



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

ORDER P-1369

Appeal P_9600391

Ministry of Consumer and Commercial Relations



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NATURE OF THE APPEAL:

The appellant, a trade organization, submitted a request to the Ministry of Consumer and Commercial Relations (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for a copy of the report on the review of the Liquor Control Board of Ontario (LCBO) conducted by the Ministry and concluded in February or March of 1996.

The Ministry located a responsive record, and issued an interim access decision and fee estimate. This decision indicated that exemptions would be claimed under the Act, implying that full disclosure would not be given. The appellant paid the estimated fee.

After a time extension under section 27(1)(b), the Ministry forwarded its final access decision to the appellant, denying access in full pursuant to the following exemptions in the Act:

- Cabinet records - section 12(1)
- advice or recommendations - section 13(1)
- economic or other interests - sections 18(1)(f) and (g).

The final decision also indicated that “section 65 applies because disclosure may affect labour relations”. This appears to be a reference to section 65(6), which excludes certain records relating to labour relations and employment from the scope of the Act.

As a consequence of its decision to deny access to the entire record, the Ministry refunded to the appellant the bulk of the fees it had charged for processing the request.

The appellant wrote to the Office of the Information and Privacy Commissioner (the Commissioner’s office) to appeal the Ministry’s decision.

The Commissioner’s office sent a Notice of Inquiry to the appellant and the Ministry. In addition, because the LCBO and Management Board Secretariat appeared to have an interest in the records, this office contacted them and indicated that, if they wished to participate in making representations, they should contact the Ministry. Representations were received from the Ministry only.

ROLE OF THE COMMISSIONER’S OFFICE:

The appeal letter refers to payment of the \$25 appeal fee “for reviewing your own decision”. In this regard, it is important to note that the Commissioner’s office was created to fulfill the objective enunciated in section 1(a)(iii) of the Act, which states:

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,

- ...
(iii) decisions on the disclosure of government information should be reviewed **independently of government.** [emphasis added]

The Commissioner's office is an independent review body which is not part of any institution under the Act, and this order is not a review of "our own decision". Rather, it is an independent review of the decision made by the Ministry.

DISCUSSION:

JURISDICTION

The Ministry claims that sections 65(6)2 and 3 apply to exclude the record from the scope of the Act. These sections state:

- (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:
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.

Section 65(7), which lists exceptions to the section 65(6) exclusions, states:

- (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 my view, it is clear that section 65(7) does not apply to exclude the record from the operation of section 65(6).

In its representations on section 65(6), the Ministry submits that the record:

... was created by the Ministry for the purpose of setting the policy and direction for the future management of the LCBO.

The Ministry also indicates that:

[t]he purpose of the record ... is to identify areas within the LCBO that may lead to more efficient service delivery and result in expenditure savings or increase operational efficiency. A substantial portion of service delivery expenditures and operations of the LCBO are labour costs.

With regard to section 65(6)2, the Ministry submits that:

... the documents [sic] in question will be used by or on behalf of the institution in relation to negotiations or anticipated negotiations involving the employment of persons by the LCBO.

With regard to section 65(6)3, the Ministry submits that:

... the record in question was prepared by or on behalf of the Ministry in relation to meetings, consultations, discussions or communications about labour relations matters in which the Ministry has an interest. The document in question is in fact a consultation or discussion about labour relations and employment-related matters involving the LCBO.

In order to qualify under either section 65(6)2 or 3, a record must have been collected, prepared, maintained or used by or on behalf of an institution "in relation to" the subjects referred to in those sections. In Order P-1223, former Assistant Commissioner Tom Mitchinson indicated that the collection, preparation, maintenance or use of a record must have a "fairly substantial"

connection with an activity listed in sections 65(6)1, 2 or 3 in order to meet this requirement. He went on to state:

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]

I agree with these views of the former Assistant Commissioner and I adopt them for the purposes of this order.

I have reviewed the record in its entirety, including the portions indicated by the Ministry in its representations as supporting its section 65(6) arguments. In my view, the purpose of the record described in the first quote from the Ministry’s submissions, above (i.e. “setting the policy and direction for the future management of the LCBO”), is an accurate characterization.

Although the record may have an impact on future labour relations negotiations, I have concluded that the relationship between its contents and any such negotiations is too remote to allow me to find that the collection, preparation, maintenance or use of the record was “in relation to” the negotiations. Therefore, I find that section 65(6)2 does not apply.

Similarly, in my view, the connection between the contents of the record and “meetings, consultations, discussions or communications about labour relations or employment-related matters” is too remote to allow me to find that the collection, preparation, maintenance or use of the record was “in relation to” such meetings, consultations, discussions or communications. In addition, I am not persuaded that the record itself represents a consultation or discussion “about” labour relations or employment-related matters; rather, it is a broadly-based organizational review which touches occasionally, and in an extremely general way, on staffing and salary issues. For these reasons, I find that section 65(6)3 does not apply.

Therefore, my conclusion is that this record is subject to the Act and as a consequence, it falls under the jurisdiction of the Commissioner’s office. Accordingly, I will proceed to consider whether any of the claimed exemptions applies.

CABINET RECORDS

The Ministry submits that the record is exempt under the introductory wording of section 12(1), and also under sections 12(1)(a), (b) and (e).

These sections state:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy.

The Ministry submits that disclosure of the record would reveal policy options or recommendations submitted to a committee of the Executive Council within the meaning of section 12(1)(b).

As part of its submissions, the Ministry has provided a minute of the meeting of Management Board of Cabinet held on April 2, 1996, which confirms that the record was, in fact, submitted to and considered by Management Board. Management Board is a committee of the Executive Council. I am satisfied that the record reveals both policy options and recommendations. Accordingly, the requirements of section 12(1)(b) are met, and I find that the record is exempt from disclosure under that section.

In view of this finding, it is not necessary for me to consider the other exemptions claimed by the Ministry.

ORDER:

1. I do not uphold the Ministry's decision that the record falls outside the scope of the Act under section 65(6).
2. I uphold the Ministry's decision to exempt the record from disclosure under section 12(1)(b) of the Act.

Original signed by: _____
John Higgins
Inquiry Officer

March 20, 1997