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

# INTERIM ORDER P-1627

Appeal P_9800120

Ministry of the Attorney General

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## NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of all records relating to a job competition for the position of Legal Counsel with the Legal Services Branch of the Ministry of Consumer and Commercial Relations (MCCR). This position was advertised on the Association of Law Officers of the Crown (ALOC) job transfer list. The appellant was an unsuccessful candidate for this position.

The request included the job description, questions used at the appellant's interview, model answers used to assess the answers provided by the applicant for the job transfer, answers provided by the applicant as recorded by the interview panel and model draft factum, and model draft legal opinion used to assess the draft factum and draft legal opinion submitted by the applicant for the job transfer.

The Ministry identified 35 pages of responsive records. They consist of the "Interview Questions and Rating Sheet", which includes the notes of the interviewers and the answers provided by the appellant, the job posting, and a description of the competition process and scoring. The Ministry denied access to all records in their entirety, claiming they fell outside the scope of the Act pursuant to section 65(6)3.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the Ministry clarified that a job description, a model draft factum and model answers were not created for the competition.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties.

## DISCUSSION:

### JURISDICTION

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegates to continue an inquiry on the substantive issue of whether or not a record is exempt. If the requested records fall within the scope of section 65(6), it would be excluded from the scope of the Act unless it is a record described in section 65(7). Section 65(7) lists exceptions to the exclusions established in section 65(6).

> (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.

Sections 65(6) and (7) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 65(6) falls within one of the exceptions enumerated in section 65(7), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in the Act apply.

**Section 65(6)3**

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

1. they were 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 submits that the records were collected, maintained and/or used by the Ministry in connection with a competition to fill the position of Legal Counsel at the Legal Services Branch of MCCR. In his representations, the appellant acknowledges that "the records were collected, maintained and used for the purposes of a job transfer."

I find that the first requirement of section 65(6)3 has been established.

**Requirement 2**

The Ministry submits 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 took place around the job competition process (Orders M-861, M-992 and P-1258).

The appellant disputes the findings from previous orders that a job interview is a "meeting" for the purposes of section 65(6)3. He states that "meeting" is not defined in the Act, and neither the Oxford English Dictionary nor Black's Law Dictionary defines "meeting" as including a job or employment interview. The appellant submits that common usage would not include a job or employment interview in the definition of meeting.

I do not agree with the appellant's narrow approach to the definition of "meeting". However, even if I did, it is important to note that a job interview does not need to qualify as a "meeting" in order for the second requirement of section 65(6)3 to be established. The orders referred to by the Ministry and the appellant do not restrict themselves to findings regarding "meetings". They also find that records produced in the context of a job competition are "communications" (Orders M-861 and P-1258), and 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).

I find that records collected, maintained or used in a job competition (as is the case here) are communications in relation to that competition. Therefore, I find that the second requirement of section 65(6)3 has been satisfied.

**Requirement 3**

Clearly, a job competition is an employment-related matter, and the appellant concedes that the "employment of a person is relevant to this appeal." The appellant was an employee of the

Ministry at the time of the job competition. The complete hiring process, including the screening of potential candidates, must be considered to be an employment-related matter, regardless of the fact that the person may not ultimately be the successful candidate (Order M-1127). Therefore, 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, I 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, the interpretation of this term has been expanded in recent orders.

In Order P-1575, I dealt with a request for notes "made during an employee performance and evaluation process". I concluded that, while the institution had an interest to administer its performance appraisal process fairly, that was not sufficient to bring the employment-related matter within the scope of section 65(6)3. To meet the requirements of this section, the Ministry must establish an interest that has the capacity to affect its legal rights or obligations. I considered whether the performance appraisal process was grievable, the collective agreement and the Ontario Labour Relations Act. I found that there was no evidence that a grievance had been filed, nor was there evidence of arbitrary discrimination or unfair actions on the part of the Ministry. Finally, I found that several months had passed since the appellant had received her performance appraisal and that there was no evidence that "exceptional circumstances" existed which would allow her to take any steps in now bringing a complaint.

In Order P-1586, the records related to meeting minutes regarding the resignation of a named individual. In considering the institution's legal obligations to properly discharge its responsibilities under the Power Corporation Act, I found that several months had passed since the named individual's employment ended, and the matters under consideration at the meeting were concluded. Therefore, I found that the context had changed and that there was no evidence before me to suggest that there was an ongoing dispute or other employment-related matter involving the institution and the named individual that had the capacity to affect the institution's legal rights or obligations.

In Order M-1128, Inquiry Officer Laurel Cropley used the same line of reasoning in concluding that the institution did not have a legal interest in records consisting of the appellant's application for employment and related documentation, dating back approximately 10 years, as there was not a reasonable prospect that this interest would be engaged.

Finally, in Order P-1618, I dealt with a request for records relating to the investigation of a complaint against two OPP police officers made under the Police Services Act. I found that the investigation was about an employment-related matter, and that the OPP's statutory obligation to

investigate the complaint constituted a legal interest in an employment-related matter at the time of the investigation. However, because six years had passed since the investigation and its subsequent review was completed, there was no outstanding interest in the investigation that had the capacity to affect the OPP's legal rights or obligations, and the records did not fit within the scope of section 65(6)3.

Although these orders, with the exception of Order P-1618, were specifically referred to in the Notice of Inquiry, the Ministry chose not to address them in its representations.

The Ministry relies on the provisions of an earlier order (M-830) in supporting its position that it has a legal interest in the records. In that order I found that:

> ... job competitions are matters in which an institution "has an interest" because the job competition process involves certain legal obligations which an employer must meet under the Ontario Human Rights Code, for example, a duty not to discriminate in selecting an employee in a job competition.

