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

FINAL ORDER PO-2105-F

Appeal PA-020096-1

Ministry of Public Safety and Security

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 Ministry of Public Safety and Security (formerly the Ministry of the Solicitor General) (the Ministry), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the appellant for access to records "concerning a meeting held on Sunday, June 9, 1996, concerning the report of [named individual], Child Advocate, Entitled 'Summary Report and Recommendations on the Management of Youth Transferred from the Bluewater Youth Centre Upon and Following Their Admission to Elgin Middlesex Detention Centre', February 19, 1996". Specifically, the appellant wanted access to all information and documentation concerning the June 9, 1996 meeting, including the following:

1. The names of all those in attendance and confirmation of the following officials known to have been present: [11 names provided]

…

2. Copies of any and all documents prepared for the meeting, during the meeting or after the meeting, whether the author of the documents was in attendance or not. Such documents to include but not be limited to: personal notes, briefing papers, Issue notes, "talking points", question and answers, reports, memos, minutes of the meeting E-mails and correspondence.

The Ministry responded to the appellant as follows:

> As you may be aware, the Ministry of Correctional Services and the Ministry of the Solicitor General became separate ministries in June of 1999. In view of the fact that your request concerns a correctional services matter, the Ministry of Correctional Services will be responding to your request on behalf of the former Ministry of Solicitor General and Correctional Services. The search for potentially responsive records will include record holdings of the former Ministry of the Solicitor General and Correctional Services and the current Ministry of Correctional Services.
>
> Based on the content of your request, our office plans to undertake a search for responsive records in the following program areas:
>
> Deputy Minister's Office
> Communications Branch
> Legal Services Branch
> Office of the Assistant Deputy Minister, Community and Young Offender Operations.
>
> Could you please confirm whether there are any other ministry locations where you believe responsive records may exist. Also, could you please advise the purpose of the June 9, 1996 meeting, the name of the person who coordinated or chaired the meeting, the location of the meeting and the approximate time length of the meeting. This will assist with the records search process. Once we have

> received the necessary clarification and details, our office will proceed with a search for responsive records.

The Ministry also noted that two of the individuals identified in the request appear to have been representatives of the Ministry of the Attorney General, and that one individual appears to have been a representative of Management Board Secretariat. The Ministry stated that any records prepared or retained by these individuals would be in the custody and/or under the control of their respective ministries, and suggested that the appellant submit separate requests under the *Act* to each of these ministries directly. The appellant subsequently did so.

The appellant responded to the Ministry's letter as follows:

> In response to your questions please be advised that the meeting in question was held at 175 Bloor Street East, was apparently organized by [named individual] and Chaired by [named individual]. The purpose of the meeting was to "review the situation (the allegations of the Child Advocate)…so that the minister … would have an appropriate response for the House on (the following) Monday" and "to see what we (the Ministry) had on our hands and how we would deal with it". I am unaware how long the meeting lasted but as it was a special meeting that took place on a Sunday, I am sure that any of the participants will be able to provide you with that information.
>
> Other locations I would suggest that pertinent information will be found are as follows:
>
> Office of the Solicitor General
> Office of the Assistant Deputy Minister, Correctional Services
> Office of the Operational Support and Coordination Branch
> Information Management Unit
> Issues Coordination Unit

The Ministry then issued a decision to the appellant, identifying that it had undertaken an extensive records search involving the following program areas:

> Office of the Minister and Deputy Minister's Office – former Ministry of the Solicitor General and Correctional Services
> Communications Branch – Ministry of the Solicitor General
> Communications Branch – Ministry of Correctional Services
> Legal Services Branch – Ministry of the Solicitor General and Ministry of Correctional Services (includes records currently held by external legal counsel)
> Assistant Deputy Minister's Office – Community and Young Offender Services (includes record holdings of the former Assistant Deputy Minister, Correctional Services Division) – Ministry of Correctional Services
> Operational Support and Standards Branch (includes record holdings of the Information Management Unit and the former Operational Support and Coordination Branch) – Ministry of Correctional Services

The Ministry located 52 pages of responsive records, consisting of correspondence, briefing materials and handwritten notes, and denied access to all of them on the basis that they fell within the scope of section 65(6) and were therefore excluded from the *Act*.

