

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3229

Appeal PA12-511

Ministry of Government Services

July 5, 2013

**Summary:** The ministry received a request for records relating to certain meetings of the Information Technology Executive Leadership Council which took place in 2003 and 2004. The ministry denied access to the responsive portions of the records on the basis that they were excluded from the operation of the *Act* under section 65(6)3. In this order, the ministry's decision is upheld and the records are found to be excluded from the operation of the *Act*.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(6)3.

### OVERVIEW:

[1] The Ministry of Government Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the Information Technology Executive Leadership Council (ITELC) and the Office of the Corporate Chief Information Office (OCCIO).

[2] The ministry subsequently issued two fee estimate and time extension decisions. The first decision was in response to the original request as described above. The second was based on a narrowed request.

[3] During discussions with the ministry, the requester further narrowed his request. The ministry described the narrowed request as the following:

Agendas, minutes and supporting documentation to do with privatization and contracting out of IT project work for the three ITEL C meetings held on October 17, 2003, November 14, 2003, and January 9, 2004.

[4] The ministry located records responsive to the narrowed request and issued a decision to deny access to these records pursuant to the exclusionary provision in section 65(6)3 of the *Act* (labour relations and employment information).

[5] The requester (now the appellant) appealed the ministry's decision to deny access to the withheld records. During mediation, the ministry identified portions of the records which it claimed are not responsive to the request and confirmed that it was relying on the exclusion in section 65(6)3 to deny access to the remainder of the records. The ministry also confirmed that in the alternative, even if the *Act* was to apply, it would rely on section 12(1) of the *Act* (Cabinet records) to deny access to certain portions of the responsive records.

[6] The appellant advised that he is not seeking access to information that was identified by the ministry as not responsive to the request. Accordingly, this information is no longer at issue in this appeal. However, the appellant confirmed he seeks access to the remainder of the records.

[7] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the ministry, a severed version of which was provided to the appellant, who also provided me with representations.

[8] In this decision, I uphold the ministry's decision that the records fall outside the scope of the *Act* as a result of the operation of section 65(6)3.

## **RECORDS:**

[9] The records remaining at issue consist of portions of three Agendas; three Minutes of Meetings and attachments and two Meeting Highlights.

## **DISCUSSION:**

[10] By way of background, the ministry provided the following explanation of the mandate and role of ITEL C. It explains that:

The mandate of ITEL C, a Council within the government, is to ensure that the value of the Ontario government's investment in information and

information technology (I&IT), both in terms of **staff** and money, is maximized by setting the overall directions and priorities for the planning, development and delivery of I&IT in government in support of business directions and priorities. The Council's membership is composed of various senior management officials across government and certain individuals at the Director and Assistant Deputy Minister level.

The Chief Information Officers that sit on the Council are representatives of all ministries across government. Each Chief Information Officer represents a specific cluster which supports one or more ministries. Chief Information Officers have a dual reporting relationship within government. They report to their respective Deputy Ministers as well as to the Information Officer for Ontario [who] heads the Office of the Corporate Chief Information Officer ("OCCIO"), which is a division of the Ministry [of Government Services].

Although ITEL C is composed of government officials from across government, it has a direct reporting relationship to OCCIO, a division of the Ministry [of Government Services], and therefore should be considered as part of an institution for the purposes of the Act.

ITELC provides a forum to identify and address I&IT issues on a government-wide level. It also provides a forum for the exchange of information and ideas between clusters and corporate offices in government in support of I&IT matters and the government's mandate, and it has a responsibility to offer strategic advice to influence the directions through which the mandate is implemented.

ITELC acts [as] a decision-making body within government and it currently provides advice and recommendations to the Information and Information Technology Deputies' Committee in the government. Of the various areas that ITEL C provides support and direction in, it establishes priorities for I&IT **human resources** in government, including the identification of emerging needs, trends, and issues and approves plans to address these human resources issues.

The Ministry of Government Services is the ministry of the government that is responsible for the government's workforce. Put another way, it is the corporate employer for the Ontario Public Service (the OPS).

[11] The sole issue for determination in this appeal is whether the records are excluded from the operation of the *Act* as a result of the application of section 65(6)3, which 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.

[12] If section 65(6)3 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*.

[13] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.<sup>1</sup>

[14] 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.<sup>2</sup>

[15] 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].

[16] 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.<sup>3</sup>

[17] 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

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<sup>1</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>2</sup> *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.

