

A Notice of Inquiry was provided to the appellant and the Board by this office. Representations were received from both parties. Because Hydro, in its capacity as the employer in the Board proceeding, is also an institution for the purposes of the Act, it was invited to make submissions on the application of section 65(6) to the records contained in the Board file as well. Representations on this issue were received from Hydro.

PRELIMINARY ISSUE:

TIMING OF THE REQUEST

On May 15, 1995, the appellant made a request to the Board for transcripts and minutes of certain "meetings" involving the Board which were held on April 11, 12, 18 and 19, 1995. This was followed by another request to the Board on June 19, 1995 for the same information as well as any records which were kept by a named Labour Relations Officer (LRO) employed by the Board concerning the appellant's Board proceeding. Again, on July 24, 1995, the appellant requested "any and all documentation relating to the Board's investigation of my case. Specifically, minutes/transcripts of meetings with the Board". The request which has given rise to this appeal was made on August 6, 1996 and pertained to the contents of the Board's files.

The appellant submits that because the Board's response to his request made originally in June 1995, should have (but did not) deal with the records which are the subject of the present request, I should deal with the request as if it predates the enactment of the amendments to the Act, including section 65(6), which were included in the Labour Relations and Employment Statute Law Amendment Act (Bill 7), was passed into law in November 1995. If I agree with this submission, I will have to consider whether the amendments to the Act introduced by Bill 7 operate retroactively.

I will, therefore, determine whether the requests submitted by the appellant in May, June and again in July 1995 included the information contained in the Board's files which was requested on August 6, 1996.

The Board submits that the subject matter of the pre-Bill 7 requests did not include the contents of the Board's files but, rather, was limited to "minutes/transcripts from meetings with the labour board" and "documents which the LRO assigned to the case would have pertaining to the case".

It also submits that the Board's decision regarding access to the information responsive to these requests was upheld in Order P-1230, which I issued on July 17, 1996.

The Board further submits that the requester's pre-Bill 7 requests were completely disposed of in my Order P-1230. For this reason, the Board argues that the information sought in the present appeal is either res judicata or is subject to issue estoppel (if it involves the same records as the earlier request) or, falls within the ambit of section 65(6) and is not subject to the Act (if it involves other records).

In my view, the records requested by the appellant in his August 6, 1996 request are separate and distinct from the records sought in his earlier requests. The earlier requests dealt specifically with "minutes/transcripts" of particular Board hearings and records maintained by a specified Board employee. The present request was not so specifically framed. The appellant is now seeking access to the Board's files, which consist of some 435 pages of documents, including correspondence between the Board and the parties to the proceedings, their pleadings and various administrative records created by the Board in preparing for the hearings themselves.

In conclusion, I find that the present request and appeal were made following the enactment of the Labour Relations and Employment Statute Law Amendment Act in November 1995 and I will proceed with my determination as to whether the responsive records in fact fall outside the ambit of the Act under section 65(6).

DISCUSSION:

APPLICATION OF SECTION 65(6)

Sections 65(6) and (7) 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 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In Order P-1223, former Assistant Commissioner Tom Mitchinson found that in order for a record to fall within the scope of paragraph 1 of section 65(6), an institution, in this case the Board, must establish that:

1. the record was collected, prepared, maintained or used by the Board 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 Board.

The Board submits that the files sought by the appellant contain information which falls within the ambit of section 65(6)1 of the Act. The files involve complaints of an unfair labour practice against a trade union brought by the appellant and another individual. The Board reviewed the complaints and dismissed them.

The Board argues that:

1. these records have been collected and/or prepared and/or maintained and/or used by the Board;
2. the Board is an “institution”;
3. the records relate to proceedings or anticipated proceedings before the Board.
4. a complaint filed with the Board is a “proceeding”;
5. the Board is a “tribunal” relating to labour relations.

In the proceedings before the Board which resulted in the creation of the requested records, the employer was Hydro and not the Board. The only involvement of the Board in this matter was in its role as adjudicator.

Section 65(6)1 refers to the collection, preparation, maintenance or use of records by or on behalf of an institution in proceedings before a court, tribunal or other entity. In my view, this does not extend to situations where the records relate to proceedings where the institution’s involvement is in the role of adjudicator. Rather, in order to qualify as a collection, preparation, maintenance or use **by or on behalf of** the Board as an institution, in relation to the proceedings, it would have to be an entity subject to the processes of the adjudication body (itself), such as a party to the proceedings or a witness called to produce evidence which is relevant to the proceedings. By necessary implication, the institution’s role in such proceedings must be in its capacity as an employer or former employer in order to bring the records within the scope of section 65(6)1.

This interpretation is supported by references throughout section 65(6) to proceedings and negotiations relating to the “employment of a person by the institution”, and in section 65(6)3, to “labour relations or employment-related matters in which the institution has an interest”. In my view, an institution such as the Board, acting as an impartial adjudicator would not “have an interest” in a labour relations or employment-related matter before it, in the sense intended by section 65(6)3. Such an interest would be inconsistent with impartial adjudication. Therefore, in my view, the records were not collected, prepared, maintained or used by or on behalf of the Board in relation to the proceedings before itself in the sense intended by section 65(6)1. I find that the application of this section, on the basis of the Board’s role in the proceedings before it, has not been established. I also note that, because the Board does not “have an interest” in the proceedings in the sense intended by section 65(6)3, this section also does not apply.

The same cannot, however, be said about the records contained in the Board’s files which originated with or were sent by the Board to Hydro. These include any pleadings filed by Hydro and any correspondence or records of other communications between Hydro and the Board. In my view, these records were collected, prepared, maintained or used by Hydro, which is an institution under the Act, in relation to proceedings before the Board which relate directly to labour relations between it and its unionized employees. As a result, I find that these records are excluded from the scope of the Act under section 65(6)1.

ORDER:

1. I order the Board to issue a decision letter to the appellant regarding access to the requested records, with the exception of any records which contain communications between the Board and Hydro, and any records filed by Hydro in connection with the proceedings before the Board, treating the date of this order as the date of the request.
2. I order the Board to provide me with a copy of the decision letter referred to in Provision 1. It is to be forwarded to my attention c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ February 12, 1997