Information and Privacy
Commissioner/Ontario

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

ORDER P-1575

Appeal P-9700315

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant is an employee of the Ministry of the Attorney General (the Ministry). During the summer of 1997 she received a performance appraisal, in accordance with the Ministry's human resources policies. As part of the appraisal process, three Ministry employees (the evaluators) were asked to complete the performance evaluation section of the appraisal contained on page 3 of the appraisal form, and submit it to the appellant's supervisor. All three evaluators did so. These "page 3 forms" were then used by the supervisor in finalizing the performance appraisal.

After receiving her completed performance appraisal, the appellant made an informal request for access to a copy of the "page 3 forms" and any notes made by the evaluators in the context of participating in the performance appraisal. The appellant was advised that all original notes and "page 3 forms" had been shredded, but that one evaluator had kept a photocopy of her "page 3 form". This copy was provided to the appellant.

The appellant then submitted a formal request pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to these same records.

The Ministry denied access to any responsive records on the basis that they fell within the scope of section 65(6)3, and therefore outside the jurisdiction of the Act.

The appellant appealed the Ministry's decision.

This Office provided a Notice of Inquiry to the appellant and the Ministry. The Notice also included the issue of reasonableness of search, since the appellant believed that notes may still exist.

Representations were received from both parties. They both also responded to a Supplementary Notice of Inquiry issued in order to clarify certain issues not raised in the original Notice.

For ease of reference, I will refer to the "page 3 notes" and any other notes made by the evaluators as "the notes".

DISCUSSION:

JURISDICTION

In this appeal, the first issue to be decided is whether sections 65(6) and (7) of the Act apply to the notes. These two sections 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:
>
> 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.

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 outside the Commissioner's jurisdiction.

Section 65(6)3

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

1. they were 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

The Ministry submits that the records requested by the appellant are specifically notes "made during an employee performance and evaluation process administered by the institution as an employer", and as such they were clearly collected, prepared and/or used by the Ministry, in relation to meetings, consultations, discussions or communications which take place as part of the performance appraisal process. The Ministry states that it has instituted an employee performance and evaluation process in accordance with standard management practices, and that a central component of this process is for management to communicate and discuss the results of the evaluation with the employee. Managers or supervisors often prepare notes to assist them in identifying performance or other issues relevant to the evaluation.

In her representations, the appellant concedes that the first two requirements of section 65(6)3 are present in the circumstances of this appeal.

I find that the first 2 requirements of section 65(6)3 have been established.

Requirement 3

I am satisfied that notes about an employee's performance are about an "employment-related matter" for the purpose of section 65(6)3. The only remaining issue is whether this is an employment-related matter in which the Ministry "has an interest".

In Order P-1242, I stated the following regarding the meaning of the term "has an interest":

> Taken together, these [previously discussed] authorities support the position that an "interest" is more than 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.

The appellant submits that the circumstances in which the forms were created "were not such as to affect the Ministry's legal rights or obligations but rather were a forum in which the Ministry could set out their concerns about an employee and vice versa". In the appellant's view, the forms deal with concerns, not legal interests. According to the appellant, "[t]he evaluation form encourages the opportunity to have open, one-to-one, honest, continuing discussions with a supervisor in which the employee's participation is essential. This form is not at all in the nature of a legal interest."

The Ministry submits that as an employer and a party to contractual agreements with its employees, it has a very real legal interest in the performance monitoring and appraisal policies it has implemented. The Ministry states that "[t]he [performance appraisal] process must be administered in a manner consistent with the principle of fairness, failure of which would surely result in a formal grievance being made by employee trade unions or bargaining units".

I accept that the Ministry has an interest in or an obligation to administer its performance appraisal process and policies fairly. However, in my view, that is not sufficient to bring the employment-related matter within the scope of section 65(6)3. To meet the requirements of this section, the Ministry must establish an interest that has the capacity to affect its legal rights or obligations.

The appellant is a member of the Ontario Public Service Employees Union (OPSEU). I have examined the collective agreement between OPSEU and Management Board Secretariat. Article 2 ("Management Rights") of the collective agreement states, in part:

> [T]he right and authority to manage the business and direct the workforce including the right to hire and lay-off, appoint, assign and direct employees ... training and development and **appraisal** ... shall be vested in the employer. It is agreed that these rights are subject only to the provisions of this Agreement and any other collective agreement to which the parties are subject. [emphasis added]

Article 22.14.6 provides:

> The [Grievance Settlement Board] shall have no jurisdiction to alter, change, amend or enlarge any provision of the collective agreement.

Performance appraisals themselves do not appear to be grievable. However, if an employee is disciplined or dismissed, that action would appear to be grievable under Article 21 of the collective agreement, and the content of a performance appraisal may be relevant to such a grievance. In addition, if the performance appraisal constitutes a contravention of another article of the collective agreement and is arbitrary, discriminatory, unfair or in bad faith, then an employee may have a right to grieve.

