



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2035

Appeal PA-020047-1

Ministry of Transportation



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NATURE OF THE APPEAL:

This appeal arises out of a request by the appellant for a copy of records relating to a Competition Audit. As background, the appellant is an employee of the Ministry of Transportation (the Ministry), covered by a collective agreement between the Ontario Public Service Employees Union (OPSEU) and his employer. Following postings for two positions within the Ministry, the appellant sought clarification about these competitions, and requested a review of the recruitment process under the Ministry's Equal Opportunity Policy.

In response, the Ministry decided to include an audit of the competitions in question as part of the random competition audits performed each fiscal year within the Ministry by its Equal Opportunity Office. The appellant was dissatisfied with the information he received about the results of this audit and filed a grievance under his collective agreement, on the basis that the Notice of Competition in relation to one of the competitions did not reasonably and fairly state the nature of the position.

The appellant subsequently made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the results of this audit. The Ministry has taken the position that pursuant to section 65(6), the records are not covered by the *Act* as they relate to labour relations and/or employment-related matters. Therefore, it denied access to the records on the basis that they fall outside the scope of the *Act*.

During mediation through this office, certain issues were narrowed or clarified. The Ministry states that it is relying on the provisions in sections 65(6)1 and 65(6)3 of the *Act*. The appellant has agreed to confine his request to records relating to a specified job competition only.

In view of the information in the file and the issues raised by the appeal, I decided to send the Notice of Inquiry to the appellant initially. Having received these representations and considered the matter, I find it unnecessary to invite the Ministry to provide submissions.

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 at issue consist of a three-page document entitled "Competition Audit", relating to a specified job competition, as well as supporting documentation.

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.

Because of my conclusion that section 65(6)3 applies to exclude the records from the *Act*, it is not necessary for me to consider whether section 65(6)1 might also apply.

SECTION 65(6)3

General

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.

Section 65(6) is record-specific and fact-specific. If section 65(6) applies to the records, and none of the exceptions found in section 65(7) is applicable, section 65(6) has the effect of excluding records from the scope of the *Act*. The appellant has no right of access to records which are outside the ambit of the *Act* pursuant to section 65(6).

Requirement 3

In the appellant's own submissions and the evidence he has provided, he describes the circumstances which led to the creation of the records which are at issue before me. They came directly out of the appellant's expressions of concern over a job competition, and his request for a review of that competition under the Ministry's policies.

Previous orders of this office have found that generally speaking, job competitions are employment or labour relations matters in which an institution has an interest (see, for example, Orders M-830 and PO-1950). In the circumstances of this appeal, it is apparent that the appellant was concerned about the fairness of a job competition. The correspondence between the appellant and others within the Ministry reflects his concerns, and his quest to have them addressed. His filing of a grievance also demonstrates his dissatisfaction with the manner in which his concerns over the competition have been dealt with and his ability, under his collective agreement, to challenge the actions of his employer in relation to that competition.

The appellant has submitted that the records were collected, prepared, maintained or used as part of the Equal Opportunity Program's normal administrative duties as directed by Management Board Secretariat, and are therefore not about labour relations. The fact remains, however, that the audit is about a job competition, which is clearly an employment-related matter (see, for example, Order M-830, where Assistant Commissioner Tom Mitchinson described this as "self-evident").

In these circumstances, I am satisfied that the job competition which is the subject of the records is a labour relations or employment-related matter in which the Ministry has an interest.

Requirements 1 and 2

Further, I am satisfied that the records at issue were "collected, prepared, maintained or used" by the Ministry in relation to "consultations, discussions or communications" about the job competition at the heart of the appellant's complaint, in that they were created as a result of the appellant's expressions of concern and a consequent decision to conduct an internal review of that competition.

Accordingly, all of the requirements of section 65(6)3 have been met.

I find that none of the exceptions in section 65(7) apply to the information in the records. The appellant has submitted that the audit was offered as a solution to the matters he raised, and that

the circumstances amount therefore to a kind of “agreement” within the meaning of section 65(7). I find that the evidence does not establish the existence of either negotiations or an agreement within the meaning of this provision.

In the result, the records are excluded from the scope of the *Act*.

In a recent decision of the Ontario Court of Appeal (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355), the court found that the Commissioner’s interpretation of certain aspects of section 65(6) was incorrect. Subsequently, the Supreme Court of Canada denied a motion for leave to appeal that decision and as a result, the judgment of the Court of Appeal stands. It should be noted, however, that the decision of the Court of Appeal does not cast doubt on the correctness of the application of section 65(6)3 to job competitions in the orders I have referred to above.

ORDER:

I uphold the Ministry’s decision.

Sherry Liang
Adjudicator

August 29, 2002