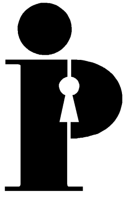

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1264

Appeal P-9600119

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The appellant is an employee of the Ministry of the Solicitor General and Correctional Services (the Ministry). He submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) for minutes of the Southern Region Area Managers' meetings for the period of January 1, 1992, to the date of the request.

The Ministry identified a number of responsive records, and provided the appellant with partial access. Access to some records was denied, in whole or in part, pursuant to sections 13, 14, and 21 of the Act. The Ministry also claimed that parts of some records fall within the parameters of section 65(6)3 of the Act, and are therefore outside the scope of the Act.

The appellant appealed the Ministry's decision.

During mediation, the appellant indicated that he did not want the personal information of any individual, nor did he require the password to a named computer program. As a result, the sections 14 and 21 exemption claims are no longer at issue. The Ministry also located minutes of two other meetings, and denied access to parts of these records pursuant to sections 18(1)(f) and (g), 19, 21 and 65(6)3 of the Act. Again, because the appellant was not interested in receiving personal information, section 21 was removed from the scope of the appeal.

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), as well as the exemptions claimed by the Ministry. Representations were received from both parties.

In its representations, the Ministry withdrew the section 13 exemption claim, and indicated that, as a consequence, it has released more pages of records to the appellant.

Thirteen pages or partial pages of records remain at issue. Some are subject to the jurisdictional issue raised by section 65(6)3, and others have been withheld on the basis of one of the following exemption claims:

- economic and other interests of the Ministry - sections 18(1)(f) and (g)
- solicitor-client privilege - section 19

DISCUSSION:

JURISDICTION

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

> (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 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.

Section 65(6)3

In Order P-1242, I found that in order to fall within the scope of paragraph 3 of section 65(6), 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.

Requirements 1 and 2

The Ministry states that the records were prepared, maintained and used by the Southern Region Ministry staff as a mechanism to formally document and communicate matters discussed at Area/Regional Managers meetings. According to the Ministry, these meetings are held to discuss various operational, administrative, labour relations and employment-related issues.

In Order P-1223, I made the following comments regarding the interpretation of the phrase "in relation to" in section 65(6):

> In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was **for the purpose of, as a result of, or substantially connected to** an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity. (emphasis added)

Having reviewed the records, I find that they were clearly prepared, maintained and/or used by employees of the Ministry in relation to meetings, discussions or communications. Therefore, the first and second requirements of section 65(6)3 have been established.

Requirement 3

The Ministry submits that the parts of the minutes excluded under section 65(6)3 deal with various labour relations and employment-related matters, including hiring procedures, strike planning, grievance practices, and human resources planning.

Having reviewed these parts of the minutes, I agree that they reflect meetings, discussions and communications about labour relations and/or employment-related matters, as defined in previous orders (e.g. Order P-1242). The only remaining issue is whether or not these matters are ones in which the Ministry "has an interest".

In Order P-1242, I reviewed a number of legal sources regarding the meaning of the term "has an interest", as well as several court decisions which considered its application in the context of civil proceedings. I concluded by stating:

> 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.

I have applied this interpretation in a number of orders involving section 65(5)3 (and section 52(3)3, the equivalent provision in the Municipal Freedom of Information and Protection of Privacy Act)), and found that institutions "have an interest" in the following matters:

- harassment investigations conducted under the Workplace Discrimination and Harassment Prevention policy (Order P-1242)

- harassment investigations outside the WDHP policy (Order P-1260)

- job competitions (Orders P-1258 and M-830)

- investigations into a work stoppage under the Occupational Health and Safety Act (Order P-1255)

The Ministry's representations in this appeal do not specifically address this issue. I have reviewed the relevant portions of the records myself, and make the following findings:

- Items 2 and 3 on page 10, item 11 on page 13, and item 7 on page FI00176 deal with hiring procedures, strike-related issues, and a general discussion about a grievance. These are matters which have the capacity to affect the Ministry's legal rights or obligations, and thereby are matters in which the Ministry "has an interest" for the purpose of section 65(6)3. All of the requirements of section 65(6)3 have been established by the Ministry for these parts of the records. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal, and I find that items 2 and 3 on page 10, item 11 on page 13, and item 7 on page FI00176 fall within the parameters of section 65(6)3, and therefore are excluded from the scope of the Act.

- Item 5 on page 4, item 4 and the remaining parts of item 5 on page 11, item 16 on page 15, item 8 on page FI00176, and all of pages FI0096-99 deal with what, in my view, are accurately characterized as concerns, but not matters which have the capacity to affect the Ministry's legal rights and obligations. As I stated in Order P-1242, a concern is not sufficient to constitute "an interest", for the purposes of section 65(6)3. These parts of the records do not relate to meetings, discussions or consultations about labour relations and/or employment-related matters in which the Ministry has an interest, and therefore the requirements of section 65(6)3 have not been established. I find that item 5 on page 4, item 4 and the remaining parts of item 5 on page 11, item 16 on page 15, item 8 on page FI00176, and all of pages FI0096-99 fall under the scope of the Act, and I will order the Ministry to make an access decision respecting them.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims section 19 as the basis for denying access to pages 1, 2, 3, item m) on page 4, and item 1 on page 10.

