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

ORDER PO-2211

Appeal PA-030122-1

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:

> . . . all records and documents relating to the ministry's investigation of the Solid Waste Reduction Unit (SWARU) in Hamilton, dating from the time the Ministry became aware of concerns from the operator in October 2000 until the present. In addition, but not limited to this, I would specifically like these records to include the ministry's internal staff report that reviewed the entire SWARU investigation that was conducted by the Hamilton office. This staff report is referred to in a letter from Minister Chris Stockwell to Hamilton East MPP Dominic Agostino, dated November 27, 2002.

The Ministry initially issued an interim fee estimate and decision on access. The requester paid the requested deposit and the Ministry issued a final decision granting partial access to the responsive records. Records were withheld, in whole or in part, on the basis that they were exempt from disclosure under the following exemptions contained in the *Act*:

- law enforcement report– section 14(2)(a);
- third party information – section 17(1);
- invasion of privacy – section 21(1); and
- information published or available – section 22(a).

The Ministry also indicated that a twelve-page internal review of the investigator's report fell outside the ambit of the *Act* due to the operation of section 65(6)3 of the *Act*.

The requester, now the appellant, appealed the Ministry's decision.

During the mediation stage of the appeal, the appellant agreed to limit the scope of his request to include only the 11-page investigator's report dated June 20, 2002 and the 12-page internal review document dated October 11, 2002 referred to in the request. Accordingly, only the application of sections 14(2)(a) and 21(1) remain at issue with respect to the investigator's report. In addition, the Ministry maintains that the internal review document falls outside the scope of the *Act* under section 65(6)3. As no further mediation was possible, the appeal was moved into the adjudication stage.

I decided to seek the representations of the Ministry initially. The Ministry submitted representations in response to the Notice of Inquiry, the non-confidential portions of which were shared with the appellant, along with a Notice of Inquiry. The appellant also submitted representations, which were shared, in their entirety, with the Ministry. In his representations, the appellant raises the possible application of the "public interest override" provision in section 23 of the *Act*. I then solicited and received additional representations from the Ministry, by way of reply.

RECORDS:

The records at issue consist of an 11-page investigator's report dated June 20, 2002 and a 12-page internal review document dated October 11, 2002.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry submits that, as a result of the operation of section 65(6)3, the internal review document falls outside the scope of the *Act*.

General Principles

Section 65(6)3 states:

> 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:
>
> > 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) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

Section 65(6)3: matters in which the institution has an interest

Introduction

For section 65(6)3 to apply, the Ministry must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

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 institution has an interest.

Part 1: collected, prepared, maintained or used

The Ministry submits that the internal review document was:

> . . . collected and prepared by [a named individual], Director of the Investigations and Enforcement Branch with the assistance of his program manager [another named individual] for the Acting Assistant Deputy Minister of Operations Division [a third named individual].
>
> . . .
>
> The local media, including [the newspaper employing the appellant] reported that the local police department was critical of the investigation carried out by [a named investigator] of the Ministry. Given the concerns, the Acting Assistant Deputy Minister found it prudent to conduct an internal review of the investigation and determine if the criticism was warranted.
>
> The [Acting Assistant Deputy Minister] asked that [the Director of the Investigations and Enforcement Branch] conduct the internal review of [the investigator's] investigation to determine:
>
> 1. What is the quality of the investigation?

> 2. Has the investigator reached a reasonable conclusion with his/her decision on this case?
>
> 3. Are there any areas that merit special consideration for improvements?
>
> . . .
>
> In summary, the Ministry collected the information, prepared the report and used it to evaluate the adequacy of the investigation including performance of the investigator. In the Ministry's view, this satisfies the first part of the test.

The appellant's submissions do not specifically address this aspect of the test under section 65(6)3.

Based on my review of the record and the confidential and non-confidential portions of the Ministry's submissions, I am satisfied that the internal review document dated October 11, 2002 was collected, prepared, maintained and used by the Ministry, thereby satisfying the first part of the test under section 65(6)3.

Part 2: meetings, consultations, discussions or communications

The Ministry submits that the information in the internal review document was used by the Director "to evaluate the investigation and meet with his superior, the Acting Assistant Deputy Minister." It goes on to add that the record itself "reveals that it was a communication, a memorandum between the Director and his superior, thereby satisfying the second part of the test.

