



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2613

Appeal PA06-212

Ministry of Government Services



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Government Services (the Ministry, formerly Management Board Secretariat (MBS)) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for “a copy of MBS’ Job Evaluation System (JES) ... a database of job descriptions, positions, and classification standards”.

In response, the Ministry sent a decision letter to the requester which stated that access to the records was denied pursuant to the exclusion found in section 65(6) of the *Act*.

The requester, now the appellant, appealed the Ministry’s decision.

During mediation, the Ministry provided this office with a sample of the types of records found in the JES database. The Ministry also reiterated that the *Act* does not apply to the requested database on the basis of section 65(6) because it was developed as part of the Bargaining Unit Overhaul, and is used in the context of labour relations and negotiation matters. The appellant disputed the application of 65(6), and stated that he is not involved in any proceedings before a court or tribunal, nor is his request related to any labour negotiations.

Mediation did not resolve this issue, and the file was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the Ministry’s representations, to the appellant. The appellant provided brief representations in response.

RECORDS:

The record at issue is the Ministry’s Job Evaluation System (JES), which is a database of job positions, job descriptions, and classification standards, and job evaluations (which consist of a written rationale as to why a particular position was assigned to a particular classification level).

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry takes the position that the *Act* does not apply to the record because it falls within the exclusion in section 65(6).

General Principles

Section 65(6) of the *Act* states:

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.

If section 65(6) applies to the record, and none of the exceptions found in section 65(7) applies, the record is excluded from the scope of the *Act*.

The term “in relation to” in section 65(6) means “for the purpose of, as a result of, or substantially connected to” [Order P-1223].

The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507, (“*Solicitor General*”)].

Nature of the record

In support of its position that the *Act* does not apply to the requested record, the Ministry specifically describes it as follows:

The JES database is an interactive human resources management tool maintained by the Total Compensation Strategy Branch in the Ministry of Government Services.

The JES database contains information that may be grouped into the following types of records: job positions, job descriptions, classification standards and evaluations.

The database has been developed by the Ministry, and is used for several corporate human resources management and labour relations purposes by human resources staff in the Ministry and other ministries:

- The database is used to catalogue and archive job descriptions, classification standards and evaluations of positions across the Ontario Public Service ("OPS").
- The database is used by human resources staff to research and develop job descriptions and to evaluate and assign positions into classification levels.
- The database is used by human resources staff and Ministry counsel to prepare for labour relations grievances involving disputes about the assignment of a position into a particular classification level.
- The database is used by the Ministry during labour relations negotiations with bargaining agents to develop and assess bargaining positions relating to Essential Services Agreements, compensation and staffing matters.

Composition of the JES Database

Job Positions:

The database is used to maintain information about the number of incumbents in each position within each classification level in the OPS. The OPS workforce is organized by classification level. Classification levels are administrative designations that differentiate groups of positions based on similarities in the scope of responsibilities and accountabilities. For example, the administrative management series is divided into several classes with each class having progressively greater responsibilities and accountabilities.

All positions in the OPS are assigned to a particular classification level. The collection of job positions found in the database therefore enables the Ministry to keep up to date records of the OPS workforce, providing an overview of the number of persons employed in the OPS, grouped by position and classification level.

Job Descriptions

The database also contains job descriptions of positions in the OPS. A job description includes a detailed description of information relating to a particular position. This includes: position title, ministry, branch, work location, classification level, purpose of position, duties, skills and knowledge required in the position, scope of responsibilities, accountabilities and other job requirements.

Classification Standards

Classification standards are documents developed by the Ministry that describe the benchmark requirements of each classification level in the OPS. In general, they describe the level of responsibility, accountability, skill and knowledge required of positions in a particular classification level. Classification standards for positions represented by a bargaining agent are generally the product of negotiation and agreement with the bargaining agent.

