Information and Privacy
Commissioner/Ontario

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

ORDER P-1513

Appeals P-9700256 and P-9700265

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NATURE OF THE APPEALS:

The Ministry of Environment and Energy, now the Ministry of the Environment (the Ministry), received two requests under the Freedom of Information and Protection of Privacy Act for access to records relating to the Ministry's downsizing which resulted in the requester being surplussed. The requests sought access to:

(1) Any directives, memos or other types of correspondence from the former Assistant Deputy Minister to management, outlining the criteria to be used by the directors and managers in assessing which programs would cease to be funded in the Ministry's downsizing plans and which individuals would be surplussed on May 22, 1996;

(2) A copy of the Ministry downsizing/restructuring plan which was referred to in the surplus letter received by the requester;

(3) A copy of the work plans for all employees of the Aquatic Toxicology section of the Standards Development Branch of the Ministry for the 1996/1997 fiscal year.

With respect to item 1, the Ministry indicated that there were no records responsive to the request. With respect to item 2, the Ministry located an organizational chart and disclosed the record to the requester. However, both the parties acknowledge that this record does not contain the information being sought and therefore, is not responsive to the request. With respect to item 3, the Ministry provided the requester with a work plan for the Aquatic Toxicology section and stated that work plans for individual employees did not exist.

The requester appealed both decisions on the basis that records responsive to items 1, 2 and 3 should exist. Appeal Numbers P-9700256 (items 1 and 2) and P-9700265 (item 3) were opened. The requester (now the appellant), the institution and the subject matter requested are the same and I will, therefore, dispose of the issues arising from both appeals in this order.

The Ministry did not refer to the possible application of section 65(6) (jurisdiction) in its decision letters. However, it appears that if the records existed, they would deal with labour relations or employment-related matters. Accordingly, in the Notice of Inquiry provided by this office, the parties were asked to comment on the possible application of section 65(6) (jurisdiction) of the Act and the reasonableness of the Ministry's search for records responsive to the request. Representations were received from both parties.

DISCUSSION:

JURISDICTION

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.

Sections 65(6) and (7) 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:
>
> 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.

In its representations, the Ministry states that it conducted a thorough search for responsive records and none were located. The Ministry position is that "if [responsive] records had been located, this exclusion [section 65(6)] would have been utilized".

The Ministry submits that the responsive records, if they were located, would have been prepared by Ministry officials, relate to downsizing and therefore, relate directly to the employment of

Ministry officials. The Ministry states that the Assistant Deputy Minister (the ADM) discussed the downsizing with directors in the particular division and since the downsizing affected the sections or positions that would be declared surplus, the discussions would affect both labour relations and employment-related matters.

The Ministry explains that the appellant has filed a number of grievances as a result of his position being declared surplus and consequently, the Ministry, as the employer, has a duty to meet its obligations under the collective agreement with OPSEU and the Crown Employees Collective Bargaining Act. Further, during the downsizing, the Ministry is also required to comply with the Human Rights Code.

The Ministry relies on Order M-941 and states that these records would meet the three requirements of section 52(3)3 of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent of section 65(6)3 of the Act. 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.

In Order M-941, the record at issue was a report relating to a departmental operational review. In that order, I found, upon review of the record, that while it included suggestions for the elimination of certain positions and the creation of others, the report was primarily an organizational review of the department. I concluded that the record was more appropriately characterized as relating to the "efficiency and effectiveness of the operation" rather than to labour-relations or employment-related matters and that the record was subject to the Act.

I have reviewed the representations of the parties. It is likely that the records, if they are located, would contain information about labour relations and employment-related matters. However, I cannot conclude, without viewing the records, that they were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications. In addition, section 65(6)3 also requires that these labour relations or employment-related matters be ones in which the institution has an interest.

