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

Reconsideration Order PO-2077-R

Appeal PA-990380-1

Order PO-1782

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

This order sets out my decision on the reconsideration of Order PO-1782 issued May 9, 2000.

BACKGROUND

The appellant submitted a request to the Ministry of the Solicitor General, now the Ministry of Public Safety and Security (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to his Ontario Provincial Police (OPP) Uniform Recruitment file.

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 and Appeal PA-990380-1 was opened.

Appeal PA-990380-1 was resolved by Order PO-1782 in which I found that section 65(6)3 did not apply to the records in the circumstances. I then ordered the Ministry to issue a decision on access. The Ministry subsequently applied to the Divisional Court for judicial review of this decision. The application for judicial review of Order PO-1782 was placed on hold pending the outcome of the judicial review of three other orders of the Information and Privacy Commissioner/Ontario (IPC) that raised similar issues.

In August of last year, the Ontario Court of Appeal issued a ruling quashing the three orders that were under review on the basis that the Commissioner's interpretation of section 65(6) was incorrect (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355). This office subsequently brought a motion for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. On June 13, 2002, the Supreme Court denied this motion ([2001] S.C.C.A. No. 509). As a result, the judgment of the Court of Appeal now stands.

Shortly after that, I wrote to the parties to advise them that I was contemplating a reconsideration of this order and asked for representations on this issue, in light of the decisions of the Court of Appeal and the Supreme Court of Canada in *Ontario (Solicitor General).* I also indicated to the parties that I had reached the preliminary conclusion that there is a jurisdictional defect in Order PO-1782 and set out my reasons for so concluding. I then asked the parties to respond to the following questions:

1. Does the reconsideration request fit within any of the grounds for reconsideration set out in the IPC's *Code of Procedure*?

2. If the reconsideration request is granted, what is the appropriate remedy?

Only the Ministry submitted representations in response. In them, the Ministry states that it agrees with my preliminary conclusions and asks that Order PO-1782 be reconsidered.

DISCUSSION:

SHOULD ORDER PO-1782 BE RECONSIDERED?

Introduction

The reconsideration procedures are set out in section 18 of the *Code of Procedure*. In particular, section 18.01 of the *Code* states:

> 18.01 The IPC [Office of the Information and Privacy Commissioner] may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.

Section 65(6)3

Section 65(6)3 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:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest

In order to fall within the scope of paragraph 3 of section 65(6), the institution must establish that:

1. the records were collected, prepared, maintained or used by the institution 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 institution has an interest.

In Order PO-1782, I found that the Ministry had established the first two parts of the three-part test for section 65(6)3. However, I found that the third part of the test was not met, for the following reasons:

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

I then reviewed the Ministry's representations concerning whether or not there existed a reasonable prospect of the Ministry's legal interest being engaged in the future, and concluded:

> 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 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 Ceyssens in *Legal Aspects of Policing* (Toronto: Earlscourt 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*.

In *Ontario (Solicitor General)*, above, the Court of Appeal stated the following with respect to the words "in which the institution has an interest" in section 65(6)3:

> In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6)3 must be referring to "a legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant Privacy Commissioner.
>
> As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Sub clause 1 deals with records relating to "proceedings or anticipated proceedings relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 3 deals with records relating to a miscellaneous category of events "about labour-relations or employment related

> matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.

Applying a "correctness" standard of review to the IPC's interpretation of section 65(6)3, the Court of Appeal thus determined that this office's interpretation of the words "in which the institution has an interest" to mean a "legal interest" was incorrect.

The finding in Order PO-1782 that section 65(6)3 does not apply is based on the previous interpretation of "in which the institution has an interest" described above. Because this interpretation was explicitly rejected by the Court of Appeal, I conclude that my finding constitutes a jurisdictional defect in the order under section 18.01(b) of the IPC's *Code of Procedure*, and that the order should be reconsidered for this reason.

Referring to the Ministry's original representations on the application of the third requirement under the section 65(6)3 test as noted above, I accept that, as an employer, the Ministry has a management interest in ensuring that the recruitment process is fair, which, in my view, constitutes an interest in the records that is "more than a mere curiosity or concern". Therefore, based on the court's direction in *Ontario (Solicitor General)*, the Ministry's representations with respect to the records and my review of the records, I find that the Ministry has established the requisite "interest" in the records to satisfy the third requirement, thus bringing it within the scope of section 65(6)3.

WHAT IS THE APPROPRIATE REMEDY?

The two order provisions in Order PO-1782 provide:

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.

In light of my findings above that Order PO-1782 contains a jurisdictional defect, and that the records fall outside the scope of the *Act* pursuant to section 65(6)3, in my view, the appropriate remedy in the circumstances is to permanently stay the two order provisions of Order PO-1782.

ORDER:

Provisions 1 and 2 of Order PO-1782 are permanently stayed.

Original signed by: November 28, 2002
Laurel Cropley
Adjudicator