



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER P-1563**

## **Appeal P-9700368**

### **Management Board Secretariat**



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/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

Management Board Secretariat (MBS) received a request under the Freedom of Information and Protection of Privacy Act (the Act) from the Ontario Federation of Justices of the Peace Associations, for all documents relating to the Report of the Ontario Justice of the Peace Remuneration Commission, 1995 (the Report). The request identified specific types of records being sought, and made it clear that any and all records dealing with MBS's consideration, analysis and response to the Report fell within the scope of the request.

MBS identified a large number of responsive records and issued an interim decision which provided the requester with a fee estimate of \$486. MBS asked for a deposit of \$250 before proceeding with the request. This interim decision informed the requester that approximately 90 per cent of the records may be exempt from access because they were prepared for Management Board of Cabinet, a committee of the Executive Council, and/or contained information subject to solicitor-client privilege. The requester paid the requested deposit, and asked for a partial fee waiver on the basis that it was fair and equitable to do so, particularly if a large number of documents might not be disclosed.

MBS subsequently issued a final decision in which it waived the fee and claimed that the records fell outside the scope of the Act pursuant to section 65(6)3.

The requester (now the appellant) appealed this decision.

There are 49 records at issue in this appeal, consisting of briefing notes and related materials, memoranda, e-mails, notes, meeting minutes, options, analyses and related materials, correspondence, draft correspondence, communications strategies/plans and drafts, totalling approximately 300 pages.

A Notice of Inquiry was sent to MBS and the appellant. Representations were received from both parties.

## **PRELIMINARY MATTERS:**

### **Adequacy of the decision letter**

The appellant submits that the decision letter was inadequate in that it failed to provide any reasons for denying access to the requested information, pursuant to section 29(1)(b)(ii) of the Act. The appellant states that the decision "simply referenced section 65(6)3 as a blanket exemption" and this "has prejudiced the Appellant's ability to make full and meaningful submissions on this matter".

Section 29(1)(b)(ii) of the Act states:

Notice of refusal to give access to a record or a part thereof under section 26 shall set out,

(b) where there is such a record,

- (ii) the reason the provision applies to the record,

In Order M-936, former Inquiry Officer Anita Fineberg addressed this issue in the context of a claim under section 52(3) of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent provision to section 65(6). She stated:

In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). Although these orders dealt with cases in which exemptions were at issue, I feel that their rationale is equally applicable in cases, such as the present, where the institution's decision relates to a jurisdictional issue.

In this case, I agree with the appellants that the decision letter of the Police should have provided him with **reasons** for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the Act. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the Act under which access is refused.

Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations which I have referred to in my disposition of all issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellants.

I agree with Inquiry Officer Fineberg's views, and find them applicable here. I find that, despite the inadequacy of the decision letter as described below, there would be no useful purpose served in requiring MBS to issue a new decision letter, and I decline to make such an order.

I remind MBS that a re-statement of the language of the legislation is generally not sufficient to satisfy the requirements of section 29(1)(b)(ii). When reasons why a request has been denied are clearly communicated, requesters are in the best position to decide whether to accept the decision or to appeal. It is in the interest of both requesters and institutions, as well as this office, to avoid the costs and delay associated with appeals arising from inadequate decision letters, and I strongly encourage MBS to adhere to the letter and spirit of section 29(1)(b)(ii) when responding to requests in which access is denied.

### **Inquiry process**

The appellant argues that MBS has had ample opportunity to raise discretionary exemptions during the initial stages of this appeal, and has instead "chosen to rely solely on s.65(6)3 in order to deny the Appellant's request". The appellant submits that the request is urgent, and that if I determine that section 65(6)3 does not apply, I should order the disclosure of all responsive records.

Section 65(6) is an exclusionary provision, not an exemption, and as such may be treated differently. In some cases, in denying an access request under the Act, an institution may rely on both section 65(6) and one or more exemptions. On appeal, depending on the circumstances, this office may conduct an inquiry to determine the application of both section 65(6) and the exemption(s).

However, in the majority of cases where institutions claim the application of section 65(6), no exemption is relied on. If the matter is appealed, this office normally conducts an inquiry solely on this issue and, if the records are found to be within the jurisdiction of the Act, the institution is ordered to make a further decision in accordance with the access procedure under Part II of the Act. If the records are found not to be within the jurisdiction of the Act, the matter is at an end (see, for example, Orders M-936, P-1345 and P-1346).

While the usual practice of institutions and this office in this regard may be departed from in certain circumstances, I am not persuaded that there are sufficient reasons to do so in this case.

