



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

ORDER PO-1649

Appeal PA-980160-1

Ministry of Education and Training



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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 the Ministry of Education and Training (the Ministry). The request was for access to records regarding a specific Ministry job competition which took place in April 1998. Specifically, the requester asked for all records for all applicants interviewed, including interview questions, responses, rating scores, any or all ad hoc comments, any or all references, opinions and resumes.

The Ministry denied access to the requested records claiming that they fell outside the scope of the Act by virtue of section 65(6)3 of the Act. The appellant appealed the Ministry's decision.

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

RECORDS:

The records at issue consist of screening sheets, interview rating forms, documentation provided by candidates, a written assignment, the job advertisement, a report summary, a memorandum about, and letter address to, the successful candidate and the interview schedule.

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.

Section 65(6)3

In order for a record 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]

Requirements 1 and 2:

The Ministry submits that the records were collected, prepared and maintained for its use in the recruitment process, which includes the actual recruitment for the advertised position as well as for the purpose of responding to debriefing requests of unsuccessful candidates and potential, future grievances.

The Ministry submits further that the collection, maintenance or usage of the records was in relation to communications, meetings and/or discussions about the job competition. The Ministry relies on previous orders of this office which have found, in the context of a job competition, that such records are collected, prepared, maintained or used “in relation to” communications which take place around the job recruitment process (Orders P-1258, P-1242, P-1442 and P-1590).

I am satisfied that the records were collected, maintained and used by the Ministry in a job recruitment process and that records produced in this context are “communications” (Order P-1258). Further, I find that records generated with respect to these activities would either be for the purpose of, as a result of, or substantially connected to these communications, and therefore, properly characterized as being “in relation to” them (Order P-1258). Accordingly, I find that the first and second requirements of section 65(6)3 have been satisfied.

Requirement 3:

Job competitions, by their very nature, are clearly employment-related matters (Orders P-1258, P-1442 and P-1590). Moreover, the appellant was an employee of the Ministry at the time of the competition. I am satisfied that the records qualify as records about “employment-related matters” for the purposes of section 65(6)3.

The only remaining issue is whether this is an employment-related matter in which the Ministry “has an interest”.

In Order P-1242, Assistant Commissioner Tom Mitchinson stated the following 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.

However, several recent orders of this office have considered the application of section 65(6)3 (and its municipal equivalent in section 52(3)3) in circumstances where there is no reasonable prospect of the institution’s “legal interest” in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a

matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records.

The Ministry indicates that the appellant has expressed continued dissatisfaction with the results of this competition with the most recent correspondence having been received by the Ministry in September, 1998.

In earlier correspondence sent to the Chair of Management Board of Cabinet, the appellant demanded a ministerial inquiry into the circumstances surrounding his perpetual lack of success in job competitions. The Ministry indicates that the appellant currently has one outstanding grievance relating to another unsuccessful competition. The Ministry states further that it is currently involved in on-going debriefing discussions with the appellant regarding this competition with the most recent meeting scheduled for sometime this month. Finally, the Ministry anticipates, based on the appellant's actions, that he may pursue a complaint under the Ontario Human Rights Code (the Code). The Ministry cites Order P-1258 as authority for the position that the provisions of the Code are relevant to the issue of an institution's legal obligations.

Based on the Ministry's representations, I am satisfied that there remain on-going interests in this job recruitment process that have the capacity to affect the Ministry's legal rights or obligations. Therefore, I find that the Ministry has established a current and active legal interest in the employment-related matter to which the records at issue relate and the third requirement for section 65(6)3 has been met.

None of the exceptions in section 65(7) apply in the circumstances of this appeal, and I find that the records fall outside the jurisdiction of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Laurel Cropley
Adjudicator

January 7, 1999