<sup>3</sup> *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.

conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.<sup>4</sup>

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

#### ***Introduction***

[18] 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.

#### ***Part 1: collected, prepared, maintained or used***

[19] The ministry submits that the Agendas, Minutes of Meetings, attachments and Meeting Highlights which comprise the records at issue in this appeal were prepared by the Strategy, Policy and Planning Branch of the former Management Board Secretariat (MBS). In addition, it submits that the slide deck presentation for the January 9, 2004 meeting was prepared by the Procurement, Policy and IT Procurement Branch of the former MBS, which is now part of the ministry. It goes on to submit that these records were used by ITEL C in carrying out its mandate.

[20] Based on my review of the records and the context surrounding their creation, I am satisfied that they were prepared and used by the ministry of its predecessor or on their behalf by ITEL C and that the first part of the test under section 65(6)3 is met.

#### ***Part 2: meetings, consultations, discussions or communications***

[21] The ministry goes on to indicate that the records were prepared and used for three ITEL C meetings held on October 17, 2003, November 14, 2003 and January 9, 2004. Again, having reviewed the contents of the records, it is clear that their preparation and use related to meetings of ITEL C which took place on those dates. As a result of this finding, I am satisfied that the second part of the test under section 65(6)3 has been met by the ministry.

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<sup>4</sup> *Ministry of Correctional Services*, cited above.

***Part 3: labour relations or employment-related matters in which the institution has an interest***

[22] 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*.<sup>5</sup>

[23] 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.<sup>6</sup>

[24] 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.<sup>7</sup>

[25] 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].

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<sup>5</sup> *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

<sup>6</sup> Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

<sup>7</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[26] The ministry submits that all of the records contain information that relate to labour relations or human resources issues "because the records relate to the government managing and implementing such issues in its capacity as employer for the OPS, in respect of the privatization and contracting out of I&IT positions in the OPS."

[27] Specifically, the ministry submits that the records relating to the October 17, 2003 meeting address grievances filed by the bargaining agents for the individuals holding I&IT positions in the OPS. The records contain information about the government's corporate approach to the grievances and discuss its next steps. In addition, the records pertaining to this particular meeting include information about the discussion around plans and strategies for future management of the OPS's I&IT workforce.

[28] The ministry goes on to argue that the records pertaining to the November 14, 2003 meeting contain specific information about the government's recommended human resource strategy for addressing I&IT positions in government.

[29] In its non-confidential representations, the ministry argues that the records relating to the January 9, 2004 meeting also address the government's human resources strategy with respect to the future of I&IT positions within the OPS.

[30] The ministry concludes its arguments on this point by submitting that all of the records are fundamentally "about the government's management and implementation of changes in its workforce in 2003-04." It goes on to state that its interest in the subject matter of the records is not a "mere curiosity or concern" and that in its role as employer, the ministry has an interest in the records within the meaning of that term in section 65(6)3.

[31] The appellant outlines in his representations his reasons for seeking access to the records. The majority of his representations, however, outline his concern that another individual was granted access to ITEL documents and its meetings that were not held *in camera* that cover the time period of his request. He suggests that if the meetings had included a discussion of confidential labour relations matters, this outside individual would have been excluded, as was the case with respect to the *in camera* sessions. Essentially, the appellant seeks a similar level of access to the information which was the subject matter of the discussion at these meetings of ITEL in October and November of 2003 and January 2004.

[32] I have carefully reviewed each of the records identified as responsive in this appeal and conclude that they fall within the ambit of records relating to labour relations or are employment-related. The records clearly address labour relations issues pertaining to the management of the OPS's workforce. Some of the issues addressed in the records include discussion of its strategies in response to certain grievances filed by

bargaining agents and other workplace issues around the deployment and use of staff within the I&IT departments within the OPS.

[33] I find that these issues qualify as either labour relations or employment-related matters for the purposes of the third part of the test under section 65(6)3. In addition, these are clearly issues around which the ministry has a genuine interest in its capacity as the employer of OPS staff, including those in I&IT positions, thereby satisfying all of the requirements of the third part of the test under section 65(6)3.

[34] In conclusion, I find that all of the records were prepared for and used in relation to meetings where labour relations or employment-related matters in which the ministry had an interest were discussed. Accordingly, the records are excluded from the scope of the *Act* as a result of the operation of section 65(6)3 and none of the exceptions to the exclusion in section 65(7) apply.

**ORDER:**

I uphold the ministry's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

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July 5, 2013