

ORDER P-1514

Appeal P-9700124

Ministry of the Solicitor General and Correctional Services

NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) from a member of the Ontario Provincial Police (the OPP). The request was for access to his personnel records compiled since November 1970, as well as any records maintained by the OPP's Professional Standards Bureau. The Ministry located 1002 pages of responsive records and denied access to them, in their entirety, claiming that because of the operation of sections 65(6)1 and 3 of the Act, these records were outside the scope of the Act.

The appellant appealed the Ministry's decision. As no mediation was possible, a Notice of Inquiry was provided by this office to the appellant and the Ministry. During the inquiry stage of the appeal, the Ministry located another 51 pages of records relating to the appellant's Workers' Compensation Board claims (the WCB records) and a further 282 pages relating to claims filed by the appellant for Long Term Disability coverage with his insurer (the LTD records). The Ministry advised the appellant that access to these records was also denied because of the application of section 65(6)1 and 3. The appellant indicated that he wished to appeal this aspect of the Ministry's decision as well.

Representations in response to the Notice of Inquiry were received from both parties. The appellant also advised that he did not wish to make any further submissions with respect to the WCB and LTD records located by the Ministry in the inquiry stage of the appeal.

THE RECORDS:

The records at issue in this appeal consist of a number of documents from the appellant's personnel file which were compiled by the OPP Human Resources Department since his employment began in 1970. In keeping with the Ministry's numbering system, these records are described as Pages 1 to 328 in the Notice of Inquiry. Pages 329 to 1002 are records compiled by the OPP's Professional Standards Bureau in the course of several disciplinary investigations and proceedings involving the appellant in 1988-89 and 1992 to 1995. I have described the records relating to the appellant's Long Term Disability claims as Records LTD 1 to 282 and those relating to his Workers Compensation Board claims as Records WCB 1 to 51.

DISCUSSION:

JURISDICTION

The sole 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.

Section 65(6)1

In Order P-1223, 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 these records, it is clear that all of them were, at one time or other, prepared and used by officials within the OPP's Human Resources Department and its Professional Standards Bureau.

In addition, I find that those records maintained by the Human Resources Department which relate to the appellant's WCB claim (Records WCB 1 to 51) and the records relating to discipline proceedings against the appellant under Part V of the Police Services Act (the PSA) which were maintained by the Professional Standards Bureau (Records 329 to 1002) were collected, prepared, maintained or used in relation to a proceeding or an anticipated proceeding before a tribunal or other entity for the purposes of the second requirement of section 65(6)1 (Orders M-996 and M-1034).

I further find that the WCB and the OPP's disciplinary proceedings relate to labour relations or to the employment of the appellant by the Ministry. Accordingly, the third part of the section 65(6)1 test has been satisfied with respect to these records. They are not subject to any of the exceptions in section 65(7). To summarize, I find that Records WCB 1 to 51 and Records 329 to 1002 fall within the ambit of section 65(6)1 and are, accordingly, outside the scope of the Act.

The Ministry goes on to argue that the appellant's personnel files (Records 1 to 328) are also being maintained and used by the Ministry in connection with a civil action that the appellant has initiated against the OPP.

The appellant's legal proceeding alleges that the appellant was prosecuted under Part V of the PSA for improper reasons and seeks damages against the Ministry. The Ministry maintains that the personnel records represented by Records 1 to 328 "will be reviewed in the course of proceedings associated with his civil action to verify the circumstances of his employment with the Ministry." For this reason, it submits that Records 1 to 328 fall outside the ambit of the Act, under section 65(6)1.

In my view, the dominant purpose for the creation of Records 1 to 328 was simply to document various employment-related matters which occurred during the appellant's long career with the OPP. These records consist of a wide range of personnel records dating back to August 1969 and include such documents as the appellant's initial application for employment, letters received from members of the public about his work, payroll, attendance and medical records.

I find that these records predate the commencement of the court proceeding, some by over twenty years, and do not relate to the subject matter of the appellant's civil action in any tangible way. In addition, the Ministry has not demonstrated that these particular records are relevant to the preparation of the Ministry's defence to the appellant's legal proceeding. I find, therefore,

that the collection, maintenance and use of these records was not “in relation to” the pending civil action initiated by the appellant within the meaning of section 65(6)1. Accordingly, Records 1 to 328 do not fall within the ambit of section 65(6)1.

The Ministry has not made any submissions with respect to the application of section 65(6)1 to Records LTD 1 to 282. Based on my review of their contents, I am of the view that they do not fall within the scope of this section as they were not maintained or used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity as is required by section 65(6)1 .

