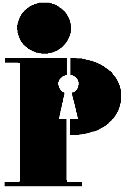

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2163

Appeal PA-020293-1

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NATURE OF THE APPEAL:

Management Board Secretariat (MBS) received a request from a union under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about expenses and savings resulting from the 2002 OPSEU strike. Specifically, the requester sought access to a copy of "all 'Labour Disruption' templates completed by ministries, agencies, boards and/or commissions submitted to Management Board Secretariat". MBS and the requester subsequently clarified that the 2002-03 first quarter reports submitted by various provincial ministries to MBS that set out the costs or savings related to the strike are the only responsive records.

MBS denied access to all of the records on the basis that they fall within the scope of section 65(6)3 and are outside the jurisdiction of the *Act*.

The requester, now the appellant, appealed the decision.

Mediation was not successful in resolving the appeal, so it was transferred to the adjudication stage of the appeals process. I sent a Notice of Inquiry to MBS and received representations in response. I then sent the Notice to the appellant, along with a copy of MBS's representations, and the appellant responded with representations.

RECORDS:

The records consist of 24 two-page quarterly reports submitted to MBS by various ministries. Each record sets out the costs and savings of a particular ministry during the strike period under the headings "Operating Labour Disruption Costs and Savings" and "Capital Labour Disruption Costs and Savings".

DISCUSSION:

Introduction

The only issue to be determined in this appeal is whether section 65(6) applies. Section 65(6) is record-specific and fact-specific. If section 65(6) applies, and none of the exceptions found in section 65(7) apply, section 65(6) has the effect of excluding the records from the scope of the *Act*.

Section 65(6)3 provides:

> 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:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In order for the records to be excluded from the *Act* under section 65(6)3, MBS must establish that:

1. the records were collected, prepared, maintained or used by an 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 appellant's position

The appellant's representations do not address the specific requirements of section 65(6)3, but instead take the position that section 65 should be interpreted narrowly in accordance with its legislative intent. The appellant submits:

> I believe that the original intent behind the 1995 reforms to [the *Act*] was to prevent access, through [the *Act*], to grievance notes - not to exclude each and every document that might potentially have some labour implications. I am not aware of any public or private records that suggest that the latter intent existed in 1995.
>
> Taken to the extreme, a broad interpretation of this amendment could exclude practically all government records; surely the great majority of government decisions can be said to have some impact on public servants and their bargaining agents. Any records that relate to wrong-doing, for example, could be excluded using the argument that the Government might consider taking disciplinary action at some point against the employees in question. Another example would be discussions between two levels of government regarding their respective roles and responsibilities. One could argue that the outcome of such discussions might lead to the termination, redeployment, or hiring of provincial employees. Should the Government really be allowed to use Section 65 to exclude records of such discussions?

Requirement 1: were the records collected, prepared, maintained or used by MBS?

MBS submits that the records were prepared by individual ministries as part of their first quarter financial reporting requirements, and then collected, maintained and used by MBS as the central agency responsible for the allocation of budgetary resources.

I concur, and find that the first part of the section 65(6)3 test has been established. Although MBS did not prepare the records, it did collect, maintain and use them, which is sufficient to satisfy requirement 1.

Requirement 2: were these activities in relation to meetings, discussions or communications?

MBS submits that the records were collected, maintained and used in relation to discussions, meetings and communications about the costs incurred and savings realized during the strike period.

Again, I concur, and find that requirement 2 of the section 65(6)3 test has been established. It is clear from the contents of the records that they formed the basis of communications relating to the impact of the strike on the operation of the Ontario government.

Requirement 3: were these meetings, discussions or communications about labour relations or employment-related matters in which the institution has an interest?

In Order PO-2157, Adjudicator Sherry Liang dealt with other records created in the context of this same public sector strike. In addressing the third requirement of section 65(6)3 she stated:

> In considering this part of the test under section 65(6)3, I find that "labour relations" matters refers to matters arising out of the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation. "Labour relations" matters are distinct from "employment-related" matters, which may cover human resources or staff relations issues that do not arise out of a collective bargaining relationship.

Applying that approach to the records at issue in this appeal, I find that they deal exclusively with issues that arose in the context of the labour dispute between the provincial government and one of its bargaining agents, and as such they fall within the scope of "labour relations" matters for the purposes of section 65(6)3.

The word "about" as it appears in section 65(6)3 has been discussed in a number of previous orders. For example, in Order P-1369, former Adjudicator John Higgins adopted the requirement articulated in Order P-1223 that the collection, preparation, maintenance or use of a record must have a "fairly substantial" connection to an activity listed in section 65(6) in order for it to be "about" that activity. In Order P-1369, Adjudicator Higgins described the record at issue as a review of the Liquor Control Board of Ontario (LCBO) whose purpose was to set "the policy and direction for the future management of the LCBO". As a "broadly-based organizational review which touches occasionally, and in an extremely general way, on staffing and salary issues", the review was found to have too remote a connection to labour relations negotiations for section 65(6) to apply. As section 65(6) did not apply, the review was subject to the *Act*.

