

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3777

Appeal PA16-426

Legal Aid Ontario

October 24, 2017

Summary: The sole issue in this appeal is whether records relating to LAO's procurement process for an external consultant to conduct an investigation into a workplace harassment complaint are excluded from the scope of the *Act* under section 65(6)3. In this decision, the adjudicator upholds LAO's application of the exclusion and dismisses the appeal.

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

Orders and Investigation Reports Considered: P-1242

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Legal Aid Ontario (LAO) for access to all records relating to a procurement process LAO's Human Resources Department conducted between April 1, 2014 and December 31, 2015. The appellant stated that the procurement process resulted in a contract between LAO and an identified company on January 13, 2015.

[2] After locating responsive records, LAO notified two parties whose interests may be affected by the disclosure of the records (the affected parties) pursuant to section 28 of the *Act*. One affected party (Affected Party 1) consented to the disclosure of records relating to it. The second affected party (Affected Party 2) submitted that the information relating to it is exempt from disclosure under section 17(1) (third party commercial information) of the *Act*.

[3] Upon review of the affected parties' submissions, LAO issued an access decision to the affected parties and the appellant denying the appellant access to the records, in full. LAO advised the parties that the records were excluded from the scope of the *Act* in accordance with section 65(6) (employment or labour relations). In the alternative, LAO advised the parties that even if the *Act* applies to the records, they are exempt from disclosure in accordance with the mandatory exemption in section 17(1)(b) of the *Act*.

[4] The appellant appealed LAO's decision.

[5] During mediation, LAO confirmed its position that section 65(6) applies to exclude the records from the operation of the *Act*. The appellant confirmed that he continues to pursue access to all of the responsive records.

[6] Mediation did not resolve the appeal and the file moved to the adjudication stage of the appeals process. I began my inquiry by inviting LAO and the affected parties to respond to a Notice of Inquiry, which outlined the facts and issue in the appeal. LAO and the affected parties submitted representations. Affected Party 1 reiterated its position that it does not take issue with the disclosure of the records relating to it. Affected Party 2 changed its position on disclosure and advised the IPC that it now consents to the disclosure of the records relating to it.

[7] I then invited the appellant to submit representations in response to LAO's submissions and the affected parties' positions. LAO's representations were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. I then sought and received reply representations from LAO.

[8] In the discussion that follows, I find that the records are excluded from the scope of the *Act* pursuant to section 65(6)3 and dismiss the appeal.

RECORDS:

[9] There are six records at issue in this appeal, consisting of two Submissions and Proposals, the Agreement between LAO and the winning proponent, and three email chains.

DISCUSSION:

Does section 65(6) exclude the records from the *Act*?

[10] In its representations, LAO submits that the records are excluded from the scope of the *Act* under section 65(6)3. Section 65(6)3 states, in part:

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.

If section 65(6) applies to the records and none of the exceptions listed in section 65(7) applies, the records are excluded from the scope of the *Act*.

[11] For the collection, preparation, maintenance or use of a record to be *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.¹ Further, if section 65(6) is found to apply at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.²

[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 analogous relationships. The meaning of *labour relations* is not related to employer-employee relationships.³

[13] The term *employment-related matters* refers to human resources or staff relations issues arising from the relationship between an employer and employees that does not arise out of a collective bargaining relationship.⁴

[14] Section 65(6) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the municipal *Act*.⁵

[15] The types 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 the 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.⁶

[16] For section 65(6)3 to apply, LAO must establish that

1. the records were collected, prepared, maintained or used by LAO or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

¹ Order MO-2589, see also *Ministry of the Attorney General v. Toronto Star et al.*, 2010 ONSC 991 (Div. Ct.).

² *Ontario (Solicitor-General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 OR (3d) 355 (C.A.), leave to appeal refused [2001] SCCA No. 507.

³ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] OJ No. 4123 (C.A.); see also Order PO-2157.

⁴ Order PO-2157.

⁵ Orders P-1560 and PO-2106.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 OR (3d) 457, [2008] OJ No. 289 (Div. Ct.).

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which LAO has an interest.

[17] The phrase "labour relations or employment-related matters" has been found to apply in the context of a job competition⁷ and a grievance under a collective agreement.⁸ It has been found not to apply in the context of an organizational or operational review.⁹

[18] The phrase "in which an institution has an interest" means more than a "mere curiosity or concern" and refers to matters involving the institution's own workforce.¹⁰

Representations

[19] As background, LAO states that the appellant was previously employed at LAO. LAO states that the appellant commenced a civil legal proceeding against LAO claiming damages for wrongful dismissal and these proceedings are currently ongoing. LAO states that it conducted an investigation into a workplace complaint against the appellant prior to his termination. LAO states that the appellant is aware of the identity of the complainant, the general nature of the complaint and the results of the investigation.

[20] LAO states that it received a written complaint under its Prevention of Harassment and Discrimination in the Workplace Policy (the policy) from one of the appellant's colleagues. LAO states that the complainant raised several allegations regarding the appellants' behaviour in the workplace.

[21] Given this context, LAO submits that the records are excluded from the scope of the *Act* under section 65(6)3. First, LAO submits that the records at issue were prepared, maintained and used by LAO or on its behalf as a result of and for the purpose of responding to the allegations of wrongdoing in the workplace and workplace harassment. LAO states that it launched two separate investigations in response to the complaint. The records at issue relate to LAO's decision to retain the services of an external consultant to investigate certain allegations identified in the complaint.

[22] Secondly, LAO submits that the records were prepared, maintained and used in the context of meetings, consultations, discussions and communications. LAO asserts that these meetings, consultations, discussions and communications were for the purpose of, as a result of and substantially connected to the allegations of wrongdoing in the workplace and workplace harassment.

