



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

ORDER P-1377

Appeal P_9700010

Ministry of Municipal Affairs and Housing



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NATURE OF THE APPEAL:

The Ministry of Municipal Affairs and Housing (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to information relating to the investigation of a Workplace Discrimination and Harassment Prevention (WDHP) complaint made against the appellant. The Ministry identified a number of responsive records and granted access to them, in part. Access to the balance of the records was denied on the basis that, under section 65(6) of the Act, they are outside the scope of the Act. The appellant appealed the Ministry's decision.

The records at issue consist of correspondence received by the Ministry from the complainant in this matter, harassment logs prepared by the complainant, a memorandum and a number of witness statements. The records were compiled as part of an investigation into the appellant's conduct which was undertaken by the Deputy Minister's designate under the Ministry's WDHP Program.

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:

JURISDICTION

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.

The Ministry submits that section 65(6)3 applies to the records. Section 65(6)3 of the Act reads:

- (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:
 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.

In order for a record to fall within the scope of section 65(6)(3), 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.

[Orders P-1242 and P-1323]

Requirements 1 and 2

As I have indicated previously, the records consist of a memoranda, correspondence, a log and various witness statements which were generated as a result of the complaint against the appellant and the subsequent investigation. In my view, each of these records was either collected, prepared, maintained and/or used by the Ministry. I find also that the collection, preparation, maintenance or use of each of these records was in relation to meetings, consultations, discussions or communications. Accordingly, Requirements 1 and 2 have been met.

Requirement 3

The Ministry submits that the meetings, consultations, discussions or communications are about employment-related matters and that both the appellant and the complainant were employees of the Ministry at the time of the complaints and the resulting WDHP investigation. I am satisfied

that the appellant was an employee of the Ministry and that the meetings, consultations, discussions or communications which gave rise to the creation of the records are about employment-related matters, the WDHP complaint and the subsequent investigation.

The remaining component is whether a WDHP investigation can be characterized as a matter “in which the institution has an interest”.

In Order P-1242, former Assistant Commissioner Tom Mitchinson addressed a similar issue involving the application of section 65(6) to WDHP investigation records. In that order, he commented that “[a]n “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”. I agree with the former Commissioner’s reasoning and approach and adopt it for the purposes of this appeal.

In the same order, based on an extensive review of case law, former Assistant Commissioner Tom Mitchinson also concluded that:

“If the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the [Human Rights] Code, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry’s legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as a matter “in which the institution has an interest.”

I find that this conclusion applies equally in the circumstances of this appeal, and I adopt it for that purpose. Accordingly, I find that Requirement 3 has been met.

In summary, I find that the records were collected, prepared, maintained and/or used by the Ministry in relation to meetings, consultations, discussions or communications about employment-related matters in which the Ministry has an interest. None of the exceptions in section 65(7) apply in the circumstances of this appeal. I find, therefore, that the records fall within the parameters of section 65(6)(3) and are, therefore, excluded from the scope of the Act.

The appellant argues that the records are not excluded from the scope of the Act because they “relate to purposes of law enforcement”. The appellant appears to have taken the position that records which are required for “a law enforcement purpose” are not outside the scope of the Act, despite there being no such distinction or exception listed under section 65(7). As I have found that the records fall within section 65(6)(3) and do not qualify under one of the exceptions under section 65(7), they are outside the jurisdiction of the Act.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Donald Hale
Inquiry Officer

April 15, 1997