



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

ORDER PO-2819

Appeal PA07-437

Northern College of Applied Arts and Technology



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NATURE OF THE APPEAL:

The Northern College of Applied Arts and Technology (the College) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a specified consulting report at an identified workplace environment.

The College issued a decision denying access to the report. The College advised the requester that the requested report is excluded from the operation of the *Act* by virtue of section 65(6), as it is an employment-related report.

The requester, now the appellant, appealed the College's decision.

During mediation, the College issued a supplementary decision letter, claiming the exemptions found in sections 13(1) (advice to government), 17(1)(a), (b), (c) (third party information), 18(1)(c), (d) (economic interests) and 21(1) (personal privacy) of the *Act* as alternative grounds for denying access to the records. In its letter, the College reiterated its position that the records are excluded from the scope of the *Act*, by virtue of section 65(6).

Also during mediation, the College advised that the responsive records consist of the following documents:

- Cover Letter to the Summary Report
- Summary of Feedback on the Employee Survey
- Appendix 1: Internal e-mail
- Appendix 2: Template letter to staff
- Appendix 3: Schedule of interviews

Upon discussion with the mediator, the appellant indicated that he does not wish to pursue access to Appendices 1, 2 and 3, or to any information relating to individuals' names which may be included in the responsive records. However, the appellant claimed that a public interest exists in the disclosure of the remaining documents, raising the possible application of section 23 of the *Act*. As no further mediation was possible, the file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I began my inquiry by sending a Notice of Inquiry setting out the facts and issues on appeal to the College, seeking its representations. The College provided representations in response. I then sent a Notice of Inquiry to the appellant, along with a complete copy of the College's representations. The appellant also provided representations. I then sent a copy of the appellant's representations to the College and invited it to make representations in reply. The College submitted reply representations.

RECORDS:

The records at issue consist of a cover letter and summary report.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The College submits that section 65(6)3 applies to exclude the records at issue from the scope of the *Act*. Section 65(6)3 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:

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 records, and none of the exceptions found in section 65(7) applies, the records are 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]. 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 [Order MO-2024-I].

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. The meaning of “labour relations” is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

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].

Section 65(6) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

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

For section 65(6)3 to apply, the College 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 College or on its behalf.

The College submits that the records which are the subject of the request consist of a workplace investigation report prepared by an external consultant and the cover letter prepared by the consultant summarizing the findings of the report. The investigation was a result of a complaint made by the appellant regarding human rights abuses and poor leadership in the department. The appellant requested that the College hire a neutral third-party to act as a fact-finder. The external consultant was retained by the College to conduct an investigation. Accordingly, the College submits that the record at issue was prepared on behalf of the College and it was to be used by the College to make organizational changes where necessary. The appellant does not dispute this fact. I accept the College's submission that the record was prepared on behalf of the College by the external consultant and it was to be used by the College, thereby satisfying the first part of the test under section 65(6)3.

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

In regard to this requirement, the College submits that once it received the report (and cover letter), it had discussions internally about it and made decisions based on the contents of the report. It submits that these discussions were “in relation to” the College’s use of the report. The College states specifically:

The College received the Report, had discussions about it (including discussions involving its President) and used it to manage labour relations and employment. The College members of the Union/College Committee attempted to table the findings of the Report at a Committee meeting..but the discussion did not proceed...the findings of the Report [were discussed] at a meeting with individual employees in the Department...The College made changes to how employees in the Department are managed based on the Report and these meetings.

The appellant did not make submissions on this issue.

Based on the College’s representations and my review of the record, I am satisfied that the record was prepared and/or used in relation to meetings, consultations and discussions. I conclude that the records at issue were prepared by the external consultant to be used by the College in relation to meetings, discussions and consultations on management in a particular department of the College.

Requirement 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 and PO-2123]
- an employee’s dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832 and 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 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722 and 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 [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above].

The records collected, prepared maintained or used by the Ministry ... are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions [*Ministry of Correctional Services*, cited above].

In support of its position that the records fall within the exclusion in section 65(6)3, the College submits that the report was prepared for discussions and used exclusively for labour and employee relations. The College submits that the appellant’s correspondence with the College requesting action, which resulted in the report being prepared, identify the labour relations aspect of the report because the appellant is the union representative for the employees in the department.

On the issue of “employee relations”, the College states:

The matter is also about employee relations, which in the circumstances, entails (1) an exercise of due diligence consistent with the College’s duty to provide a discrimination and harassment free work environment under the *Human Rights Code* and the College’s Human Rights Policy; (2) an exercise of due diligence consistent with the College’s duty to provide a safe work environment under the *Occupational Health and Safety Act*; and (3) an exercise that was undertaken with a view to the retention and recruitment of employees and, more generally, the leadership of employees.

Finally, the College summarizes its position and states:

The Ontario Court of Appeal has held that the phrase “in which the institution has an interest” establishes a fairly low standard of exclusion, only meaning “more than a mere curiosity or concern.” Following the Court of Appeal’s decision, the IPC has held that an employer who inquires into labour and employment related matters similar to those at issue in this appeal has an interest in the records produced that goes beyond a “mere curiosity or concern.” The College viewed the appellant’s allegations as serious even

though they were not particularized. The College's response demonstrates its interest in the matter, which is related to labour relations and employment as submitted above. The "more than a mere curiosity or concern" standard has been met.

The appellant did not make submissions on this issue directly. The appellant's concern was that the College had agreed to allow the appellant to view the report and take notes and then later rescinded this offer. The College did not give reasons for withdrawing the offer to allow the appellant the opportunity to view the report. The appellant does not appear to dispute the fact that the record relates to labour relations or employment-related matters in which the institution has an interest. In fact, the appellant states, "the union local has indicated that it intends to use the information from the [report] study solely to help prevent similar incidents for occurring in the workplace." This admission supports the College's position that the report and cover letter relate to a matter involving labour and employee relations.

In the circumstances of this appeal, I am satisfied that the records identified by the College satisfy the third part of the test under section 65(6)3. I accept that the records relate to labour and employment-related matters, including work environment, management, work issues, and communication within the department. Accordingly, I find that the records at issue are about "labour relations" and "employment-related matters" in which the College "has an interest" within the meaning of that term in section 65(6)3.

Although I have found that the requirements of all three parts of the section 65(6)3 test have been met, my determination of whether or not section 65(6)3 applies to exclude the records from the scope of the *Act* is subject to a determination of whether any of the exceptions in section 65(7) apply.

Section 65(7): exceptions to section 65(6)

If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. Section 65(7) states:

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.

Having reviewed the records at issue, I find that they do not fall within any of the exceptions listed in section 65(7). Therefore, I conclude that section 65(6)3 applies to exclude the records from the scope of the *Act*.

ORDER:

I uphold the College's decision that the records are excluded from the scope of the *Act* as a result of section 65(6)3.

Original Signed by: _____
Stephanie Haly
Adjudicator

_____ August 26, 2009