

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4364-F

Appeal PA19-00377

Ontario Power Generation

March 16, 2023

Summary: The appellant seeks access from Ontario Power Generation (OPG) to the “termination/severance allowance” paid to a former OPG employee. OPG created a record containing the severance amount paid to the employee but denied access in full based on the exclusion under section 65(6) (employment or labour relations) of the *Freedom of Information and Protection of Privacy Act*. Alternatively, OPG claimed it is exempt under section 18(1)(c) (economic and other interests). In this order, the adjudicator finds that the information is not excluded from the *Act* under section 65(6) because of the exception in section 65(7) (agreement following negotiations). The adjudicator also finds that the termination/severance allowance is not exempt under section 18(1)(c) and orders the OPG to disclose it to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S. O. 1990, c. F.31, sections 18(1)(c), 65(6)3 and 65(7)3.

Orders Considered: Orders P-1302, MO-1941, PO-4130 and PO-4219-I.

OVERVIEW:

[1] This appeal is about access to the severance amount Ontario Power Generation (OPG) paid to a former employee. The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access the following:

...the classification, salary range and benefits, and employment responsibilities for [a named employee].

Please provide the termination/severance allowance for [the named employee].

I believe disclosure of this information would be in the public interest.

[2] OPG issued a decision setting out the employee's job classification, salary range and benefits, and granted access to two job descriptions that contained the employee's employment responsibilities. None of this information is at issue in this appeal.

[3] However, OPG denied access to the amount of termination or severance paid to the employee. The appellant appealed OPG's decision to the IPC.

[4] The only issue in this appeal is access to the termination/severance allowance.

[5] During mediation of the appeal, OPG maintained its decision to deny access to the information requested. To facilitate the appeal, OPG created a record, a Word document consisting solely of the severance amount paid to the former employee, but denied access to the created record for the same reasons articulated in its original decision, namely that the created record was excluded from the *Act* by operation of section 65(6), or, in the alternative, exempt under sections 18(1) (economic or other interests) and section 21(1) (personal privacy).

[6] In Interim Order MO-4219-I, I addressed the parties' dispute about whether the created record was responsive to the request. I found that the created record containing only the requested information was responsive to the request and that my inquiry could continue on the potential application of the exclusion and exemptions OPG claimed over the created record. I asked the appellant to notify me if she continued to seek access to the created record, or whether she intended to withdraw her current request and submit a new one to OPG. The appellant elected to continue with the current appeal.

[7] Accordingly, the only remaining issues are whether the amount of the termination/severance allowance is excluded from the *Act* under section 65(6), and if not, whether it is exempt under section 18(1)(c) because disclosure could reasonably be expected to prejudice OPG's economic interests.

Section 21(1) personal privacy exemption no longer an issue

[8] As described in Interim Order MO-4219-I, OPG claimed in its decision (in the alternative to its other claims) that the termination/severance allowance is exempt

under the mandatory personal privacy exemption in section 21(1).¹

[9] Section 21(1) is a mandatory exemption that has the purpose of ensuring that the privacy of individuals is maintained except where infringements on this interest are justified.² There is no dispute that the severance amount is financial information pertaining to a former OPG employee that OPG says, and I agree, is his personal information within the meaning of section 2(1) of the *Act*.

[10] As part of my inquiry, I notified the former employee of the appeal and invited him to submit representations regarding the potential disclosure of his personal information.

[11] The employee provided his unqualified written consent to disclosure of the amount of his termination/severance allowance.

[12] Because section 21(1)(a) provides an exception to the exemption in section 21(1) where there the affected party has provided "prior written consent," and because the former employee provided his written consent, OPG withdrew its reliance on the section 21(1) privacy exemption. Because of the employee's written consent, the severance amount is not exempt under section 21(1).

[13] Accordingly, in this order, I will address only the remaining outstanding issues, which are whether the termination/severance amount is excluded from the *Act* under section 65(6), and if not, whether it is exempt under section 18(1)(c).