In the circumstances of this appeal, no evidence has been provided by the parties to suggest that a grievance was filed, or that the appellant has a pending grievance to which her performance appraisal would be relevant.

I also have no specific evidence before me to establish that the actions of the Ministry were arbitrary, discriminatory, unfair or in bad faith; however the Notices of Inquiry did not seek specific representations on this issue. In any event, I do not need to decide this issue in light of the following discussion.

Article 22.2.1 of the collective agreement states:

> It is the mutual desire of the parties that complaints of employees be adjusted **as quickly as possible** and it is understood that if any employee has a complaint, the employee shall discuss it with the employee's immediate supervisor within **thirty (30) days** after the circumstances giving rise to the complaint have occurred or ought reasonably have come to the attention of the employee in order to give the immediate supervisor an opportunity of adjusting the complaint. [emphasis added]

Although courts have differed in their interpretation of whether language in collective agreements setting out time limits are "mandatory" (and must be strictly applied) or "directory" (giving the arbitrator flexibility to extend time limits in appropriate cases), section 48(16) of the Ontario Labour Relations Act, which would appear to apply to the OPSEU collective agreement, provides:

> Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedures under a collective agreement, despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

Several months have passed since the appellant received her performance appraisal. In my view, a time extension of this magnitude would require exceptional circumstances, and I have no evidence before me to suggest that any such circumstances exist.

Even if the appellant has a right to grieve her performance appraisal, which is certainly not clear, the time period for filing a grievance has long-since expired. Therefore, I find that there is no legal forum in which the appellant can challenge the Ministry with respect to her performance appraisal under the terms of the collective agreement with OPSEU. Accordingly, I find that the performance appraisal is not an employment-related matter in which the Ministry has an interest, and the third requirement of section 65(6)3 has not been established.

Therefore, I find that any responsive records, should they exist, are subject to the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which she is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under section 24 of the Act, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.
Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must provide a reasonable basis for concluding that such records may, in fact, exist.

The Ministry states that the notes were collected by the appellant's supervisor, and shredded "prior to the performance appraisal being completed with the employee". The Ministry provided the appellant with a photocopy of one of the evaluator's notes, but maintains that the others no longer existed at the time of the appellant's request.

The appellant states that she requested the notes on the day of her performance review. When told by her supervisor that these records had been shredded, the appellant states that she approached the three evaluators and asked them to recreate their original notes. According to the

appellant, at least two of the three evaluators attempted to reconstruct their notes and, in her view, "there appears to be no effort by the Ministry to seek out these recreated notes or to have the evaluators reconstruct what was destroyed."

I accept the Ministry's position that the original notes were destroyed prior to the date of the appellant's request. However, although the Act does not require an institution to create or recreate records in response to an access request, it also does not preclude an institution from doing so. Based on the representations provided by the appellant, it would appear that "page 3 forms" or similar notes may have been recreated by the evaluators between the time of the appellant's performance appraisal and the date of her request under the Act. In my view, if any such records exist, they would be responsive to the appellant's request. The Ministry's representations do not address the possible existence of these records and, as a result, I am not convinced that the Ministry's search for records was reasonable. I will order the Ministry to conduct a further search for these records.

DESTRUCTION OF RECORDS

Although I accept that the original notes have been shredded, this causes me concern.

The evaluators' notes were used for the purpose of assisting the appellant's supervisor in conducting the performance appraisal. There is no question that these records would contain the personal information of the appellant within the meaning of section 2(1) of the Act.

Section 40(1) of the Act provides that:

> Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that personal information to whom the individual relates has a reasonable opportunity to obtain access to the personal information.

Section 5(1) of Regulation 460 of the Act states that:

> Personal information that has been used by an institution shall be retained by the institution for at least one year after use unless the individual to whom the information relates consents to its earlier disposal.

It seems clear to me that the Ministry was in breach of these provisions when it destroyed the evaluators' notes. It is also possible that this practice of prematurely shredding documents could have ramifications beyond the scope of this particular appeal. Our office will be in contact with the Ministry to ensure that adequate processes are in place to ensure that section 40(1) of the Act and section 5(1) of Regulation 460 are adhered to in future.

ORDER:

1. I order the Ministry to conduct a further search for additional records responsive to the appellant's request, that is, any recreated evaluators' notes.

2. If, as a result of the further search, the Ministry locates additional responsive records, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26 and 29 of the Act, treating the date of this order as the date of the request.

3. I order the Ministry to provide me with a copy of the decision letter referred to in Provision 1 by forwarding it to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: May 29, 1998
Tom Mitchinson
Assistant Commissioner