



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

ORDER PO-2962

Appeal PA10-393

Ministry of Consumer Services



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NATURE OF THE APPEAL:

The Ministry of Consumer Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the performance agreements of a named individual from 1994 to the date of the request.

The Ministry responded to the request by denying access to the requested records on the basis that the responsive records fell outside of the scope of the *Act* due to the operation of the exclusionary provision in section 65(6)3 of the *Act*.

The appellant appealed the Ministry's decision.

During mediation, the parties confirmed their positions. In addition, the Ministry identified that it was unable to locate responsive records for the years prior to 2001. Accordingly, the responsive records are the performance agreements for each of the years 2001-2008.

Mediation did not resolve this appeal and it was transferred to the inquiry stage of the process. The sole issue in this appeal is whether the records fall outside the scope of the *Act* as a result of the exclusionary provision in section 65(6)3.

I decided to send a Notice of Inquiry, identifying the facts and issues in this appeal to the appellant, initially. The appellant declined to provide representations in response to the Notice. However, the appellant referred to the information he had provided to this office earlier in support of his position that the records fall within the scope of the *Act*.

I decided it was not necessary to hear from the Ministry in the circumstances of this appeal.

RECORDS:

The records at issue are identified as the "MCBS Performance Development and Learning Plan & Appraisal Form" (hereafter "Performance Development and Appraisal Form") of the identified individual for seven separate year-long periods (from 2001 to March 31, 2008).

There are seven separate records at issue in this appeal, and each is 3 to 5 pages long. They are completed standard form documents relating to the performance standards and evaluations or appraisals of the identified individual for each of the seven years. These forms are completed by the individual's manager, and include information relating to the individual's performance commitments, indicators and results for each of the seven years, as established and determined by the individual's manager. They also include a section regarding learning and development objectives and results, as well as an overall evaluation and "comments" section. Each record also identifies whether or not a merit increase is recommended for the period of time covered by the appraisal. (NB: I note that the format and title of the form for 2001 is slightly different than those for 2002-2008).

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

As indicated above, the Ministry takes the position that the *Act* does not apply to the records because they fall 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) apply, the record is excluded from the scope of the *Act*.

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*”)].

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: Were the records collected, prepared, maintained or used by the Ministry or on its behalf?

The records at issue consist of the completed yearly Performance Development and Appraisal Form relating to an identified individual employed by the Ministry. Each of these forms covers separate one-year periods of time, and each is completed by the individual's manager. Each form is signed by both the individual and the manager, and each form refers to the fact that these forms will be used by human resources employees, managers and auditors. In my view, it is clear that the records were collected, prepared, maintained and/or used by the Ministry.

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

On my review of these records, I am satisfied that they were prepared, maintained or used in relation to consultations, discussions or communications. More specifically, the records themselves consist of the yearly performance appraisals of the individual by his manager, and are signed by both of these individuals, each confirming that the appraisal was completed. Accordingly, each record relates to communications and consultations between the individual and his manager, as well as communications with human resources personnel.

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

The type of records excluded from the *Act* by section 65(3) 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 in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context. (See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 Div. Ct.)

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)].

With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis* (cited above) that:

In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,

It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that “(w)hether or not a particular record is ‘employment related’ will turn on an examination of the particular document.”

I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

In this appeal, the records at issue consist of the specific Performance Development and Appraisal Forms completed by a manager for an identified individual. On my review of the records, I am satisfied that they were prepared and maintained by the Ministry with regard to consultations and communications concerning the performance of an employee. In my view, these completed performance reviews and appraisals are directly related to the Ministry's relations with its own workforce, and I find that the records at issue are about employment-related matters for the purpose of section 65(6)3. In addition, I am satisfied that the Ministry has an interest in these records, as they relate to matters involving the Ministry's own workforce. In these circumstances, I find that the exclusionary wording in section 65(6)3 applies to the records, and they fall outside the scope of the *Act*.

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

I have also considered whether the exception to section 65(6) found in section 65(7) may apply to the records at issue. 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.

The appellant's request is for the "performance agreements" of a named individual for the period of time from 1994 to the date of the request. However, it is clear from the appellant's communications with the Ministry during the mediation process that it is these yearly Performance Development and Appraisal Forms that he is interested in obtaining, as they contain the information he seeks.

On my review of the records at issue, I am not satisfied that they fit within the exception found in section 65(7). The records do not fit within paragraphs 1, 2 or 4 of that section. With respect to whether these records fit within the exception in section 65(7)3, I find they are not agreements between an institution and an employee "resulting from negotiations." Although these records are signed by the manager and the employee, I find that records of this nature are not

“negotiated” for the purpose of section 65(7), and this is confirmed by wording found in a number of the records at issue. In that respect, I find that the records did not result from “negotiations” between the institution and the employee for the purpose of section 65(7).

Accordingly, none of the exceptions in section 65(7) applies, and I find that the records at issue are excluded from the scope of the *Act*.

ORDER:

I uphold the decision of the Ministry, and find that the records are excluded from the scope of the *Act* under section 65(6)3.

Original signed by:
Frank DeVries
Adjudicator

April 8, 2011