[14] For the reasons that follow, I find that the termination/severance amount is not excluded from the *Act* because this amount derives from a severance agreement and, as such, the exception to the exclusion in section 65(7)3 applies. I also find that the termination/severance amount is not exempt under section 18(1)(c) and order that it be disclosed to the appellant.

RECORD:

[15] The record is a one-page Word document prepared by OPG that sets out the termination/severance amount paid to the former employee.

[16] For the balance of this order, I will refer to this as the severance amount, because this is the only information contained in the record.

¹ As discussed in this order, and in Interim Order MO-4219-I, OPG claimed the record is excluded from the *Act*. In the alternative, OPG claimed it is exempt under the mandatory personal privacy exemption in section 21(1), and the discretionary exemption in section 18(1)(c) (economic and other interests).

² Order P-568.

ISSUES:

- A. Does the labour relations and employment exclusion in section 65(6) exclude the severance amount from the *Act*?
- B. Does the discretionary exemption at section 18(1)(c) for economic and other interests of the institution apply to the severance amount?

DISCUSSION:

Issue A: Does the labour relations and employment exclusion in section 65(6) exclude the severance amount from the *Act*?

[17] Because OPG claims that the severance amount is excluded from the *Act* under section 65(6), I must consider this issue first. Only if it is not excluded from the *Act* does the section 18(1)(c) exemption on which OPG relies to deny access become relevant.

[18] Pursuant to section 65 of the *Act*, the *Act* does not apply to certain classes of records collected, prepared, maintained or used in relation to certain enumerated matters. A finding that the *Act* does not apply to the severance amount would end the matter before me because if the *Act* does not apply, then the general right of access in section 4(1) does not apply.

[19] Section 65(6) provides that the *Act* does not apply to records concerning certain employment-related matters. Section 65(6) states that:

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 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.

[20] If section 65(6) applies to the severance amount, and none of the exceptions

found in section 65(7) apply, it is excluded from the scope of the *Act*. If records are excluded from the *Act*, it simply means that the *Act* does not apply to them. It does not mean that they cannot be disclosed outside of the access scheme in the *Act*.³

[21] For the collection, preparation, maintenance of use of a record to be “in relation to” the paragraph 3 of section 65(6), it must be reasonable to conclude that there is “some connection” between them.⁴ The “some connection” standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context.⁵

[22] The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employee that do not arise out of a collective bargaining relationship.⁶ An employee’s dismissal is an example in which the phrase “labour relations or employment-related matters” in section 65(6) has been found to apply.⁷

[23] Section 65(7) sets out exceptions to the exclusions in section 65(6). If any of the exceptions applies, the record is not excluded from the *Act* and the *Act* continues to apply. Paragraph 3 of section 65(7) is relevant here. It states that the *Act* applies to an agreement between an institution or one or more employees resulting from negotiations about employment-related matters between the institution and an employee or employees.

Representations

OPG’s representations

[24] OPG submits that all three paragraphs of section 65(6) apply to the severance amount. It says that the severance amount was negotiated in anticipation of employment-related litigation, and that OPG has a direct interest in these matters as employer.

[25] According to OPG, the severance amount was “a part of a uniquely negotiated settlement,” was “highly negotiated in the unique circumstances of this case to settle anticipated litigation,” and that “the severance amount that OPG negotiated settled potential litigation.”

[26] OPG says that the exception under section 65(7)3 does not apply because it requires that the record itself be an agreement. OPG says that the information sought is

³ See Orders MO-2242, MO-2282 and PO-3519.

⁴ Order MO-2589. See also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁵ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

⁶ Order PO-2157.

⁷ Order MO-1654-I.

not a final written agreement, and that the appellant did not seek access to an agreement but to information only. OPG submits that the severance amount is one piece of information reflecting one part of confidential negotiations with a former employee, and, citing Order MO-1941, says that the IPC has held that records which reflect a "step in the negotiation" that led to a final agreement are excluded from the *Act*.

