



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

ORDER PO-1905

Appeals PA_000046_1, PA-000047-1, PA-000048-1 & PA-000049-1

Ministry of Correctional Services



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NATURE OF THE APPEAL:

The appellant, a journalist, made four requests to the Ministry of Correctional Services (the Ministry) seeking access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to records relating to certain named and unnamed individuals. All of the requests relate to allegations of sexual abuse in Cornwall, Ontario.

The Ministry advised that access was being denied on the basis of section 65(6), which excludes certain employment-related records from the scope of the *Act*.

The appellant appealed these decisions to this office.

During the mediation stage of these appeals, the appellant clarified that she was specifically seeking access to records of complaints, investigations into misconduct, reviews, associated issue notes and any related records, from 1975 to the present.

Due to the nature of the request and the surrounding circumstances, I am reluctant to include in this order as much detailed information about the background of this appeal as I normally would.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry, which provided representations in response. I then sent the Notice of Inquiry, together with the Ministry's representations, to the appellant, who provided representations in response.

ISSUES:

APPLICATION OF THE ACT

Introduction

Section 65(6) of the *Act* provides:

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.

Section 65(6) is record-specific and fact-specific. If this section applies to a record, and none of the exceptions listed in section 65(7) applies, section 65(6) excludes that record from the scope of the *Act* (see, for example, Orders P-1564 and PO-1772). It was not submitted that section 65(7) is relevant, and I am satisfied that it has no application here.

The Ministry relies on paragraphs 1 and 3 of section 65(6). I will first address the application of section 65(6)1.

In order to fall within the scope of paragraph 1 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 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.

To qualify under section 65(6)3, the Ministry must establish that:

1. The records were 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.

Because the three part test under each of sections 65(6)1 and 3 parallel one another to a greater or lesser degree, I will consider the application of both exclusions together.

Requirement 1 - “collected, prepared, maintained or used” - sections 65(6)1 and 3

The Ministry submits that its staff “collected, prepared, maintained and/or used the records at issue”.

The appellant makes no specific submissions on this aspect of the test for the application of sections 65(6) 1 and 3.

In the circumstances, I am satisfied that all of the records at issue were collected, prepared, maintained and/or used by the Ministry and, therefore, they meet the first requirement specified above.

Requirement 2 - “proceedings or anticipated proceedings before a court, tribunal or other entity” - section 65(6)1

The Ministry submits that it collected, prepared, maintained and/or used the records at issue for the purpose of anticipated proceedings, and states:

On June 27, 2000, a notice of claim was delivered to the Ministry of the Attorney General pursuant to section 7(1) of the *Proceedings Against the Crown Act*. The notice of claim states that fifteen former clients of the ministry will be commencing an action for damages against Her Majesty the Queen as represented by the Minister of Correctional Services. The Ministry has been informed by its legal counsel that on or about November 1, 2000, legal counsel for the plaintiffs advised that a Statement of Claim will be served on the Ministry within a matter of weeks. (See attached news articles for publicly released details of the anticipated civil action.)

On page 5 of Order PO-1772, Assistant Commissioner Mitchinson considered whether proceedings are anticipated once a notice of claim under section 7(1) [of the] *Proceedings Against the Crown Act* of an intended action . . . has been received. Assistant Commissioner Mitchinson concluded that:

. . . the lawyer’s letter has put the Ministry on notice that proceedings may be initiated at a later date, and the Ministry is obliged to maintain the records in relation to these anticipated proceedings. Therefore, I find that the proceedings are “reasonably anticipated” in the circumstances, and the second requirement of section 65(6)1 has been established.

In addition, it should be noted that at the time the requests were submitted, the Ministry was in the process of responding to a related earlier civil action against the Ministry and the estate of two former deceased employees. This action was dismissed on consent of the parties by the Ontario Superior Court of Justice in December 1999. The Ministry is aware that in an October 2000 Canadian Broadcasting Corporation radio interview, the plaintiff in this case publicly indicated his dissatisfaction with the settlement that was reached in respect to this litigation.

The appellant submits:

. . . [T]his section of [the Act], like other sections of the Act, must be read restrictively in order to give efficacy to the main purpose of the Act, which is to promote the openness of government. In this situation, . . . the records in question

may only be excluded if every portion of this section has been satisfied . . . [T]his section requires that records be collected, prepared, maintained or used *in relation to* 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. Based on the plain wording of this section, . . . unless these records were collected, prepared, maintained or used with a view to or in reaction to such proceedings, they do not fall within this exemption. If they were created independently from such proceedings and without a view to them, they should not fall within this exemption. Finally, it is the position of the Ministry that the mere existence of proceedings acts as a bar to the release of these materials . . . [T]he Ministry must do more than simply state that proceedings exist, and that they must satisfy the Commission that these records are being maintained or used in relation to the proceedings.