### **Access to representations**

During the course of this inquiry, the appellant asked for an opportunity to receive and comment on any representations submitted by MBS. I wrote to the appellant advising him that I intended to follow this office's regular procedure for submitting representations, which does not involve the exchange of representations. I also stated that, after receiving all representations, I would determine the most appropriate process for dealing with all outstanding issues, including whether the exchange of representations was necessary or appropriate.

The appellant has been provided with a copy of the Notice of Inquiry which includes a general description of the records, explains the jurisdictional issue raised by MBS, and the onus requirements of the Act. Having received and reviewed all representations, in my view, the appellant has been provided with sufficient information to enable him to address the issues in this appeal.

## **DISCUSSION:**

### **JURISDICTION**

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegates to continue an inquiry on the substantive issue of whether or not a record is exempt. If the requested records fall within the scope of section 65(6), it would be excluded from the scope of the Act unless it is a record described in section 65(7). Section 65(7) lists exceptions to the exclusions established in section 65(6).

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.

Sections 65(6) and (7) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 65(6) falls within one of the exceptions enumerated in section 65(7), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in the Act apply.

MBS's representations state:

It is conceded that justices of the peace are not, in the strictest sense, in an employee/employer relationship with the Crown. When performing their functions, they must be completely independent from the Crown. They must enjoy complete independence in their decision making.

The appellant also submits that justices of the peace are independent judicial officers, and not employees, and refers me to a number of court decisions which support this position (Reference re: Public Sector Pay Reduction Act (P.E.I.), s. 10 (1997), 150 D.L.R. (4th) 577 (S.C.C.); R. v.

Valente, [1985] 2 S.C.R. 673; and Currie v. Ontario (Niagara Escarpment Commission) (1984), 46 O.R. (2d) 484 (H.C.)). [I note that Currie was reversed by the Court of Appeal in a decision reported at (1984), 48 O.R. (2d) 609, but on other grounds]. The appellant has also included with its representations a copy of a decision of an Adjudicator under the Employment Standards Act (Re Devine, [1996] O.E.S.A.D. No. 41 dated February 14, 1996) in which it was held that justices of the peace are not employees as that term is defined in section 1 of the Employment Standards Act.

I concur with the parties, and find that no employer/employee relationship exists between justices of the peace and the Government of Ontario.

However, MBS submits that, because section 65(6)3 refers to “employment-related matters” it does not require that the institution “employ” the individuals in order for the section to apply. In support of its position, MBS points to the different phrases “employment of a person by the institution” in sections 65(6)1 and 2, and “employment-related matters in which the institution has an interest” in section 65(6)3. MBS also submits that “salary is quintessentially an ‘employment-related’ matter, and that the records, which deal with remuneration, are thus communications about employment-related matters for the purpose of section 65(6)3. MBS maintains that the additional hyphenated word “related” enhances the general application of the term “employment”, and that “if ‘employment-related matters’ means nothing more than ‘employment matters’, then the added hyphenated word ‘related’ would be meaningless”, which could not have been the legislative intent.

In the view of MBS, the phrase “employment-related” refers to more than simply employment matters and includes records that would be related to or like those typically found in an employment relationship.

The appellant points out that the terms of reference of the Ontario Justices of the Peace Remuneration Commission make it clear that the Government of Ontario recognizes that financial compensation of justices of the peace must be kept separate from employment or labour related issues, in order to ensure the impartiality and independence of judicial officers. The appellant submits that “[o]n this basis alone, section 65(6)3 is not applicable.”. The appellant relies on Order P-1545, where I found that a contract between an institution and an individual who was not an employee was not covered by section 65(6), even though the contractual arrangement was “similar to employment”.

Having carefully reviewed the detailed representations of both parties and the records, I find that section 65(6)3 is not applicable in the circumstances of this appeal. I acknowledge that section 65(6)3 includes different wording (“employment-related matter”) than sections 65(6)1 and 2 (“employment of a person”), but I am not persuaded that the use of these different words means that the Legislature intended section 65(6)3 to apply to relationships outside the employment context. As I found in Order P-1545, an employer/employee relationship must exist in order to trigger the application of section 65(6) and, as both parties acknowledge, no such relationship exists between justices of the peace and the government.

I find that the records responsive to the appellant’s request were not collected, prepared, maintained or used by or on behalf of MBS in relation to meetings, consultations, discussions or

communications about labour relations or employment-related matters in which it has an interest. Therefore, section 65(6)3 does not apply, and the records are subject to the provisions of the Act.

**ORDER:**

1. I order MBS to issue a decision letter to the appellant, in accordance with the provisions of section 29 of the Act, regarding access to the requested records, treating the date of this order as the date of the request.
2. I order MBS to provide me with a copy of the decision letter referred to in Provision 1 by sending it to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ May 12, 1998