MBS makes the following submissions on the "about" component of requirement 3:

> The records were prepared by individual ministries as communications to MBS about the costs incurred and savings realized as a direct result of the OPSEU

> strike, which is a labour relations matter. Although the records consist of financial information, the title of the records clearly indicates that this information was communicated in the context of, and in relation to that labour relations matter. The records were prepared for the very purpose of conveying information about the financial impact of the strike. As such, they were prepared in relation to communications about a labour relations matter. MBS respectfully submits that the fact that the content of the information is financial does not change the underlying nature and purpose of the information, which relates directly to the labour disruption. Indeed, the financial matters reflected in the records are fundamental to MBS's ability to plan for and manage labour disruptions. Furthermore, as the corporate employer, MBS uses the information in these records for ongoing human recourses management, and for the development of OPS labour negotiations strategies.

Again, I accept MBS's position. In my view, the records, and MBS's collection, maintenance and use of them, have a substantial connection to a labour relations matter, specifically the OPSEU strike and its financial impact on the government. They deal exclusively with costs and savings associated with the labour dispute and, unlike Order P-1369, the connection to this labour relations matter is substantial and not merely occasional or general.

The only remaining issue is whether MBS has an "interest" in this labour relations matter.

In *Ontario (Solicitor General)* v. *Ontario (Assistant Information and Privacy Commissioner)* (2001) 55 O.R. (3d) 355, the Ontario Court of Appeal found that this office's long-standing interpretation of section 65(6)3 was incorrect, and stated the following with respect to the words "in which the institution has an interest":

> In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6)3 must be referring to "a legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant [Information and] Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant [Information and] Privacy Commissioner.
>
> As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. … Sub clause 3 deals with records relating to a miscellaneous category of events "about labour-relations or employment related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest"

> in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.
>
> …
>
> In my view, the time sensitive element of subsection 6 is contained in its preamble. The *Act* "does not apply" to particular records if the criteria set out in any of sub clauses 1 to 3 are present when the relevant action described in the preamble takes place, *i.e.* when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the *Act*, the records remain excluded. The subsection makes no provision for the *Act* to become applicable at some later point in time in the event the criteria set out in any of sub clauses 1 to 3 cease to apply.

MBS relies on the judgment in *Ontario (Solicitor General)* in support of its position that it has an "interest" in the records at issue in this appeal. It submits:

> … the ministries that originally prepared the records, and MBS, which subsequently collected, maintained and used the records, have an interest in them that goes well beyond "mere curiosity or concern". As employers, they have an inherent and significant interest in all aspects of the strike that affected their workforce, including the financial consequences that resulted from the strike. Individual, the ministries have an interest in the records as they relate to their own workforce. In addition, MBS, as the corporate employer, has an interest in the records as it relates to its responsibility for managing labour relations activities of the [Ontario Public Service] in general.

The appellant acknowledges that the Court of Appeal broadened the interpretation of the term "interest" in section 65(6)3 to include more than a "legal interest", but states:

> … [t]he court did not, in my opinion, impose on [the Commissioner's office] an open-ended interpretation of the phrase in question.
>
> It is incumbent upon [the Commissioner's office] to establish a new definition of "interest" in accordance with the ruling of the Ontario Court of Appeal. That new definition can not be so broad as to exclude any record that might have labour implications. After all, as I mention above, could it not be argued that almost any government decision has potential workforce implications?

As corporate employer for the Ontario government, I find that MBS had a significant interest in its 2002 labour dispute with OPSEU and in collecting and using information received from various ministries in its management of the financial implications of the strike. In my view, this "interest" is clearly more than a mere curiosity or concern and, using the words of the Court of

Appeal in *Ontario (Solicitor General)*, MBS's involvement with this labour relations dispute "relates to matters involving the institution's own workforce".

Although not necessary in order to satisfy the requirements of Requirement 3, in my view, MBS also has a "legal interest" in the records at issue here. In previous orders I defined "legal interest" as an interest that "has the capacity to affect the Ministry's legal rights or obligations" (See, for example, Orders P-1242, P-1575 P-1586). As the Ontario government's corporate employer, MBS has a legal obligation to deal with labour relations matters involving various bargaining agents, including OPSEU, and, in my view, this obligation extends to issues involving the financial impact of the 2002 strike.

Accordingly, I find that the third and final requirement of section 65(6)3 has been established.

The appellant takes the position that one or more of the exceptions in section 65(7) apply in the circumstances of this appeal. He submits:

> … I assume that a large proportion of the costs and savings information contained in the records in question derives from the paid activities of government employees. In particular, overtime pay, meal and travel allowances, and special bonuses were all arranged between ministries and senior government employees - these arrangements are an integral part of the records in question and should qualify under Section 65(7) of the *Act*.

The only types of records listed as exceptions in section 65(7) are either agreements of some kind or expense accounts. None of the records at issue in this appeal is an agreement or expense account. Therefore, I find that section 65(7) has no application.

As section 65(6)3 applies, I find that the records are excluded from the scope of the *Act*.

ORDER:

I uphold Management Board Secretariat's decision.

Original signed by: July 17, 2003
Tom Mitchinson
Assistant Commissioner