Job Evaluations

The database also contains records of evaluation for each job description. An evaluation is a record prepared by a human resources consultant in the Ministry or in other ministries, developed to assign a position to a particular classification level. When a job description is prepared or modified, a human resources consultant is responsible for classifying the position; this is done by comparing the responsibilities, knowledge and skills outlined in the job description against benchmarks set in a classification standard. Evaluations serve as the written rationale as to why a particular position was assigned to a particular classification level.

Section 65(6)1: court or tribunal proceedings

Introduction

For section 65(6)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Requirement 1: Was the record collected, prepared, maintained or used by the Ministry or on its behalf?

The Ministry takes the position that the JES database is collected, prepared, maintained and used by the Ministry.

Having reviewed the representations, including the record as described in them, I am satisfied that the record was collected, prepared, maintained and used by the Ministry.

Requirement 2: Was the record collected, prepared, maintained or used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity?

As identified above, the term “in relation to” in section 65(6) means “for the purpose of, as a result of, or substantially connected to” [Order P-1223].

The word “proceedings” means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F].

For proceedings to be “anticipated”, they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223, PO-2105-F].

The word “court” means a judicial body presided over by a judge [Order M-815].

A “tribunal” is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties’ legal rights or obligations [Order M-815].

“Other entity” means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an “other entity”, the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

Representations

The Ministry submits as follows:

... the classification of a position is a contentious matter that is often the subject of a grievance. The job descriptions, classification standards and evaluations contained in the JES database are a critical component of determining the classification level of a given position, and are referred to by the Ministry during a grievance proceeding to formulate the employer's position. It is therefore submitted, that the collection of the records in the JES database and the maintenance of the database itself is substantially connected to proceedings and anticipated proceedings.

The material maintained in the JES database is used by the Ministry in classification grievances brought forward by employees and/or bargaining agents, in relation to the following proceedings or anticipated proceedings:

1. proceedings before arbitrators and labour relations boards, including the Ontario Labour Relations Board and Grievance Settlement Board; and

2. court proceedings in the form of judicial review applications

In Order P-1223, the IPC considered the term "anticipated proceeding" and found that "to fall within the definition of this term, there must be a reasonable prospect of such proceedings at the time of the preparation of the record - the proceedings must be more than just a vague or theoretical possibility."

Given the frequency of grievances filed challenging the classification of a position, the Ministry had a reasonable prospect of labour relations proceedings when collecting the job descriptions and evaluations in the JES database. It is thus submitted that the Ministry's continued maintenance, preparation and use of these documents is in relation to the reasonable prospect of future grievances in relation to the issue of position classification.

Finding

I have carefully reviewed the representations of the Ministry, including its representations on the nature of the record at issue in this appeal. As identified above, the record consists of the complete database maintained by the Ministry, containing all of the job positions, job descriptions, classification standards and evaluations in the OPS. The Ministry takes the position that, because these records are regularly used in proceedings (and in anticipated proceedings), they are collected, prepared, maintained or used in relation to those proceedings or anticipated proceedings. Accordingly, the Ministry submits that it qualifies for exclusion. I do not accept the Ministry's position.

As identified above, the term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

In my view, the record at issue does not do not fit within the parameters of section 65(6)1, as it was not collected, prepared, maintained or used "in relation to" the proceedings or anticipated proceedings. It may be that portions of the record regularly form part of the evidence tendered in various proceedings, including grievance proceedings. In my view, however, this does not mean that the entire record was collected, prepared, maintained or used "in relation to" those proceedings or anticipated proceedings. Many different types of records may ordinarily form part of the evidence in proceedings, for example, certain Ministry policies or procedures may regularly be tendered as evidence in grievance proceedings; however, that does not mean that these entire records are excluded from the scope of the *Act*.