The appellant's representations

[27] The appellant says that, because she has not been provided with detailed information about the former employee's exit from OPG, including relating to any anticipated legal proceedings, her ability to comment on the exclusion is limited. However, she submits that the section 65(7)3 exception to the section 65(7) exclusion applies to the severance amount.

[28] The appellant argues that the former employee's severance was a final agreement and not a "step in the negotiation" as OPG suggests.

[29] The appellant also argues that the exception in section 65(7)2, which applies to "[a]n 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 employment-related matters," applies here because, as OPG submits, the severance allowance was "negotiated in the unique circumstances of this case to settle anticipated litigation."

Analysis and findings

[30] Below, I find that paragraph 3 of section 65(6) applies, but that the exception to the exclusion in paragraph 3 of section 65(7) also applies, so that the severance amount is not excluded from the *Act*.

Section 65(6)3

[31] Information will be excluded under paragraph 65(6)3 where three criteria are met:

- i. the information was collected, prepared, maintained or used by an institution or on its behalf,
- ii. this collection, preparation, maintenance, or usage was in relation to meetings, consultations, discussions or communications, and
- iii. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[32] 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 resource questions are at issue.⁸ In Order PO-4130, involving access to records relating to OPG and the same employee, the adjudicator noted that “labour relations or employment-related matters” arise in the context of an employee’s dismissal or voluntary exit.

[33] In its representations, OPG says that the information sought is not a final written agreement, and that the appellant did not seek access to an agreement but to information only. The evidence before me establishes that OPG and the employee entered into an agreement that included the severance amount paid to the employee, settled the matter of his termination, and avoided potential litigation. While I appreciate that the OPG created the record for the access request, the information is derived from the negotiated termination agreement. Accordingly, I will consider the application of the exclusion (and any exception thereto) in relation to the agreement.⁹

[34] I find that the termination agreement, and the severance amount contained therein, is captured by paragraph 3 of section 65(6)3. I accept that OPG prepared and used the agreement in relation to meetings, consultations, discussions and communications with the former employee in connection with the termination of his employment, a matter in which OPG had an interest. As noted above, OPG says that these meetings, consultations, discussions and communications resulted in a “negotiated settlement amount” that “settled potential litigation” relating to the employee’s departure.

[35] Because I have found that the record meets the test for exclusion in section 65(6)3, I need not consider the OPG’s arguments that it is excluded under paragraphs 1 or 2 of section 65(6). However, even if it were excluded under paragraphs 1 or 2 of the section 65(6), this does not change my conclusion that the exception in section 65(7)3 applies.

Section 65(7)3: an exception to the exclusion in section 65(6)

[36] If a record falls within any of the exceptions in section 65(7), it is not excluded from the application of the *Act*. I have reviewed the exceptions in section 65(7) and find that only paragraph 3 of section 65(7) is relevant.¹⁰ It states that:

This Act applies to the following records:

⁸ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457. See also Order PO-3549.

⁹ The IPC takes a “whole record” approach to the exclusions in section 65(6). This means that a record is examined as a whole. The exclusion cannot apply to only a portion of a record. Either the entire record is excluded under section 65(6), or it is not.

¹⁰ I have noted that the appellant also raises the exception in section 65(7)2, which excepts “[a]n 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 employment-related matters.” There is no evidence before me of a matter before a court, tribunal or other entity such that this exception could apply, only that the amount was negotiated to avoid any such proceeding.

...

(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.

[37] For the reasons that follow, I find that the exception in paragraph 3 of section 65(7) applies and that the severance amount is therefore not excluded by section 65(6). I am satisfied that the severance amount is derived from an agreement that was the result of negotiations between OPG and a terminated employee.