Again, the appellant's submissions do not directly address this aspect of the section 65(6)3 test.

Based on my review of the record and the Ministry's representations, I find that the collection, preparation, maintenance or usage of the record was in relation to communications between the Director and the Acting Assistant Deputy Minister. Accordingly, I agree that the second part of the test under section 65(6)3 has been satisfied.

Part 3: labour relations or employment-related matters in which the institution has an interest

The Ministry submits that the internal review document is "substantially connected to labour relations and employment-related matters" and that it has the requisite "interest" in the subject matter of the record in its capacity as employer of the staff of the Investigations and Enforcement Branch. The Ministry states that this interest arises as a result of the operation of the *Public Service Act* and the *Environmental Protection Act* as well as from general common law principles regarding employer/employee relations. The Ministry adds that it "has an inherent managerial interest in human resource issues relating to its workforce, including the performance of its staff."

In its confidential representations, the Ministry goes on to describe the nature of the findings contained in the internal review document and relates these findings to its evaluation of the manner in which the investigator completed his or her work.

In my view, the Ministry has provided me with sufficient evidence to enable me to make a finding that the internal review document addresses an employment-related matter for the purposes of section 65(6)3. The review entailed an examination into the manner in which a Ministry investigator performed an environmental investigation following a request under Part IV of the *Environmental Bill of Rights*. The review was undertaken following certain complaints made by a local police service into the manner in which the investigation had been conducted. The complaints centered around the performance of a particular investigator. In my view, the internal review was designed to operate in much the same fashion as a performance review of the investigator's actions. It was clearly undertaken to evaluate the manner in which the investigation was conducted and to determine whether errors or omissions in the investigation occurred on the part of the investigator. I find that the subject matter of the internal review was an employment-related matter and that the Ministry, in its capacity as the employer of the investigator, has the requisite interest in it.

As a result, I find that the internal review document falls within the ambit of section 65(6)3 and that none of the exceptions in section 65(7) have any application. This record is, therefore, outside the scope of the *Act*.

LAW ENFORCEMENT

The Ministry takes the position that the Investigation Report dated June 20, 2002 is exempt from disclosure under the discretionary exemption in section 14(2)(a), which reads:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

General principles

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

The word "report" is not defined in the *Act*. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

Section 2(1) of the *Act* defines "law enforcement" in the following manner:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

Is the record a "report"?

The Ministry argues that a review of the record demonstrates that it is more than "mere observations or reporting of the fact" and that it clearly qualifies as a "report" for the purposes of section 14(2)(a). It submits that the investigation was not "prepared as a result of a routine inspection" and therefore does not fall within the exception to section 14(2)(a) in section 14(4). The Ministry goes on to indicate that:

> The investigator interviewed numerous employees of [the company that was the subject of the investigation] and copied many pages of documents.
>
> Investigators with the Ministry's Investigation and Enforcement Branch are required to summarize the results of their interviews, analyze the evidence, draw conclusions and make a recommendation with respect to further action.
>
> If the matter is recommended to proceed to charges, the investigator submits a Crown Brief. If no charges are to be laid, the investigator prepares a report for management and in some cases, Legal Services Branch of the Ministry outlining why charges ought not to be laid.
>
> For the record at issue, the investigator prepared a report summarizing the investigation, drew conclusions and [made a recommendation].

> [The investigator] prepared a report for [his or her] immediate supervisor [a named individual] on June 20, 2002.
>
> As indicated on the last page, [the investigator] wrote 'Date of report: June 20, 2002' which implies that the investigator saw the record as a report.
>
> Since the report is a formal summary and analysis of the detailed information, the Ministry views the report as a collation and consideration of the information; thereby satisfying the first part of the test.

Based on my review of the Ministry's representations and the record itself, I am satisfied that it represents "a formal statement or account of the results of the collation and consideration of information." The record contains the information and facts gathered by the investigator as well as a detailed analysis of that information and certain conclusions, along with a recommended course of action. On this basis, I find that the record qualifies as a report for the purposes of section 14(2)(a) and the first part of the test under that section has been met.

Was the report prepared in the course of law enforcement inspections or investigations?