The appellant appealed the Ministry's decision.

During mediation, the appellant took the position that additional responsive records should exist, such as any notes taken at the June 9, 1996 meeting. In response, the Ministry stated:

> The Ministry believes its records search was reasonable in the circumstances of the appellant's request. The Ministry is of the view that the content of the identified responsive records clearly confirms that such records fall outside the scope of the [*Act*] in accordance with section 65(6). There is no ambiguity in this respect. As such, the provisions of the [*Act*] do not apply. The Ministry believes that the reasonableness of the records search process should only be considered if the already identified records are determined to be subject to the *Act*.

Mediation was not successful in resolving the appeal, so it was transferred to the adjudication stage. I sent a Notice of Inquiry to the Ministry, initially, inviting written representations on the possible application of section 65(6), the reasonableness of the Ministry's search for responsive records, and whether the search issue should be deferred until I make my decision on the section 65(6) jurisdictional issue.

In the course of preparing its representations, the Ministry conducted more searches and located one additional one-page responsive record. The Ministry advised the appellant that access to this record was denied on the basis of section 65(6) of the *Act*. I have included this record within the scope of the appeal.

The Ministry then submitted representations in response to the Notice of Inquiry, including an attached affidavit outlining the various search activities. After reviewing the representations, I decided that it was necessary to proceed to the next stage of the inquiry process and to seek representations from the appellant on two issues: (1) the application of section 65(6); and (2) the timing for my review of the reasonable search issue. I also decided that it was necessary to share the Ministry's representations on these two issues with the appellant, subject to certain valid confidentiality considerations. Because I decided not to deal with the issue of whether the Ministry's searches for records was reasonable, it was not necessary to share the affidavit with the appellant at that time, although I did not rule out the possibility of sharing it in future, depending on how I decided to deal with the search issue.

After issuing Interim Order PO-2070-I, which dealt with issues involving the sharing of the Ministry's representations with the appellant, I sent the Notice of Inquiry and the non-confidential portions of the Ministry's representations to the appellant, inviting representations on the two identified issues. The appellant provided representations in response.

RECORDS:

The Ministry has identified 53 pages of responsive records. I have grouped the records into the following categories:

1. briefing materials prepared for the Solicitor General and Minister of Correctional Services (the Minister) (39 pages);

2. e-mail message transmitting briefing materials (1 page)

3. handwritten letter from the Deputy Solicitor General and Deputy Minister of Correctional Services (the Deputy Minister) to the Minister, dated June 9, 1996 (2 pages)

4. two 2-page "action plans" signed by the Deputy Minister, dated June 9, 1996 and June 10, 1996, respectively (4 pages)

5. a 1-page letter from the Deputy Minister to the appellant, dated June 13, 1996

6. letters sent from a senior Ministry official to various Ministry employees, all dated June 10, 1996 (3 pages)

7. handwritten notes reflecting a meeting that took place involving senior Ministry officials and the appellant, dated June 10, 1996 (2 pages)

8. handwritten notes reflecting a meeting that took place involving various Ministry and government officials, dated June 9, 1996 (1 page)

The category 8 record is the one identified by the Ministry after the appeal had been transferred to the adjudication stage.

All of the records contain information relating to events stemming from the release of the Child Advocate's Report concerning the transfer of young offenders in February 1996.

DISCUSSION:

SECTION 65(6) OF THE *ACT*

Introduction

Section 65(6) of the *Act* reads as follows:

> 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.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) are present, the records are excluded from the *Act*. Section 65(7) is not relevant in the context of this appeal.

