

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3648

Appeal PA15-364

Ministry of Transportation

September 14, 2016

Summary: The issues in this appeal are whether the majority of the records at issue are excluded from the scope of the *Freedom of Information and Protection of Privacy Act* (the *Act*) under section 65(6)3 of the *Act*, and whether other records are exempt from disclosure under section 18(1)(c) or non-responsive to the appellant's access request. In this order, the adjudicator upholds the Ministry of Transportation's (the ministry's) access decision, and finds that the records are either excluded from the scope of the *Act* under section 65(6)3, exempt from disclosure under section 18(1)(c) or non-responsive to the request. The adjudicator also upholds the ministry's exercise of discretion. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1)(c), 24 and 65(6)3.

OVERVIEW:

[1] This order disposes of the issues raised arising from an appeal of an access decision made by the Ministry of Transportation (the ministry) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester's access request was for all information about him in the custody of named individuals relating to the performance of his duties and responsibilities, and any other information about him as an individual over a specified time period.

[2] The ministry located responsive records and issued a decision letter to the requester, granting partial access. The ministry denied access to a number of records, claiming the application of the exclusion in section 65(6) (employment or labour

relations) and the discretionary exemption in section 18(1) (economic and other interests). The ministry also advised the requester that a portion of one record was not responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision to this office. During the inquiry of this appeal, I sought representations from the ministry and the appellant. Only the ministry provided representations.

[4] For the reasons that follow, I uphold the ministry's access decision and dismiss the appeal.

RECORDS:

[5] The records consist of emails, hand-written notes, a grievance, complaints, a performance development plan, a chronology and a summary memorandum.

ISSUES:

- A. What records are responsive to the request?
- B. Does section 65(6) exclude the records from the scope of the *Act*?
- C. Does the discretionary exemption in section 18(1) apply to the records?
- D. Did the ministry exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A. What records are responsive to the request?

[6] The ministry claims that a portion of record 176 is not responsive to the request. Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[7] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹ To be considered responsive to the request, records must *reasonably relate* to the request.²

[8] The ministry states that the portion of record 176 that it withheld is not responsive to the appellant's request because it relates to another individual, and does not relate to the appellant's job performance or him as an individual. The ministry argues that severing this information does not render the rest of the record meaningless to the appellant.

[9] I have reviewed the portion of record 176 that was withheld as non-responsive. This portion consists of one sentence, which does not relate to the appellant's request and relates solely to another individual. Consequently, I find that this information is not responsive to the request and was properly withheld from the appellant.

Issue B. Does section 65(6) exclude the records from the scope of the *Act*?

[10] The ministry claims that records 1-175 and a portion of record 178 are excluded from the *Act* by virtue of section 65(6)3, which 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:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[11] 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*. For the collection, preparation, maintenance or use of a record to be in relation to the subjects mentioned in paragraph of this section, it must be reasonable to conclude that there is *some connection* between them.³

[12] The term *labour relations* refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

³ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

analogous relationships. The meaning of labour relations is not restricted to employer-employee relationships.⁴ The term *employment-related matters* refers to human resources or staff relation issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁵

[13] 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 employee's actions.⁶ 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.⁷

[14] 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.

[15] The phrase *labour relations or employment-related matters* has been found to apply in the context of:

- a job competition;⁸
- an employee's dismissal;⁹ and
- a grievance under a collective agreement.¹⁰

[16] 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.¹¹

[17] The ministry submits that the appellant is one of its former employees, and that the records for which section 65(6) is claimed fall into the following categories of records consisting of or relating to:

⁴ *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.

⁵ Order PO-2157.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.).

⁷ *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.

⁸ Orders M-830 and PO-2123.

⁹ Order MO-1654-I.

¹⁰ Orders M-832 and PO-1769.

¹¹ See note 7.

- The appellant's workplace harassment and discrimination complaint;
- The appellant's job performance, including a performance development plan and chronologies;
- The appellant's grievance, and communications leading up to the grievance;
- The possible extension of the appellant's employment contract;
- The termination of the appellant's employment contract and the circumstances surrounding the termination;
- The appellant's efforts to be re-hired by the ministry and the ministry's response to these efforts;
- The appellant's resume relating to his possible re-employment;
- The appellant's correspondence to the ministry about his experiences while employed by the ministry;
- The appellant's complaints about his treatment by his union while he was employed by the ministry;
- The ministry's response to the appellant's attempts to contact ministry staff after his termination;
- Correspondence from the ministry to the appellant in response to his request for information regarding his workplace discrimination and harassment file;
- Various post-employment correspondence relating to the appellant; and
- Internal correspondence regarding some of the issues identified above.

[18] The ministry submits that the exclusion in section 65(6)3 applies because all of the records at issue were collected, prepared, maintained or used in relation to *meetings, consultations, discussions or communications about labour relations or employment-related matters* in which the ministry has an interest. In particular, the ministry states that the labour relations or employment-related matters concerned include: the appellant's grievance; his discrimination and harassment complaint; his job performance and development plan; a chronology of his employment; his resume; communications about the extension or termination of his employment contract; and external and internal communications and discussions in relation to the appellant's post-termination efforts to pursue a range of complaints and other matters all stemming from his employment and termination by the ministry.

[19] The ministry also submits that none of the exceptions in section 65(7) apply in these circumstances.