I find support for this position in the approach taken to the phrase "in relation to" by Senior Adjudicator John Higgins in Order MO-2024-I, which reviewed section 52(3)1 of the *Municipal Freedom of Information and Protection of Privacy Act* (similar to section 65(6)1 at issue in this appeal). In that Order, Senior Adjudicator Higgins stated:

As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order

P-1223]. In my view, *meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings*. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be “in relation to” proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be “in relation to” either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. (emphasis added)

In this appeal, although the Ministry has indicated that portions of the records are regularly used in proceedings or anticipated proceedings, the Ministry has not introduced evidence identifying which portions of the record were used in this manner. In addition, I have not been provided with evidence that the record as a whole was used in this way. Requirement 2 of section 65(6)1, as set out above, requires that *the record* be collected, prepared, maintained or used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity. I have not been provided with evidence that the record, as a whole, was collected, prepared, maintained or used in this manner.

Accordingly, I find that the record at issue in this appeal was not collected, prepared, maintained or used “in relation to” proceedings or anticipated proceedings before a court, tribunal or other entity. Instead, I find that the record was maintained and used by the Ministry primarily to properly document and record the nature of the information contained in it, to enable the Ministry to properly conduct its business.

As a result, I find that the Ministry has not satisfied me that the record falls within the second requirement of section 65(6)1. As all three parts of the test must be met, section 65(6)1 does not apply to exclude the record from the scope of the *Act*.

Section 65(6)2: negotiations

Introduction

For section 65(6)2 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and
3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[Orders M-861, PO-1648]

Requirement 1: Was the record collected, prepared, maintained or used by the Ministry or on its behalf?

As identified above, in the circumstances, I am satisfied that the record was collected, prepared maintained and/or used by the Ministry.

Requirement 2: Was the record collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution?

The Ministry argues that the record was collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. The Ministry states:

The Ministry also uses the JES database during negotiations relating to compensation and staffing and Essential Services Agreements. In this regard, the database has several uses. As the database includes up-to date information on the number of positions at each classification level in the OPS, the Ministry can quickly assess the actual cost implications of compensation and benefit proposals developed by either the employer or a bargaining agent during the negotiation process. For example if an increase to the salary range of a particular class or classes of positions is being considered, the Ministry may determine the aggregate cost of the proposal by accessing the number of positions affected from the database.

The database also plays a role in the negotiation of Essential Services Agreements. When formulating a position on which job positions in the OPS should qualify as "essential" during a strike or emergency situation, the Ministry uses the JES database to determine whether the position should be "essential", and if changes in staffing and job descriptions have had an impact on positions

currently categorized as "essential". This information forms the basis of consultations with bargaining agents during the negotiation process.

The database is an important tool used by the Ministry and human resources staff in other ministries to manage the development of job descriptions, evaluations and classification standards, and is also used to assist in grievance proceedings and labour relations' negotiations....

The Ministry goes on to state:

The Ministry respectfully submits that the collection of records vis-a-vis the JES database, and the maintenance of the JES database itself is in relation to negotiations and anticipated negotiations relating to labour relations and the employment of persons by the Ministry, as the database enables the Ministry to research the implications and form positions on proposals relating to compensation, staffing and "essential" positions during labour relations negotiations.

In Order PO-2520, the IPC has also found that although a record is not created for the purpose of negotiations relating to labour relations, if the record is later used for that purpose it can still meet the "in relation to" requirement. The JES database was initially created to assist the Ministry in the management of the OPS workforce and employment records associated with its workforce. The JES database now serves many purposes, and is an important resource for the Ministry during negotiations.

When negotiating increases in compensation for a particular class of positions, the Ministry uses the JES database to look at all the positions in the particular class, the number of incumbents and the size of the population of the particular class. Given the size of the OPS, and the various positions and classes, the ability to search and produce this information is critical to the Ministry when participating in the negotiation process.

The Ministry uses the JES database to look up the descriptions for various positions to determine which ones have qualified as "essential", and how changes in staffing and job descriptions may have an impact on which ones should currently be "essential". This information is then used in negotiating an Essential Services Agreement. In Order PO-1648, the IPC found that the use of job descriptions was substantially connected to negotiations pertaining to which positions are "essential".

