

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4130

Appeal PA19-00015

Ontario Power Generation

March 30, 2021

Summary: The appellant seeks access to records relating to the employment of a former employee of OPG. There are four records at issue in this decision: three email chains and one page with text message screenshots. OPG denied the appellant access to the records, claiming they are excluded from the *Act* under section 65(6) (labour relations exclusion). The appellant appealed the OPG's decision. In this order, the adjudicator finds the records are excluded from the Act under section 65(6)3 and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 65(6)3 and 65(7).

OVERVIEW:

[1] The appellant, a political party, submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the Ontario Power Generation (OPG). The appellant seeks access to any correspondence relating to the employment of a former OPG employee sent since August 1, 2018 to or from the Premier's Office, OPG's executive team and/or OPG's board of directors.

[2] After locating responsive records, OPG issued an access decision to the appellant denying it access to the records, in full. OPG claimed the records are excluded from the scope of the *Act* under section 65(6) (labour relations exclusion). In the alternative, OPG claimed the application of the exemptions in sections 13(1) (advice or recommendations), 18(1) (economic or other interests) and 21(1) (personal privacy) to

exempt information in the records from disclosure.

[3] The appellant appealed OPG's decision.

[4] During mediation, the appellant claimed the application of the public interest override in section 23 of the *Act*. Accordingly, section 23 is also at issue in this appeal.

[5] OPG issued a revised access decision indicating that one record is not responsive to the request. OPG advised the appellant the record is not responsive because it is not between the individuals identified in the request. The appellant did not object to OPG's non-responsive claim. Accordingly, that record is no longer at issue in this appeal.

[6] OPG also clarified its section 18(1) claim. OPG confirmed it relies on sections 18(1)(e) and (f) to withhold the information at issue from disclosure.

[7] The appellant raised the issue of whether OPG conducted a reasonable search for responsive records. OPG stated it located other records during its search, but they were not responsive because they were not between the individuals identified in the request. The appellant was satisfied with OPG's response and confirmed it will not pursue the issue of reasonable search.

[8] Mediation did not resolve the issues under appeal and the appeal transferred to the adjudication stage of the appeal process. I began the inquiry by seeking representations from OPG in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. OPG submitted representations. The appellant then submitted representations in response to the Notice of Inquiry and the OPG's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The OPG submitted reply representations and the appellant submitted further sur-reply representations.

[9] In its representations, the appellant raises a number of issues regarding the timeline of the events and whether these records are, in fact, all of the records responsive to its original request. During mediation, the appellant confirmed it does not pursue the issue of reasonable search. The appellant was reminded that reasonable search is not at issue in this appeal during the inquiry. Therefore, I will not consider whether OPG conducted a reasonable search for records in this order. In addition, I confirm I cannot consider the circumstances in which the employee in question was terminated nor whether the decision was improper.

[10] In the discussion that follows, I find the records are excluded from the *Act* under section 65(6) and dismiss the appeal.

RECORDS:

[11] The four records at issue are:

1. Email dated November 13, 2018 between OPG employees
2. Email dated November 13, 2018 between OPG employees
3. Email dated November 13, 2018 between OPG employees
4. Screenshots of text messages dated September 17 to 20 between OPG representatives and an external party

DISCUSSION:

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

[12] OPG claims that sections 65(6)1, 65(6)2 or 65(6)3 apply to the records at issue. 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.

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*.

[13] For the collection, preparation, maintenance, or use of a record to be *in relation to* the subjects mentioned in paragraphs 1, 2, or 3 of this section, it must be reasonable to conclude there is *some connection* between them.¹ The *some connection* standard must involve a connection that is relevant to the statutory scheme and purpose

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

understood in their proper context.²

[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.³

[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.⁴

[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.⁵

[17] 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 terms and conditions of employment or human resources questions are at issue.

[18] I begin by considering the application of section 65(6)3 of the *Act*.

Section 65(6)3

[19] For section 65(6)3 to apply, OPG must establish

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.

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.⁶

² See, for example Order MO-3664, which found that the relationship between labour relations and accounting documents that detail an institution’s expenditures on legal and other services in collective bargaining negotiations is not enough to meet the *some connection* standard. Order MO-3664 was upheld in *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

³ *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.

⁴ Order PO-2157.

⁵ *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.

