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

ORDER P-1359

Appeal P_9600314

Ministry of Municipal Affairs and Housing

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 appellant submitted an eight-part request to the Ministry of Municipal Affairs and Housing (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The requested information pertained to seven Housing Operations Division Regional Offices and two Rent Control Program Offices, and related to the Ministry's reorganization process in late 1994 to early 1995.

The Ministry located records responsive to parts 1, 2 and 4 of the request and provided a fee estimate of $157.56. The Ministry denied access to one record responsive to part 5 of the request, claiming that it fell within the parameters of section 65 of the Act, and was, therefore, outside the scope of the Act. Finally, the Ministry asked for clarification of the type of documentation being requested for parts 3, 6, 7 and 8.

In response to the Ministry's decision, the appellant sent a letter to the Ministry and asked for a fee waiver of the sum of $157.56. He also provided clarification for parts 6, 7 and 8 of his request. The appellant did not clarify part 3 at this time.

At the same time, the appellant appealed the amount of the fee and the Ministry's decision regarding part 5 to the Commissioner's office.

Subsequently, the Ministry issued a second decision in which it denied the appellant's request for a fee waiver. Further, in response to the clarifications provided by the appellant, the Ministry indicated that a fee estimate in the amount of $2, 256 was applicable regarding parts 6 and 7 of the request. The Ministry provided an explanation in response to part 8 of the request and advised that no records pertaining to this part exist.

The appellant then sent a letter to the Ministry enclosing payment for the amount of $157.56, but stipulated that the amount of the fee was still under appeal. At this time, the appellant clarified part 3 of the request, and modified his request with respect to parts 6 and 7 (in order to eliminate the larger fee estimate). He also asked for an explanation regarding the Ministry's response to part 8.

The Ministry then issued a third decision in which it answered the appellant's questions regarding parts 3 and 8. At that time, the Ministry enclosed records responsive to parts 1, 2 and 4, and parts 6 and 7 as modified by the appellant.

Following receipt of the Ministry's third decision, the appellant contacted the Commissioner's office and indicated that he was not satisfied with the Ministry's response to his request.

In this regard, the Appeals Officer confirmed with the appellant that he did not dispute the Ministry's decisions with respect to parts 3, 6, 7 and 8 of his request. He stated that he was appealing the Ministry's decision to withhold the records responsive to part 5 under section 65(6) of the Act. He also indicated that he was appealing the original fee estimate of $157.56 and the denial of a fee waiver. He indicated further that he believes more records exist that would be responsive to parts 1, 2 and 4 of the request.

This office provided a Notice of Inquiry (the NOI) to the appellant and the Ministry. The Ministry submitted representations in response to the NOI. The appellant indicated that he wishes all previous correspondence with this office to serve as his representations.

Just prior to the deadline for the receipt of representations, the Ministry located more records responsive to part 4 of the request and provided copies of them to the appellant. The appellant advised this office that he still believes that more records responsive to this part exist.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that additional records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify responsive records. While the Act does not require that the Ministry prove to the degree of absolute certainty that such records do not exist, the search which the Ministry undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

As I indicated above, the appellant believes that more records exist with respect to parts 1, 2 and 4 of his request. In these parts, the appellant requested the following information:

> Part 1: Organizational charts showing all approved staff positions with job titles and classifications at the conclusion of the [Ministry's] reorganization process in late 1994 or early 1995 ...;
>
> Part 2: Organizational charts showing any subsequent changes to the above benchmark charts with actual dates, up to the present time;
>
> Part 4: Job description for each different position ... which include salary range and effective date of description classification. (NB No duplicates - just one job description for Executive Officer II, OA10, etc.).

In his correspondence with this office, the appellant outlined his reasons for believing that more records exist.

With respect to part 1, he indicates that there are more positions which exist than those which were listed on the organizational chart. In addition, the records he received did not contain any information regarding classifications.