It is submitted that the records in the JES database are an important resource for the Ministry in preparing for negotiations, and are clearly used in relation to negotiations relating to labour relations.

Findings

On my review of the representations of the Ministry, I am not satisfied that the record at issue was collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. The representations of the Ministry focus on the manner in which the database may be accessed and referenced in the course of negotiations relating to compensation, staffing and/or Essential Services Agreements. The Ministry confirms that the information in the database is an up-to-date database of the various positions and classification levels at the OPS; however, not all information which may be referenced in the course of negotiations necessarily falls within the scope of section 65(6)2.

The information in the record is, in my view, more in the nature of a database of factual information, as well as a convenient and necessary tool which maintains information about the job descriptions, classifications, etc. of positions within the Ontario Public Service. The Ministry confirms that the record was created to assist it in the management of the OPS workforce and the employment records associated with its workforce, and that it serves many purposes. Although it may be that the record or portions of it will assist the Ministry in its labour relations negotiations, this does not mean that the record is collected, maintained, prepared or used “for the purpose of, as a result of, or substantially connected to” those negotiations or anticipated negotiations.

The Ministry also refers to Order PO-2520 in support of its position that, although a record may not have been created for the purpose of negotiations relating to labour relations, if the record is later used for that purpose it can still meet the “in relation to” requirement. I have reviewed Order PO-2520. In that order, Senior Adjudicator John Higgins found that the record at issue in that appeal, which was a two-page contract entered into between the institution and an affected party, was excluded from the scope of the *Act*. However, with respect to the issue of whether the record was used “in relation to” negotiations, Senior Adjudicator Higgins stated:

Based on the evidence before me, it is clear that the record was provided to the union in the course of settlement negotiations that, in the end, produced Minutes of Settlement. It is also clear that the record was relevant to the subject matter of the grievance, as noted in the College’s reply representations (quoted above). In my view, this is sufficient evidence for me to conclude that it was “used” for the purpose of, and therefore “in relation to”, the negotiations. [emphasis added]

In that appeal, Senior Adjudicator Higgins found the 2-page record was excluded from the scope of the *Act* because that actual record was used in specifically identified negotiations. That is different from the situation in this appeal, where the Ministry argues that its whole database of information relating to job positions, descriptions and classifications is collected, prepared, maintained or used “in relation to” negotiations generally (as opposed to specifically identified negotiations).

In my view, the record at issue does not within the parameters of section 65(6)2, as it was not collected, prepared, maintained or used “in relation to” negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. It may be that portions of the record are used in negotiating the Essential Services Agreement or other agreements entered into by the Ministry. In my view, however, this does not mean that the entire record was collected, prepared, maintained or used “in relation to” those negotiations or anticipated negotiations. Many different types of records may ordinarily be used to prepare for or assist in various negotiations, including parts of the record in this appeal; however, that does not mean that the entire record is excluded from the scope of the *Act*.

I again find support for this position in the approach taken to the phrase “in relation to” by Senior Adjudicator John Higgins in Order MO-2024-I, and the portion of that order referred to above. In my view, meeting the definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the negotiations or anticipated negotiations referred to by the Ministry, and the Ministry has not provided sufficient evidence to support such a finding.

In this appeal, although the Ministry has indicated that portions of the records are regularly used in negotiations or anticipated negotiations, the Ministry has not introduced evidence identifying which portions of the record were used in this manner. In addition, I have not been provided with evidence that the record as a whole was used in this way. Requirement 2 of section 65(6)2, as set out above, requires that *the record* be collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. I have not been provided with evidence that the record, as a whole, was collected, prepared, maintained or used in this manner.

Accordingly, I find that the record at issue in this appeal was not collected, prepared, maintained or used “in relation to” negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. Instead, I find that the record was maintained and used by the Ministry primarily to properly document and record the nature of the information contained in it, to enable the Ministry to properly conduct its business.

