



Information and Privacy
Commissioner/Ontario

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

ORDER P-1486

Appeal P_9700230

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 for access to a copy of a consultant's report into the operation of a Ministry office where the appellant was formerly employed. The Ministry located the responsive record and denied access to it, claiming that section 65(6) of the Act applies to exclude it from the scope of the Act.

The appellant appealed the Ministry's decision to deny access. This office provided the Ministry and the appellant with a Notice of Inquiry, soliciting their submissions on the application of section 65(6) to the subject record. Representations were received from both the Ministry and the appellant.

DISCUSSION:

JURISDICTION

The sole issue to be determined in this appeal is whether the record falls 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 claims that the record is excluded from the scope of the Act by virtue of sections 65(6)1 and 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 that the record was prepared on its behalf and that it subsequently used the record in relation to communications between Ministry staff. The communications concerned the steps to be taken to address the issues raised in the record and implement its recommendations. I have reviewed the record and the submissions of the Ministry and find that the subject record was prepared on behalf of the Ministry. I also find that the record was used in relation to communications about the steps required to implement the recommendations contained in the report. Accordingly, I find that Requirements 1 and 2 have been satisfied.

Requirement 3

The Ministry submits that the communications which occurred following the creation of the record were “about” both labour relations and employment-related matters in which the Ministry has an interest. Because of the nature of the contents of the record, and in light of the employer-employee relationship between the Ministry and the appellant, I find that the communications which are the subject of the record are 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 a current WDHP [Workplace Discrimination and Harassment Policy] complaint, based partly on the [consultant’s] review. The appellant could then bring a civil action against the Ministry for damages. She could also bring an Ontario Human Rights complaint which could result in a finding of liability/damages against the Ministry.

The Ministry indicates that the appellant has initiated a grievance through the procedures established in the collective agreement between her bargaining agent and the Ministry which govern her employment. I find that the grievance relates directly to the issues addressed in the record. I further find that the employment-related matter communicated in the record has the capacity to effect the Ministry’s legal rights or obligations in a possible proceeding before the courts, the Ontario Human Rights Commission or the Grievance Settlement Board. In my view, the Ministry has established that it has a legal interest in the employment-related matter which is the subject of the record. Accordingly, I find that the Ministry has satisfied all of the component parts of Requirement 3.

To summarize, I find that the record was 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 record, it is 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 17, 1997