Regarding part 2, the appellant indicates that there were a series of stages of staff reductions in the Ministry. The appellant believes there should be a series of organizational charts reflecting each stage of downsizing. The appellant also states that some positions are missing from one of the charts.

Finally, with respect to part 4, the appellant states that a number of job descriptions, for positions he is aware of, were not identified or provided. In addition, none of the records contain salary ranges.

In its representations, the Ministry outlines the steps taken to search for records responsive to the appellant's request. In this regard, the Ministry states that the search was primarily carried out in the Ministry's Human Resources Branch. The Ministry states further that job specifications are not centrally maintained. Rather, they are maintained individually by a Human Resource Advisor who has responsibility for the particular area of the Ministry. In order to locate the job descriptions obtained from the organizational charts, files at a number of locations within the Human Resources Branch were also searched. The Ministry contends that these are the only locations at which the requested records would be kept.

The Ministry indicates that the searches were conducted by the Divisional Project Co-ordinator in the Executive Support Unit of the Housing Operations Division (the Co-ordinator), a Senior Human Resources Advisor (the Advisor) and by an Assistant Human Resources Advisor (the Assistant Advisor). The Ministry indicates that the Advisor and Assistant Advisor have six and five years, respectively, of human resources experience in the Ministry. All three individuals are familiar with the organization of the Ministry during the time period identified by the appellant.

The Ministry states that initial searches were conducted by the Advisor and the Assistant Advisor in the files of the various Human Resources Advisors (as noted above) and in the file room of the Human Resources Branch. Following receipt of the NOI, the Advisor conducted a further search for the records thought to exist by the appellant as indicated in the NOI.

The Co-ordinator was in charge of co-ordination and implementation of management's determination of staffing responses to changes in Ministry budgets and programmes during the time period at issue. She conducted both a paper and electronic search of the files in her office that might have contained records responsive to the request.

The Ministry asserts that no records exist other than those provided to the appellant throughout this appeal. The Ministry submits that the appellant's belief that more records exist is based on a "misapprehension" with respect to the human resources procedures of the Ministry. In this context, the Ministry provided submissions in response to the particular concerns expressed by the appellant as identified above.

The Ministry states that it is not a Ministry requirement that organizational charts include classifications. In this case, this information was not contained in the charts. However, the Ministry advises that it attempted to accommodate the appellant's request by inserting this information into the October 1996 charts which were provided to him.

With respect to additional positions which the appellant expected to see on the charts, the Ministry indicates that the charts were reviewed by the Co-ordinator, the Advisor and the Assistant Advisor. As I noted above, all of these individuals are familiar with the organization of the Ministry during the time period covered by the organizational charts. They confirm that these charts are the ones that were prepared, first, to reflect the Ministry organization after the

reorganization that took place at the beginning of 1995, and second, to reflect changes that had taken place since the first organizational charts were prepared.

With regard to the appellant's contention that there should be a series of organizational charts reflecting each stage of downsizing, the Ministry states that because of the extensive and on-going nature of the changes and the lack of certainty with respect to the changes, formal organizational charts were not prepared. The Ministry indicates that the October 1996 organizational charts were the only ones prepared which reflect the changes which occurred during the time period following the preparation of the February 1995 charts.

Finally, regarding additional job descriptions, the Ministry indicates that the Co-ordinator, the Advisor and the Assistant Advisor confirmed that the job descriptions which were provided to the appellant reflect the relevant job descriptions of employees in the parts of the Ministry at issue in the request. The Ministry states that it has never been its practice to include salary ranges in job descriptions.

Following my review of the Ministry's representations and the appellant's correspondence with this office, I am satisfied that the Ministry's search for records responsive to the appellant's request was reasonable.