Section 65(6)1

General

In order for a record to fall within the scope of section 65(6)1, the institution must establish that:

1. the record was collected, prepared, maintained or used by the institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Requirement 1

The Ministry submits that all of the records were collected, prepared, maintained and used by the Ministry. The appellant's representations do not deal specifically with this requirement.

Having reviewed the records, I find that all of them were prepared, maintained and/or used by the Ministry, thereby satisfying the first requirement of section 65(6)1.

Requirement 2

The Ministry takes the position that the preparation, maintenance and use of the records was "in relation to proceedings and anticipated proceedings before the Divisional Court, the Ontario Superior Court of Justice and the Public Service Grievance Board."

In support of its position, the Ministry submits:

> The records at issue are substantially connected to a judicial review application filed in the Divisional Court by the appellant in relation to the Ministry's decision to remove him from his position … and re-assign him to a Ministry project pending the outcome of the internal investigation and review of the EMDC [Elgin Middlesex Detention Centre] abuse allegations. On January 6, 1997, in an unreported decision, the Court confirmed that the Ministry, as an employer, had the right to re-assign the appellant.
>
> The records at issue also appear relevant with respect to a civil action recently initiated by the appellant and another former EMDC employee in respect to the 1996 Child Advocate's Report … . On May 24, 2002, a Statement of Claim was filed at the Ontario Superior Court of Justice. [The Ministry] is one of the defendants. … The content of paragraph 33 of the Statement of Claim arises in the context of the appellant's employment with the Ministry. Paragraph 33 states:
>
> > As a direct result of the libellous Report, in May, 1997 both of the Plaintiffs were terminated from their employment with the Ministry of Correctional Services.
>
> The records at issue in the appeal are also substantially connected to a grievance filed by the appellant on May 9, 1997. The appellant's statement of grievance reads:
>
> > I grieve that I have been denied due process and natural justice and have been wrongfully and unjustly dismissed from my employment as a classified civil servant with the Ontario Public Service.
>
> … On May 20, 1997, the Ministry received notice that the grievance was received by the Public Service Grievance Board. On May 27, 1997, the Ministry received notice from the Public Service Grievance Board that a hearing would be held in regard to the grievance on July 18, 1997. …

The appellant disputes the Ministry's position.

As far as any records prepared before or at the June 9, 1996 meeting are concerned, the appellant maintains that "[b]efore any determinations can be made as to whether section 65(6) applies, it is essential to first of all establish the purpose of the [June 9, 1996] meeting". In that regard, the appellant points to a sworn statement made by a senior government official (apparently in the context of a related proceeding), wherein, according to the appellant, the official states that the purpose of the meeting was to:

> "… review the situation {the allegations of the Child Advocate[}] … so that the Minister … would have an appropriate response for the House on Monday {June

> 10} and to see what we {the ministry} had on our hands and how we could deal with it."

The appellant submits that this statement, as well as the content of the Child Advocate's Report, the fact that the meeting took place on a Sunday, and his understanding that a number of senior executives and political staff were in attendance at the meeting, support his position that the purpose of the meeting was not in relation to employment or labour relations issues.

As to the Ministry's position that the records were prepared in anticipation of legal actions, the appellant submits that this position is "patently absurd". He goes on to state:

> Such production would be counter-productive to the ministry's purpose given the sworn statement of [the senior ministry official] which shows that the attendees at the June 9 meeting, those responsible for the administration of justice in Ontario, conspired illegally to abrogate the rights of EMDC managers, knowingly conspired to suspend them in direct violation of the Public Service Act, for political purposes. Were [the Information and Privacy Commissioner] to somehow find that the referenced documents meet the criteria of section 65(6), the ministry should not be allowed to benefit from "the fruits of the poisoned tree".

