



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

ORDER P-1556

Appeal P-9700326

Management Board Secretariat



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BACKGROUND:

The appellant was an unsuccessful candidate in a job competition. The appellant, at the time an employee of the Ministry of the Solicitor General and Correctional Services (the Ministry) and a member of the Ontario Public Service Employees' Union, filed a formal grievance related to the conduct and outcome of the competition. Subsequently, the successful candidate made a complaint against the appellant under the Ministry's Workplace Discrimination and Harassment Prevention (WDHP) policy. In response to the complaint made against him, the appellant filed a counter-complaint under the policy. The appellant asked that his complaint be investigated by Management Board Secretariat (MBS) or another Ministry.

MBS engaged the services of a consultant to review the complaint and issue a report of her investigation. A preliminary report was prepared and submitted to the Ministry.

NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to MBS. The request was for access to any/all information relating to his WDHP complaint, including a preliminary report submitted by the investigating official.

MBS located the records responsive to the request and denied access pursuant to section 65(6) of the Act, claiming that they fell outside of the scope of the Act. The appellant appealed the denial of access.

A Notice of Inquiry was sent to MBS and the appellant. Representations were received from both parties.

RECORDS:

The records at issue consist of memoranda, e-mail, facsimile cover sheets, correspondence, various forms, a legal opinion, the preliminary report, occurrence reports, and documents related to the WDHP complaint.

DISCUSSION:

JURISDICTION

The only issue in this appeal is whether the records fall within the scope of sections 65(6) and (7) of the Act. These sections read:

- (6) 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.
- (7) 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 interpretation of sections 65(6) and (7) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 65(6) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In its representations, MBS claims that paragraphs 1 and 3 of section 65(6) apply to exclude the records from the Act. I will first consider whether the requirements of paragraph 3 are present in the circumstances of this appeal.

Section 65(6)3

In order to fall within the scope of paragraph 3 of section 65(6), MBS must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf; **and**
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

MBS states that the records were collected by the consultant during the course of her investigation into the complaint, and the consultant also created other records such as notes and analyses of findings for the preliminary report. The consultant was appointed under the provisions of the WDHP Directive to act as an impartial investigator and report her findings. The records which were collected and created were used as the basis for a preliminary report prepared by the consultant on behalf of MBS.

I am satisfied that the records were all collected, prepared, maintained or used by or on behalf of MBS, who was conducting the investigation on the Ministry's behalf, and Requirement 1 has been met. I do not agree with the appellant's contention that the records were collected, prepared, maintained or used on his behalf.

Requirement 2

The Ministry indicates that all of the records were collected or prepared for the purpose of or as a result of meetings related to the harassment complaint, and were used for the preparation of the preliminary report which communicated the results of the investigation.

In Order P-1223, Assistant Commissioner Tom Mitchinson stated:

In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was **for the purpose of, as a result of, or substantially connected to** an activity listed in sections 65(6)1, 2 or 3, it would be "in relation to" that activity. (emphasis added)

Having reviewed the records, I find that they were collected, prepared or used for the purpose of or are substantially connected to discussions, communications and/or meetings related to the WDHP complaint. Accordingly, I find that the second requirement has been met.

Requirement 3

In Order P-1242, Assistant Commissioner Mitchinson's view towards WDHP complaints was stated as follows:

In my view, the WDHP program is, by definition, designed to address an employment-related concern, and I find that any investigation which takes place under the terms of the program is properly characterized as an "employment-related matter" for the purposes of section 65(6)3 of the Act.

I agree and find that the records relate to an employment-related matter.

With respect to whether a WDHP investigation is a matter in which MBS or the Ministry has an interest, Assistant Commissioner Mitchinson made the following findings in Order P-1242:


On the basis of these board of inquiry decisions, I conclude that if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the [Human Rights] Code, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as a matter "in which the institution has an interest".

I agree with these findings and am satisfied that the records at issue in this appeal were collected, prepared and/or used by or on behalf of MBS and the Ministry, in relation to meetings, discussions and communications about employment-related matters in which MBS and the Ministry have an interest. All of the requirements of section 65(6)3 of the Act have thereby been established.

I have found that the records meet all of the requirements of section 65(6)3 of the Act. As none of the exceptions contained in section 65(7) are present in the circumstances of this appeal, I find that the records fall within the parameters of this section and, therefore, are excluded from the scope of the Act. Because of the findings I have made, it is not necessary for me to consider the application of section 65(6)1 to the records.

ORDER:

I uphold MBS's decision.



Holly Big Canoe
Inquiry Officer

April 9, 1998