FEES/ FEE WAIVER

CALCULATION OF THE FEE

The first issue to be determined in this discussion is whether the Ministry's fee estimate of $157.56 is calculated in accordance with the Act and the Regulations made thereunder. Section 57(1) of the Act and Regulation 460, each dealing with fees, were amended in February 1996 by the Savings and Restructuring Act. The request and appeal, in this case, were both initiated subsequent to these amendments and are, accordingly, subject to the fee provisions, as amended. Section 57(1) states:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Section 6 of Regulation 460 (as amended by Regulation 21/96) provides:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

The Ministry submits that its fee estimate was calculated as follows:

Part 1:	search time 1 hour @ $30 per hour	$ 30.00
	photocopies (20 pages @ $.20/page)	4.00
Part 2:	search time 1 hour @ $30 per hour	30.00
Part 4:	search time 2 hours @ $30 per hour	60.00
	photocopies (156 pages @ $.20/page)	31.20
Purolator Charges		2.36
TOTAL		**$157.56**

Search Time

In its representations, the Ministry indicates that the actual costs of responding to parts 1, 2 and 4 of the appellant's request totalled $873.40. This amount includes: 18 hours of search time (@ $30 per hour = $540); 10 hours of preparation time (@ $30 per hour = $300) and photocopies of 167 pages (@ $.20 per page = $33.40).

The Ministry indicates that the bulk of the time actually expended was spent searching for the job descriptions obtained from the organizational charts. This was the case because files at a number of locations within the Human Resources Branch had to be searched. In addition, the appellant indicated that he did not want duplicate job descriptions. The Ministry indicates that this required the comparison of a number of job specification documents.

The Ministry also states that although it is not a Ministry requirement to include classifications on the organizational charts, in order to respond to the appellant's request, its staff searched other files for this information and manually inserted the classifications onto the October 1996 chart. The Ministry indicates that the bulk of preparation time was spent in creating a form of the record which would be responsive to the request.

The Act does not require that the Ministry create a record in order to respond to an access request. In this case, the Ministry chose to add the information from another source within the Ministry in an attempt to respond to the appellant's request. However, I note that the appellant was not charged for this preparation time.

In his correspondence, the appellant indicates that as a former employee of the Ministry, he has had experience in preparing Ministry responses to access requests and he, therefore, has knowledge of the costs involved. He states:

> I can recall that major discounting of fees were made at Head Office which pretty well wiped out search time charges and vastly reduced photocopy charges. No business that I am aware of charges $.20 per copy and, in fact, the Ministry's Eastern Regional Office accepts $.03 per copy for employee personal copying.

The Legislature's intention to include a user pay principle in the Act is clear, as evidenced by the provisions of section 57 and Regulation 460. As I noted above, these provisions set out the amounts that an institution shall charge in responding to an access request. In my view, despite the appellant's purported experience with the Act, his perception of what he should be charged is inconsistent with the charges allowable under the Act.

In reviewing the Ministry's explanation of the steps taken to search for and locate records responsive to the appellant's request, I am satisfied that the estimated costs of $157.56 charged to him were calculated in accordance with the Act and Regulation.

Photocopies

The fee estimate for 176 pages of photocopies (amounting to $35.20) was calculated in accordance with the fees which the Ministry is entitled to charge for photocopies. However, the Ministry indicates that it actually only photocopied 167 pages (amounting to $33.40). The Ministry has, therefore, overcharged the appellant $1.80 for the photocopies. In my view, because the actual costs of responding to the appellant's request far exceeds the amount charged to the appellant, it will not be necessary for the Ministry to reimburse the appellant for this amount.

Shipping Costs

The Ministry has included a charge of $2.36 for courier service. This charge represents the cost of shipping the records to the appellant, which is an allowable charge under section 57(1)(d) of the Act.

In summary, I find that the Ministry's fee estimate of $157.56 was prepared in accordance with section 57(1) and Regulation 460.

FEE WAIVER

The appellant submits that the requirement for the payment of a fee in the circumstances of this appeal should be waived under sections 57(4)(b) of the Act. This section reads:

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering:
>
> > whether the payment will cause a financial hardship for the person requesting the record.