Section 65(6)3

In order for the remaining records (Records 1 to 328 and Records LTD 1 to 282) 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 noted above, Records 1 to 328 consist primarily of payroll and attendance records pertaining to the appellant. Records LTD 1 to 282 contain similar information, as well as medical information and correspondence about the appellant with respect to his claims for long term disability coverage from his insurer. I find that all of these records were collected, prepared and/or maintained by the Ministry in its capacity as the appellant’s employer, thereby satisfying the first requirement of section 65(6)3.

With respect to the second requirement of section 65(6)3, the Ministry simply states that:

... Ministry staff collected, prepared, maintained and/or used the records at issue in relation to meetings, consultations, discussions and communications about labour relations and employment-related matters in which the Ministry has an interest.

It goes on to add that the appellant’s personnel file (Records 1 to 328) is being maintained and used for meetings, consultations, discussions and communications relating to the appellant’s legal action against the Ministry. I find that Records 1 to 328 have been maintained and used by the Ministry in relation to various communications and discussions about the requester and his

job performance. As such, I find that the second requirement of section 65(6)3 has been satisfied with respect to these records.

The Ministry has not adduced any evidence to demonstrate whether the collection, preparation, maintenance or use of the records relating to the appellant's Long Term Disability claim (LTD 1 to 282) was in relation to any of the activities listed in section 65(6)3. Nor am I able to determine, based on my review of these records, whether their collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications. I find, therefore, that the second requirement of section 65(6)3 has not been met with respect to Records LTD 1 to 282.

As all three requirements of section 65(6)3 must be satisfied, I find that Records LTD 1 to 282 fall within the ambit of the Act

Requirement 3

I am satisfied that the appellant was an employee of the Ministry, specifically the OPP, at the time that Records 1 to 328 were created. I am also satisfied that these records were created by the Ministry and that they pertain to the employment of the appellant by the Ministry. Accordingly, Records 1 to 328 qualify as records about "employment-related matters" for the purposes of section 65(6)3.

The question which must now be answered is whether the Ministry has a legal interest in the matters addressed in these records. Previous orders have held that an "interest" for the purposes of section 65(6)3 must be more than a 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 its legal rights or obligations (Order P-1242).

The Ministry submits that its legal interest in the records arises from:

1. the statutory requirements of the Public Service Act, the Police Services Act and the Workers' Compensation Act,
2. the collective agreement which exists between the Ministry and members of the Ontario Provincial Police Association, including the appellant, and
3. from general common law principles which govern the relationship between employees and employers.

In addition, the Ministry submits that it has a legal interest in the records as the appellant has filed a civil action which requires the submission of a defence. The Ministry concludes by arguing that the civil action has the capacity to affect its legal rights and interests.

In my view, the Ministry has not demonstrated that it has sufficient legal interest in the appellant's personnel records (Records 1 to 328) to bring them within the ambit of section 65(6)3. I agree that the Ministry has a limited degree of interest in these records simply because of its position as the appellant's employer and their custodian. I cannot agree, however, that the Ministry has the requisite **legal interest** in these particular records. Neither, in my view, are

these records necessarily required for the preparation of the Ministry's defence to the appellant's action. This is particularly so with respect to the appellant's employment records which date back a number of years, before the events which gave rise to the proceedings against the appellant under Part V of the PSA. Therefore, I find that Records 1 to 328 have no relation to the subject matter of the appellant's legal action and do not pertain to some other legal obligation, either statutory or at common law, owed by the Ministry to the appellant.

Accordingly, in my view, the Ministry's interest in the subject matter of Records 1 to 328 does not qualify as a "legal interest" for the purposes of section 65(6)3. These documents are, therefore, within the scope of the Act.

By way of summary, I find that the records pertaining to the appellant's WCB file (Records WCB 1 to 51) and the file pertaining to the Professional Standards Bureau investigations and proceedings (Records 329 to 1002) are outside the scope of the Act as a result of the operation of section 65(6)1. However, those records which relate to the appellant's LTD claims (Records LTD 1 to 282) and the contents of his personnel file (Records 1 to 328) fall within the jurisdiction of the Act. I will, therefore, order the Ministry to provide the appellant with a decision letter with respect to access to those records only.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 329 to 1002 and WCB 1 to 51 on the basis that these records fall outside the scope of the Act. This portion of the appeal is, therefore, dismissed.
2. I order the Ministry to provide the appellant with a decision letter with respect to Records 1 to 328 and LTD 1 to 282 in accordance with the time frames set forth in section 26 of the Act, using the date of this order as the date of the request, and without recourse to a time extension under section 27 of the Act.
3. I further order the Ministry to provide me with a copy of the letter referred to in Provision 2 by forwarding a copy to my attention c/o the Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____

Donald Hale
Inquiry Officer

January 13, 1998