



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1696

Appeal PA-990017-1

Ministry of the Attorney General



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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 Attorney General (the Ministry). The request was for access to the following audits:

1. Criminal Injuries Compensation Board
2. Ontario Court at Brantford
3. Ontario Court (General Division) at Toronto
4. Review of P-Card Transactions (Court Services Division)
5. Ontario Court (Provincial Division) at London

The Ministry denied access to the records responsive to parts 1, 3, 4 and 5 of the request on the basis that the records are excluded from the scope of the Act under section 65(6)3 of the Act. Access was granted in part to the record responsive to part 2 of the request, with severances made pursuant to section 13(1) of the Act.

The appellant appealed the Ministry's decision, and argued that because disclosure of the records is in the public interest, section 23 of the Act applies.

I sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties. Part 1 of the request will be dealt with in a separate order as the Criminal Injuries Compensation Board is a separate institution under the Act.

RECORDS:

The records at issue in this appeal are:

1. Audit Report - April, 1997
Ontario Court (General Division) at Brantford
Ontario Court (Provincial Division) at Brantford
2. Audit Report - Draft
Review of Family Law Section
Ontario Court (General Division) at Toronto
3. Audit Report - Draft
Review of P-Card Transactions
Court Services Division
4. Audit Report - September, 1998
Special Investigation
Ontario Court at London

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Ministry claims that section 13(1) of the Act applies to the information severed from Record 1. The appellant argues that this record is not subject to the exemption provided under section 13(1), because it constitutes a report on the performance or efficiency of an institution and, therefore, falls within section 13(2)(f) of the Act. These sections state:

- (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.
- (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
 - (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Order 118].

I have reviewed the severed information, and I find that it does contain advice or recommendations as contemplated by section 13(1).

Despite being directly asked in the Notice of Inquiry whether the record contains a report or study on the performance or efficiency of an institution, the Ministry's only submission respecting the application of section 13(2)(f) is, "It is respectfully submitted that none of the [exceptions] in subsection 13(2) apply to the record at issue."

The appellant makes reference to Orders P-348 and P-603. In Order P-348, Assistant Commissioner Tom Mitchinson ordered disclosure of a report commissioned by Humber College to review matters pertaining to the College. He found:

The record involves the study of a number of issues and concerns pertaining to student satisfaction, confidentiality, professionalism, professional relationships, conflict resolution and leadership. The record sets out the consultant's advice and recommendations for dealing with these issues. These corrective recommendations are aimed at enabling the institution to deal efficiently with existing and future issues and concerns, and assisting the President to improve administrative operations. In my view, the record satisfies the
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requirements of the section 13(2)(f) exception, thereby precluding the institution from denying access to the record under section 13(1) of the Act.

In Order P-603, I ordered disclosure of audit reports of the Workers' Compensation Board. I stated:

In my view, a report which considers effectiveness, efficiency and economy is one which considers the "performance" and "efficiency" of an institution, and I find that Records 1, 3, 5, 6, 7, 9, 10 and 11 fall within the mandatory exception in section 13(2)(f) and accordingly, are not exempt under section 13(1) of the Act.

In its submissions respecting the application of section 13(1), the Ministry states:

... the sections of the report which were not released consist of the opinions of the Audit Branch as to the deficiencies in the operations of the Brantford Court and their recommendations to improve the financial and operational management of the Court.

Consistent with Orders P-348 and P-603, I find that Record 1 which, in the Ministry's own words, consists of opinions as to deficiencies in operations and recommendations to improve the financial and operational management of part of the Ministry, is a report on the performance or efficiency of the institution, and section 13(2)(f) applies. The Ministry is, therefore, precluded from denying access to Record 1 under section 13(1) of the Act.

Because I have found that Record 1 does not qualify for exemption under section 13(1) of the Act, it is not necessary for me to consider the application of section 23.

JURISDICTION

The interpretation of sections 65(6) and (7) of the Act is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry. These 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.

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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 not subject to the Commissioner's jurisdiction.

The Ministry relies on section 65(6)3.

Section 65(6)3

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

1. it 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]

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Requirement 1

The Ministry explains that Records 2, 3 and 4 were prepared by the Audit Services Branch of the Ministry, and used by the Court Services Division of the Ministry to review the performance of certain Ministry employees, or their compliance with financial policies and guidelines, and to receive recommendations to correct any problems identified by the auditors.