It has been established in a number of previous orders that the person requesting a fee waiver must justify the request and demonstrate that the criteria for a fee waiver are present in the circumstances (Orders 10, 111, P-425, P-890, P-1183 and P-1259). I am also mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 57.

In requesting a fee waiver, the appellant advised the Ministry that he was out of work and had not had any income for two months. He indicated that, as a result, his ability to pay was severely limited. However, the appellant has not provided the Ministry or this office with any information regarding his present financial situation. Based on the limited information provided by the appellant regarding his employment status, I am not satisfied that the payment of the estimated fee would cause the appellant a financial hardship within the meaning of section 57(4)(b).

Therefore, I find that, in the circumstances of this appeal, the appellant has not established that it would be fair and equitable for the fee to be waived on the basis that the payment of a fee would cause him a financial hardship.

JURISDICTION

The final issue in this appeal is whether the records responsive to part 5 of the request fall within the scope of sections 65(6) and (7) of the Act. These provisions 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.

The record identified by the Ministry as responsive to part 5 of the request is entitled "Housing Operations Division, Budget Reduction Strategy, Options Paper". The Ministry claims that the record falls within the parameters of section 65(6)3 of the Act.

To substantiate this claim, 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-1223)

Requirements 1 and 2

The Ministry states that the options paper was prepared by Ministry staff to be used specifically for meetings and discussions by senior management "in connection with the establishment of a basis for determining specific position and expenditure reductions to meet government-wide savings targets". According to the Ministry, the document, meetings and discussions focused on employment-related issues.

In Order P-1223, former Assistant Commissioner Tom Mitchinson 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 options paper deals with various labour relations and employment-related matters, such as the impact of the collective agreement between the Ministry and its employees on decisions made about the "surplussing" of specific positions, and the effects on Ministry employment of the government-wide savings targets.

The Ministry indicates that the purpose of the meetings and discussions was to make decisions based on the options provided in the record.

Having reviewed the Ministry's representations and the record at issue, I agree that the record reflects 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, former Assistant Commissioner Mitchinson 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. He concluded as follows:

> 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 agree with this interpretation and adopt it for the purposes of this appeal.

The Ministry states that its legal interest in the labour relations and employment-related matters contained in these records arises from statute, including the Public Service Act (the PSA) and the Employment Standards Act (the ESA), from collective bargaining agreements, including the Central Collective Agreement between the Ontario Public Service Employees Union and the Government of Ontario (the Central Agreement) and from general common principles regarding employer/employee relations, including the termination of employment of public servants.

The Ministry has also provided a number of examples of the specific provisions of the Central Agreement, the PSA and its regulations, and the ESA and its regulations which affect the Ministry's legal rights or obligations with respect to the matters set out in the record at issue. The Ministry notes that employee complaints in regard to the employment-related issues dealt with in this record could result in the filing of a grievance under Article 27 of the Central Agreement.

Having reviewed the record and the Ministry's submissions, I am satisfied that the meetings and discussions have the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that they are matters "in which the institution has an interest". The record deals with employment impacts, such as staff reductions and workload demands, that will result from savings targets. These are matters having the capacity to affect the Ministry's legal rights or obligations, pursuant to the Central Agreement and/or the PSA and ESA.

In summary, I find that the record was prepared, maintained and/or used by employees of the Ministry in relation to meetings, discussions or communications about labour relations and/or employment-related matters. Consequently, all of the requirements of section 65(6)3 have been established by the Ministry. None of the exceptions contained in section 65(7) apply. Therefore, the options paper is excluded from the scope of the Act.

ORDER:

1. I uphold the Ministry's decision regarding the fees charged to the appellant in the amount of $157.56.
2. I uphold the Ministry's decision not to waive the fees.

3. Section 65(6)3 applies to the record responsive to part 5 of the request, and this record is excluded from the scope of the Act.

4. The Ministry's search for records was reasonable and this part of the appeal is dismissed.

Original signed by: March 6, 1997
Laurel Cropley
Inquiry Officer