



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2403**

**Appeal PA-040148-1**

**Ontario Power Generation**



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## **NATURE OF THE APPEAL:**

Ontario Power Generation (OPG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

Any and all information relating to an investigation conducted by [a named company] into allegations made by [the requester] with respect to various improprieties at Ontario Hydro Technologies and specifically, but without restrictions, the final report by [the named company] thereto. This investigation was concluded late in 1994.

Any and all information regarding an internal audit, conducted in 1993, regarding the above and specifically, without limitation, the final report thereto.

The OPG responded to the request by indicating that access to the requested records would not be provided, as they were excluded from the application of the *Act* on the basis of the exclusionary provision in section 65(6) of the *Act*. The OPG stated:

The records were maintained and/or used formerly by Ontario Hydro and currently by [OPG] in relation to proceedings or anticipated proceedings before a court and/or tribunal relating to labour relations and/or the employment by Ontario Hydro of [the requester and others].

The decision letter also stated:

In addition section 10(b) of the *Act* (that the request is frivolous and vexatious) precludes provision of the requested records.

The requester (now the appellant) appealed the decision of OPG.

During the mediation stage of the appeal, the OPG agreed to generally describe the nature of the records to the appellant, who indicated that he wished to pursue access to all of the records. Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the process.

I sent a Notice of Inquiry to the OPG, initially, identifying the facts and issues in this appeal. I invited the OPG to provide representations on the issue of whether section 65(6) excludes the records from the *Act*, and on whether the request for access is frivolous or vexatious. The OPG provided representations on both these issues. I then sent the Notice of Inquiry, along with the non-confidential portions of the OPG's representations, to the appellant, and invited the appellant to provide representations on the issue of whether section 65(6) excludes the records from the operation of the *Act*. The appellant provided representations in response.

## **RECORDS:**

The following records are at issue in this appeal:

- the review prepared by the identified consultants;

- the Ontario Hydro Internal Investigation findings and related memorandum

## **DISCUSSION:**

### **ARE THE RECORDS EXCLUDED FROM THE ACT DUE TO THE OPERATION OF SECTION 65(6)3?**

#### **Introduction**

Section 65(6)3 reads:

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:

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

In order to fall within the scope of paragraph 3 of section 65(6), the OPG must establish that:

1. the records were collected, prepared, maintained or used by the OPG or on their 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 OPG has an interest.

Section 65(6)3 is record-specific and fact-specific. If section 65(6)3 applies to the records, and none of the exceptions found in section 65(7) applies, then section 65(6)3 has the effect of excluding records from the scope of the *Act*.

Section 65(7) has no application in the circumstances of this appeal.

#### **Parts One and Two of the Test under Section 65(6)3**

Concerning the first and second requirements of section 65(6)3, the OPG provides an extensive and detailed history of the circumstances leading to the preparation of the records at issue, as well as a review of the actions of the appellant and the OPG since the creation of the records.

The OPG then summarizes the information by identifying that, during the time when the appellant was an employee of the OPG, he made a number of accusations and allegations against identified individuals employed by the OPG. The OPG states that these allegations, including ones relating to job performance issues and improprieties, related to its employees, and states:

The records which are the subject of appeal in this case were prepared and collected by the institution, in the case of the 1993 internal audit and prepared for and collected on behalf of the institution, in the case of the [review by the identified consultants], in direct response to these allegations, to determine whether there was any substance to them. The records were subsequently maintained and used by the institution for the purpose of resolving human resource and staff relations issues with respect to the [named employees]. Ultimately, when the [appellant's] allegations were proven by both internal and independent auditors to be groundless, the records were maintained and used by the institution against the [appellant] himself with respect to his discipline and finally termination of his employment.

The appellant takes issue with the OPG's position that the records were prepared or maintained by the OPG for the identified purposes, and also provides his own detailed review of the events resulting in the preparation of the records at issue. With respect to the first two parts of the test, the appellant states:

... there is a complete lack of either evidence, detail or even assertion that there *were any particular or specific meetings, consultations, discussions or communications* that directly relate either to the allegations made by the appellant or to the alleged internal and external investigations. There is a complete lack of reference to names, times or details of the same. Therefore, although the records may be found to have been prepared or maintained with respect to matters of employment, the representations lack the required specificity to meet the requirements of the section that would give rise to the records being properly excluded from public scrutiny.

