



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1530

Appeal P-9700295

Ministry of the Environment



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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information related to the status of various positions within the Standards Development Branch (the SDB) in the Ministry. Specifically, the requester sought access to:

1. The dates on which two Scientist 2 positions (Assistant Regulatory Toxicologist and Assistant Environmental Toxicologist) were deleted from the SDB;
2. The date on which the Assistant Environmental Scientist position in the Pesticide section of the SDB became vacant, what the status of the position was on April 1, 1997, what the status of the position is at the current time, and whether the position was filled at any time during the period from when it became vacant until the present time;
3. The date on which the incumbent in the Assistant Environmental Scientist position commenced her educational leave of absence, how long the position was temporarily vacant, the date on which the incumbent returned to occupy the position on a full-time basis, the current status of the position, and whether the position was filled at any time during the period from when it became vacant to the present time; and
4. A complete and accurate list of all temporary and permanent (or "true") vacancies in the SDB on April 1, 1996, May 22, 1996 and April 1, 1997, including the position title, position code and an indication of whether the vacancy was a temporary or permanent vacancy.

The Ministry identified the requested information and denied access to it on the basis that section 65(6) of the Act applies. The requester, a former employee of the Ministry, appealed the decision to deny access.

The Ministry has provided the information to which access was denied, to this office, for the purposes of the appeal and this order. Page 1 contains information responsive to parts 1, 2 and 3 of the request as set out above. Pages 2-4 contain the information responsive to part 4 of the request.

During mediation, the appellant indicated that he had previously received the information on pages 2-4 from the Ministry but believed that it did not include the temporary vacancies within the SDB. He claimed that records containing this information should exist. The Ministry indicated that it did not have a complete list of all temporary and permanent vacancies for the requested dates of May 22, 1996 and November 22, 1996, but has provided information as at August 21, 1996.

This office provided a Notice of Inquiry to the appellant and the Ministry. The information on page 1 of the record appears to contain personal information and accordingly, in addition to the application of section 65(6) and the reasonableness of the Ministry's search for responsive

records, the parties were also asked to comment on the application of section 21(1) (invasion of privacy). 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) 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)3

In Order P-1242, Assistant Commissioner Tom Mitchinson stated that in order for a record 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 submits that the information in the records was gathered from successive organizational charts and from personnel files. The Ministry submits that the charts and hence the information at issue, are prepared by the branch, in this case the SDB. They are then forwarded to the Environmental Sciences and Standards Divisional Co-ordinator who checks them for accuracy and has them approved by the Director of the branch and the Assistant Deputy Minister before they can be designated as "official" for planning and budgetary purposes. The charts also contain information from personnel files.

The Ministry explains that vacancies are listed on the organizational charts without reference to a category of "temporary vacancy" since a position is left vacant until the approval of the Assistant Deputy Minister is obtained to recruit. The Ministry states that leaving a position vacant allows the Ministry the greatest latitude to meet its financial constraints and in many cases, these vacant positions are declared "surplus" at a later date. The Ministry states that the organizational charts reflect the downsizing that the Ministry is undergoing as a result of fiscal reductions and are used to orally discuss ongoing staff reductions and future program planning and budgeting. The Ministry submits therefore that its staff collected, prepared, maintained and used the information contained in the records in relation to meetings, consultations, discussions and communications within the branch, the department and the Ministry. I find that the first and second requirements have been met.

Requirement 3

The Ministry submits that since the downsizing process affected the sections and positions that were being declared surplus within the SDB, the meetings, consultations, discussions and communications related to both labour relations and employment-related matters. During the downsizing, the Ministry is required to follow the requirements of the Ontario Human Rights

Code and the collective agreement that it has with its employees. I find that the communications between the branch, the department and the Ministry are “about labour relations” and “employment-related matters” for the purposes of section 65(6)3.

In Order P-1242, Assistant Commissioner Tom Mitchinson stated the following regarding the meaning of the term “has an interest”:

Taken together, these [previously defined] 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 Ministry states that it is obliged to conduct the downsizing and planning process in accordance with terms and conditions set out in the Public Service Act, the Crown Employees Collective Bargaining Act, the collective agreement with OPSEU and the Corporate Management Directives. The Ministry submits that any variance or violation would affect its legal rights and obligations. I find that the Ministry has an interest in adhering to the terms and conditions of the agreements described above. Accordingly, I find that the third requirement has been met.

All of the requirements of section 65(6)3 of the Act have been established. None of the exceptions in section 65(7) apply in the circumstances of this appeal. I find that the records are excluded from the scope of the Act.

Because I have found that the records fall outside of the scope of the Act, I find that I do not have the jurisdiction to address the reasonableness of the Ministry’s search for responsive records and the application of section 21(1) of the Act.

ORDER:

I uphold the Ministry’s decision and dismiss the appeal.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

February 13, 1998