



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1693

Appeal PA-990036-1

Ministry of Community and Social Services



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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Community and Social Services (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to a job competition in which she was a candidate. In particular, the appellant sought access to the questions asked of, and the answers given by, the successful candidates together with the seniority dates of these individuals. The job competition was held in October 1998.

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.

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

RECORDS:

The records at issue were described in the Notice of Inquiry as the seniority dates as set out in an interoffice memorandum, and the questions and responses of the two successful candidates and the appellant. The Ministry initially indicated in its representations that the records at issue only consist of the questions and responses of the two successful candidates and the appellant. The Ministry states that the seniority dates which were contained in the interoffice memorandum referred to in the Notice of Inquiry were compiled by it as a result of a query by the Mediator assigned to this appeal. The Ministry notes that it advised the Mediator at that time that a record containing seniority dates did not exist.

Following further mediation on this issue, the Ministry agreed to include the portion of the interoffice memorandum containing the seniority dates as a record responsive to the request.

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.

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 not subject to the right of access under section 10(1) of the Act.

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 an internal job competition process, which includes the actual interview process, 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 M-830 and PO-1649).

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). Although the interoffice memorandum was created during the appeals process rather than the job recruitment process, I am satisfied that this information was taken from records within the custody and control of the Ministry which were used by the Ministry during the job recruitment process. 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). 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.

The Ministry indicates that Order M-830 stands for the proposition that a job competition process involves certain legal obligations which an employer must meet under the Ontario Human Rights Code (the Code).

[IPC Order PO-1693/July 8, 1999]

The Ministry submits that it has an obligation and duty to ensure that it does not discriminate in selecting an employee in a job competition process.

In Order M-830, Assistant Commissioner Tom Mitchinson stated:

The Ontario Human Rights Code (the Code) applies to the Ministry, and includes the following sections which are relevant to the issue of the institution's legal obligations and the possible effects of failing to observe them:

- 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

- 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. [Note: section 5(1) is in "this Part" - i.e. Part I of the Code.]

- 41(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
 - (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
 - (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

From these sections, it is clear that, if an employer engages in discrimination in selecting an employee in a job competition, the employer has committed a direct breach of section 5(1) of the Code, and, as a party to a Board of Inquiry proceedings, could be liable in damages.

Thus, in my view, it can properly be said, that the job competition process involves legal obligations which the employer must meet.

I discussed other provisions of the Code in Order P-1242, which dealt with whether the Ministry of Community and Social Services “had an interest” in records prepared or used in the context of an investigation conducted under the Ontario government’s Workplace Discrimination and Harassment Program (the WDHP). In that case I concluded that:

... if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the 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”.

Similarly, I find that if the employer conducts a proper job competition and avoids discriminatory practices, it would avoid liability under the Code, and therefore, on this basis, the competition is properly characterized as matter “in which the institution has an interest”.

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. In my view, the findings in Orders P-1242 and M-830 must be read and interpreted in the context of these more recent orders.

The Ministry does not state that the appellant or anyone else has made a claim under the Code or any other process available for redress, with one exception. Nor does the Ministry state that anyone, including the appellant has given any indication that he or she intends to do so. In my view, the Ministry has not established that there is any reasonable prospect that its "legal interest" will be engaged in this regard.

The Ministry also states that the appellant is involved in a grievance related to the outcome of this competition and submits that it has an ongoing legal interest in this job recruitment process and grievance as it will affect the Ministry's legal rights and obligations before a tribunal. The documentation submitted to this office by the appellant indicates that the appellant initiated her grievance on December 3, 1998. However, this documentation also notes that her grievance was denied on December 18, 1998. I asked the Ministry to confirm whether there were any outstanding issues relating to this grievance or with respect to any other grievances in which the appellant is currently involved. The Ministry indicated that there are no outstanding issues relating to this grievance. Further, none of the other grievances involving the appellant relate to this job competition or the records compiled in connection with it in any way. After considering the totality of

the evidence before me, I conclude that there is insufficient evidence to support a finding that there is any reasonable prospect that the Ministry's legal interests are currently, or will in the future, be engaged with respect to this matter.

Therefore, I find that the Ministry has not 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 not been met.

As a result, I find that the records at issue are subject to the Act.

ORDER:

1. I do not uphold the Ministry's decision.
2. I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26 and 29 of the Act, treating the date of this order as the date of the request.
3. I order the Ministry to provide me with a copy of the decision letter referred to in Provision 2 by forwarding it to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____

July 8, 1999

Laurel Cropley
Adjudicator