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

Reconsideration Order PO-2081-R

Appeal PA-000204-1 – Order PO-1863
Appeal PA-000204-2 – Order PO-1934

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

This order sets out my decision on the reconsideration of Orders PO-1863 and PO-1934 issued February 1, 2001 and July 31, 2001, respectively.

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 copies "of the interview questions and the anticipated answers to the questions with the associated maximum scores possible for the following job competitions":

SGCS - 225 (Assistant Section Head, Gaming)
SGCS - 194 (Forensic Document Examiner)
SGCS - 64 (Senior Forensic Scientists)
SGCS - 63 (Forensic Technician Electronics)
SGCS - 662 (Forensic Biologists)
SGCS - 406 (Senior Forensic Scientist, Hair and Fibre Unit)
SGCS - 449 (Section Head, Biology)
SGCS - 336 (Senior Forensic Scientist, Chemistry)
SGCS - 405 (Forensic Technicians)
SGCS - 235 (Property Clerk)
SGCS - 81 (Quality Assurance Technologist)
SGCS - 554 (Forensic Pathologist's Assistant)
SGCS - 672 (Centre Receiving Officer).

The Ministry denied access to the records on the basis that they were excluded from the scope of the *Act* pursuant to section 65(6). The appellant appealed this decision and Appeal PA-000204-1 was opened.

Appeal PA-000204-1 was resolved by Order PO-1863, in which former Adjudicator Dora Nipp found that all of the records, with the exception of Record 12 (SGCS – 554 – Forensic Pathologist's Assistant), were excluded from the scope of the *Act*. The adjudicator ordered the Ministry to issue a decision on access in respect of Record 12. The Ministry subsequently applied to the Divisional Court for judicial review of this decision.

The Ministry then issued a decision as required by provision 1 of Order PO-1863 and denied access to Record 12 on the basis that the exemptions contained in sections 18(1)(a) (valuable government information), 18(1)(c) (economic and other interests) and 18(1)(h) (examination questions) of the *Act* applied.

The appellant appealed the denial of access and Appeal PA-000204-2 was opened. During mediation and adjudication of this appeal, the Ministry indicated that it maintains its position that section 65(6) applies to the record.

Appeal PA-000204-2 was resolved by Order PO-1934, in which I found that the exemptions claimed by the Ministry did not apply. I ordered the Ministry to disclose the record to the appellant. I then stayed my disclosure order pending the disposition by the Superior Court of

Justice (Divisional Court) of the judicial review of Order PO-1863. The application for judicial review of Order PO-1863 was subsequently placed on hold pending the outcome of the judicial review of three other orders of the Information and Privacy Commissioner (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 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 Order PO-1863 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-1863 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-1863 be rescinded and the second appeal, which resulted in Order PO-1934, be dismissed.

DISCUSSION:

SHOULD ORDER PO-1863 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 her order, former Adjudicator Nipp found that the Ministry had established the first two parts of the three-part test for section 65(6)3. However, the former adjudicator 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."
>
> ***"has an interest"***
>
> The Ministry submits that the responsive records reflect discussions and communications about labour relations and/or employment matters in which the Ministry has an "interest". Its representations refer to Order P-1242 in which Assistant Commissioner 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.

Previous orders have stated that an "interest" for the purposes of section 65(6) of the *Act* means more than a mere curiosity or concern. In addition to a "legal interest" as stated by Assistant Commissioner Mitchinson in the above order, 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 a legal interest in the records. 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 (Ont. Div. Ct.); leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.). Where there has been a settlement of an employment-related matter, for instance, a legal interest no longer exists (see Order MO-1215).

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

> However, the Ministry does not direct its comments specifically to record 12 in this appeal. 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 *Code* 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 his representations, the appellant refers to Order PO-1718 in which 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. However, in the circumstances of the current appeal, there is no evidence before me that either the appellant or a Ministry employee is contemplating making a complaint. Also, the Ministry has not indicated that the grievance process is available to the appellant nor has it referred to other statutory provisions or principle of common law that would provide a basis for any cause of action (Order MO-1193).

With respect to record 12, 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, the third requirement has not been established.

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-1863 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 this 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.

In Order PO-1863, former Adjudicator Nipp relates the Ministry's arguments regarding the application of the third requirement under the section 65(6)3 test:

> In its representations, the Ministry asserts that it periodically re-uses questions and answers in competitions for identical or similar positions. It submits that there are significant labour relations implications if the answers to interview questions are made known in advance to some, but not to all of the applicants. The Ministry further notes that it is bound by the *Ontario Human Rights Code* (the Code) with respect to job competitions and recruitment activity.

I accept that, as an employer, the Ministry has a management interest in ensuring that job competitions involving its workforce are 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 this record and my review of the record, I find that the Ministry has established the requisite "interest" in the record to satisfy the third requirement, thus bringing it within the scope of section 65(6)3.

WHAT IS THE APPROPRIATE REMEDY?

The relevant order provision in Order PO-1863 provides:

> I order the Ministry to issue a decision letter to the appellant with respect to record 12, in accordance with Part I of the *Act*, treating the date of this order as the date of the request.

The Ministry has already complied with this provision. In the circumstances, despite my finding that Order PO-1863 contains a jurisdictional defect, my staying or rescinding that order would have no practical effect, and I therefore will not make any further order with respect to Order PO-1863.

However, for the reasons set out above, the second appeal has no jurisdictional basis. The operative provisions of Order PO-1934 read:

1. I order the Ministry to disclose the record, in its entirety, to the appellant.

2. My order for disclosure of the record under Provision 1 of this order is stayed pending the disposition by the Superior Court of Justice (Divisional Court) of the current judicial review of Interim Order PO-1863.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

In my view, the appropriate remedy in the circumstances is to permanently extend the stay set out in Provision 2. Therefore, I hereby permanently stay Provisions 1 and 3 of Order PO-1934.

ORDER:

Provisions 1 and 3 of Order PO-1934 are permanently stayed.

Original signed by: December 4, 2002
Laurel Cropley
Adjudicator