In the subject appeal, I do not have the record to review. The request is for "[a]ny directives, memos or other types of correspondence from ...", "a copy of the Ministry downsizing/restructuring plan" and "a copy of the work plans for all employees...". In my view, the wording of the request is broad enough that it could encompass records which are not directly related to labour-relations or employment related matters.

Section 65(6) is record-specific and fact specific. Even if I were to consider the application of sections 65(6)1 and 65(6)2, there is not sufficient evidence before me to link the records (as

described in the requests) with the requirements of these sections. I am not persuaded that **all** of the records requested would fall within the purview of labour relations or employment related matters or grievance proceedings.

For all the reasons above, I am therefore, unable to conclude that all three requirements of section 65(6) have been met. Accordingly, I find that the records are subject to the Act and I have jurisdiction to address the issue of the reasonableness of the Ministry's search for responsive records.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the Ministry indicates that such records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any responsive records. The Act does not require the Ministry to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified, the appellant must provide a reasonable basis for concluding that records may, in fact, exist.

In his representations, the appellant states that the section work plan that has been provided to him by the Ministry does not contain the information that he is seeking. He states that this record does not contain all the programs, the percentage of each person's time that was to be allocated to each program, the objectives of each program and the delivery times of each program. The appellant believes that such a plan was tabled by the Manager at one of the section meetings in 1996.

The appellant submits that the downsizing/restructuring plan was referred to in the surplus notice received from the former ADM. Therefore, it is the appellant's position that such a plan must exist. The appellant states the ADM had met with staff to advise them of the impending layoffs and at that time, had discussed some of the criteria to be used in determining which programs would be cut. The appellant submits that it is difficult to believe that the Ministry "did not have a written restructuring or downsizing plan and that they may not have used clear and universally-applied criteria to test, evaluate and determine which programs would be scaled back or eliminated and which people would be surplussed".

In its representations, the Ministry submits that searches were conducted through the files of the ADM and the files in the Standards Development Branch, where the Aquatics Toxicology section is located. The Ministry provided written confirmation from the Assistant Budget Coordinator, who conducted the initial search and a subsequent search of the ADM's files, that no records were located.

Written confirmation was also provided from the Divisional Budget Co-ordinator (the Co-ordinator) that no responsive records exist. The Co-ordinator states that he was present at most

of the management meetings between the ADM and the Directors where these issues were discussed. He states that the division had completed a priority setting initiative. The Co-ordinator states that one-on-one meetings were held and each Director was asked to review his/her programs and report back to the ADM as to which activities could be discontinued and which ones could be done more efficiently or through an alternative method.

With respect to the work plan, the Ministry has acknowledged that the record disclosed to the appellant is not totally responsive to the request. The Ministry submits that the record was provided by the Manager of the Aquatic Toxicology Section who advised that this record represents the "final work plan" for the section and that no individual work plans were produced for the 1996/97 fiscal year.

I am sympathetic to the appellant's position. It is reasonable to expect that a government body, in its efforts to improve the efficacy of the system, would have a well-documented plan with specific criteria, either from the Managers of its various divisions or from the executive, to rely upon in a process which is as critical as downsizing. However, I have reviewed the letter from the ADM to the appellant which reads "[a]s a result of downsizing/restructuring plans for this ministry...". In my view, the reference to the "downsizing/restructuring plans" does not necessarily dictate that a concrete and specific plan exists.

As I have indicated previously, the Ministry does not have to prove with absolute certainty that records responsive to the request do not exist. But the Ministry does have to provide me with sufficient evidence that searches in likely locations were conducted by experienced employees who are familiar with the records which may be responsive to the requests. In the present case, the Ministry states definitively that, although it has conducted several searches, the records were not located because they have never existed. It has also provided evidence of its searches together with confirmation from the parties involved.

I have carefully reviewed the representations of the parties and I am satisfied that the Ministry's searches for records responsive to the requests were reasonable in the circumstances.

ORDER:

I dismiss the appeals.

Original signed by: January 8, 1998
Mumtaz Jiwan
Inquiry Officer