



Information and Privacy  
Commissioner/Ontario

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

# **ORDER PO-1782**

Appeal PA-990380-1

Ministry of the Solicitor General



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## **NATURE OF THE APPEAL:**

The appellant submitted a request to the Ministry of the Solicitor General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to information contained in his Ontario Provincial Police (OPP) Uniform Recruitment file. Specifically, the appellant asked for information pertaining to the reasons for his "decline for offer of service".

The Ministry located responsive records and denied access to them claiming that they were excluded from the scope of the Act by virtue of section 65(6)3.

The appellant appealed the Ministry's decision.

I sent a Notice of Inquiry to the Ministry, initially. The Ministry submitted representations in response to this Notice. Upon review of the Ministry's representations, I decided that it was not necessary to hear from the appellant.

## **RECORDS:**

The records consist of a variety of recruitment related documents, including forms, application for position of Constable, evaluations, interview notes, e-mails, tests/examinations, handwritten notes, investigative findings, references and correspondence. These records all relate to the appellant's application for recruitment made in April, 1999 and the subsequent decision of the OPP to decline his "offer of service" in August, 1999.

## **DISCUSSION:**

### **JURISDICTION**

The only issue in this appeal is whether the records fall within the scope of sections 65(6) and (7) of the Act. These provisions read:

- (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) 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 Act does not apply to the record.

### **Section 65(6)3**

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.

[Order P-1242]

**Requirements 1 and 2:**

[IPC Order PO-1782/May 9, 2000]

The Ministry states that the records were collected, prepared, maintained and used by the Ministry in relation to meetings, consultations, discussions and communications with respect to the appellant's application for employment with the OPP. The Ministry relies on a previous order of this office which found that similar types of records met the first two requirements of section 65(6)3 (Order P-1590).

Previous orders of this office have found, in the context of a job competition, that such records are collected, prepared, maintained or used "in relation to" communications which take place around the job recruitment process (Orders P-1258, P-1242, P-1442 and P-1590).

I am satisfied that the records were collected, maintained and used by the Ministry in a job recruitment process and that records produced in this context are "communications" (Order P-1258). Further, I find that records generated with respect to these activities would either be for the purpose of, as a result of, or substantially connected to these communications, and therefore, properly characterized as being "in relation to" them (Order P-1258). Accordingly, I find that the first and second requirements of section 65(6)3 have been satisfied.

### **Requirement 3:**

Job competitions, by their very nature, are clearly employment-related matters (Orders P-1258, P-1442, P-1590 and P-1627). In Interim Order P-1627-I and Order PO-1685-F, Assistant Commissioner Tom Mitchinson found that the complete hiring process, including the screening of potential candidates, must be considered to be an employment-related matter, regardless of the fact that the person may not ultimately be the successful candidate.

I agree with these conclusions and find that this part of the third requirement has been established.

The only remaining issue is whether this is an employment-related matter in which the Ministry "has an interest".

The Ministry relies on the reasoning in Order P-1590 in which former Adjudicator Mumtaz Jiwan found:

It is apparent from my review of the records that they relate to a job competition and also involved applicants other than the appellant. In my view, the recruitment process involved in a job application is an employment-related matter and therefore, the meetings, discussions and communications were "about" employment-related matters.

In Order P-1258, Assistant Commissioner Tom Mitchinson found that the mandatory non-discriminating requirements of the Ontario Human Rights Code apply to job competitions and impose legal obligations on an institution concerning the manner in which the competition is conducted. In the present circumstances, the records relate to an application for employment and it is evident that the "pre-determined scores" and other

bench marks speak to the efforts of the OPP to ensure its legal obligations are met and to maintain the integrity of its recruitment process. Accordingly, I find that the Ministry has an interest in the subject matter of the records as the application and recruitment process has the capacity to affect the legal rights or obligations of the Ministry. Requirement 3 has been met.

The Ministry submits that the records at issue in the current appeal are similar to those considered by former Adjudicator Jiwan in Order P-1590 and I should, therefore, apply the reasoning and findings in that Order to the facts in the current appeal.

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

Taken together, these [previously discussed] 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.

A number of orders have considered the application of section 65(6)3 of the provincial Act (and its municipal equivalent in section 52(3)3) in circumstances where there is no reasonable prospect of the institution’s “legal interest” being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). Specifically, this line of orders has held that an institution must establish an interest, in the sense that the matter has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has the requisite interest. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner) (March 21, 2000), Toronto Docs. 681/98, 698/98, 209/99.