⁶ *Ibid.*

[20] OPG submits the records are excluded from the *Act* because each record consists of communications about an employee's suitability for employment and his potential termination and severance. OPG says these records also informed the negotiations surrounding the employee's exit from OPG and would have been relevant to any employment-related litigation.

[21] With regard to section 65(6)3, OPG submits Records 1-3 were collected, prepared, maintained, and used by or on behalf of OPG. OPG says these records form part of an email thread involving an individual and OPG employees about his employment at OPG and possible exit from the organization. Records 1-3 were prepared and used by OPG employees through their OPG email accounts, meaning that each email was also collected and maintained by OPG. Referring to Order PO-2915, OPG states the IPC has previously found that emails between employees of an institution satisfy the first requirement for the application of section 65(6)3.

[22] OPG submits the collection, preparation, maintenance and usage of Records 1-3 relates to meetings, consultations, discussions and communications, thereby satisfying the second requirement for section 65(6)3. OPG submits email is a "quintessential form of communication and discussion in the workplace" and as such, the email records at issue represents discussions and communications between OPG employees.

[23] Finally, OPG submits Records 1-3 are related or have *some connection* to employment-related matters in which OPG has an interest. OPG submits the email records have *some connection* to an individual's employment terms and departure, which is an employment-related matter in which OPG has an interest. OPG says the emails were sent as part of the continued discussion internally about an individual's employment and the terms and timing of his potential departure. Therefore, OPG submits the email records are excluded from the *Act* under section 65(6)3.

[24] OPG states Record 4 contains text message screenshots over a four-day period between an individual and an OPG employee. OPG submits the text messages relate to an internal staffing matter at OPG and are excluded from the *Act* under section 65(6)3. OPG submits the text messages were collected, prepared, maintained or used by the OPG employee on the institution's behalf and the OPG employee prepared the messages they sent. OPG says it used the text messages in considering the employment matter they raised. OPG submits the text messages represent discussions and communications about a staffing decision at OPG. As such, the texts messages satisfy the second requirement for the application of section 65(6)3. Finally, OPG submits the communications in Record 4 have *some connection* to employment-related matters in which the institution has an interest. Therefore, OPG submits Record 4 is excluded from the scope of the *Act* pursuant to section 65(6)3.

[25] In its representations, the appellant asks me to consider certain "possibilities" regarding the manner in which the individual identified in the request was terminated and the implications about the integrity of OPG's governance and procedures. The

appellant raised these concerns in the context of its public interest claim; however, the appellant also encourages me to consider whether, in these circumstances, it is possible that so few records exist. In his representations, the appellant says it hopes I would provide a remedy if I “discover reasons to believe that not all the responsive records are in the index.” I will not consider the circumstances surrounding the termination of the identified individual in this order. I also confirm that reasonable search is not at issue and will not be considered either.

[26] The appellant suggests that the “true subject” of the emails is not the individual’s employment. Rather, the appellant speculates the emails discuss a news article that was published on the date the emails were exchanged. The appellant submits there is no evidence the emails were collected, prepared, maintained or used “as part of an authorized employment process.” The appellant submits the emails may be discussing the “reputational risk to OPG or other individuals, but these are not employment-related matters.” The appellant submits OPG should not be permitted to stretch the definition of *employment-related matter* under section 65(6) to include any record in which a person’s employment is mentioned, however tangentially.

[27] In addition, the appellant submits the text messages were dated the same day as the individual’s hiring was announced and the day they were reportedly terminated. Given these circumstances, the appellant submits it is likely the text messages were exchanged in response to the announcement of the individual’s hiring or perhaps to his firing that day. The appellant suspects the records contain an unauthorized directive concerning the individual’s employment. If this is the case, the appellant submits the text messages cannot be excluded under section 65(6).

[28] Finally, the appellant submits that if severance was paid to the individual identified in the records, this is evidence that there was a settlement agreement with the individual. If this is the case, the appellant submits the exception to the exclusion in section 65(7) would apply.

[29] In its reply representations, OPG submits the appellant’s arguments are based on a misunderstanding of the timeline of events. OPG states the appellant incorrectly states the individual’s employment was terminated on the date the text messages were exchanged. OPG states the individual was employed when the text messages were exchanged. In addition, OPG states Records 1-3 do not discuss a new article, as the appellant alleges. OPG asserts Records 1-3 are about an individual’s employment with OPG and possible exit from the organization. OPG states the e-mail thread relates to communications about the individual’s employment and potential departure.