As a result, I find that the Ministry has not satisfied me that the record falls within the second requirement of section 65(6)2. As all three parts of the test must be met, section 65(6)2 does not apply to exclude the record from the scope of the *Act*.

Section 65(6)3: matters in which the institution has an interest

Introduction

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

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.

Requirement 1: Was the record collected, prepared, maintained or used by the Ministry or on its behalf?

As identified above, the Ministry takes the position that the JES database is collected, prepared, maintained and used by the Ministry. I am satisfied that the record was collected, prepared, maintained and/or used by the Ministry.

Requirement 2: Was the record collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

In support of its position that the record was collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications, the Ministry states:

As mentioned above, the preparation, classification and evaluation of job descriptions is an interactive process, where human resources staff in the Ministry and other ministries are required to engage in meetings, consultations, discussions and communications about the creation of these employment records. It is accordingly submitted that the Ministry's collection and maintenance of the JES database and the records in the database is substantially connected to meetings, consultations, discussions and communications, as the records in the database are the very basis of these meetings, consultations, discussions and communications.

Based on the Ministry's representations outlined above, I am satisfied that the record was collected, prepared and/or used in relation to meetings, consultations, discussions or communications.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest?

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]

- a review of “workload and working relationships” [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*], [2003] O.J. No. 4123 (C.A.)]

The phrase “labour relations or employment-related matters” has been found *not* to apply in the context of:

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

The phrase “in which the institution has an interest” means more than a “mere curiosity or concern”, and refers to matters involving the institution’s own workforce [*Solicitor General* (cited above)].

In support of its position that the record falls within the exclusion in section 65(6)3, the Ministry states:

... the meetings, consultations, discussions and communications are about the classifications and evaluation of job descriptions, grievances and collective bargaining negotiation, which are clearly labour relations or employment-related matters.

The meetings, consultations, discussions and communications between human resources professionals in the Ministry and other ministries pertain to the development, classification, evaluation and review of job descriptions. In Order MO-1307, a request was made for job descriptions of particular employees. The IPC found that the review of job descriptions is an "employment-related matter". It is accordingly submitted that the Ministry's meetings, consultations, discussions and communications are about an “employment-related matter”.

As noted above, the classification of a position is a matter that is frequently grieved. In this regard, the JES is an important resource in enabling the Ministry to respond to the classification grievances, as it is used to obtain the reason for the classification, and is also used to form a comparative analysis of the classifications of similar positions. The IPC has previously found that a grievance under a collective agreement is a "labour relations or employment-related matter" [M-832, PO-1769]. Therefore use of the JES database in consultations about the defence of a classification of a position during a grievance is a "labour relations or employment-related matter”.

Findings

This office has considered the application of section 65(6)3 (and its equivalent in the *Municipal Freedom of Information and Protection of Privacy Act*, section 52(3)3) to records held by an institution on a number of occasions. Many of these cases have turned on the issue of whether the preparation, collection, maintenance or use of a record is “in relation to” a labour relations or employment-related matter.

In this appeal, the record at issue is the JES database, which the Ministry identifies was initially created to assist the Ministry in the management of the OPS workforce and employment records associated with its workforce. The Ministry has also identified that “the preparation, classification and evaluation of job descriptions is an interactive process, where human resources staff in the Ministry and other ministries are required to engage in meetings, consultations, discussions and communications about the creation of these employment records”. Furthermore, the Ministry states that the meetings, consultations, discussions and communications pertain to “the development, classification, evaluation and review of job descriptions”. The Ministry also confirms that the record was created to assist it in the management of the OPS workforce and employment records associated with its workforce.

The Ontario Court of Appeal reviewed the wording of section 65(6)3 in *Solicitor General* (cited above). In that decision, the Court stated:

As already noted, s. 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. Subclause 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]. Subclause 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]. Subclause 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 subclause 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”....