The appellant explains that ALOC, of which he is a member, is not a trade union and does not act or represent employees pursuant to the Labour Relations Act or any other statutory scheme. He adds that in 1995 a "Job Security Agreement" was negotiated with Management Board of Cabinet which covered a limited number of matters, one of which was "job transfer" or "Internal Transfer Policy". The appellant points out that as an employee he has no legal rights to initiate any legal proceeding against Management Board, the Crown, its employees, agents or representatives under this agreement. In fact, the appellant states, the only form of dispute resolution available to him under the agreement was "discussion" before the Dispute Resolution Committee, which he unsuccessfully availed himself of in February 1998.

The appellant argues that there is no grievance process available to him under the agreement or any other agreement or arrangement between ALOC and Management Board or the Ministry. He further argues that the grievance procedures under the Public Services Act are not applicable in this type of situation, and he is not aware of any other statutory provisions or principle of common law that would provide a basis for any cause of action. According to the appellant, there is no evidence to support any complaint under the Employment Standards Act or the Ontario Human Rights Code, nor has he made a complaint to either of these bodies.

Finally, the appellant states:

> If there is any legal basis for any proceeding whatsoever (other than this appeal and any legal proceeding arising therefrom), I have no knowledge of it. Furthermore, if any cause of action had existed (and I do not believe there was any), it would now be statute-barred pursuant to the Proceedings Against the Crown Act and the Public Authorities Protection Act.

Therefore, the appellant submits, there are no binding legal obligations on the Ministry in the fact situation of this appeal, there are no interests of the Ministry, and there are no legal interests arising from the Job Security Agreement.

As stated earlier, the Ministry's representations provide no reference to any of the more recent orders dealing with the interpretation of the third requirement of section 65(6)3.

I have examined the Job Security Agreement between ALOC and Management Board of Cabinet. Article 4(5) under Part H of the agreement states:

> The parties agree that issues arising out of the application, interpretation and administration of this Agreement that are not subject to arbitration by the MAG Designate may be brought to the Dispute Resolution Committee for discussion to ascertain whether a resolution satisfactory to the parties and the affected lawyer is possible. Subsection (5) does not affect any rights the associations or lawyers may have to enforce such issues in the courts.

As noted above, the appellant stated that this was the only avenue available to him under the agreement. I have examined the agreement and it would appear that the appellant is correct. As far as avenues outside the agreement are concerned, the appellant concedes that the grievance procedures under the Public Services Act are not applicable in this type of situation; there are no apparent grounds for a complaint under the Employment Standards Act or the Ontario Human Rights Code; and I have been provided with no evidence of any other statutory right or common law basis for redress available to the appellant.

I accept that the Ministry's responsibilities as an employer to adhere to the requirements of the Ontario Human Rights Code during the recruitment process constituted a legal interest in an employment-related matter at the time of the job competition. However, the recruitment process has been completed, and the appellant has provided convincing arguments that there are no outstanding interests in this job competition process that have the capacity to affect the Ministry's legal rights or obligations.

Accordingly, I find that, in the circumstances of this appeal, there is no employment-related matter pending or reasonably foreseeable which has the capacity to affect the Ministry's legal rights or obligations, and I find that the Ministry has not demonstrated that it has sufficient legal interest in the records to bring them within the ambit of section 65(6)3.

Therefore, I find that the records are subject to the Act.

**REASONABLENESS OF SEARCH**

In his representations, the appellant refers to a number of records, in addition to those that have been identified by the Ministry, which he feels are responsive. They include a draft outline and fact situation dated November 28, 1997, the draft legal memorandum and draft factum provided by the appellant at his interview on January 8, 1998, and letters (one undated and the other dated January 15, 1998) to the appellant from the Director of the Legal Services Branch of MCCR. The appellant points out that if these additional records are not in the Ministry's custody or control, then the request should be transferred to MCCR.

The appellant's submissions raise the possible application of section 25(1) of the Act, which deals with the obligations of an institution when it determines that it does not have custody or control of responsive records.

Section 25(1) of the Act states:

> Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
>
> (a) forward the request to the other institution; and
>
> (b) give written notice to the person who made the request that it has been forwarded to the other institution.

This section imposes mandatory obligations on the Ministry in situations where another institution has custody or control of responsive records which the Ministry does not have in its own custody or control. These obligations include making inquiries and, where another institution has a responsive record under its custody or control, forwarding the request to that other institution and notifying the requester that this has been done.

Based on the information provided to me by the appellant, I am not convinced that all responsive records have been identified. Therefore, I will include a provision in this interim order requiring the Ministry to conduct further searches to ensure that all responsive records have been identified. In so doing, I remind the Ministry of its obligations under section 25(1) of the Act. The Ministry will be required to provide the appellant and me with a detailed outline of these additional search activities, and if further responsive records are identified, to include these records in its access decision within the time frame included in the order provisions.

## ORDER:

1. I order the Ministry to issue a decision letter to the appellant in accordance with the provisions of section 26, 28 and 29 of the Act, regarding access to the requested records, treating the date of this order as the date of the request.

2. I order the Ministry to conduct a further search for additional records responsive to the appellant's request.

3. I order the Ministry to communicate the results of this search to the appellant in the decision letter referred to in Provision 1.

4. If additional responsive records are located, I order the Ministry to provide the appellant with an access decision as part of the terms of Provision 1.

5. I order the Ministry to provide me with copies of the correspondence referred to in Provisions 1, 3 and 4, as applicable, by sending a copy to me when it sends this correspondence to the appellant.

6. I remain seized of this matter in order to deal with the records at issue, the Ministry's search for additional responsive records and any other matters concerning this appeal.

Original signed by: November 3, 1998
Tom Mitchinson
Assistant Commissioner