Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1323

Appeal P_9600029

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received three requests under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to job competitions (Requests 1 and 2) and records relating to an investigation into the requester's allegations (Request 3). The issues arising from Requests 1 and 2 were resolved by Order P-1258.

In the third request, the requester sought access to all records relating to an investigation into her allegations of harassment, favouritism and improper management practices relating to two job competitions and other employment-related matters. The Ministry denied access to the records, stating that the records were covered by the recent amendments to the legislation, i.e. section 65(6) and were, therefore, beyond the scope of the Act. The requester appealed the decision to deny access to the records.

The records at issue consist of inter-office memoranda, respondent's statement, appellant's statement, voice-mail transcription, management review and addendum report, and witness statements. The records all relate to an investigation which resulted from the complaints made by the appellant. The investigation was conducted under the Ministry's Workplace Discrimination and Harassment Prevention Program (WDHP).

This office sent a Notice of Inquiry to the appellant and the Ministry, seeking representations on the jurisdictional issue raised by sections 65(6) and (7) (known as Bill 7). Representations were received from both parties.

In her representations, the appellant stated that she had discussions with the Ministry with regards to obtaining a copy of the investigation report and other information months before the legislation was changed. She alleged that the Ministry had caused a delay which resulted in her formal request being made after Bill 7 was passed into law. With her representations, the appellant included copies of correspondence between herself and the Ministry. With her consent, copies of this correspondence were provided to the Ministry who was asked to make submissions on the issue raised by the appellant. Additional representations were received from the Ministry. I will address the issue raised by the appellant as a preliminary matter.

PRELIMINARY MATTER:

The amendments to the Act creating the current sections 65(6) and (7) were part of what is known as "Bill 7", which was passed by the Legislature in the fall of 1995 and came into force on November 10, 1995. As a result, if the appellant made her request prior to November 10, 1995, it would be subject to the law in effect prior to the enactment of Bill 7. On the other hand, if the request was not made until after this date, it would be subject to the new provisions creating sections 65(6) and (7).

The appellant submitted a written request on November 27, 1995. In her representations, she states that she met with the Regional Director of the Central South Regional Office, Courts Administration (the Director) on August 1, 1995 at which time she requested a copy of the investigator's final report and other information. On August 10, 1995, the appellant received a memorandum from the Director indicating that the parts of the investigation report which contain information provided by the appellant to the investigator would be available to her. In the memorandum, the Director asks the appellant to notify her office if she would like to receive the excerpts of the report.

The appellant states that she had two further meetings with the Director (August 21, 1995 and November 22, 1995) and at the latter meeting, she was advised to submit a request in writing to the Ministry's Freedom of Information Co-ordinator in Toronto. The appellant submits that her request was initiated in August 1995, prior to the changes in the legislation which took place on November 10, 1995 even though her formal request in writing was made on November 27, 1995.

The Ministry acknowledges that the appellant did meet with the Director on August 10, 1995. The Ministry states that at that point, the appellant was only seeking access to the investigation report and not all the additional information listed in her formal request of November 27, 1995. The Ministry points out that at that meeting, the Director indicated that parts of the investigation report were available to the appellant. The Ministry states that the appellant did not follow up to obtain a severed copy of the report.

The Ministry states that the appellant had asked her Director for a copy of the investigation report and the Director had responded, indicating that she could provide the report, but personal information pertaining to other individuals would be severed. The Ministry states that this earlier request was not treated as a request made under the Act; rather, the Director had treated it as an internal matter.

The Ministry submits that the request of November 27, 1995 was the first communication that the Ministry's Freedom of Information office had with the appellant. The Ministry states that while the appellant's earlier request to the Director was only for access to the report, the request of November 27, 1995 sought access to copies of all letters, evidence and correspondence between the investigator, the WDHP co-ordinator, the Deputy Minster's office, the Human Resources office and the Regional Director's office.

The Ministry responded by letter dated November 28, 1995 advising that "the Act has recently been amended. The amendment is contained in Bill 7, which deals with amendments to various labour relations statutes and, in effect, means that the Act no longer covers labour relations or employment related records." The Ministry advised the appellant to contact the Regional Director if she still wished to pursue access to the records. The appellant did not do so.

