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

ORDER P-1438

Appeal P_9600420

Ministry of the Solicitor General and Correctional Services

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The appellant is a former employee of the Ministry of the Solicitor General and Correctional Services (the Ministry). He maintains that in 1995 he was compelled to resign his position by reason of racial discrimination and harassment.

Following his resignation, the appellant filed a complaint against the Ministry pursuant to the government's Workplace Discrimination and Harassment Prevention Policy (WDHP). At about the same time, he also filed a complaint with the Ontario Human Rights Commission (the OHRC) alleging racial discrimination by the Ministry contrary to the Ontario Human Rights Code. The appellant subsequently filed a grievance against the Ministry pursuant to the Collective Agreement governing the union of which he was a member. The grievance also alleged violation of the anti-discrimination provisions of the Agreement on the basis of race and colour.

The appellant also submitted requests to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act) for access to his personnel file as well as information related to his employment with the Ministry. Order P-1314 of this office was issued to resolve the issues arising out of those requests.

NATURE OF THE APPEAL:

In May of 1996, the appellant submitted a new 51-part request to the Ministry seeking access to occurrence reports, misconduct reports, duty rolls, memos, correspondence, log books, statements, interview notes, investigation reports and policy documents from both the Ministry and the Toronto Jail. The Ministry concluded that this was actually 39 different requests for which it requested the $5 application fee for each.

The appellant filed an appeal of this decision and Inquiry Officer Holly Big Canoe issued a decision in which she upheld the Ministry's decision to consider Item 51 as one request, Items 52 and 53 as one request and Item 54 as one request. However, she ordered the Ministry to issue one decision with respect to the remaining items (Order P-1267).

The Ministry issued this decision, denying access to all the responsive records, claiming that they fall within the parameters of section 65(6) of the Act, and therefore outside the scope of the Act. The appellant filed an appeal of this decision.

During the appeal, the appellant's counsel raised the following constitutional question:

> ... that section 65(6) of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.F.31, as amended (the "Act"), as applied to the request for information by the Appellant, denies the Applicant equality before the law, contrary to section 15 of the Canadian Charter of Rights and Freedoms (the "Charter"). By limiting the Appellant's access to the documents in the possession and custody of the employer which are the only means of proof of violation of

> section 15 of the Charter by the employer, section 65(6) of the Act as applied to the Appellant reinforces the denial of equality which the appellant has suffered at the hands of the employer.

This office sent a Notice of Inquiry to the Ministry and the appellant. The Notice of Inquiry invited the parties to comment on the application, if any, of section 15 of the Charter. The appellant's counsel attached a copy of the Notice of Inquiry to his Notice of Intention to Raise a Constitutional Question which he sent to the Attorneys General of Ontario and Canada.

The Attorneys General did not respond to counsel's Notice. In its initial representations, the Ministry stated that it would not be providing comments on the Charter issue and, accordingly, its submissions only addressed the application of section 65(6) of the Act. The appellant's counsel provided representations on both the Charter and jurisdictional issues. Counsel subsequently provided supplementary representations to this office in which, among other matters, he advised that he had brought the appeal to the attention of three organizations that might have an interest in making submissions in the appeal. I have received no submissions from these organizations.

Subsequently, the appellant's counsel agreed that his submissions on the Charter issue could be provided to the Ministry who, in turn, provided submissions on this matter. The appellant's counsel then provided me with reply submissions.

In this order, I must first determine if section 65(6) of the Act applies to exclude the records at issue from the scope of the Act. If so, I will then consider the constitutional question.

DISCUSSION:

JURISDICTION

The issue here is whether the records responsive to parts 1-16 and 25-50 of the appellant's request fall within the scope of sections 65(6) and (7) 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:
>
> 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.

The Ministry submits that the records at issue are outside the scope of the Act by virtue of sections 65(6)1 and 65(6)3.

Section 65(6)1

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 agree with this approach and will apply it in the present appeal.

