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

ORDER PO-1808

Appeal PA-990438-1

Liquor Control Board of Ontario

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant is a manager employed by the Liquor Control Board of Ontario (the Board), covered by a collective agreement between the Board and the Ontario Liquor Board Employees' Union (the Union). On July 23, 1999, the appellant was in attendance at a Stage 2 grievance meeting dealing with two grievances filed by another employee of the Board. The appellant was in attendance as the supervisor of the grievor, and as the subject of the grievor's harassment grievance.

The appellant subsequently made a request to the Board under the Freedom of Information and Protection of Privacy Act (the Act) for access to copies of all notes taken during the grievance meeting. He claims that inappropriate personal questions were directed towards him during the grievance meeting, and he wishes to have the notes of that discussion, as well as of the discussion about a letter of recommendation. The appellant also requested access to any documentation placed in his personnel file after September 20, 1999.

The Board granted access to the appellant's personnel file records, but denied access to the grievance records, relying on the provisions of section 65(6) of the Act. The appellant has appealed the Board's decision.

During the inquiry process, a Notice of Inquiry was sent to the Board initially, asking for its representations. These representations were shared with the appellant, with the exception of one page which was withheld because of confidentiality concerns, and the appellant was also invited to and did submit representations in response. The appellant has objected to the Board's representations on the basis that they were submitted beyond the time specified in the Notice of Inquiry. Upon my review of the file, I am satisfied that a reasonable extension of time for the submission of those representations was granted by this office, and that the Board's representations were submitted in a timely way in accordance with the new deadline. Accordingly, I see no reason to disregard those representations.

The sole issue to be addressed by this order is whether the records are excluded from the Act by application of section 65(6).

RECORDS:

The records consist of five pages of handwritten notes, and the typewritten version of the notes, comprising another five pages. The records indicate, among other things, the date of the Stage 2 grievance meeting, the persons in attendance at the meeting, and the discussion that occurred. There were two grievances discussed during the meeting, one relating to a 4-hour shift, and one alleging harassment. The records show that the grievance relating to the 4-hour shift was withdrawn, and that the grievance alleging harassment was not resolved. I shall treat the handwritten notes as one record, and the typewritten notes as the second record.

CONCLUSION:

I have concluded that section 65(6) applies to the circumstances of this case, and the records are accordingly excluded from the operation of the Act.

DISCUSSION:

Sections 65(6) and (7) of the Act provide:

> (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)3

General

I will focus my discussion on section 65(6)3. Because of my conclusion that section 65(6)3 applies, it is not necessary for me to consider whether sections 65(6)1 and 65(6)2 might also apply.

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

1. the records were collected, prepared, maintained or used by the institution 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 institution has an interest.

The Board has submitted that the notes were prepared by the Board's management members, for management's benefit, and on this basis, I am satisfied that the first requirement outlined above has been met.

With respect to the second requirement, the notes are by their nature a record of discussions between the Board and the Union, and I find that the preparation of the records therefore was in relation to "meetings, consultations, discussions or communications".

Further, I am satisfied that the discussions between the Board and the Union were about labour relations matters, in which the Board has an interest.

Labour Relations Matters

Previous orders have found that "labour relations", as used in section 65(6), refers to the collective relationship between an employer and its employees: see Order P-1223. The grievances which were under discussion at the meeting of July 23, 1999 are "labour relations matters", since they represent disputes under the collective agreement between the Board and its Union.

Has a Legal Interest

Previous orders have stated that an "interest" for the purposes of section 65(6) of the Act means more than a mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Board has an interest must have the capacity to affect its legal rights or obligations: see, for instance, Order P-1242. Further, 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. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld 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.); leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (Ont. C.A.). Where there has been a settlement of an employment-related matter, for instance, a legal interest no longer exists: see Order MO-1215.

I am satisfied that the Board has shown that it had a legal interest in these records at the time they were created, and that their legal interest continues to this date. There is no dispute that, in the normal course, an outstanding grievance at this workplace may be referred to hearing before the Grievance Settlement Board (the GSB), a body created by statute to hear and determine grievances between the Board and the Union. The GSB has the power to issue orders binding on the parties at such a hearing. I am therefore satisfied that grievances under the collective agreement are matters which have the "capacity to affect the legal rights or obligations" of the Board.

As I have indicated above, during the course of the discussion on July 23, 1999, the grievance relating to a 4-hour shift was withdrawn by the grievor. The harassment grievance, however, was not resolved. In the course of the Board's representations, the Board has referred to the grievances filed by the *appellant*, and has mistakenly suggested that these were also discussed on July 23, 1999. The appellant disputes this, and the material filed by the Board clearly indicates that the earliest grievance filed by the appellant was dated in September of 1999. This error in the Board's representations is not material to the issues in any event. What matters is that on July 23, 1999, the Board and the Union met to discuss grievances filed by one of the employees at the Board. The appellant was present during these discussions, since the grievances affected him as the employee's manager. Although one grievance was withdrawn, the harassment grievance remains outstanding.

