



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-1488

Appeal P\_9700217

Ministry of the Solicitor General and Correctional Services



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## **NATURE OF THE APPEAL:**

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Solicitor General and Correctional Services (the Ministry). The request was for access to any information considered and relied upon by the Ministry in reaching a decision to dismiss him from employment in June, 1997, including any information collected through an informal Workplace Discrimination and Harassment Prevention policy (WDHP) investigation in which the appellant was identified as the respondent.

The Ministry located the records responsive to the request and denied access to them 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 denial of access.

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

## **RECORDS:**

The appellant has narrowed the records at issue in this appeal to the following: a one-page memorandum to the Deputy Superintendent, Operations, from the Superintendent, dated September 27, 1996 (Record 1); a two-page memorandum to the Superintendent from the Deputy Superintendent, Operations, dated September 26, 1996 (Record 2); a one-page occurrence report completed by an individual, dated September 22, 1996 (Record 3).

## **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 its representations, the Ministry claims that paragraphs 1 and 3 of section 65(6) apply to exclude the records from the Act. I will first consider whether the requirements of paragraph 3 are present in the circumstances of this appeal.

### **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 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]

### **Requirement 1**

The Ministry indicates that the appellant was an employee of the Ministry. The Ministry states that the records were prepared, maintained and used by the Ministry as a result of and for the purpose of responding to a WDHP complaint made against the appellant.

In reviewing the records, I note that Record 1 is a response from the Superintendent to the Deputy Superintendent arising from the information contained in Record 2. In Record 1, the Superintendent gives direction as to the manner in which the Deputy Superintendent is to proceed. Record 2 contains an outline of the appellant's behaviour in the matter connected to the WDHP complaint. This record was prepared by the Deputy Superintendent. Record 3 contains information which is referred to in Record 2 as providing support for further investigation of the complaint. This record was prepared by an employee of the Ministry.

I am satisfied that the records were all prepared and used by Ministry staff, and requirement 1 has been met.

### **Requirement 2**

The Ministry indicates that an investigation was conducted by senior management staff of the Ministry. The records document the communication of the issue amongst Ministry management to address the complaint. The Ministry states further that once the investigation of the WDHP complaint was completed, a meeting was held in May, 1997, in the office of the Deputy Superintendent, D. C. Operations, to review the allegations made under the WDHP Policy. The appellant did not attend the meeting and the decision, made in June, 1997, was communicated to the appellant indicating the termination of his contract. In this regard, the Ministry states that the records also contain the response of Ministry staff in relation to the investigation and the communicated response to the appellant.

In Order P-1223, Assistant Commissioner Tom Mitchinson stated:

In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was **for the purpose of, as a result of, or substantially connected to** an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity. (emphasis added)

Having reviewed the records, I find that all three of them were prepared or used for the purpose of or are substantially connected to discussions, communications and/or meetings related to the WDHP complaint.

Accordingly, I find that the second requirement has been met.

### **Requirement 3**

I am satisfied that the appellant was an employee of the Ministry at the time the records were prepared and communicated to, or used in meetings attended by, senior management at the appellant's place of employment.

In Order P-1242, Assistant Commissioner Mitchinson's view towards WDHP complaints was stated as follows:

In my view, the WDHP program is, by definition, designed to address an employment-related concern, and I find that any investigation which takes place under the terms of the program is properly characterized as an "employment-related matter" for the purposes of section 65(6)3 of the Act.

I agree and find that the records related to an employment-related matter.

With respect to whether a WDHP investigation is a matter in which the Ministry has an interest, Assistant Commissioner Mitchinson made the following findings in Order P-1242:

On the basis of these board of inquiry decisions, I conclude that if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the [Human Rights] Code, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as matter "in which the institution has an interest".

I agree with these findings and am satisfied that the records at issue in this appeal were collected, prepared and/or used by or on behalf of the Ministry, in relation to meetings, discussions and communications about employment-related matters in which the Ministry has an interest. All of the requirements of section 65(6)3 of the Act have thereby been established by the Ministry.

The appellant submits that the exception in section 65(7)1 applies to the records at issue. As I indicated above, this section states:

This Act applies to the following records:

An agreement between an institution and a trade union.

In his representations, the appellant outlines the history of this matter, indicating that he brought a grievance against his employer immediately following his termination. With respect to his grievance, he refers in particular to the disclosure requirements in Articles 22.14.4 and 22.14.5 of the collective agreement that currently governs labour relations between the Ministry and OPSEU. In this regard, he states:

I believe Section 65(7)(1) of the Act is applicable to my appeal. This section refers to records that the Act does apply to i.e. "An agreement between an

institution and a trade union.” In the context of this appeal ‘institution’ refers to the Ministry and ‘trade union’ refers to OPSEU. It is my opinion, Article 22.14.4 and Article 22.14.5 of the Collective Agreement outlines a clear provision for the release of or disclosure of records. Therefore, this provision specifically and the Collective Agreement in general constitute ‘agreement’ that Section 65(7)(1) requires.

In my view, section 65(7)1 is intended to apply when the actual agreement has been requested and is the record at issue in an appeal. The section does not refer to any matters which may flow from that agreement. In this regard, I find that the disclosure to the appellant during the grievance process provided for by Articles 22.14.4 and 22.14.5 flows from the collective agreement and therefore, does not fall within the exception in section 65(7)1.

I have found that the records meet all of the requirements of section 65(6)3 of the Act. As none of the exceptions contained in section 65(7) are present in the circumstances of this appeal, I find that the records fall within the parameters of this section, and therefore are excluded from the scope of the Act. Because of the findings I have made it is not necessary for me to consider the application of section 65(6)1 to the records.

**ORDER:**

I uphold the Ministry’s decision.

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

\_\_\_\_\_  
November 18, 1997