The Ministry submits that all the records are correctional operational records, documenting various aspects of the appellant's employment with the Ministry, that were collected, prepared, maintained or used by the Ministry. The Ministry argues that the records are being maintained and used for the purpose of responding to the appellant's grievance in proceedings before the Grievance Settlement Board (the GSB) and the human rights complaint in proceedings before before the OHRC. The Ministry states that the GSB and the OHRC are tribunals within the meaning of section 65(6)1 and that the proceedings relate to labour relations or the appellant's employment with the Ministry.

The appellant submits that the records were created prior to his filing his grievance, WDHP and OHRC complaints. Therefore he maintains that no proceedings of the nature comntemplated by section 65(6)1 were in existence at the time the records were prepared or collected. He states that most of the records were created as a matter of routine and not because of any particular proceedings.

Requirements 1 and 2

I accept the submissions of the Ministry that the records, originally prepared and collected by Ministry staff while the appellant was an employee, are now being maintained and used by the Ministry.

In Order P-1314, Inquiry Officer Donald Hale made the following findings with respect to records contained in the appellant's personnel file, his "fact" file and other documents related to the quality of his work:

- the GSB and the OHRC are properly characterized as "tribunals" for the purpose of section 65(6)1;

- hearings before the GSB and the complaint/resolution process of the OHRC constitute a dispute resolution process which has, by law, the power to decide grievances or adjudicate human rights complaints and, as such, both properly constitute "proceedings" within the meaning of section 65(6)1; and

- although the records in the appellant's personnel and "fact" file were created prior to the filing of the grievance and the OHRC complaint, they were being used and maintained in relation to the continuing proceedings before these tribunals.

I agree with these findings and adopt them for the purpose of this appeal. In this case, the records consist of correctional operational documents as opposed to the appellant's personnel and "fact" file which were at issue in Order P-1314. However, in my view, the findings of Order P_1314 are equally applicable to these documents in the circumstances of this appeal.

Therefore, I find that the records at issue were collected and maintained by the Ministry in relation to the anticipated proceedings before the GSB and the OHRC.

Requirement 3

The Ministry submits that the proceedings in progress before the GSB and the OHRC relate to labour relations and the appellant's employment with the Ministry.

In Order P-1223, former Assistant Commissioner Mitchinson made the following findings with respect to the application of section 65(6)1 to records prepared following the initiation of a grievance by a Ministry employee. He found that:

> In the circumstances of this appeal, the Ministry has established that the appellant, who was a member of OPSEU at the time, filed her grievance under the procedures contained in Article 27 of the collective agreement between the government and OPSEU. The collective agreement contains provisions which outline the role of the Grievance Settlement Board in hearing and resolving grievances filed by members of OPSEU. Therefore, I find that the anticipated proceedings before the Grievance Settlement Board which existed at the time the grievance was filed by the appellant related to labour relations, and the third requirement of section 65(6)1 has been established.

In Order P-1314, Inquiry Officer Hale adopted the above-noted findings and concluded that the proceedings involving the appellant's grievance before the GSB relate to labour relations within the meaning of section 65(6)1. The facts which support this finding are the same in the present appeal. I agree with Inquiry Officer Hale, and find that the third requirement of section 65(6)1 has been established.

In summary, I find that the correctional operational records concerning the appellant are used and maintained by the Ministry in relation to proceedings before the GSB and the OHRC and that the proceedings before the GSB relate to labour relations matters. As all of the requirements of section 65(6)1 of the Act have been satisfied by the Ministry, I find that the records fall within the parameters of this section and are, therefore, excluded from the scope of the Act. Because of the manner in which I have addressed the application of section 65(6)1 to the records, it is not necessary for me to consider the application of section 65(6)3.

Both the Ministry and the appellant submit that none of the exceptions in section 65(7) apply in the circumstances of this appeal. I agree. Therefore, the records are excluded from the scope of the Act by virtue of section 65(6)1.

EQUALITY OF RIGHTS UNDER THE CHARTER

As I indicated above, I have received representations on this issue from the appellant, representations in the form of a reply from the Ministry and further reply representations from the appellant.