### ***Analysis***

The first part of the three-part test requires a determination as to whether the records were collected, prepared, maintained or used by the OPG or on their behalf. Based on the representations of the parties, I am satisfied that the records at issue were collected, prepared, maintained or used by the OPG. It is clear that the internal investigation report was prepared, maintained and used by the OPG, and that the independent consultants report was prepared on behalf of the OPG and maintained and used by it.

With respect to the second part of the test, I am satisfied that the preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications. I do not accept the appellant's position that there is insufficient evidence to show that there were any particular

or specific meetings, consultations, discussions or communications. Based on the supporting information and documentation provided by both the OPG and the appellant, it is clear that the records were prepared following meetings, interviews and consultations. Furthermore, the documentation also confirms that, following the preparation of the records, a number of discussions and communications resulted from the records. Accordingly, I am satisfied that the second part of the test has also been satisfied.

As a result, I find that the first and second requirements of the section 65(6)3 test have been established.

### **Part Three of the Test under Section 65(6)3**

The third part of the test requires that the meetings, consultations, discussions or communications be about labour relations or employment-related matters in which the OPG has an interest.

#### ***Representations of the parties***

The OPG submits that the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the OPG has an interest. As identified above, the OPG states that the records were prepared as a result of a number of accusations and allegations the appellant made against identified individuals employed by the OPG, at the time that the appellant was employed by the OPG. The OPG states that these allegations related to its employees, and states:

Job performance and integrity in relation to individual employees is both a human resource and a staff relations issue. If the allegations were proven they could result in discipline up to and including termination. This is a human resource issue. The records ...were prepared and collected [by or on behalf of the OPG] ... in direct response to these allegations, to determine whether there was any substance to them. The records were subsequently maintained and used by the institution for the purpose of resolving human resource and staff relations issues with respect to the [named employees]. Ultimately, when the [appellant's] allegations were proven by both internal and independent auditors to be groundless, the records were maintained and used by the institution against the [appellant] himself with respect to his discipline and finally termination of his employment.

The appellant takes the position that the matters at issue relate primarily to the public interest, as opposed to labour relations or employment-related matters. He states:

...the matters at issue primarily concern the public interest. This is evidenced by the efforts made by the appellant to, firstly engage the internal management of the institution to deal with potential improper activities and, secondly, bring the

matters to the attention of the public through the police, the media and the government. If any meetings, consultation, discussions or communications did in fact take place ... it is submitted that the real purpose of the same was the investigation of potential improper or fraudulent activity within the institution. Indeed, the institution has so admitted. OPG has consistently maintained that the alleged investigations were carried out with the genuine purpose and intent of determining whether the allegations put forth by the appellant were indeed correct. It cannot both assert that its efforts were in response to a genuine concern for the uncovering of improper activities, and, to the contrary, engaged with the primary purpose of overseeing its internal employee relations. It has been found that "labour relations or employment related matters" do not apply in the context of:

- (i) an organizational or operational review [Orders M-941, P-1369]
- (ii) litigation in which the institution may be found vicariously liable for the actions of its employees [Orders PO-1722, PO-1905]

It is submitted that the result of a proper and thorough investigation of the allegations put forth by the appellant may have been the liability of the institution for actions of its employees engaged in conduct found to be improper or fraudulent.

## ***Findings***

### *Employment-related matters*

In order for the records to qualify under part three of the test, the meetings, consultations, discussions or communications must be about labour relations or employment-related matters.

