



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1814

Appeal PA-000026-1

Ministry of Correctional Services



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NATURE OF THE APPEAL:

The appellant is a former employee of the Ministry of Correctional Services (the Ministry). Until September of 1999, she was employed as a part-time correctional officer at a facility operated by the Ministry, covered by a collective agreement between the Ministry and the Ontario Public Service Employees Union (OPSEU). Starting on or around June 11, 1998, the appellant was suspended from her duties for five working days, pending “an investigation”. This suspension was renewed several times, and became the subject of three grievances, all of which were settled by Memorandum of Settlement dated July 23, 1998. The appellant was then returned to active duty.

On December 14, 1998, the appellant was once again suspended from duty. She was informed that under the authority of section 22 of the Public Service Act (PSA) and Regulations, her employer intended to conduct an investigation into certain allegations. In subsequent correspondence, she was informed that she was alleged to have an association with a resident of the corrections facility at which she worked, and did not report her association. The investigation was later expanded to include further allegations, and the result was two documents titled “Investigation Report”, one dated May of 1999 and the other August of 1999.

The appellant’s suspension, which commenced on December 14, 1998, was renewed continuously until she was dismissed on September 1, 1999.

On January 12, 1999, the appellant filed two grievances against her second suspension. On September 1, 1999, she filed two grievances against her dismissal. On November 9, 1999, all grievances were settled by a Memorandum of Settlement signed by the appellant, a representative of OPSEU and the Ministry. The appellant is no longer in the employ of the Ministry.

In December of 1999, the appellant made a request to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act) for “full disclosure of all materials that are currently on my personnel file with the Ministry of the Solicitor General and Correctional Services”. She also requested disclosure of all materials, notes and documentation relating to the investigations conducted under section 22 of the Public Service Act.

The Ministry responded to the appellant’s request by denying access to her personnel file in its entirety, and denying access to the investigation file. In its decision, the Ministry relied on section 65(6) of the Act (labour relations and employment-related matters), taking the position that by operation of this section, the records are not covered by the Act.

The Ministry has submitted representations on the issues raised in this appeal, in response to my Notice of Inquiry. Further, it has reconsidered its decision on the appellant’s request for access, and has released five pages to her from that file, more detail about which is provided below.

In view of my determination of the issues, I have decided that it is unnecessary to invite the appellant to submit representations.

The sole issue addressed by this order is whether the records are excluded from the Act by application of section 65(6).

THE RECORDS:

The records at issue consist of two investigation reports prepared by a named investigator and dated August, 1999 (36 pages) and May, 1999 (85 pages), together with 157 pages from the appellant's personnel file. The investigation reports contain numerous attachments, including such documents as the appellant's appointment to the public service, memos and letters, typewritten and handwritten transcripts of interviews, telephone records, policies and procedures and occurrence reports.

The 157 pages of records from the appellant's personnel file include documents relating to her appointment to the public service and successive renewals of her appointment, miscellaneous employment-related documents (such as Revenue Canada TD1 forms), and documents relating to a claim to the Workplace Safety and Insurance Board. Further, the records include documents relating to the appellant's suspension from work in June and July of 1998, the ensuing grievances from the appellant, and the settlement of these grievances dated July 23, 1998.

The records from the appellant's personnel file also include documents relating to the appellant's second suspension, the grievances which arose out of that suspension, and a letter informing the appellant of the completion of the investigation on August 30, 1999. Finally, there is the Memorandum of Settlement referred to earlier, dated November 9, 1999.

It should be noted that page 49 of the records from the appellant's file is no longer at issue, as it relates entirely to another employee. Also no longer at issue are pages 52, 53, 66, 67 and 68 of this file since by its decision of June 29, 2000, the Ministry has released them to the appellant. Pages 52, 53, 66, 67 and 68 are the Memoranda of Settlement between the appellant, OPSEU and the Ministry in relation to her various grievances.

CONCLUSION:

I have decided that the records at issue fall within the scope of the Act.

DISCUSSION:

Sections 65(6) and (7) of the Act provide:

- (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 Ministry relies on section 65(6)3 in this appeal. It is not submitted that there are any proceedings or anticipated proceedings, negotiations or anticipated negotiations relating to labour relations or to the employment of a person, within the meaning of sections 65(6)1 and 65(6)2, and on my review of the material before me, I am satisfied that these sections are not applicable.

It should be noted that section 65(6) is record-specific and fact-specific. If this section applies to a specific record, and none of the exceptions listed in 65(7) are present, section 65(6) has the effect of excluding records from the scope of the Act: see Orders P-1564 and PO-1772.

In Order P-1242, Assistant Commissioner Tom Mitchinson found that in order to fall within the scope of section 65(6)3, it must be established that:

1. the records were collected, prepared, maintained or used by the 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.

With respect to the first requirement, on a review of the records, I am satisfied that they were “collected, prepared, maintained or used by the institution or on its behalf”. They are documents which were either compiled or created by the Ministry, for its own use.

I am also satisfied that the second requirement is met, in that the collection or preparation of the records was in relation to “meetings, consultations, discussions or communications” about the appellant’s employment.

