



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

ORDER P-1495

Appeal P_9700153

Ministry of Labour



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NATURE OF THE APPEAL:

The appellant has concerns that several employees of the Ontario Labour Relations Board may be in a conflict of interest situation due to their involvement with a company that provides private arbitration and mediation services. She made a detailed 13-part request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Labour (the Ministry). The request dealt with various aspects of the administration of the Ministry's conflict of interest policy, as well as the Ministry's recent decision to eliminate the grievance mediation program.

The Ministry provided access to certain responsive records, and partial access to a 20-page record entitled "Labour Relations Review Project: Recommendations for a Framework for Labour Relations Delivery for Ontario" pursuant to section 12(1)(b) of the Act (Cabinet records).

The Ministry identified 11 other records, totalling 24 pages, which it claimed fell under the scope of section 65(6), and therefore outside the jurisdiction of the Act. These records consist of a briefing note, memoranda, letters and an action request. In the event that section 65(6) does not apply to all of these records, the Ministry claimed sections 19 (solicitor-client privilege) as the basis of denying access to three of them, and 21 (personal information) for four others.

The appellant appealed the Ministry's decision.

This office sent a Notice of Inquiry to the Ministry, the appellant, and four individuals whose interests could be affected by the outcome of this appeal (the affected persons). Representations were received from all parties.

DISCUSSION:

JURISDICTION:

In this appeal, the first issue to be decided is whether sections 65(6) and (7) of the Act apply to any of the 11 records. These two sections 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.

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 outside the Commissioner's jurisdiction.

Section 65(6)3

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 institution 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 institution has an interest.

[Order P-1242]

Requirements 1 and 2

The Ministry states that all of the records were either "collected, prepared, maintained, or used" by the Ministry for the purpose of "meetings, discussions, consultations, or communications" concerning conflict of interest issues. Having reviewed the records, it is clear to me that they

were all prepared and used by officials within the Ministry, and this preparation and use was related to employment-related conflict of interest policies and issues within the Ministry.

Accordingly, I find that the first two requirements have been met.

Requirement 3

The Ministry states that all of the records involve the issue of conflict of interest on the part of various Ministry employees, and that conflict of interest in the employment context is an employment-related matter.

The records all deal with the involvement of Ontario Labour Relations Board employees in a company which provides private arbitration and mediation services, and whether this activity amounts to a conflict of interest in the employment context. As such, I am satisfied that the discussions and communications which are reflected in the records are about an employment-related matter within the meaning of section 65(6)3.

The only remaining issue is whether this employment-related matter can be characterized as one in which the Ministry has an interest.

In Order P-1242, I made the following comments regarding the meaning of the term "has an interest":

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 appellant submits that section 65(6)3 does not apply because the records do not relate to a matter in which the Ministry has a legal interest.

The Ministry states that conflict of interest is a legal interest on the part of the Ministry. The Ministry argues that Regulation 977 pursuant to the Public Service Act (in particular section 15) establishes a clear expectation that potential conflicts of interest will be identified and addressed. In the Ministry's view, it has a two-fold legal interest; first, its potential legal liability for failing to enforce conflict of interest rules, and second its potential involvement in the discipline or discharge of employees who violate Regulation 977 or the Ministry's policy. The Ministry provided me with a copy of Regulation 977 and its "Policy and Guidelines on Conflict of Interest".

I agree with the Ministry's position. I find that the Ministry has a legal interest in adhering to the standards and requirements of the Public Service Act sufficient to bring it within the scope of the third requirement.

All of the requirements of section 65(6)3 of the Act have been established by the Ministry and none of the exceptions contained in section 65(7) are present in the circumstances of this appeal.

Therefore, I find that the 11 records fall within the parameters of this section and are excluded from the scope of the Act.

Because of the way in which I have disposed of this issue, it is not necessary for me to consider the application of sections 19 and 21 of the Act.

CABINET RECORDS

The Ministry submits that the withheld portions of the record entitled "Labour Relations Review Project: Recommendations for a Framework for Labour Relations Delivery for Ontario" is exempt under section 12(1)(b) of the Act, which states:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

It has been determined in several previous orders that the use of the word "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of an Executive Council or its committees (not just the types of records listed in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).

In addition, it is possible for a record which has never been placed before the Executive Council or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosure would reveal the substance of deliberations of an Executive Council or its committees, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees.

The Ministry submits that all of the information contained in the withheld portions of the record was incorporated into a subsequent submission to Management Board of Cabinet (MBC), a Cabinet committee. The Ministry adds that, although the record itself was not actually forwarded to MBC, it contains policy options and recommendations which were subsequently submitted to and discussed by MBC.

The Ministry provided me with a copy of a Management Board submission, dated September 24, 1996. I reviewed this record, and I am satisfied that disclosure of the withheld portions would reveal both policy options and recommendations contained in the Management Board submission. Therefore, I find that the Ministry has established the requirements of the introductory wording of section 12(1), and the remaining parts of this record are properly exempt under that section.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

November 27, 1997