



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1769

Appeal PA-990384-1

Ministry of Correctional Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant made a request to the Ministry of Correctional Services (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to a report submitted by a named individual to the Superintendent of the Toronto East Detention Centre between March 15, 1999 and April 5, 1999.

The Ministry located the responsive record and denied access to it, in its entirety, claiming that because of the operation of section 65(6) of the Act, the record falls outside the scope of the Act. The appellant appealed this decision.

I provided a Notice of Inquiry to the appellant requesting that he make submissions on the issue of the application of section 65(6) to the record. The appellant submitted representations in response to the Notice of Inquiry. Because of my findings below, it was not necessary for me to solicit the representations of the Ministry in this appeal.

RECORDS:

The record at issue is a six-page occurrence report dated June 23, 1999 which was submitted by a named individual to the Superintendent of the Toronto East Detention Centre.

DISCUSSION:

JURISDICTION

In this appeal, the sole issue to be decided is the interpretation of sections 65(6) and (7) of the Act. These amendments to the Act may apply to the record requested by the appellant.

If section 65(6) applies, and none of the exceptions found in section 65(7) apply, section 65(6) has the effect of excluding records from the right of access under the Act.

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]

Parts One and Two of the Test

During the mediation stage of this appeal, the Ministry provided some background information concerning the circumstances giving rise to the creation of the record and the appeal before me. It indicates that the appellant is employed by the Ministry as a Correctional Officer. The appellant also participates as a facilitator in the Ministry's Systemic Change Program, which is designed to sensitise Ministry staff to issues surrounding racism and harassment in the workplace. The Ministry received a complaint from a participant in the program about a comment made by a facilitator (not the appellant) at a session held on February 24, 1999. The complainant also made certain allegations about the appellant's actions after his/her concerns about the program had been raised with a Supervisor, who also acts as facilitator for the Systemic Change Program. This complaint is the record at issue in this appeal.

Following the receipt of the record from the complainant by the Supervisor, the appellant initiated a total of four grievances against the Ministry which allege violations of Articles 3 and 9 of the Ontario Public Service Employees Union Central Agreement. These grievances allege that the Ministry contributed to the creation of a poisoned work environment and condoned the harassment of the appellant in the workplace. The grievances have now advanced through Stage 2 of the grievance procedure, which entailed a meeting in November 1999 between representatives of the Ontario Public Service Employees Union (OPSEU) and the Ministry. The grievances revolve around allegations by the appellant that the Ministry failed to respond appropriately to the complaint which is outlined in the record at issue in this appeal.

Based on the information provided to me by the Ministry and the appellant, I am satisfied that the Ministry maintained and used the record at issue in relation to meetings (including the Stage 2 grievance meeting), discussions and consultations concerning the issues raised by the appellant in his grievances, which arise directly from the matters addressed in the record at issue. Accordingly, parts one and two of the section 65(6)3 test have been met.

Part Three of the Test

It has been established in a number of previous orders that grievances which are initiated pursuant to the procedures contained in the collective agreement between OPSEU and the Government of Ontario are, by their very nature, about labour relations matters (Orders P-1223, P-1253 and P-1255). Therefore, because the record at issue relates directly to the subject matter of the appellant's grievances, I am satisfied that it qualifies as a record about "labour relations" matters for the purposes of section 65(6)3.

The only remaining issue is whether this is a labour relations 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 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, M-1161 and P-1618 which was upheld on judicial review in Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner) (March 21, 2000), Toronto Docs. 681/98, 698/98, 209/99 (Ont. Div. Ct.)). 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 because the appellant’s grievances were not resolved at the Stage 2 grievance meeting in November 1999, they have been referred to the Grievance Settlement Board (the GSB) for adjudication. Dates for the hearing of these grievances have not yet been set.

Based on the submissions made by the Ministry during the mediation of this appeal, I am satisfied that there exists an ongoing interest on the part of the Ministry in the grievances filed by the appellant which has the capacity to affect its legal rights or obligations. Therefore, I find that the Ministry has established a current and active legal interest in the labour relations matter to which the record at issue relates. The third requirement of the test for section 65(6)(3) has, accordingly, been met.

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

ORDER:

I uphold the Ministry’s decision.

Original signed by: _____

March 23, 2000

Donald Hale
Adjudicator