[20] Past orders of this office have found that for the collection, preparation, maintenance or use of a record *in relation to* the subjects mentioned in paragraph 3 of section 65(6), it must be reasonable to conclude that there is *some connection* between them.¹² Other orders have found that the following type of information can qualify as falling under the exclusion, bearing in mind the specific circumstances of each appeal:

- Grievances;¹³
- Records relating to the complete hiring process;¹⁴
- Information which reviews, assesses or investigates employees' responses, actions or conduct;¹⁵
- Records that stem directly from a previously existing employment relationship;¹⁶
- Records supplied to the institution by the requester, and records previously provided to the requester;¹⁷ and
- Records authored by the requester.¹⁸

[21] Having reviewed the ministry's representations and the records¹⁹ at issue, I find that they are excluded from the application of the *Act* under section 65(6)3 of the *Act*. I find that all of the records for which the ministry claimed the application of section 65(6)3 were accurately described by the ministry in its representations. I further find that the records were collected, prepared and used by the ministry and that this collection, preparation and usage was in relation to discussions and communications about employment-related matters in which the ministry has an interest. In particular, I find that all of the records relate to the appellant's employment at the ministry, during the time he was actually employed there, and in the months following his employment when the appellant was seeking to be re-hired by the ministry. The employment-related issues dealt with in the records are matters in which the ministry has an interest, as they directly relate to an identified former employee.

[22] I also find that none of the exceptions in section 65(7) apply to the records at issue. The records at issue do not consist of agreements between the ministry and a trade union or the appellant, nor do they include expense accounts.

[23] Consequently, I find that the exclusion in section 65(6)3 applies to these records, which excludes them from the scope of the *Act*.

¹² Order MO-2589.

¹³ Order M-967.

¹⁴ Order P-1627.

¹⁵ Order MO-2698.

¹⁶ Order PO-2212.

¹⁷ Order P-1255.

¹⁸ Order M-1130.

¹⁹ I note that most of the records consist of email chains and, as a result, there is extensive duplication of content in them.

Issue C. Does the discretionary exemption in section 18(1) apply to the records?

[24] The ministry claims that a portion of each of records 177 and 179 is exempt under sections 18(1)(c) and/or 18(1)(d), which state:

A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[25] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.²⁰

[26] For sections 18(1)(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²¹

[27] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.²²

[28] The ministry states that the information withheld under section 18(1), located in records 177 and 179, are password and PIN codes for a government teleconference phone number, and a cell telephone number of a government employee, respectively. The ministry submits that disclosure of this information would harm its interests by providing external parties with unauthorized access to teleconferences held by public servants and by enabling outside individuals to contact the cell number at the government's expense. The ministry states:

²⁰ Toronto: Queen's Printer, 1980.

²¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²² Order MO-2363.

It is clearly in the interest of the government to keep such information confidential as its disclosure could reasonably be expected to impede the conduct of the government's business and cause it unnecessary expense.

[29] I am satisfied that the ministry has provided credible evidence that disclosure of the password and PIN codes in records 177 and 179 could reasonably be expected to cause harm to the economic interests of the ministry and the financial interests of the government of Ontario because I find that disclosure of this information would allow persons to use teleconference facilities without authorization. I make this finding based not only on the evidence provided by the ministry, but also on my review of the records. Therefore, I find that the withheld portions of records 177 and 179 for which section 18(1)(c) and/or (d) are exempt from disclosure under section 18(1)(c), subject to my findings regarding the ministry's exercise of discretion.

Issue D. Did the ministry exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

[30] The section 18(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[31] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²³ This office may not, however, substitute its own discretion for that of the institution.²⁴

[32] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁵

- The purposes of the *Act*, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- The wording of the exemption and the interests it seeks to protect;
- Whether the requester is seeking his or her own personal information;
- Whether the requester has a sympathetic or compelling need to receive the information;

²³ Order MO-1573.

²⁴ See section 54(2).

²⁵ Orders P-344 and MO-1573.

- Whether the requester is an individual or an organization;
- The relationship between the requester and any affected persons;
- Whether disclosure will increase public confidence in the operation of the institution;
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person; and
- The historic practice of the institution with respect to similar information.

[33] The ministry submits that it properly exercised its discretion in not disclosing the information it withheld in records 177 and 179 under section 18(1). It states that it took relevant factors into consideration, such as the principles of the *Act* and the nature of the information it exempted from disclosure. The ministry goes on to argue that disclosure of this information would do nothing to advance the access principles enshrined in the *Act*. The ministry also submits that the confidentiality of the information at issue is of importance to the government. Lastly, the ministry submits that it did not take irrelevant factors into consideration in exercising its discretion to exempt the information under section 18(1).

[34] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion. I note that the appellant has not provided representations on this, or any other issue, in this appeal.

[35] I am satisfied that the ministry weighed the appellant's interest in obtaining access to the requested information against the protection of sensitive government information, whose disclosure could reasonably be expected to cause economic harm to the government. I also note that the ministry disclosed as much of records 177 and 179 as possible, withholding only that information which I have found to be exempt under section 18(1). Accordingly, I am satisfied that the ministry did not err in the exercise of its discretion in applying the exemptions in section 18(1) to records 177 and 179.

[36] In conclusion, I find that the exclusion in section 65(6)3 applies to the records for which it was claimed. I also uphold the application of the exemption in section 18(1) to records 177 and 179, as well as the ministry's exercise of discretion. Lastly, I find that the information withheld in record 176 is non-responsive to the appellant's access request.

ORDER:

I dismiss the appeal.

Original Signed By: _____
Cathy Hamilton
Adjudicator

September 14, 2016 _____