

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-3262

Appeal PA13-65

Ontario Northland Transportation Commission

October 10, 2013

**Summary:** The appellant submitted a request to the Ontario Northland Transportation Commission for all correspondence during a specified time period containing the name of an identified individual. The Commission denied access to the one responsive record, a single email, on the basis that it is excluded from the scope of the *Act* under section 65(6)3 (employment-related information). In this order, the adjudicator finds that the record was collected and used by the Commission in relation to consultations, discussions and communications about employment-related matters in which it has an interest. The order upholds the decision of the Commission that the *Act* does not apply to the record.

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

### OVERVIEW:

[1] The Ontario Northland Transportation Commission (the Commission) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

All printed and email correspondence between [a named individual] and the Commission for the time period of January 1, 2011 until October 16, 2012 that contains the word "[named individual]."

[2] The Commission issued a decision stating that the one responsive record is employment-related information in which it has an interest and therefore falls outside the jurisdiction of the *Act* pursuant to section 65(6)3.

[3] The requester (now the appellant) appealed this decision.

[4] Mediation did not result in a resolution of the appeal and it was referred to adjudication. The Commission submitted representations in response to the Notice of Inquiry. These representations were shared with the appellant, who provided a response.

### **RECORDS:**

[5] The record at issue consists of a single email dated July 21, 2012.

### **ISSUES:**

[6] The sole issue for me to determine is whether section 65(6) excludes the record from the scope of the *Act*.

### **DISCUSSION:**

[7] Section 65(6) 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.

[8] If section 65(6) applies to the record, and none of the exceptions found in section 65(7)<sup>1</sup> applies, the record is excluded from the scope of the *Act*. 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.<sup>2</sup>

[9] The Commission relies on the provisions of section 65(6)3. For this section to apply, it must establish that:

1. the records were collected, prepared, maintained or used by the 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.

[10] 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>3</sup> 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.<sup>4</sup> 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>5</sup>

[11] The Commission submits that the record at issue records a dialogue about a search for a suitable job candidate. It states that the nexus to employment is clear not only from the responsive email, but also from the following additional context:

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<sup>1</sup> 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.

<sup>2</sup> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

<sup>3</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>4</sup> Order PO-2157.

<sup>5</sup> *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLii 8582 (ON CA).

1. The search for a candidate was for a position to be developed that would report to the second individual listed in the "to" field — "the hiring manager."
2. The hiring manager worked with the other individual listed in the "to" field and the sender of the email in conducting the search.
3. The sender of the email sent his email to convey feedback on a particular job candidate. He had no other purpose for sending this email.

[12] The Commission asserts that these three facts are consistent with and evident from the text of the responsive email itself. Thus, the Commission states, it is excluded under section 65(6)3, pursuant to a purposive and textual analysis.

[13] The Commission also submits that the purpose of the section 65(6) exclusion is engaged as the exclusion is intended to allow sensitive matters related to employment and labour relations to be dealt with in a zone of privacy. The Commission states that the courts have recognized this purpose and interpreted the text of section 65(6) to support a reasonably broad zone of privacy.

[14] In the Commission's submission, the email at issue illustrates the very confidentiality interest that government intended to protect with this section of the *Act*, providing the institution with a "zone of privacy in which to have the kind of full and frank dialogue about job candidates that is recorded in the responsive email."

[15] The Commission applies these principles in support of its position that the responsive email is excluded from the *Act*, arguing that:

1. The email was "collected" and "used" by the hiring manager in the course of his duties for the Commission and on the Commission's behalf.
2. There is more than "some connection" between the email and consultations, discussions and communications about employment-related matters. The responsive email is a "communication" that embodies a "consultation" or "discussion" about a hiring decision — an employment-related matter as recognized in numerous IPC orders. The purpose of the email is only related to the employment of an individual.
3. The Commission has more than a "mere curiosity or concern" in the employment-related matters addressed in the email. The significance of the search for a job candidate is addressed in the text of the responsive email itself. The Commission's search process did not result in the hiring of the candidate discussed in the email, but the exclusion nonetheless applies.

- [16] The appellant does not address or contest the application of section 65(6). He simply asserts that he would be satisfied to receive a redacted version of the record that protects the identity of any individual directly named. Further, the appellant states it is in the public interest that this document be released, and this can be done without compromising anyone's privacy rights.
- [17] I have reviewed the record at issue and agree with the Commission that it has met the three-part test for exclusion under section 65(6)3. The email was sent to a manager with the Commission, in relation to consultations, discussions or communications about employment-related matters.<sup>6</sup> The record at issue is itself a communication about a hiring decision, conveying feedback about a particular job candidate.
- [18] In this case, the job competition involved a potential position within the Commission, establishing its "interest" in this employment-related matter for the purpose of section 65(6)3. Further, although it may be the case that the job recruitment process has come to an end and did not result in the hiring of the candidate discussed in the email, this does not negate the application of section 65(6)3.<sup>7</sup>
- [19] I find that all three parts of the test for exclusion under section 65(6)3 have been met. I also find that none of the exceptions in section 65(7) applies in the circumstances.
- [20] I conclude that the record is excluded from the scope of the *Act* under section 65(6)3. The right of access under the *Act* does not apply, and likewise the "public interest override" provision in section 16, to which the appellant alluded.

**ORDER:**

I uphold the decision of the Commission that the *Act* does not apply to the record.

Original Signed by: \_\_\_\_\_  
Sherry Liang  
Senior Adjudicator

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October 10, 2013

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<sup>6</sup> Previous orders of this office, as referred to by the Commission, have found that a job recruitment process qualifies as an employment-related matter: see, for example, Orders PO-1649, M-1105, M-1127, MO-1193, MO-1236, PO-1863, PO-2123 and MO-2902.

<sup>7</sup> See footnote 5 above.