



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1541

Appeal P-9700312

Ministry of the Solicitor General and Correctional Services



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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). The requester, a Correctional Officer employed by the Ministry since 1992, sought access to her personnel file. The Ministry located a number of responsive records and denied access to them in their entirety, claiming that, pursuant to section 65(6) of the Act, the records fall outside the scope of the Act. The requester, now the appellant, appealed the Ministry's decision.

This office provided the parties with a Notice of Inquiry soliciting their submissions on the application of section 65(6) to the records. Representations were received from the Ministry as well as the appellant.

The records at issue consist of a number of personnel-related documents including telephone absence reports, memoranda, the appellant's resume and application form, appointment forms, performance appraisals, correspondence relating to certain grievances initiated by the appellant and job competitions entered by the appellant.

DISCUSSION:

JURISDICTION

The only issue in this appeal is whether the records fall within the scope of sections 65(6) and (7) of the Act. These provisions read as follows:

- (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 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In Order P-1223, Assistant Commissioner Tom Mitchinson determined that, in order for a record to fall within the scope of paragraph 1 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 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.

The Ministry has provided documentation to establish that the appellant has filed five grievances under Article 27 of the collective agreement between the Ontario Public Service Employees Union (OPSEU) and the Government of Ontario, alleging that she was discriminated against by her employer. The grievances are broadly drafted and cover a number of areas of the appellant's work. The collective agreement was negotiated under the terms of the Crown Employees Collective Bargaining Act (CECBA). The appellant was a member of OPSEU when the grievances were filed.

The Ministry submits that the records were maintained and used to respond to the appellant's grievances, and are also maintained and used in anticipation of proceedings before the Grievance Settlement Board (the GSB).

The Ministry also submits that the grievance process under the terms of the collective agreement

and CECBA constitutes “proceedings” for the purposes of section 65(6)1, and that these proceedings relate to both labour relations and the employment of a person by the Ministry.

I will now consider whether the Ministry has established the three requirements of section 65(6)1, as outlined above.

1. Were the records collected, prepared, maintained or used by the Ministry or on its behalf?

I accept the submissions of the Ministry that the records at issue are presently being used by the Ministry to prepare its response to the grievances initiated by the appellant. Part one of the test has, accordingly, been met.

2. Was this collection, preparation, usage and maintenance in relation to proceedings or anticipated proceedings before a court, tribunal or other entity?

“court, tribunal or other entity”

The GSB is established by its enabling statute (the Crown Employees Collective Bargaining Act) as an administrative body with powers to determine matters affecting rights. As such, I find that it is properly characterized as a “tribunal” for the purpose of section 65(6)1.

“proceedings”

In Order P-1223, Assistant Commissioner Mitchinson defined the term “proceedings” as:

Given the references to proceedings “before a court, tribunal or other entity”, I am of the view that a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide the matters at issue would constitute “proceedings” for the purposes of section 65(6)1.

I find that the hearings before the GSB constitute a dispute and complaint resolution process which has, by law, the power to decide grievances and, as such, hearings before it properly constitute “proceedings” within the meaning of section 65(6)1.

“in relation to”

The Ministry submits that its use of the appellant’s personnel records are clearly in relation to her ongoing grievances. Because of the broad nature of the issues raised in the appellant’s grievances, I accept the Ministry’s submissions that the records which are the subject of the present appeal are being used by the Ministry in relation to the proceedings before the GSB. Accordingly, I find that these documents are being “used” in relation to the grievance proceedings within the meaning of section 65(6)1.

Accordingly, the second part of the section 65(6)1 test has been met.

3. Do these proceedings relate to labour relations or to the employment of a person by the Ministry?

Again, in Order P-1223, 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:

Section 65(6)1 uses the phrase “relating to labour relations **or** to the employment of a person by the institution” (emphasis added). Consequently, in my view, the legislature must have intended the terms “labour relations” and “employment” to have separate and distinct meanings and application. My view is supported by the presumption of consistent expression in statutory interpretation, one of whose tenets is that “it is possible to infer an intended difference in meaning from the use of different words or a different form of expression” (Driedger on the Construction of Statutes, 3rd ed., p.164).

The term “labour relations” also appears in section 17(1) of the Act. In this context, Inquiry Officer Holly Big Canoe discussed the term “labour relations information” in Order P-653, and made the following statements:

In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the **collective** relationship between the employer and its employees.

Given the particular wording of section 65(6)1, I find that Inquiry Officer Big Canoe’s interpretation of the term is equally applicable in the context of paragraph 1. Therefore, I find that “labour relations” for the purposes of section 65(6)1 is properly defined as the collective relationship between an employer and its employees.

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.

I adopt the approach taken by Assistant Commissioner Mitchinson and find that, for the reasons expressed above, the proceedings involving the adjudication of the appellant’s grievances before the GSB relate to labour relations within the meaning of section 65(6)1. Accordingly, the third requirement of section 65(6)1 has been established.

In summary, I find that the records at issue in this appeal are being used by the Ministry in relation to proceedings before a tribunal, the GSB, and that these proceedings relate to labour relations. All of the requirements of section 65(6)1 of the Act have been satisfied by the Ministry, and the exceptions provided by section 65(7) do not apply. Accordingly, I find that the records fall within the parameters of this section and are 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 will not be necessary for me to address the application of section 65(6)3 to them.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ March 5, 1998