[38] OPG cites Order P-1302, which I summarize below, and submits that the exception in section 65(7)3 does not apply because it requires the record it created (containing only the severance amount) to be an "agreement" before the *Act* will apply. OPG says that the severance amount reflects negotiations about the employee's departure and relates to litigation that may have followed. It submits that the severance amount "is not a final agreement" so that the exception under section 65(7)3 does not apply, and that, in any event, the appellant did not seek access to an agreement, but to information.

[39] As I discuss further below, the evidence before me establishes that OPG and the employee entered into an agreement that included the severance amount paid to the employee, settled the matter of his termination, and avoided potential litigation. I therefore understand OPG's argument in relation to Order P-1302 to be that the form of the information as it is before me in this appeal is not in the form of a final agreement and that this should determine the matter.

[40] Order P-1302 dealt with a request to the Ministry of Transportation (the ministry) for access to a consulting company's findings.¹¹ The record at issue was a report prepared by the consultants. The report was found to be excluded from the *Act* by operation of section 65(6)3 because it related to staff complaints and therefore communications about employment-related matters. After concluding that the consultants' report was excluded, the adjudicator considered whether the exception in section 65(7)3 applied.

[41] He wrote that:

The section requires that the record itself be an "agreement" before the Act will apply. It is clear that the Report does not constitute an agreement between the Ministry and any of its employee. Rather, it is, as the title suggests, a "**Review** of Human Resources Service Delivery Generalist Consultants Positions." It sets out the process of the review, the information gathering and data analysis findings and recommendations.

¹¹ The ministry retained a consulting company to study the classification levels of human resource consultants at the ministry.

Therefore, I find that the Report does not fall within the exception in section 65(7)3. [emphasis in original]

[42] With respect to the reference in section 65(7)3 to an “agreement,” Order P-1302 states only that the record must be an agreement. The record at issue in Order P-1302 did not reflect an agreement, nor was it a record created by the ministry by extracting relevant portions of a final agreement to facilitate the appeal, as OPG says it did in this case. In the appeal before me, the severance amount is the final negotiated amount.

[43] OPG also says that, in Order MO-1941, the IPC held that records which reflect a “step in the negotiation” that led to a final agreement are excluded under the employment exclusion.¹² OPG submits that the severance amount sought by the requester is “one piece of information reflecting one part of confidential negotiations” with a former employee.

[44] I likewise find this order to be of limited application to the current appeal.

[45] In Order MO-1941, the adjudicator held that two of three records at issue – a release agreement and a memorandum of agreement – “fell within the ambit of the exception” in the municipal equivalent of section 65(7)3.¹³ The adjudicator found that the third record, a termination letter with an offer to settle, did not fall within the exception because it did not represent an agreement, but was rather “merely the first step in the negotiation that led to the creation of” the two agreements at issue.

[46] Based on all of the material before me, I cannot conclude that the severance amount, albeit contained in a record created for the purpose of this appeal, represents, or contains information that represents, a mere step in the parties’ negotiation. According to OPG’s representations, the severance amount represents a uniquely negotiated settlement, completed in part to avoid potential litigation arising from the employee’s termination. It does not contain an offer, but contains the final, agreed-upon severance amount that, according to OPG’s representations, “settled potential litigation.”

[47] OPG has not provided evidence that the information in the record does not represent the parties’ final agreement regarding the amount of severance that was to be paid to the employee. OPG itself states that the amount is a “negotiated settlement amount” that was the result of highly unique settlement negotiations intended to finalize the terms of the employee’s departure and to avoid litigation.

[48] Past IPC orders have found that severance agreements are subject to the exception in section 65(7)3 (and its municipal equivalent).¹⁴ In my view, to find that the

¹² Section 52(3) of the *Municipal Freedom of Information and Privacy Act*, R.S.O. 1990, c. M.56, as amended.

¹³ Section 53(4)3 of the *Municipal Freedom of Information and Protection of Privacy Act*, supra.