Based on the nature of the record and the representations of the Ministry, I am satisfied that the record was created or prepared “for the purpose of” or “as a result of” labour relations or employment-related matters. The record at issue, the JES database, relates directly to the workforce of the OPS. The Ministry confirms that the record was created to assist it in the

management of the OPS workforce and employment records associated with its workforce. In doing so, the Ministry created and used the record with regard to meetings, consultations and communications about the subject matter of the record - that is - the development, classification, evaluation and review of job descriptions. The subject matter (job descriptions) necessarily involves the employees of the Ministry and, in my view, the meetings, consultations, discussions or communications involving the subject database are about labour relations or employment-related matters.

I am satisfied that the record was collected, prepared, maintained or used for meetings, consultations, discussions or communications about labour relations or employment-related matters. As such, the record is “substantially connected to” the activities listed in section 65(6)3, and was therefore created, prepared, maintained or used “in relation to” them.

As a result, I find that the third requirement of section 65(6)3 has been established for the record at issue in this appeal.

All of the requirements of section 65(6)3 of the *Act* have thereby been established by the Ministry. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal, and I find that the record falls within the parameters of this section, and therefore is excluded from the scope of the *Act*.

ORDER:

I uphold the Ministry’s decision that the record is excluded from the scope of the *Act* as a result of section 65(6)3.

Original Signed By: _____

September 20, 2007

Frank DeVries
Adjudicator

POSTSCRIPT:

In this appeal, the Ministry provided lengthy and detailed submissions in support of its position that the record at issue, a database of all of the job positions, job descriptions, and classification standards within the Ontario Public Service, is excluded from the ambit of the *Act* on the basis of the operation of sections 65(6)1, 2 and 3 of the *Act*.

I found that the record did not fit within the exclusionary language of sections 65(6)1 or 65(6)2, and I did not uphold the Ministry’s position on the application of those sections. However, I did

find that the record was excluded from the ambit of the *Act* on the basis of section 65(6)3 of the *Act*. Section 65(6)3 is unique in that it excludes from the scope of the *Act* (both its access and privacy provisions) all labour relations or employment related matters in which the institution has an interest and which fit within its ambit.

When the *Act* was initially passed, the purposes of the *Act* were set out in section 1, which states:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

- (i) information should be available to the public,
- (ii) necessary exemptions from the right of access should be limited and specific, and
- (iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

In the spring of 2004, the Premier issued a memorandum to all ministers and deputy ministers calling upon them “to strive to provide a more open and transparent government.” He emphasized that the government “should ensure that information requested of it should continue to be made public unless there is a clear and compelling reason not to do so.” Ministers Gerry Phillips and Michael Bryant issued a follow-up memorandum emphasizing the importance of Freedom of Information legislation in the democratic process. They urged provincial ministries and agencies to go beyond the ceremonial and reactive access to information process and use a proactive approach for disseminating information to the public.

In this order, I was compelled by the wording of section 65(6)3, as interpreted by the courts (see *Solicitor General*, cited above) to uphold the Ministry’s claim that a record containing the job positions, job descriptions, and classification standards within the Ontario Public Service is not covered by the *Act*. However, section 65 in no way prohibits an institution from disclosing records, it simply removes them from the access and privacy regimes established by the *Act*. Outside the scope of the *Act*, an institution still has the discretion to disclose records even when section 65 is applicable. Relying on this provision to deny public access to information about jobs the public’s tax dollars pay for seems at odds with the stated purposes of the *Act*, and the Government’s recent statements supporting its “culture of openness”.

In contrast, in section 21(4) of the *Act* the legislature specifically states that the disclosure of information that contains the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister does not constitute an invasion of that individual’s personal

privacy under section 21(1) of the *Act*. The *Act* specifically recognizes that this type of information, even when it relates to identifiable individuals, ought to be disclosed despite any privacy interests that may exist. However, as a result of the application of section 65(6)3, I have been compelled to find that information of a similar nature, in an anonymized format and for all of the Ontario Public Service, must be excluded from the ambit of the *Act*. I urge the Ministry to consider voluntarily disclosing this information.