



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER P-1515**

**Appeal P-9700272**

**Management Board Secretariat**



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## **NATURE OF THE APPEAL:**

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to Management Board Secretariat (MBS). The request was for a report which investigated the appellant's management style. The appellant is an employee of MBS and claims that parts of the report were read out loud to her in July, 1997. MBS denied access to all responsive records, claiming that they fall within the parameters of section 65(6) of the Act, and therefore outside the scope of the Act.

The appellant appealed the decision.

This office provided a Notice of Inquiry to the appellant and MBS. Representations were received from both parties.

## **RECORDS:**

The records at issue in this appeal consist of a covering letter, the final copy of an investigation report into the management practices of the appellant, and a letter of complaint.

## **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:

- (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.

MBS submits that the records fall within the scope of paragraphs 1 and 3 of section 65(6).

### **Section 65(6)3**

In order to fall within the scope of paragraph 3 of section 65(6), MBS must establish that:

1. the record was collected, prepared, maintained or used by MBS 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 MBS has an interest.

(Order P-1242)

MBS advises that the appellant is an employee of MBS who was employed in a management position in one of its branches. MBS indicates that initially, an oral complaint was received from a staff member of the Branch. The Branch Director informally investigated the issues raised, however, MBS indicates that the situation was not resolved successfully.

At the same time, staff performance appraisals of the appellant were being considered. MBS indicates that the appellant raised objections to the concept of performance appraisals. MBS indicates that as a result of a collection of events concerning the appellant, senior management felt that events were serious enough to warrant a formal investigation of the appellant's management practices. Accordingly, the services of a Human Resource Consultant were retained to formally investigate a number of issues raised in the unit and prepare a report of findings.

MBS indicates that the appellant received a verbal briefing of the overview of findings of the report from the consultant and the Assistant Deputy Minister (the ADM), Internal Ministry Services Division. In view of the circumstances, it was agreed by all parties that the appellant should not return to work in the unit. The appellant is currently assigned to another area of MBS.

MBS indicates that the matter has not been resolved, however. In this regard, MBS states that the complaints raised by witnesses in the report point to a significantly poisoned workplace which needs to be addressed. MBS states further that management has a responsibility to provide workers in the unit with a safe and harassment free workplace. Therefore, MBS states that in all likelihood the records at issue will become the basis for decisions which will ultimately be used to discipline the appellant. Because the appellant is employed in the Senior Management Group, she has the right to litigate before the courts any disciplinary action.

MBS indicates that the information contained in the records relates to the steps taken by a consultant on behalf of the ADM, Internal Ministry Services, to investigate various allegations pertaining to the appellant's management style. In this regard, the report contains an overview of findings, details of investigation/review and statements from witnesses, as well as a copy of the initial complaint from the staff member of the unit.

The appellant refers to the interpretation of the term "legal interest" which was first determined by Assistant Commissioner Tom Mitchinson in Order P-1242. In that order, the Assistant Commissioner found 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 MBS does not have a legal interest in the records. In this regard, the appellant asserts that an investigation conducted into her management practices does not, in and of itself, have the capacity to affect MBS's legal rights or obligations.

The appellant comments on the lack of due process in the handling of this matter by MBS and indicates further that, at the present time, there has been no formal determination of her rights concerning her employment.

The appellant submits that MBS cannot, on the one hand, claim the advantage of denying access to the report as not being covered by the scope of the Act, and on the other hand, deny her the benefit of the rights accompanying a formal process throughout the investigation and after. The

appellant argues that if the generation of the report had the capacity to determine or affect the institution's legal rights or obligations, then there ought to have been specified procedures followed to reflect a concern for due process, both to protect the legitimacy of the process and as well, the legitimacy of any decision made as a result of it. On this basis, the appellant submits that a process carried out informally and in a discretionary manner cannot be said to have the capacity to affect the legal rights or obligations of the institution.

MBS submits that it has an "interest" because the record affects its legal rights or obligations under the Public Service Act (the PSA). In this regard, MBS states:

The [PSA] regulates the conduct of public servants and permits discipline, including the "imposition of fines, removal from employment, demotion or otherwise..."

Following consideration of the submissions of both parties and a review of the records at issue, I find that they were prepared, maintained and used by MBS or on its behalf in relation to discussions and/or communications about and/or with the appellant. Therefore, I am satisfied that the first two requirements of section 65(2)3 have been met.

The purpose of the creation of the records was to provide a formal evaluation of the appellant's job performance, and I find this is directly related to her employment with MBS. I do not agree with the appellant's position that MBS does not have "an interest" in these records in the requisite sense (as defined in Order P-1242). In my view, MBS is obligated to provide workers in the unit with a safe and harassment free workplace, and the assessment of an employee's employment related performance is consistent with this obligation. Further, the employer is required, both at law, and in accordance with the PSA, to deal with employment-related concerns raised by the appellant as a result of this assessment of her performance. Accordingly, I find that MBS has an interest in the records at issue.

Therefore, the third requirement of section 65(6)3 has also been established.

In summary, I find that the records at issue in this appeal were prepared, maintained and/or used by or on behalf of MBS, in relation to discussions and consultations about employment-related matters in which MBS has an interest. All of the requirements of section 65(6)3 of the Act have thereby been established by MBS. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal, and I find that the records fall within the parameters of this section, and therefore are excluded from the scope of the Act.

## **ORDER:**

I uphold MBS's decision.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ January 13, 1998