Labour relations or employment-related matters in which the institution has an interest

The third requirement merits more discussion. The Ministry has accurately described the appellant’s personnel file as documenting all stages of her employment with the Ministry, including her initial hiring, training, working conditions, suspensions from employment, grievances and compensation claim. With respect to the investigation reports, the Ministry states that the first investigation was conducted at the request of the Superintendent of the facility at which the appellant worked, and the second investigation was conducted pursuant to section 22 of the Ministry of Correctional Services Act, which states:

The Minister may designate any person as an inspector to make such inspection or investigation as the Minister may require in connection with the administration of this Act, and the Minister may and has just cause to dismiss any employee of the Ministry who obstructs an inspection or investigation or withholds, destroys, conceals or refuses to furnish any information or thing required by an inspector for the purposes of the inspection or investigation.

The Ministry states that the two investigations involving the appellant were authorized in order to investigate allegations that the appellant was associating with offenders or ex-offenders in contravention of policies regarding such matters, and that these investigations are in the reasonably proximate past.

In general, the Ministry submits that the collection, preparation, maintenance and use of the appellant’s personnel file and the investigation file documents were in relation to meetings, consultations, discussions and communications about labour relations and employment-related matters in which the Ministry has an interest. The Ministry identifies its interest in the records at issue as arising from statute, including the Ministry of Correctional Services Act, the Public Service Act and the Workplace Safety and Insurance Act, from the collective agreement between OPSEU and the government of Ontario and from general common law principles regarding employer/employee relations, including the right of the employer to manage and direct its workforce.

I am satisfied that the “meetings, consultations, discussions or communications” for which the records were compiled or created were in relation to labour relations and/or employment matters. In order to meet the third requirement, however, it is not enough that the records simply relate to such matters. It must be clear that the Ministry “has an interest” in these labour relations or employment matters. Prior decisions have stated that an “interest” is more than a mere curiosity or concern. An “interest” must be a *legal* interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry’s *legal* rights or obligations: see, for instance, Orders P-1242 and P-1658. Further, there must be a *reasonable prospect* that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner) (March 21, 2000), Toronto Docs. 681/98, 698/98, 209/99 (Ont. Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (Ont. C.A.).

The statutes, collective agreement and other legal obligations cited by the Ministry are all important in establishing the framework within which to assess the existence of a legal interest in the records. I am satisfied that at the time these records were compiled and prepared, the Ministry had a legal interest in at least some of them, pursuant to its obligations under these statutes, collective agreement and the common law. It is not necessary for me to review whether a legal interest existed in each and every record at issue, for I am also satisfied that whatever legal interest existed at one time, it is no longer in existence.

As I have stated, the appellant is no longer employed by the Ministry. More important than this, however, is the existence of the Memorandum of Settlement dated November 9, 1999. This Memorandum states, in part:

6. In consideration of the above, the grievor hereby releases and forever discharges the crown, its employees, agents, Ministers, Deputy Ministers and servants of and from all actions, causes of action, claims and demands of every nature and kind arising out of or as a result of the above-noted grievances or her employment with the Government of Ontario, as well as any outstanding OHRC, OLRB and WDHP complaints.
7. The grievor agrees that she is fully informed of and understands the consequences of this settlement, and further agrees that the Union has fairly and properly represented her.
8. The union and the grievor agree that the above-noted grievances as well as any all [sic] outstanding grievances and WDHP complaints, are withdrawn.

In light of this settlement, it cannot be said, in my view, that the Ministry maintains a legal interest in the records. The appellant’s employment with the Ministry has been terminated. Any employment-related disputes have been finally resolved, and the settlement reflects not only a complete severance of that employment relationship, but a barrier to any future attempt by the

appellant to re-ignite any of the issues arising under that relationship. Further, although it is *possible* to imagine a situation where a settlement agreement may give rise to issues which engage the parties' legal interests (for instance, where there are allegations of non-compliance), the evidence before me does not establish the existence of any such potential issues, and none are alleged.

In short, having regard to the settlement between the Ministry, the appellant and her union, and the absence of any evidence indicating either current or potential disputes which have the capacity to affect the Ministry's legal rights or obligations, I conclude that there is no reasonable prospect that the Ministry's legal interests in the employment matters reflected in the records will be engaged.

My conclusion is consistent with other orders which have looked at the effect of a settlement of a dispute on the issue of whether a legal interest exists. In Order MO-1215, for instance, Assistant Commissioner Tom Mitchinson concluded that the settlement of employment-related matters between a township and two former employees resolved any legal interests which may have existed. He stated:

The only relevant evidence before me in this appeal establishes that a settlement has been reached between the Township and the appellants. Therefore, any legal interests which may have existed have been resolved. Accordingly, I find that there is no ongoing dispute or other employment-related matter involving the Township and the appellants that has the capacity to affect the Township's legal rights or obligations, and the Township has failed to establish a "legal interest" in the employment-related matter reflected in the record (see also Order M-1164).

Accordingly, I find that the third requirement of section 65(6)3 has not been established. The records at issue, comprising the appellant's personnel file and two investigation reports, fall within the scope of the Act.

ORDER:

1. I order the Ministry to issue a decision letter to the appellant regarding access to the records at issue, in accordance with the provisions of sections 26 and 29 of the Act, treating the date of this order as the date of the request.

2. I order the Ministry to provide me with a copy of the decision letter referred to in provision 1 above.

Original signed by: _____
Sherry Liang
Adjudicator

_____ August 17, 2000