In my view, these records were clearly prepared and used by the Ministry, and I find that the first requirement of section 65(6)3 has been established.

Requirement 2

The Ministry indicates that the records were used in meetings, consultations, discussions and communications to determine whether and how to implement the recommendations contained in the reports.

On the basis of the information before me, I am satisfied that the records were used in meetings, consultations, discussions or communications, thereby satisfying the second requirement of section 65(6)3.

Requirement 3

The Ministry submits that Records 2, 3 and 4 are about “employment-related matters” in which the Ministry “has an interest”.

With respect to the first aspect of this submission, the Ministry submits that the term “employment” is broad enough to encompass relationships beyond that of employee/employer and that the additional hyphenated word “related” enhances the general application of the term employment.

The purpose for initiating the audit which resulted in Record 3 was to determine whether an employee had complied with established policies and procedures with respect to purchases incurred on behalf of government. The purpose for initiating the audit which resulted in Record 4 was to investigate the performance of an employee. As such, I am satisfied that the meetings, consultations, discussions or communications in relation to which these records were prepared or used were about employment-related matters.

Record 2, however, was prepared to investigate two unrelated matters: the circumstances surrounding the issuance of a divorce certificate prior to a divorce having been granted; and to appraise the effectiveness of the financial management and operational controls in the family law section of the court. Although the first matter reviewed in this record is not specifically focussed on the employment of any specific person or persons, given the particular circumstances (which are only apparent on reviewing the record) I consider it reasonable to conclude that it is an “employment-related matter” as the term is used in section 65(6).

However, the second aspect of the audit, the appraisal of the effectiveness of the financial management and operational controls in the family law section of the court, is not what I would consider an “employment-related matter”. I do not agree with the Ministry’s submission that this term should include a general audit which does not relate to the employment of an individual or individuals specifically, but generally relates to the Ministry’s “right to control the method of carrying out work”.

However, even if I were to find that each of the records involves an employment-related matter, the Ministry would still have to establish that it was a matter in which the Ministry “has an interest”.

Previous orders have held that an interest is more than mere curiosity or concern. An “interest” for the purposes of section 65(6)3 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 legal rights or obligations of the Ministry (Orders P-1242 and M-1147).

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.

A review of the records reveals that the audits resulted in an employee being counselled in one case, an employee’s dismissal in the second, and no action against any individual employee in the third. The employee who was dismissed filed a grievance, which has since been settled.

The Ministry submits that it has a legal interest in the records at issue because the disclosure of the records could result in complaints being made under the Human Rights Code by the employees who were the subject of the investigations.

At this point, the only issue is whether the records are subject to the Act, and a finding that they are does not mean that the records would be disclosed automatically. Further, having reviewed the record and based on the other material before me, there are no apparent grounds for a complaint under the Human Rights Code stemming from any of the audits.

The Ministry also submits that it has a legal interest under the collective agreement made between the government and OPSEU, pointing out that employee disputes or complaints may result in a grievance being filed against the employer. As I pointed out above, only one of the audits resulted in the dismissal of an employee, whose grievance has since been settled. Having reviewed the collective agreement, the time limits for filing grievances relative to the other two audits have expired.

The only relevant evidence before me in this appeal establishes that there is no reasonable prospect that the institution's legal interest will be engaged in two of the cases, and that a settlement has been reached between the Ministry and the former employee in the third. Therefore, there is no reasonable prospect that any legal interests which may have existed will be engaged in future. Accordingly, I find that there is no ongoing dispute or other employment-related matter involving the Ministry that has the capacity to affect the Ministry's legal rights or obligations, and the Ministry has failed to establish a "legal interest" in the employment-related matters reflected in the records (see also Order M-1164).

Therefore, the third requirement for section 65(6)3 has not been established, and I find that the records fall within the jurisdiction of the Act.

ORDER:

1. I order the Ministry to issue a decision letter to the appellant in accordance with the provisions of sections 26, 27 and 28 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 provide me with a copy of the correspondence referred to in Provision 1 by sending a copy to me when it sends this correspondence to the appellant.
3. I order the Ministry to disclose Record 1 to the appellant by **August 5, 1999**.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 3.

Original signed by: _____
Holly Big Canoe
Adjudicator

July 14, 1999