[23] Finally, LAO submits that allegations of wrongdoing in the workplace and workplace harassment are *employment-related* within the meaning of section 65(6). LAO states that it is committed to providing a work environment free of discrimination,

⁷ Orders M-830 and PO-2123.

⁸ Orders M-832 and PO-1769.

⁹ Orders M941 and P-1369.

¹⁰ *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ONCA).

harassment and violence. LAO states that the purpose of its policy is to address employment-related concerns and foster a respectful workplace through the prevention and prompt resolution of harassment, discrimination and violence.

[24] LAO refers to Order P-1242, in which the adjudicator found that a Workplace Discrimination and Harassment Prevention Program (WDHP) investigation undertaken by the Ministry of Community and Social Services is an *employment-related matter* in which the institution has an interest. LAO adopts the adjudicator's analysis in Order P-1242 and submits that its own policy creates a positive obligation on the part of LAO to address its employees' complaints regarding workplace harassment and discrimination. As such, the investigation into employee wrongdoing is an employment-related matter connected to LAO's workforce.

[25] The appellant submits that LAO falsely conflates records generated during the procurement process with records generated by its investigation process in its application of the labour relations exclusion. The appellant submits that LAO failed to demonstrate there is *some connection* between each record and the criteria enumerated in section 65(6)3.

Findings

[26] I reviewed the records at issue and find that they satisfy the requirements for the application of the exclusion in section 65(6)3 of the *Act*. LAO collected, prepared, maintained or used each one of the records on its own behalf as the appellant's employer. The records were prepared, collected, maintained or used for the purpose of retaining a consultant to investigate the workplace harassment complaint against the appellant who was LAO's employee at the time the records were created.

[27] I also find that LAO collected, prepared, maintained and used the records in relation to meetings, consultations, discussions or communications. Clearly, the email records (Records 4 to 6) represent discussions, consultations, or communications between LAO and the affected parties relating to the Request for Quote. Furthermore, it is evident that the proposals (Records 1 and 2) and the final agreement with the winning proponent (Record 3) were collected, prepared, maintained and used in relation to meetings, consultations, discussions or communications. Clearly, LAO would have conducted discussions regarding the procurement of the external consultant. Accordingly, I find that the second requirement of section 65(6)3 is satisfied.

[28] Finally, I am satisfied that these meetings, consultations, discussions or communications are about *employment-related matters* in which LAO has an interest. From a review of the records and LAO's representations, it is clear that LAO received a complaint regarding workplace harassment and decided to hire an external consultant to investigate the complaint. The affected parties submitted their proposals (Records 1 and 2) in response to LAO's Request for Quote and LAO entered into an agreement with the winning proponent (Record 3). The email records (Records 4 to 6) relate to the procurement process that LAO initiated in response to the complaint. In light of the circumstances relating to the creation of the records and upon review of the records

themselves, I find that these meetings, consultations, discussions or communications are about *employment-related matters* in which LAO has an interest.

[29] Upon review of each record at issue, I do not accept the appellant's claim that LAO inappropriately conflated records generated by the procurement process and those generated through its investigation of the complainant. As discussed above, I find that LAO collected, prepared, maintained and used each record in relation to meetings, consultations, discussions or communications about an employment-related matter in which LAO has an interest.

[30] I find support for my finding in Order P-1242, where the adjudicator considered whether an investigation under a Workplace Discrimination and Harassment Prevention Program is an employment related matter in which the ministry had an interest. The adjudicator made this finding in light of the WDHP's Directive, which outlines the principles and requirements to create a work environment free from discrimination and harassment.¹¹ Specifically, the adjudicator found as follows:

The government's WDHP Directive is one of a series of Human Resources Directives and Guidelines issued by MBS. Directives explain human resource practices that must be followed across the Ontario public service, and Guidelines outline best practices and procedures to help human resource professionals manage effectively.

One of the objectives of the WDHP Directive is "to provide the principles and mandatory requirements essential to creating a work environment that is free from discrimination and harassment". The Directive applies to all employees appointed under the *Public Service Act*, and covers all "employment-related discrimination and harassment, except systemic discrimination". According to the Guidelines which accompany the Directive, "the [Directive] applies to discrimination in any aspect of employment ..."

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*.¹²

[31] I agree with these conclusions and find that LAO's investigation into the complaint alleging workplace harassment is about an *employment-related matter*. The records before me relate to an investigation in response to a complaint alleging workplace harassment on the part of the appellant. It is clear to me that the records have more than *some connection* to allegations relating to workplace harassment at LAO. Based on my review of the records, I am satisfied that they relate to LAO's work

¹¹ Order P-1242 at page 6.

¹² *Ibid.*

environment and this information relates to or is about *employment-related matters*.¹³ Therefore, I find that the first part of the third requirement is satisfied.

[32] In addition, I accept that LAO *has an interest* in the employment-related matter that is the subject of the records. In my view, LAO clearly has more than a mere curiosity or concern about the information contained in the records, as they relate to workplace harassment allegations in relation to its own employees. Accordingly, I find that LAO has an *interest* in the records and the second part of the third requirement is satisfied.

[33] I reviewed the exceptions listed in section 65(7) and find that none apply.

[34] In conclusion, I find that LAO established all of the requirements of section 65(6)3 and the records fall outside the scope of the *Act*.

ORDER:

I uphold LAO's decision and dismiss the appeal.

Original signed by: _____

Justine Wai
Adjudicator

October 24, 2017 _____

¹³ See also PO-2625-I in which the adjudicator upheld Ryerson University's section 65(6) claim in relation to records generated in an Office of Discrimination and Harassment Prevention Services investigation into sexual harassment allegations.