The Ministry submits that:

> . . . the investigation was commenced as a result of a referral by Senior Environmental Officer [a named individual and his or her superior] that the Investigation and Enforcement Branch conduct an investigation into a possible violation of the *Environmental Protection Act* (the *EPA*) and Regulation 347.
>
> The possible violation was non-compliance with condition 11(2) of the Certificate of Approval issued under the provisions of the *EPA* as well as Regulation 347 (general waste management requirements to be followed by industries, municipalities and individuals).
>
> Regulation 347 and the *EPA* prohibit various forms of pollution including the discharge of any contaminant into the natural environment and that it authorizes designated Ministry provincial officers to enter and inspect premises in order to investigate potential sources of pollution. The *EPA* further provides a comprehensive system of penalties for contravention of the *EPA*, which apply to corporations, municipalities and individuals.
>
> The Ministry submits that in response to the Occurrence Report of [a specified date], [a named provincial officer] was assigned to carry out an inspection pursuant to the *EPA*. The Occurrence Report summarizes the officer's action to transfer the matter to the Investigation and Enforcement Branch of the Ministry.

> . . . The investigation was completed by [a named investigator] of the Investigation and Enforcement Branch. The investigation resulted in numerous supplementary reports being created that the Ministry released to the requester.
>
> As the supplementary reports indicate, the Ministry recommended that no charges be laid in the matter and that the file be closed.
>
> The Ministry submits that the record at issue was prepared as part of the investigation into a possible violation of law and satisfies part two of the test.
>
> The fact that no charges were laid has no bearing on the disclosure of the record at issue as not all investigations lead to the laying of charges.

Based on my review of the record and the Ministry's representations, I am satisfied that the record was prepared in the course of a law enforcement investigation conducted with a view to making a determination as to whether there had been a violation of the *EPA* or Regulation 347. I find that the investigation was undertaken in order to decide whether a violation of law had occurred. The fact that no charges were laid does not, in my view, preclude the application of section 14(2)(a) to any reports prepared in the course of such an investigation. I find that the second part of the test under section 14(2)(a) has also been met.

Was the report prepared by a law enforcement agency?

The Ministry relies on the decision of Assistant Commissioner Tom Mitchinson in Order P-306 in which he found that the Ministry's Investigation and Enforcement Branch falls within the definition of a "law enforcement agency" for the purposes of section 14(2)(a). It argues that the Branch "investigates alleged violations of the *EPA* and meets the requirements of 'law enforcement' under section 2(1) of the *Act*" because a finding of guilt under the *EPA* carries with it possible penalties and sanctions.

The Ministry also refers to Order PO-1706 in which former Adjudicator Laurel Cropley found that:

> It is well-established that the Ministry's investigative and compliance functions with respect to Ontario's environmental laws, and in particular, the *OWRA* [the O*ntario Water Resources Act*], qualify as 'law enforcement' activities for the purposes of section 14 of the *Act* (Order P-306).

The Ministry indicates that "[T]he investigator fulfilled the mandate of the Investigations and Enforcement Branch by determining if there was sufficient evidence to proceed with charges against the municipality or [the company under investigation]."

The Ministry states that as a result of this request and its response to it, the requester received hundreds of pages of documents relating to the subject matter of the investigation. It submits

that "[G]iven the fact that the Ministry released the raw details of the investigation", it exercised its discretion not to release the report to the requester.

In accordance with the findings in Orders P-306 and PO-1706, I find that the Ministry's Investigation and Enforcement Branch is an agency which has the function of enforcing and regulating compliance with a law, in this case the *EPA*, for the purposes of section 14(2)(a). Accordingly, as I have found that all three parts of the test under section 14(2)(a) have been satisfied, I find that the investigation report dated June 20, 2002 is exempt from disclosure under that section. I am also satisfied that the Ministry exercised its discretion in an appropriate manner in determining not to disclose the report to the appellant.

Because I have found the investigation report to be exempt under section 14(2)(a), it is not necessary for me to consider whether it also qualifies for exemption under section 21(1).

A record which is found to be exempt under a section 14 exemption cannot be subject to the "public interest override" provision in section 23, as claimed by the appellant. As a result, this section has no application to the investigation report at issue in the present appeal.

ORDER:

I uphold the Ministry's decision to deny access to the records.

Original signed by: December 3, 2003
Donald Hale
Adjudicator