With respect to the findings in Order P-1590, I note that this order was issued during a transition period where the interpretation of the words “legal interest” was being revisited by this office. In my view, the more restrictive interpretation which has been given to these words, which has been upheld by the Divisional Court, establishes the appropriate approach to take in assessing this issue. Therefore, I have considered the Ministry’s submissions in this case to determine whether the matter has the capacity to affect its legal rights or obligations and whether there is a reasonable prospect that this interest will be engaged.

The Ministry submits that its legal interest in the employment-related matter is established by various provisions of the Ontario Human Rights Code, the Ombudsman Act and the Police Services Act (the PSA).

In particular, the Ministry submits that individual complaints regarding alleged unfair or discriminatory treatment in the OPP uniform recruitment process can be made to the Ontario Human Rights Commission [IPC Order PO-1782/May 9, 2000]

and that complaints about the OPP uniform recruitment process generally can be directed to the Ombudsman Ontario.

With respect to the PSA, the Ministry states that section 43 places special obligations upon employers of police officers and that it has an interest in ensuring that the criteria set out in section 43(1) are addressed in the OPP uniform recruitment process. In this regard, the Ministry states that it has a legal responsibility to ensure that no unqualified individuals are permitted to progress through the recruitment process. The Ministry refers to comments made by Paul Ceysens in Legal Aspects of Policing (Toronto: Earls Court Legal Press, 1994) regarding the possibility of employer liability for the negligent appointment of a police officer. The Ministry notes that the courts in Canada have not yet considered this issue but that decisions emerging from the courts in the United States “support the view that police forces would be well advised to undertake a thorough background review of applicants and perform adequate psychological evaluations”.

For these reasons, the Ministry submits that it has a continuing interest in the records at issue. The Ministry does not direct its comments to the particular circumstances of this appeal and this appellant. Rather, it relies on its general responsibilities and potential liabilities with respect to the recruitment process as set out above.

In other words, the Ministry takes the position that because there is a possibility that an individual involved in the recruitment process may bring a complaint under the Human Rights Code or the Ombudsman Act or that it may, on a theoretical level, be liable for hiring an unqualified individual, it will always have a legal interest in these employment-related matters.

In Order PO-1718, Adjudicator Holly Big Canoe made the following comments on the “possibility of legal action arising in a matter”.

The Ministry refers to the possibility of some legal action being taken as a result of the audit or disclosure of the audit, and relies on the due performance of its ongoing responsibilities to establish that its legal interests are engaged. In my view, the mere possibility of future legal action, which may be said to arise out of many kinds of audit or regulatory activities of government, is insufficient to engage a reasonable anticipation of such action actually occurring or, therefore, to engage an active legal interest. Further, the due performance of supervisory activities in setting clear standards and procedures, even with a view to avoiding exposure in possible future legal proceedings, is also insufficient to engage an active legal interest. In my view, unless there is something that arises to give reality to the prospect or anticipation of such action, government’s “interest” in the record relates to the normal course of its affairs, and the requisite legal interest is not established.

In my view, these comments are consistent with the reasoning in the recent line of decisions concerning this issue which as I noted above, were upheld on judicial review. I accept that, in the recruitment process, there is a possibility that an applicant may engage the Ministry’s legal interests through a complaint to the Ontario Human Rights Commission or the Ombudsman. However, in the circumstances of the current appeal, there is no evidence before me that the appellant has questioned the adherence of the Police to the Human Rights Code or that he has made or is contemplating making a complaint in that or any other forum, including a complaint to the Ombudsman. Moreover, the appellant was not offered a position as a police

officer and any issues relating to the PSA, even if they were more than theoretical, have no application in these circumstances. Finally, because the appellant is not an employee of the OPP, there is no grievance process available to him, and the Ministry has not referred to, nor am I aware of, any other statutory provisions or principle of common law that would provide a basis for any cause of action (Order MO-1193).

In conclusion, I find that the Ministry has failed to establish a legal interest in this employment-related matter that is reasonably capable of being engaged. Therefore, I find that the third requirement has not been met and the records are, accordingly, subject to the Act.

**ORDER:**

1. I order the Ministry to provide the appellant with a decision letter with respect to the records at issue in this appeal in accordance with the time frames set out in sections 26 and 29 of the Act, using the date of this order as the date of the request.
2. I order the Ministry to provide me with a copy of the correspondence referred to in Provision 1. This should be forwarded to my attention, c/o Information and Privacy Commission/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ May 9, 2000