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, Senior 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. [See also Order PO-2163]

In my view, the records resulting from the discussions and communications were about employment-related matters. As identified by all the parties, at the time the appellant brought the allegations and accusations to the OPG's attention, he was an employee. His allegations relate directly to the actions of other identified employees. Both records were prepared and created during the time of the appellant's employment with the OPG, and in response to the specific allegations made by the appellant about other employees. Indeed, the supporting documentation provided by the appellant identifies that a number of the "options" identified by him at the time the allegations were made related specifically to employment-related issues. Although there may have been a public interest in this matter if the allegations had been

substantiated and made public, in my view it is clear that the collection, preparation, maintenance or use of the records had a "fairly substantial" connection to employment-related matters at the time they were prepared.

In addition, based on the material provided by the parties, it is clear that the records were also subsequently used in relation to discussions or communications with the appellant concerning employment-related matters. The records were relied on and referred to in the course of the discipline and, finally, termination of his employment, as well as in the subsequent grievances brought by him in relation to his termination. In this context, the records also had a "substantial" connection to employment-related matters relating directly to the appellant's termination and the grievances brought by him.

Accordingly, I find that the records at issue in this appeal were collected, prepared, maintained or used by the OPG in relation to meetings, discussions, communications or consultations about employment-related matters.

*Has an interest*

The only remaining issue is whether OPG "has an interest" in the employment-related matters.

A number of previous orders have addressed the issue of whether or not an institution "has an interest" in a matter for the purpose of section 65(6)3 of the *Act*. In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, (leave to appeal refused [2001] S.C.C.A. No. 509), the Ontario Court of Appeal specifically addressed the meaning of the phrase "in which the institution has an interest" for the purpose of section 65(6) as follows:

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 1 deals with records relating to "proceedings or anticipated proceedings relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. 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". ...

The OPG has identified its interest in the records at issue. It states that the records were prepared in response to the appellant's allegations, and were intended to assist in determining whether there was any substance to them. It also states that the records were subsequently used by the OPG against the appellant with respect to his discipline and, ultimately, the termination of his employment. I find that the OPG clearly had an interest in the employment-related matters which resulted in the creation of the records, and that this interest was more than a mere curiosity or concern.

Furthermore, although it may be that the employment-related matters have now ended, this does not negate the application of section 65(6)3. The Court of Appeal in *Ontario (Solicitor General)*, (*supra*) stated the following with respect to the "time sensitive" element under section 65(6):

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. [emphasis added]

Therefore, because the OPG had an interest in these employment-related matters at one time, the third part of the section 65(6)3 test has been met.

I have found that all three parts of the section 65(6)3 test have been met. As a result, I conclude that the records are excluded from the scope of the *Act* by virtue of section 65(6)3.

### **Additional matter**

As a final matter, the appellant has identified a concern regarding the authenticity of the document prepared by the consultant. He states that he has consistently held out the possibility that the document was not actually prepared by the identified consultant, and refers to:

...the lack of any detail in the report (which [the appellant] had a limited opportunity to review) with respect to names, dates, author and other data that would possibly be expected in a report of the nature contemplated. [The appellant] points out also that the document bore no signature.



He then identifies that the OPG has not responded to his questions regarding its authenticity, and states:

In these circumstances, where the validity and authenticity of the document is both put in issue and not refuted, the institution has not demonstrated the very existence of a document for which it may claim exclusion from the public attention.

I do not accept the position taken by the appellant. In the first place, it is not necessary for the OPG to respond to every allegation made against it. The request was for the final report by the named company resulting from the investigation by this company that was concluded late in 1994. The responsive report has been relied on and referenced throughout the history of the various proceedings between the appellant and the OPG. It is prepared on the letterhead of the identified consultant and is, on its face, responsive to the request. I have found that it is excluded from the scope of the *Act*.

In the second place, although the possible impact of the allegation concerning the authenticity of the record on my finding that the record is excluded from the scope of the *Act* is unclear, other than the suggestions and allegations made by the appellant, referenced above, there is no other material before me supporting the appellant's position. In the circumstances, I am not persuaded that the record at issue is not authentic, and I reject the appellant's arguments on this point.

**ORDER:**

I uphold the decision of the OPG that the *Act* does not apply to the records.

Original signed by:

\_\_\_\_\_  
Frank DeVries  
Adjudicator

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June 27, 2005