Section 19 of the Act states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a government institution with the discretion to refuse to disclose:

1. A record that is subject to the common law solicitor-client privilege (Branch 1); and

2. A record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Turning first to Branch 1, in order to for a record to be subject to the common law solicitor-client privilege, the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) There is a written or oral communication; **and**

   (b) The communication must be of a confidential nature; **and**

   (c) The communication must be between a client (or his agent) and a legal advisor; **and**

   (d) The communication must be directly related to seeking, formulating or giving legal advice.

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

The Ministry states that the severed information relates to verbal legal opinions which are reflected in the minutes of two meetings. According to the Ministry, the minutes incorporate oral communications of a confidential nature, between the Ministry's legal counsel and his clients (ie. the Area\Regional managers), which are directly related to the giving of legal advice.

The Ministry has referred me to Order P-477, in which Inquiry Officer Anita Fineberg discussed records which incorporated legal advice given by counsel. In that order, Inquiry Officer Fineberg stated:

> In my view, the records which [incorporate legal advice from counsel] qualify for exemption pursuant to the common law solicitor-client privilege (Branch 1).

> These records contain written notations of the verbal legal advice that had been provided to Hydro employees from their counsel during various meetings ... The communications are of a confidential nature and are directly related to the seeking and giving of legal advice.

I find that the Ministry has established all of the requirements for common law solicitor-client privilege with respect to pages 2, 3, item m) on page 4, and item 1 on page 10 of the records. Page 1 is simply a cover page identifying the people present at the September 20, 1994 meeting, and I find that it does not qualify under either branch of section 19, and should be disclosed to the appellant.

PLANS NOT YET MADE PUBLIC/PROPOSED PLANS, POLICIES OR PROJECTS

The Ministry originally claimed both sections 18(1)(f) and (g) as the basis for exempting item 3b) on page 4 and paragraph 17 on page 15, and section 18(1)(g) only for item 4 on page 11. In its representations, the Ministry withdrew the section 18(1)(g) claim for item 4 on page 11. Section 18(1)(f) states:

> A head may refuse to disclose a record that contains,
>
>> plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

In order to qualify for exemption under section 18(1)(f) of the Act, the Ministry must establish that the record contains a plan or plans (Orders M-77 and P-229).

In Order P-348, Commissioner Tom Wright considered the question of what constitutes a "plan" for the purposes of section 18(1)(f). He stated:

> The eighth edition of The Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". In my view, the record cannot properly be considered a "plan". It contains certain recommendations which, if adopted and implemented by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan.

Having reviewed the two items exempted under section 18(1)(f), in my view, the same rationale applies. The activities reflected in these items may ultimately involve the formulation of a plan, but the items themselves do not constitute a "plan", and therefore do not qualify for exemption under section 18(1)(f).

Section 18(1)(g) of the Act reads as follows:

> A head may refuse to disclose a record that contains,

> information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

In order to qualify for exemption under this section, an institution must establish that a record:

1. contains information including proposed plans, policies or projects; and

2. that disclosure of the information could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.

(Order P-229)

In its representations, the Ministry submits that the two exempt items refer to proposed projects that have not been made public or fully implemented. The Ministry goes on to state that release of the information contained in item 17 on page 15 would result in the premature disclosure of a pending policy decision. No similar statement is made with respect to item 3b) on page 4.

In Order M-182, Inquiry Officer Holly Big Canoe made the following comments about the phrase "pending policy decision", which is also found in the municipal equivalent of section 18(1)(g) (section 11(g)):

> In my opinion, the term "pending policy decision" contemplates a situation where a decision has been reached, but has not as yet been announced, rather than a scenario in which a policy matter is simply before an institution for consideration.

I agree with this reasoning, and find that the Ministry has provided sufficient evidence to establish that the information contained in item 17 on page 15 is a proposed project, and that disclosure of this information could reasonably be expected to result in the premature disclosure of a pending policy decision. As far as information contained in item 3b) on page 4 is concerned, the Ministry acknowledges that no decision has been made regarding the proposal outlined in this item. Therefore, I find that it is a situation "in which a policy matter is simply before an institution for consideration", and fails to satisfy the second requirement for exemption under section 18(1)(g).

ORDER:

1. I uphold the Ministry's decision to refuse to disclose pages 2 and 3, item m) on page 4, items 1, 2 and 3 on page 10, item 11 on page 13, item 17 on page 15, and item 7 on page FI00176.

2. I order the Ministry to disclose page 1 and item 3b) on page 4 by **October 14, 1996**.

3. I order the Ministry to make a decision, pursuant to section 26 of the Act, with respect to the information in item 5 on page 4, item 4 and the remaining parts of item 5 on page 11, item 16 on page 15, item 8 on page FI00176, and all of pages FI0096-99, which I have found to fall within the scope of the Act. This decision must be communicated to the appellant by **October 24, 1996**.

4. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, and a copy of the decision letter referred to in Provision 3.

Original signed by: September 24, 1996
Tom Mitchinson
Assistant Commissioner