In his representations, the appellant argues that section 65(6) denies the appellant his right to equality before and under the law, and equal protection and benefit of the law, by reason of race, national or ethnic origin, and colour.

In reply, the Ministry argues that, based on recent case law (Bell v. Canadian Human Rights Commission [1996] 3 S.C.R. 854), I do not have the jurisdiction to deal with a Charter issue relating to the Act.

I do not have to rule on the Ministry's arguments regarding my authority to decide Charter questions, because I find that the appellant has not made out his Charter case. I have set out my reasons for this finding below.

The appellant indicates that the records at issue are directly relevant to the issue of discrimination. He states that he seeks to use the records and information at issue to prove allegations of racial discrimination and the creation of a racially poisoned environment in the workplace. He argues that section 65(6) makes it impossible for him to prove his case of discrimination.

The appellant raises three points in his submissions on this issue and refers to a number of cases to support his arguments. In brief, he states as follows:

1. Section 15(1) of the Charter guarantees equality in the administration and application of the law such that this office must apply and administer the Act without "discrimination based on race", intentional or not.

2. Administration of the law which has a racial effect violates section 15(1) of the Charter, even though the procedure or legislation may be racially neutral.

Citing Andrews v. Law Society of British Columbia (1989) 56 D.L.R. (4th) 1 (S.C.C.) (at page 18), the appellant provides the following definition of "discrimination":

> I would say that discrimination may be described as a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individuals or groups not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

The appellant continues that the Supreme Court of Canada has determined that it is not necessary to show intention to discriminate, and that "discrimination" is established if a neutral policy or piece of legislation has the effect of discrimination (Re Ontario Human Rights Commission and Simpson Sears Limited (1985) 23 D.L.R. (4th) 321 (S.C.C.) and Action Travail des Femmes v. CNR (1987) 40 D.L.R. (4th) 193 (S.C.C.). This is referred to as "adverse effect discrimination".

3. Applying the Act to the appellant so as to deny him access to information and records collected, created and maintained in the workplace when allegations of discrimination took

place, and making it difficult for the appellant to prove his allegations, is a violation of section 15(1) of the Charter.

The appellant contends that in order to show "adverse effect discrimination", all he must show is that the application of the Act has had the effect of impacting upon him more adversely than it would on requesters who are not seeking to use the information to prove racial discrimination.

In this regard, the appellant cites a number of cases which have examined the concept of discrimination and systemic discrimination. These cases refer to characteristics of the individual or group to which he/she belongs, and the effect of being identified as one of that group or of having characteristics of that group.

I have carefully considered the representations on this issue and I conclude as follows.

It is clear that section 65(6) is equally applicable to all requesters who make requests for the types of information falling within the parameters of the section. The question is, does this amount to adverse effect discrimination?

In both Simpson Sears and Andrews, the Supreme Court of Canada has found adverse effect discrimination where neutral legislation or rules impose, **because of some special characteristic of the employee or group**, obligations, penalties, or restrictive conditions not imposed on other members of the workforce.

As the appellant indicates (above), in order for a legislative distinction to amount to discrimination against an individual or group, the Supreme Court of Canada has stated in Andrews, supra, that the distinction must be one "which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society." (Per McIntyre J, at p. 174)

I am not persuaded that section 65(6) imposes any obligations, penalties or restrictions on the appellant (or on the racial group to which the appellant belongs), which are not imposed on others, nor are other requesters outside of his racial or ethnic group given access to the information withheld under the impugned provision. I note that section 65(6) does not make provision for differential treatment of requesters on the basis of race, and the restrictions apply to all requesters.

I also note that the appellant is not being denied the records via other means or processes by virtue of the application of the Act. The records are simply not subject to this Act.

In conclusion, I find that the restrictions on access by the appellant by virtue of section 65(6) has no discriminatory effect on the basis of the appellant's race. Accordingly, I find that section 65(6) does not infringe the appellant's equality rights under section 15(1) of the Charter.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 6, 1997
Laurel Cropley
Inquiry Officer