I do not accept the appellant's argument that section 65(6)1 cannot apply if the records "were created independently from such proceedings and without a view to them". This submission does not take into account that this part of the test may apply where the records were collected, maintained and/or used in relation to the proceedings, regardless of the purpose for which they were originally created or prepared.

In my view, the Ministry has established that all of the records were collected, prepared, maintained and/or used in relation to either existing or anticipated civil court proceedings, as described above in the Ministry's representations. Therefore, the second part of the three part test for section 65(6)1 has been met.

Requirement 2 - "meetings, consultations, discussions or communications" - section 65(6)3

The Ministry's representations do not deal specifically with the second requirement of section 65(6)3. Consistent with my findings under requirement 2 of section 65(6)1, I accept that the records are being maintained in relation to meetings, consultations and/or discussions that have been or may yet be required in the context of the current or anticipated proceedings described above. Therefore, I find that requirement 2 of section 65(6)3 has also been established.

Requirement 3 - sections 65(6)1 and 3

Section 65(6)1 requires that the current or anticipated proceedings be related to "labour relations or to the employment of a person". Section 65(6)3 requires that the activities listed in the section be "about labour relations or employment-related matters".

The Ministry submits with respect to section 65(6)1:

The allegations which form the basis of the anticipated and past civil actions relate to the employment of probation officers by the Ministry. The responsibilities of probation officers include the supervision of adult and young offenders who have been sentenced to a term of probation. Probation is a court order imposed by a judge, usually instead of, but sometimes in addition to, a term

of imprisonment. Probation authorizes an offender to live in the community under supervision and subject to conditions prescribed in a probation order.

Regarding section 65(6)3, the Ministry submits:

. . . [I]n Order P-1395, Inquiry Officer John Higgins concluded that the Ministry has a legal interest in the matter of whether or not Ministry staff at a correctional facility carried out their responsibilities in an appropriate manner. On page 6 of the Order, Inquiry Officer Higgins commented as follows:

If proven, the allegations against Ministry staff in this case could lead to civil liability, including possible vicarious liability for the Ministry. Clearly, therefore, the matter of whether or not Ministry staff carried out their responsibilities in an appropriate manner is one which has the capacity to affect the Ministry's legal rights or obligations.

In addition, section 5 of the *Ministry of Correctional Services Act* provides, in part, as follows:

It is the function of the Ministry to supervise the detention and release of inmates, parolees, probationers and young persons and *to create for them a social environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford them opportunities for successful personal and social adjustment* in the community ... [emphasis added]

In my view, the description of this "function" in this statute imposes a legal obligation on the Ministry, indicating again that the matter of whether Ministry staff behaved appropriately at Elgin Middlesex is one which has the capacity to affect the Ministry's legal rights or obligations.

Moreover, as previously noted, several internal and external proceedings, with potential legal repercussions for the Ministry, have ensued as a result of the alleged mistreatment of inmates by staff.

For these reasons, I have concluded that the Ministry "has an interest" in the "employment-related matter" of whether or not Ministry staff carried out their responsibilities in an appropriate manner, within the meaning of section 65(6)3.

The responsive records were either collected, prepared, maintained and/or used for meetings, consultations, discussions and communications relating to

employment-related matters, including the anticipated and past civil actions, in which the Ministry has an interest . . . [T]he Ministry's ongoing legal interest in the records at issue arises from statute, including the *Ministry of Correctional Services Act* and from general common law principles regarding employer/employee relations. . . [T]he content of the records supports this position.

In Order PO-1772, Assistant Commissioner Tom Mitchinson considered similar submissions made by the same Ministry. He distinguished the circumstances in Order P-1395 from those present in Order PO-1772 on the basis that the proceedings or anticipated proceedings in the former included ones that clearly arose in an employment setting, whereas the latter did not.

In Order PO-1772, the appellant sought access to records relating to an incident in which the appellant was alleged to have been assaulted by a correctional officer. The appellant had threatened to commence civil proceedings against the Ministry. The Assistant Commissioner accepted that civil court proceedings were reasonably anticipated, but found that the Ministry had failed to establish the third requirement of both section 65(6)1 and 3, for the following reasons:

In my view, section 65(6) has no application outside the employment or labour relation context (see Orders P-1545, P-1563 and P-1564). Therefore, unless the Ministry establishes that the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records do not relate to "labour relations or to the employment of a person by the Ministry", and section 65(6)1 does not apply. Similarly, unless the Ministry establishes that the meetings, consultations and/or discussions concerning the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records are not "labour relations or employment-related matters in which the Ministry has an interest", and section 65(6)3 does not apply.

The facts of this appeal establish that records were prepared by Correctional Officers as a consequence of an altercation that took place with the appellant during a period of incarceration. There is clearly a dispute between the appellant and the various Correctional Officers as to what actually took place, and the appellant has put the Ministry of the Attorney General on notice that he intends to commence proceedings against the Crown in this regard. However, there is no indication that the Ministry disagrees with or disputes the position of its employees as reflected in the various records, or that the employees and the Ministry have different interests at stake.