As far as any records prepared as a result of the June 9, 1996 meeting are concerned, the appellant submits that they:

> … do not reflect bona fide employment or labour relations issues but were merely tactical expressions of the strategy developed to scapegoat managers for political purpose - to protect the minister … from criticism. Some may have been submitted at various proceedings since the June 9 meeting but not all. …

The appellant takes the position that any records produced in the context of a proceeding are already in the public domain and should be accessible to anyone interested in them; and that any records not already produced are unlikely to be, given statutory restrictions for bringing actions against the Crown, and these records should be made available for that reason. The appellant also points out that his current lawsuit, referred to by the Ministry, was initiated after his request was made under the *Act*, and submits:

> … Furthermore, I filed suit five years after I had left public service and was not an employee of the government and most importantly, the substantive issue of the suit, libel, is based on the improper conduct of a public servant who is a defendant along with the government.

In order to satisfy the second requirement of section 65(6)1, the preparation, maintenance and/or use of the records must be "in relation to" proceedings or anticipated proceedings. In Order P-1223, I found that in order to be "in relation to" proceedings or anticipated proceedings, the preparation, maintenance and/or use of the records must be "for the purpose of, as a result of, or substantially connected to" the proceedings.

Past orders have defined "proceedings" for the purpose of section 65(6)1 as a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide the matters at issue (Order P-1223).

Clearly, the appellant's judicial review application that was heard and disposed of by the Divisional Court in 1997 constitutes a "proceeding before a court", as does his current action filed in the Superior Court of Justice. In Order P-1223, I found that hearings before the Grievance Settlement Board constitute a dispute and complaint resolution process that had, by law, the power to decide grievances and, as such, properly constitute "proceedings before a tribunal". For the same reasons, I find that hearings before the Public Service Grievance Board, which has a mandate similar in nature to the Grievance Settlement Board, are also "proceedings before a tribunal" for the purposes of section 65(6)1.

To fall within the definition of an "anticipated proceeding", the proceeding must be more than just a vague or theoretical possibility. Rather, there must be a reasonable prospect of such a proceeding at the time the record was prepared, maintained or used (Order P-1223).

As the Ministry states in its representations, the records at issue in this appeal all relate to human resources actions involving the appellant and other employees. In my view, the "actions" referred to by the Ministry are the subsequent disciplinary steps it took with respect to the appellant and others stemming from the Child Advocate's Report. The Ministry refers to the contents of the category 3 handwritten letter from the Deputy Ministry to the Minister as confirmation that the activities taking place at the June 9, 1996 meeting related to human resources actions that "involved the appellant and other employees". The one category 8 record, which was prepared in the context of the June 9 meeting itself, confirms the nature of the discussions at the meeting and the human resources actions under consideration at that time. The contents of the category 4, 5, 6 and 7 records, which are dated a short time after the June 9, 1996 meeting, also reflect actions taken at the meeting. In the circumstances, and as evidenced by the various "proceedings" that followed the Ministry's actions in this regard, in my view, there was a reasonable prospect that the grievance (and arguably also the judicial review application) would be initiated by the appellant as a result of the human resource actions discussed at the June 9, 1996 meeting, and I find that these proceedings are properly characterized as anticipated proceedings for the purposes of section 65(6)1. As far as the category 1 and 2 records are concerned, although they were prepared after the June 9 meeting and for the purpose of briefing the Minister on the Child Advocate's Report, which dealt with events that took place at the Elgin Middlesex Detention Centre involving the appellant and other Ministry employees, I find that they are directly related to the "anticipated proceedings" that are the subject matter of the other records at issue in this appeal.

I also find that all of the records were prepared, maintained and/or used for the purpose of or are substantially connected to the various anticipated proceedings, and are properly characterized as being "in relation to" these proceedings. In this regard, I do not accept the appellant's restrictive interpretation of the application of section 65(6)1. Although the purpose of the June 9, 1996 meeting may be a relevant consideration in determining whether records fall within the scope of section 65(6)1, it is clear from the wording of this section that records collected or prepared for one purpose that does not qualify under section 65(6)1 could subsequently be maintained or used for a different purpose that does qualify.

