



Information and Privacy  
Commissioner/Ontario

Commissaire à l'information  
et à la protection de la vie privée/Ontario

# ORDER P-1471

Appeal P\_9700038

Ministry of Education and Training



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## **BACKGROUND:**

A complaint of improper conduct by a teacher was made by a student. The school board which employed the teacher initiated an investigation and dismissed the teacher. The appellant in the present appeal is a parent of the student who initiated the complaint. The appellant brought the complaint to the attention of the Ministry of Education and Training (the Ministry), which then initiated its "process of procedural fairness" to determine whether or not the teacher's certificate of qualification should be suspended or revoked, pursuant to the provisions of the Education Act. During this process, the matter was referred to a panel of the Relations and Discipline Committee of the Ontario Teacher's Federation (the OTF). The OTF panel recommended a suspension of the teacher's Teaching Certificate for a fixed period of time. The appellant was unhappy with the term of the suspension and initiated a further complaint to the Minister of Education and Training, seeking the permanent revocation of the teacher's certificate of qualification, pursuant to the Education Act.

## **NATURE OF THE APPEAL:**

Following the disposition of the complaint by the Minister, the appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to a copy of the Minister's decision and reasons with respect to the appellant's complaint against the teacher. The Ministry denied access to the three records which it identified as responsive to the request, claiming the application of the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- third party information - section 17(1)
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1)

The Ministry also referred to the possible application of sections 42 and 43 of the Act. The appellant appealed the Ministry's decision.

This office provided a Notice of Inquiry to the Ministry, the appellant, the teacher who was the subject of the complaint (the first affected person) and the student who initiated the complaint (the second affected person). Because the responsive records appeared to contain the personal information of the appellant, as well as that of other identifiable individuals, the parties to the appeal were also asked to address the possible application of sections 49(a) and (b) of the Act to the records. I find that sections 42 and 43 have no application as the circumstances where disclosure is permitted which are described in these provisions of the Act are not present in this appeal.

The parties were also asked to make submissions on the possible application of section 65(6) of the Act, which removes certain types of records from the jurisdiction of the Act. Representations were received from the first affected person only.

The records at issue in this appeal consist of the Ministry's decision on the disposition of the complaint against the first affected person dated July 9, 1996 and two internal Ministry memoranda relating to the complaint, which were addressed to the Minister of Education and Training dated February 16, 1996 and June 28, 1996.

## **PRELIMINARY ISSUE:**

### **JURISDICTION**

The first issue to be addressed in this order is whether the records fall 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.

### **Sections 65(6)1 and 2**

In Order P-1223, former Assistant Commissioner Tom Mitchinson analysed the requirements of section 65(6)1 and found that:

[I]n order for a record to fall within the scope of this provision, 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 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 Ministry.

I adopt this approach and will apply it in the present appeal.

Based on my review of the records, it is clear that they were prepared and used by officials within the Ministry. I have not been provided with any evidence to establish, however, that this preparation and usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity. Accordingly, I am unable to find that the records at issue in this appeal fall within the scope of section 65(6)1.

Similarly, I find that section 65(6)2 has no application to the records as they do not relate to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the Ministry between the Ministry and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

### **Section 65(6)3**

In order for the records to qualify under section 65(6)3, the Ministry must establish that:

1. The records were 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.

[Order P-1242]

### **Requirements 1 and 2**

As stated above, in my discussion of section 65(6)1, each of the records was either prepared or used by Ministry officials. The preparation and use which was made of the records was clearly in relation to the on-going discussion and communications which took place between those Ministry officials who were engaged in the processing of the appellant's complaint against the first affected person. Accordingly, I find that Requirements 1 and 2 have been met.

### **Requirement 3**

The discussions revolved around the initiation and implementation of the Ministry's "process of procedural fairness" in order to determine whether the Minister should suspend or cancel the first affected person's teaching certificate under section 8(1)13 of the Education Act. Should this step be undertaken, section 22(2) of Regulation 298 promulgated pursuant to the Education Act provides that the first affected person would no longer be legally entitled to teach school in Ontario and his employer would be required to dismiss him.

Accordingly, based on my review of the records and the materials submitted by the parties at various stages of the appeal, I am satisfied that the discussions and communications which are reflected in the records are about employment-related matters within the meaning of section 65(6)3.

The remaining component which must be established is whether this matter can be characterized as one in which the Ministry has an interest.

In Order P-1242, Assistant Commissioner Tom Mitchinson considered the meaning of this phrase in section 65(6)3. He stated:

[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 Assistant Commissioner's reasoning and approach and adopt it for the purposes of this appeal.

Throughout the processing of the appellant's complaint by the former employer of the first affected person, the OTF's Relations and Discipline Committee and the Ministry, the appellant has maintained that he has a legal responsibility to ensure that the penalty imposed on the first

affected person is appropriate to his actions. The appellant has made it clear to all of the reviewing bodies that he intends to strictly enforce his rights, by recourse to the Courts, if necessary. In addition, the Ministry indicates that the first affected person may choose to initiate legal proceedings through the Courts or the Ontario Human Rights Commission (the OHRC) to enforce his rights against it.

In my view, the Minister had a legal obligation to properly investigate and dispose of the appellant's complaint. Consequently, I find that this responsibility constitutes a matter which gives rise to an "interest" on the part of the Ministry, within the meaning of section 65(6)3. Had the Minister's handling of the appellant's complaint be found to be tainted in any way by either the Courts or the OHRC, both he and the Ministry, may be found to be legally responsible for damages or some other relief to either party to the complaint. In my view, the Ministry's interest in the subject matter discussed in the records is such that it can be said that it "has an interest" within the meaning of section 65(6)3.

Accordingly, I find that the third requirement of section 65(6)3 has been satisfied.

By way of summary, I find that the records were prepared and used by the Ministry in relation to discussions or communications about an employment-related matter 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.

**ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ October 24, 1997