Inquiry Officer Higgins was faced with a significantly different situation in Order P-1395. In that case serious allegations of wrongdoing had been made against Correctional Officers, and the Ministry took specific action in response. Both internal and external investigations were launched, employees were charged with criminal offences, disciplinary actions were initiated, and records were produced that did not relate to the day-to-day operation of the correctional facility.

In the present appeal, the only records created were those relating to the regular operation of the detention centre. The Ministry acknowledges in its representations that these records were created at the time of the altercation, and that “[i]t is a normal procedure for involved Ministry staff to prepare reports concerning such serious incidents”. No internal or external investigation has been initiated by the Ministry. The Ministry has simply received a letter giving notice of an intent to commence proceedings against the Crown. Almost a year has passed since the letter was sent, and it is quite possible that nothing further will come of it. If a Statement of Claim is filed by the appellant, the Ministry will no-doubt defend it. If successful in its defence, there is little likelihood that the Ministry would take any subsequent employment-related action and, even if unsuccessful, it does not necessarily follow that the Ministry would take any actions that would put it in a position of conflict with its employees.

The Ministry appears to be asking me to accept that routine operational records such as those at issue in this appeal fall under the scope of section 65(6) whenever someone decides to commence a law suit or provides notice of an anticipated action against the Crown, with attendant implications of vicarious liability, but without any evidence of steps having been taken by the institution or the employee in an employment-related or labour relations context. If I accepted the Ministry’s position, then whenever government is or may be sued for actions taken or decisions made by employees, through whom government must invariably act, all related records documenting the actions taken or decision made would be excluded from the *Act* regardless of governments interest in the records in an employment or labour relations sense. I am not persuaded that this was the legislative intent of section 65(6), which was passed as part of a series of amendments to labour relations legislation, and for the stated purpose of restoring balance and stability to labour relations and promoting economic prosperity. Where, as in this case, there is no demonstrable connection between the exclusion of the records and any interest ... the Ministry may have in a labour relations or employment-related matter, I am unable to accept that the exclusions should apply solely on the basis of vicarious liability implications attendant on a possible law suit.

I agree with the principles and approach articulated by the Assistant Commissioner in Order PO-1772.

In short, the fact that the records may have been collected, maintained, used and/or disclosed in relation to current and anticipated litigation in which the Ministry may be held vicariously liable for actions of its employees is not alone sufficient to qualify the records as arising in an employment or labour relations context. As the Assistant Commissioner indicated in Order PO-1772, if I were to find otherwise, then whenever a third party decides to commence a law suit and hold the Ministry vicariously liable for its employees’ actions, all relevant records would automatically be excluded from the scope of the *Act*. I agree with the Assistant Commissioner that this could not have been the intent of the Legislature in enacting section 65(6).

The Ministry submits that I should follow Order P-1395 of this office. In my view, this order is distinguishable on its facts. In discussing the application of section 65(6)3, Inquiry Officer Higgins states that “several internal and external proceedings, with potential legal repercussions for the Ministry have ensued as a result of the alleged mistreatment of inmates by staff.” These proceedings included an internal Ministry investigation (which was continuing at the time of the order), an employment-related Divisional Court application by a former Ministry employee and an employee grievance under the *Public Service Act*. Therefore, Inquiry Officer Higgins had ample evidence before him on which to base a finding that the Ministry had a current interest in the records at issue. To the extent that Order P-1395 could be construed as standing for the proposition that the civil suit alone was sufficient to bring the matter within the scope of section 65(6)3, I do not agree with the order and decline to follow it.

Many of the records at issue relate to matters dating back several years as between the employees and the Ministry as employer, involving internal and external complaints and subsequent investigations. While at one time these records might have been considered to be about employment-related matters in which the Ministry has an interest, it is clear that these matters, between employer and employee, have long since been completed or abandoned, and there is no reasonable prospect of them being revived. Therefore, paragraph 3 of section 65(6) cannot apply.

The balance of the records, while more current, were created or compiled in the context of continuing and anticipated proceedings between the Ministry and individuals who allege that they were harmed by Ministry employees. Applying the reasoning in Order PO-1772, the meetings, consultations and/or discussions concerning the current and anticipated proceedings to which the records relate do not arise in an employment or labour relations context and, therefore, the Ministry has failed to establish the requisite legal interest under section 65(6)3.

ORDER:

1. I do not uphold the Ministry’s decision that the *Act* does not apply to the responsive records on the basis of section 65(6)1 and/or 3.
2. I order the Ministry to provide the appellant with a decision on access to the responsive records under Part II of the *Act*, treating the date of this order as the date of the request.

Original signed by: _____
David Goodis
Senior Adjudicator

_____ May 10, 2001