



Information and Privacy
Commissioner/Ontario

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

ORDER P-1483

Appeal P_9700208

Ministry of Transportation



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NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was made by a Ministry employee for access to a copy of the “Engineering Development Program Audit Report which was prepared for the Workplace Discrimination & Harassment Prevention Program”. The Ministry located records responsive to the request and denied access to them, claiming that under section 65(6) of the Act, they fall outside the ambit of the Act.

The appellant appealed the Ministry’s decision. This office provided a Notice of Inquiry to the appellant and the Ministry. Representations were received from both parties.

The Engineering Development Program (the EDP) was a program operated by the Ministry which was designed to attract recent graduates of university engineering programs or current employees to careers in the transportation industry with the Ministry. The program also sought to enhance the exposure of these individuals to many facets of the Ministry’s operations so as to prepare them for careers as engineers and managers.

The responsive records consist of a 121-page Audit Report dated July to October 1994, a three-page legend which accompanied the report and a four-page memorandum containing comments on the Audit Report. The audit was conducted at the Ministry’s request to determine whether any barriers existed which might prevent Ministry employees from entering the EDP. The auditor was also requested to examine issues of discrimination in the operation of the EDP and its possible characterization as a “Special Program” under section 14(1) of the Ontario Human Rights Code.

DISCUSSION:

JURISDICTION

The sole issue in this appeal 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 is not subject to the Commissioner's jurisdiction.

The Ministry claims that paragraphs 65(6)1 and 65(6)3 apply to exclude the Audit Report and accompanying records from the Act.

I will first consider the Ministry's arguments on the application of section 65(6)3.

Section 65(6)3

In Order P-1242, Assistant Commissioner Tom Mitchinson found that in order to fall within the scope of paragraph 3 of section 65(6), 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.

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

Requirements 1 and 2

The Ministry submits and the appellant concedes that the records were prepared on behalf of the Ministry in relation to consultations or communications. In my view, the first two requirements of section 65(6)3 have been satisfied as the records were prepared by the auditor for the Ministry and are in relation to consultations or communications within the Ministry about the EDP.

Requirement 3

The Ministry submits that the Audit Report and the accompanying documents were about employment-related matters, the EDP. It argues that the records were prepared in response to allegations raised by a number of individuals, including Ministry employees, of discrimination and harassment in the selection criteria of the successful candidates for the EDP.

The appellant argues that the interviews conducted by the consultant in preparing the Audit Report were not about “employment-related matters”. Rather, they were in regard to a training program available to engineers who may or may not be employees of the Ministry. For this reason, the appellant argues that the training program which is the subject of the records cannot be “seen as an integral part of employment”.

With respect, I cannot agree with the position taken by the appellant in this regard. In my view, a training program for engineers which is operated by the Ministry and which may apply to Ministry employees is clearly an “employment-related matter” for the purposes of section 65(6)3. As such, I find that the records in the present appeal are concerned with consultations or communications about an employment-related matter within the meaning of section 65(6)3.

Also in Order P-1242, Assistant Commissioner Mitchinson reviewed a number of legal sources regarding the meaning of the term “has an interest”, as well as several court decisions which considered its application in the context of civil proceedings. He concluded by stating:

Taken together, these [previously discussed] authorities support the position that an “interest” is more than mere curiosity or concern. An “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.

The Ministry submits that it has a legal interest in the subject matter of the records. It argues that:

The Ministry’s interest is directly related to the possibility of being found liable under the Ontario Human Rights Code and in violation of the collective agreement and that a remedy could be fashioned by either the Commission or the Grievance Settlement Board.

The appellant indicates that as no grievances have been filed, as was the case in Order P-1302 (where job classifications were the subject of the records), the Ministry's legal rights and obligations have not been "engaged". The appellant submits that the Ministry's rights or obligations would not be affected by the disclosure of the records. He continues by stating that the fact that the Ministry is curious or concerned about the issues addressed in the records should not preclude his right to obtain a copy of the records.

In my view, the Ministry has a legal obligation to its employees and to other applicants for positions to ensure that fair hiring practices are followed. I agree with the Ministry's position that failure to do so could result in grievance proceedings being initiated by an employee or a complaint of discrimination being brought to the Ontario Human Rights Commission (the OHRC) by an applicant. The findings contained in the Audit Report could conceivably be relied upon to assist an employee of the Ministry in a grievance proceeding under the appropriate collective agreement or a proceeding before the OHRC.

I have carefully considered the contents of the records and have concluded that the disclosure of the findings contained in the Audit Report may have the capacity to affect the Ministry's legal rights or obligations. In my view, the Ministry has a legal obligation to apply fair hiring practices, and this may properly be characterized as a matter in which the Ministry "has an interest" for the purposes of section 65(6)3.

To summarize, I find that the records were prepared on behalf of the Ministry in relation to communications about employment-related matters in which the Ministry has an interest. As all of the requirements of section 65(6)3 have thus been established by the Ministry, and section 65(7) has no application to the records, they are excluded from the scope of the Act. Because of the findings which I have made with respect to section 65(6)3, it is not necessary for me to consider the application of section 65(6)1.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Donald Hale
Inquiry Officer

November 7, 1997