The appellant submits that although the harassment grievance has not been withdrawn, it is not active or ongoing. The appellant refers to Article 27 of the collective agreement which establishes the procedure for the handling of grievances at this workplace, including time deadlines for moving a grievance forward to the various stages. The collective agreement states that the time limits imposed upon either party may be extended in writing by mutual agreement. The appellant submits that there is no indication of any mutual agreement to extend the time limits of this grievance. The appellant also refers to Article 27.12 of the agreement, which states: "[w]here a grievance is not processed within the time allowed or has not been processed by the employee or the Union within the time prescribed it shall be deemed to have been withdrawn."

On this issue, the Board has referred to section 48(16) of the Labour Relations Act, 1995, which applies to hearings before the GSB, and which states:

> Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

The Board therefore submits that until a grievance has been withdrawn by the Union and/or the grievor, or until the GSB has dismissed it for being untimely, there is an argument that the grievance is still active.

I accept that the Board has a current legal interest in the records. Even accepting that the Union and the Board have not dealt with the harassment grievance in a timely way, I cannot conclude that the legal dispute no longer exists. If the grievance is submitted to the GSB, it is open to the GSB to exercise its discretion under the Labour Relations Act, 1995, and extend the time limits for referring the grievance to arbitration. It would be unwise for me to speculate on whether the GSB is likely to apply the provisions of section 48(16) of the Labour Relations Act, 1995. This is a matter within its discretion and within its realm of expertise. So long as this discretion exists and has not been exercised, the legal dispute remains current.

In sum, the option of final and binding arbitration of the grievance remains open, since the grievance has not been withdrawn or settled, and the GSB has not made a final ruling disposing of it. Given that this option remains open, I am satisfied that the Board's legal interests remain engaged by the grievance.

The appellant has also asserted that the Board is holding this grievance in abeyance merely to deny access to the records in question. Even accepting that this might, if established, have a bearing on the applicationof section 65(6) of the Act, I am unable to give any weight to this submission. First, such an extraordinary conclusion would require some evidence, which I find lacking here. The appellant has pointed out that his own grievance, about which he had heard nothing for some six months, was scheduled for a Stage 3 meeting shortly after some correspondence was sent from this office to the Board. He suggests that this is more than a mere coincidence. Taken by itself, I see no reason to conclude that it is indeed more than a mere coincidence; in any event, it falls short of establishing some deliberateness on the Board's part in arranging the processing of the harassment grievance in order to avoid the application of the Act.

Second, there are two parties to the grievance process, the Union and the Board. The Board does not have the power to unilaterally determine the timetable for the processing of grievances. Given this, the appellant's assertion could only be true if the Union were party to the Board's attempt to avoid the application of the Act. Again, such a conclusion would require stronger evidence than that which is before me.

The appellant also submits that on the basis of the flimsy evidence that the grievor and his Union representative put forward during the Stage 2 grievance, it is doubtful that it would be referred to the GSB,

as suggested in the Board's representations. In my view, the application of section 65(6)3 does not require an assessment of the strength of the Board's legal position, as long as it is shown that its legal interest is engaged by having an outstanding grievance. Whether or not the harassment grievance has much merit, the fact remains that so long as it is outstanding, it continues to engage the Board's legal interest.

The appellant also argues that he is entitled to the records in question because of the application of Article 27.2(c) of the collective agreement, which states:

> If requested, the Employer shall provide the grievor with particulars relating to his/her grievance during the grievance procedure.

He submits that the records he seeks contain particulars relating to his own grievance, particulars to which he is entitled by Article 27.2(c). I am satisfied that Article 27.2(c) does not assist the appellant in the context of this appeal. Whatever may be his rights in another forum, his rights in this appeal are governed by the provisions of the Act, and not by his collective agreement.

Finally, the appellant has also submitted that part of the records do not relate to labour relations matters at all. His very complaint is that during the course of the meeting about the harassment grievance, irrelevant personal questions were directed at him. He is particularly interested in having the notes of that exchange. In essence, the appellant is suggesting that section 65(6) may operate so as to exclude a part of a record from the operation of the Act, while applying to another part. It is not necessary for me to decide whether there is any merit to this suggestion, because in my view, the records as a whole reflect discussions "about labour relations matters". The appellant clearly feels that some issues discussed during the meeting were irrelevant to the grievance, but just as clearly, others taking part in the meeting raised these issues because they felt they were relevant. The appellant's position amounts, essentially, to an assertion that there is no merit to the grievance. Whether or not at the end of the day the appellant is vindicated in his assessment, I am satisfied that the whole of the discussion during the meeting of July 23, 1999 took place within the context of certain grievances, arose out of those grievances, and were accordingly about labour relations matters.

In conclusion, I find that the records at issue in this appeal were prepared by the Board in relation to meetings, discussions and consultation about labour relations matters in which the Board has an interest. All of the requirements of section 65(6)3 of the Act have therefore been established. Since none of the exemptions contained in section 65(7) apply, I find that the records are excluded from the scope of the Act by application of section 65(6).

ORDER:

I uphold the decision of the Board.

Original signed by: July 21, 2000
Sherry Liang

Adjudicator