A number of previous orders found that the requirements under section 65(6)1 are "time sensitive", and concluded that in order to meet the requirements, an institution must establish that the proceedings or anticipated proceedings referred to are current or are in the reasonably proximate past so as to have some continuing potential impact on any ongoing labour relations issues which may be directly related to the records. However, in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 507, the Ontario Court of Appeal found that this office's interpretation of section 65(6) was incorrect. The Court stated the following with respect to the "time sensitive" element under this section:

> In my view, the time sensitive element of subsection [65(6)] is contained in its preamble. The *Act* "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, *i.e.* when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the *Act*, the records remain excluded. The subsection makes no provision for the *Act* to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.

Accordingly, the fact that the appellant's grievance and judicial review application were dealt with in 1997 and are no longer current or in the reasonably proximate past has no impact on the application of section 65(6)1 in the circumstances of this appeal.

In summary, I find that all of the records were prepared, maintained and/or used by the Ministry in relation to anticipated proceedings before the Public Service Grievance Board and/or the Courts, thereby establishing the second requirement of section 65(6)1.

Requirement 3

The Ministry submits that proceedings before the Public Service Grievance Board relate to the employment of a person by the Ministry, as required in order to establish the third requirement of section 65(6)1.

The Public Service Grievance Board is a tribunal established by statute to hear and dispose of grievances filed by certain classes of employees within the Ontario Public Service. The job held by the appellant clearly fell within the Board's jurisdiction, as evidenced by the fact that the Board received and dealt with his grievance in 1997. Accordingly, I accept the Ministry's position and find that the third requirement of section 65(6)1 has been established.

Therefore, all of the requirements of section 65(6)1 have been met. None of the exceptions in section 65(7) apply, and I find that all of the records are excluded from the scope of the *Act*.

ADEQUACY OF SEARCH

The appellant maintains that more responsive records should exist, specifically notes taken by those in attendance at the June 9, 1996 meeting.

The Ministry submits that it has conducted a reasonable search for all responsive records (which is supported by the detailed affidavit provided in response to my Notice of Inquiry), but also maintains that "the requirements for reasonable search activities relating to records that are subject to [the *Act*] should not be rigidly adhered to in situations where an institution has received a request for excluded records". The Ministry points to Orders P-1395, P-1547 and MO-1412 in support of its position, and in particular refers to the findings of Senior Adjudicator David Goodis in Order MO-1412. In that case, which involved the equivalent provision to section 65(6) contained in the *Municipal Freedom of Information and Protection of Privacy Act* (section 52(3)), Senior Adjudicator Goodis stated:

> … the appellant submits that Hydro did not conduct a reasonable search for responsive records. In his representations, the appellant provides detailed descriptions of the records or types of records which he believes Hydro should have identified as responsive to his request. In my view, these records, whether or not they exist or should have been identified by Hydro, would fall within the scope of section 52(3)3, for the reasons outlined above. Accordingly, no useful purpose would be served by making a determination on this issue and, therefore, I will not do so.

It is clear from this quotation from Order MO-1412 that a decision to absolve an institution of its responsibilities to conduct searches for all responsive records is dependent on the specific fact situation presented in a particular appeal. In Order MO-1412, Senior Adjudicator Goodis was satisfied, based on his treatment of records that had been identified as responsive, that any other records that might exist would, by definition, be treated in the same manner. In my view, I am faced with a similar situation in this appeal.

As a result of its extensive search efforts, the Ministry identified one record (the category 8 record) that was created by one of the individuals in attendance at the June 9, 1996 meeting. For reasons outlined in this order, I determined that this record falls within the scope of section 65(6)1 and is excluded from the *Act*. In my view, any records created by other individuals in attendance at the June 9 meeting would, by definition, also be excluded, for the same reasons. Accordingly, no useful purpose would be served by determining whether the Ministry's searches for other records created at the June 9, 1996 meeting were reasonable, and I will not consider the search issue further in this appeal.

ORDER:

I dismiss the appeal.

Original signed by: January 28, 2003
Tom Mitchinson
Assistant Commissioner