¹⁴ See, for example, Orders MO-3684-I and MO-3937.

negotiated agreement between OPG and its former employee is not an “agreement” for the purpose of section 65(7) simply because it appears in a format created by the OPG to facilitate the appeal would serve to improperly circumvent the exception. The evidence before me is clear and I find that the severance amount is the parties’ final agreement on the employee’s severance payment and is part of the parties’ final agreement regarding the terms of the employee’s departure.

[49] OPG argues that the appellant’s request was for information rather than a specific record. This argument must fail. A requester cannot, in my view, be expected to have insight into an institution’s record holdings, and ought not in these circumstances be prejudiced for seeking access to information that might be contained in final severance agreements, for example, without naming or identifying the agreements themselves. When an institution receives an access request for specific information, it is incumbent on it to locate any records that contain the requested information. In this case, OPG exercised its option to create a record to facilitate the appeal by setting out the parties’ agreement on the final severance amount to be paid to a departing employee. That does not change the fact that the record from which this information is gleaned is the termination agreement.

[50] In summary, I find that the severance amount is not excluded under section 65(6) because of the exception to the exclusion in section 65(7)3. I therefore find that the *Act* applies to it.

[51] I will next consider whether the severance amount is exempt under section 18(1)(c).

Issue B: Does the discretionary exemption at section 18(1)(c) for economic and other interests of the institution apply to the severance amount?

[52] OPG claims that the severance amount is exempt under section 18(1)(c) because disclosure could reasonably be expected to prejudice its economic interests.

[53] Section 18(1)(c) states that:

A head may refuse to disclose a record that contains,

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

[54] The purpose of section 18(1)(c) is to protect institutions’ ability to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of

prejudice to these economic interests or competitive positions.¹⁵ Section 18(1)(c) only requires that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.¹⁶

[55] An institution resisting disclosure on the basis of section 18(1)(c) cannot simply assert that the harm described in that section is obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from a record itself and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.¹⁷

[56] The institution must show that the risk of harm is real and not just a possibility.¹⁸ However, it does not have to prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.¹⁹

Representations

OPG's representations

[57] OPG submits that it is in its economic interest to respect the confidentiality and settlement-privileged context in which the information was prepared.²⁰ OPG says that its agreement with the former employee included confidentiality obligations with respect to the details of his departure and that, if ordered to disclose the severance amount, OPG may be in violation of those obligations, which would then expose it to the risk of litigation and require it to incur legal costs.

The appellant's representations

[58] The appellant submits that OPG has not provided detailed evidence that disclosure could reasonably be expected to prejudice its economic interests or competitive position. She says that any purported economic harm to OPG caused by disclosing the severance amount of a single former employee would be relatively minor and is outweighed by the desirable public good of subjecting the OPG's actions to public scrutiny in relation to its use of public funds.

¹⁵ Orders P-1190 and MO-2233.

¹⁶ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

¹⁷ Orders MO-2263 and PO-2435.

¹⁸ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

²⁰ The OPG has not argued that the information is subject to solicitor-client privilege.

Analysis and findings

[59] As noted above, an institution must provide detailed evidence about the risk of harm if the record is disclosed. OPG has not described what, if any, of its economic interests could reasonably be expected to be prejudiced by disclosure, stating only that it may be exposed to litigation and associated legal costs in the event that disclosure is ordered, because it would put OPG off-side its confidentiality obligations.

[60] In my view, the affected party's written consent to disclosure under the *Act* serves to significantly reduce, if not entirely eliminate, the reasonable foreseeability of a lawsuit in response to disclosure of the record at issue, as OPG speculates.

[61] In the circumstances, I am not satisfied that disclosure could reasonably be expected to prejudice OPG's economic interests or competitive position to qualify for exemption under section 18(1)(c). I find that it does not, and order OPG to disclose the severance amount to the appellant.

ORDER:

1. I order OPG to disclose the record containing the severance amount to the appellant by no later than **April 21, 2023**, but not before **April 17, 2023**.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require OPG to provide me with a copy of what it disclosed to the appellant.

Original signed by: _____

Jessica Kowalski
Adjudicator

_____ March 16, 2023