The Ministry refers to section 24(1) of the Act which provides that a person seeking access to a record must make a request in writing to the institution. The Ministry states that this section must be read in conjunction with section 11 of Reg. 460, R.R.O. 1990 which provides that the request must be in Form 2 or "any other written form that specifies that it is a request made under the Act". The Ministry submits that the appellant's earlier request was made orally and

directly to the Director and that it was never treated by the Ministry as a request under the Act. The Ministry submits that it was not the intention of the Legislature that every request for information made by an individual to an institution be dealt with under the Act.

I have carefully considered the representations of the parties together with the circumstances of this case. I have also considered the relevant sections of the Act, including section 63(1) which states as follows:

> Where a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.

The above section appears to contemplate that the request may be oral and that an institution may give access to a record under the Act in the absence of a written request. In my view, the correct interpretation of section 63(1) requires the conveying of the intention that the request, even where it is made orally, is a request for information under the Act.

Based on the evidence before me, I find that the appellant's request of August 1, 1995, was a direct request for information from an employee to her superior. There is no evidence before me to indicate that in the appellant's discussions between August 1 and August 10, 1995, she was, in effect, making a request under the Act. Alternatively, one could conclude that the Director could have, at that point, directed the appellant to file a written request under the Act. This was not done, and the Ministry submits that the Director was "attempting to resolve the matter internally". In the circumstances, I will accept that the Director and hence, the Ministry, was acting in good faith and was not employing delay tactics.

I find that the request dated November 27, 1995 was the first request received by the Ministry for access to information under the Act. I note, as well, that this request encompasses much more information than the report which was the subject of discussions between the appellant and the Director. The Ministry responded to the request within the statutory time-lines imposed by the legislation and subsequent to the passage of the amendments effected by Bill 7. Therefore, this request and the subsequent appeal is subject to the Act as amended by sections 65(6) and (7).

DISCUSSION:

LABOUR RELATIONS OR EMPLOYMENT RELATED RECORDS

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 65(6) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The Ministry submits that section 65(6)(3) applies to the records. This section reads as follows:

Sections 65(6)(3) of the Act read as follows:

> (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:
>
> 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.

In order for a record to fall within the scope of section 65(6)(3), the Ministry must establish that:

> 1. The record was collected, prepared, maintained or used by the Ministry 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 Ministry has an interest.
>
> [Order P-1242]

Requirements 1 and 2

As I have indicated previously, the records consist of internal memoranda, appellant's statement, respondent's statement, management review and addendum report, and witness statements and were generated as a result of the appellant's complaints and the subsequent investigation. In my view, each of these records was either collected, prepared, maintained and/or used by the

Ministry. I find also that the collection, preparation, maintenance or use of each of these records was in relation to meetings, consultations, discussions or communications. Accordingly, Requirements 1 and 2 have been met.

Requirement 3

The Ministry submits that the meetings, consultations, discussions or communications are about employment-related matters and that both the appellant and the respondent were employees of the Ministry at the time of complaints and the resulting WDHP investigation.

I am satisfied that the appellant was an employee of the Ministry and that the records, which relate to a WDHP investigation, are employment-related.

The remaining component is whether a WDHP investigation can be characterized as a matter "in which the institution has an interest".

In Order P-1242, former Assistant Commissioner Tom Mitchinson addressed a similar issue involving the application of section 65(6) to WDHP investigation records. In that order, he commented that "[a]n "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". I agree with the former Commissioner's reasoning and approach and adopt it for the purposes of this appeal.

In the same order, based on an extensive review of case law, former Assistant Commissioner Tom Mitchinson also concluded that:

> "If the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the [Human Rights] Code, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as a matter "in which the institution has an interest."

I find that this conclusion applies equally in the circumstances of this appeal, and I adopt it for that purpose. Accordingly, I find that Requirement 3 has been met.

In summary, I find that the records were collected, prepared, maintained and/or used by the Ministry in relation to meetings, consultations, discussions or communications about employment-related matters in which the Ministry has an interest. None of the exceptions in section 65(7) apply in the circumstances of this appeal. I find, therefore, that the records fall within the parameters of section 65(6)(3) and are, therefore, excluded from the scope of the Act.

ORDER:

I uphold the decision of the Ministry.

Original signed by: December 23, 1996
Mumtaz Jiwan
Inquiry Officer