[30] In addition, OPG disputes the appellant’s argument that section 65(7) should apply because the individual was paid severance. OPG states section 65(7) states that *agreements* between an institution and one or more employees about employment-related matters are not excluded from the scope of the *Act*. However, the records are not agreements between OPG and the individual. In fact, the individual was still

employed at OPG on the date the emails were sent and these communications pre-date any agreed-to severance.

[31] OPG also submits the appellant incorrectly claims that section 65(6) requires the records be collected, prepared, maintained or used as part of an "authorized employment process." OPG states section 65(6) does not require this. In any event, OPG asserts the records were collected, prepared, maintained and used by OPG during employment-related discussions.

[32] Finally, OPG addresses the appellant's argument that Record 4 cannot be excluded from the scope of the *Act* because an "unauthorized directive" cannot qualify for exclusion under section 65(6). OPG states this is not a requirement under section 65(6). OPG asserts the text messages were used by the institution, represent a discussion about a staffing decision at OPG, and have some connection to employment related discussions. Therefore, OPG submits the records are excluded from the scope of the *Act* pursuant to section 65(6)3.

[33] In his sur-reply representations, the appellant raises a number of concerns regarding OPG's timeline of events and whether the individual identified in the request was "fired" at the time the emails and text messages at issue were exchanged.

Analysis and Findings

[34] As stated above, there are three requirements for the application of section 65(6)3. First, OPG must demonstrate the records were collected, prepared, maintained or used by OPG or on its behalf. Second, this collection, preparation, maintenance or usage must be in relation to meetings, consultations, discussions or communications. Third, these meetings, consultations, discussions or communications must be about labour relations or employment-related matters in which OPG has an interest.

[35] First, I am satisfied the records were collected, prepared, maintained or used by OPG or on its behalf. Records 1 to 3 are email exchanges involving the individual identified in the request and OPG staff. Record 4 contains text messages between a third party and OPG representative. I reviewed these records and it is clear they were collected, prepared, maintained or used by OPG or on its behalf, thereby satisfying the first requirement for section 65(6)3.

[36] Second, I agree with OPG that the records at issue, which are emails and text messages, were collected, prepared maintained or used in relation to meetings, consultations, discussions or communications.

[37] Third, I accept OPG's claim that the records are about labour relations or employment-related matters in which OPG has an interest. This office has previously found the phrase *labour relations or employment-related matters* to apply in the

context of a job competition,⁷ an employee's dismissal,⁸ and a "voluntary exit program."⁹ Based on my review of the records, I agree with OPG that they fall squarely within *employment-related matters* because they consist of communications relating to an individual's employment with OPG. While I cannot confirm the contents or the "true subject" of the records, I can confirm the records are not merely tangentially related to an employment-related matter as the appellant suggests. Rather, the records relate to the individual's employment with OPG.

[38] Finally, I accept the employment-related matter the records involves is one in which OPG has an interest. Based on my review of the records and parties' representations, it is clear OPG has an interest in the employment and termination of one of its employees. Therefore, I find that section 65(6)3 applies to exclude the records from the scope of the *Act*.

[39] I have reviewed the exceptions to the exclusion in section 65(7) and find that none apply. I confirm for the appellant that none of the records at issue contain the type of information excepted from the exclusion in section 65(6). Therefore, I find the records are excluded from the *Act* pursuant to section 65(6)3.

[40] I appreciate the appellant has a number of concerns regarding the circumstances surrounding the individual's termination of employment with OPG and believes it is entitled to more details than OPG has provided. However, as the records are excluded from the scope of the *Act*, I cannot order OPG to disclose them to the appellant. Further, since the *Act* does not apply to the records, the public interest override position at section 23 is of no relevance.

[41] In conclusion, I find the records for which section 65(6)3 have been claimed are excluded from the *Act*. Given these findings, it is not necessary for me to consider the application of sections 65(6)1 or 2 to the records. Further, I will not consider whether the exemptions claimed by OPG in the alternative apply to the records.

ORDER:

I uphold OPG's application of section 65(6) to the records and dismiss the appeal.

Original Signed by: _____
Justine Wai
Adjudicator

_____ March 30, 2021

⁷ Orders M-830 and PO-2123.

⁸ Order MO-1654-I.

⁹ Order M-1074.