



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

ORDER P-1346

Appeal P_9600390

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 two specified Board files. The files relate to two applications made under the Crown Employees Collective Bargaining Act to the Board at the time of the Ontario Public Service Employees Union strike in the spring of 1996. 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 the Board only. Because Management Board of Cabinet (MBC), in its capacity as the employer in the Board proceedings, 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. No representations were received from MBC.

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 both MBC and the Board, must establish that:

1. the record was collected, prepared, maintained or used by MBC or the Board or on their 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 an institution.

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 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. an application 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 Management Board of Cabinet 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 institution in relation to the proceedings, the Board 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 could 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 maintained by the Board 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 and 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 MBC. These include any pleadings filed by MBC and any correspondence or records of other communications between MBC and the Board. In my view, these records were collected, prepared, maintained or used by MBC, 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 Management Board of Cabinet, and any records filed by

Management Board of Cabinet 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