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

# ORDER PO-2248

## Appeal PA-010085-4

## Ministry of Public Safety and Security

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## NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Public Safety and Security (the Ministry) (now the Ministry of Community Safety and Correctional Services), made under the *Freedom of Information and Protection of Privacy Act (*the *Act).* The requester (now the appellant) requested access to the following information:

> dates, destinations and billings for security, for the Ontario Provincial Police [OPP] detail attached to the Premier, for each trip to the United States from Jan. 1, 2000 to Jan. 22, 2001, inclusive.
>
> Air costs, hotels and associated expenses for the security detail for each trip to the United States should be listed separately and purpose of trip noted.

The history of this request has been described in the Mediator's Report as well as in Orders PO-1944 [judicially reviewed in *Ontario (Attorney General) v*. Ontario *(Assistant Information and Privacy Commissioner)*, [2002] O.J. No. 4703 (Div. Ct)] and PO-2175-R. At issue in this appeal is a single-page record provided by the Ministry in response to a direction to conduct a further search. The Ministry has taken the position that section 65(6)3 removes this record from the scope of the *Act*. The sole issue in this appeal is whether section 65(6)3 applies to the record.

I sent a Notice of Inquiry to the Ministry, initially, inviting it to provide representations on the facts and issues in the appeal. The representations were shared with the appellant who was also invited to and has made representations. I also decided to invite the Ministry to reply to specific issues raised in the appellant's representations, and the Ministry has responded by submitting reply representations.

## RECORD:

The record at issue is a single-page document. It contains a summary of the overtime hours and amounts paid to OPP officers who accompanied the Premier on his trips to the United States for the period from January 1, 2000 to January 22, 2001. The record contains columns setting out the month and year of the trip, the names of the officers, the dates worked, the number of hours worked, the rate of pay and the amount of overtime paid per officer (and the total).

## DISCUSSION:

Section 65(6) states:

> 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.

The Ministry takes the position that section 65(6)3 applies to exclude the record at issue from the scope of the *Act*.

**Section 65(6)3**

For section 65(6)3 to apply, the Ministry must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

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.

[see, for example, Order P-1242]

In its representations, the Ministry submits that its staff collected, prepared, maintained and/or used the information in the record at issue in relation to discussions and communications in respect to scheduling and compensation issues relating to the employment of the affected OPP officers. The record, it states, reflects the employer-employee relationship between the Ministry and the officers. The Ministry, as an employer, is responsible for scheduling employees for duty and for ensuring that employees are appropriately compensated. This type of information, it submits, is routinely communicated to scheduling and payroll staff of the Ministry. The record on its face is about inherently employment-related matters.

The Ministry refers to the decision of the Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507, submitting that staff scheduling and compensation issues are clearly matters relating to the management of the Ministry's workforce and that the Ministry as an employer has an interest in information relating to such activities.

The appellant submits, generally, that as a significant limit on the purpose of the *Act* and general right of access, section 65(6) should be construed narrowly so as to prevent placing a significant

number of government records beyond the reach of the *Act* and beyond the review of the public. Further, the onus on the Ministry to establish that the requirements of section 65(6) are met must be a high one and must only be met where the Ministry supplies evidence that is both detailed and convincing to clearly establish each of the three requirements for exemption under section 65(6)3.

The appellant submits that there is no evidence that the record was collected, prepared, maintained or used by the Ministry or on its behalf, in relation to meetings, consultations, discussions or communications about employment-related matters in which the Ministry has an interest. Here, it is said, the Ministry has asserted only that the *information* in the record was collected, prepared, maintained or used by it, but not that the *record* was so collected, prepared, maintained or used.

The appellant submits that this is an important distinction. The appellant submits that section 65(6)3 is record specific, not information specific – it refers to a "record" and not to "information". The appellant contrasts this with other sections of the *Act* that deal with "information" as opposed to "records", such as sections 17 and 21. The appellant submits that it is to be expected that the type of information in the record would be collected, prepared, maintained or used by the Ministry for various purposes, and that the information contained in this record would be contained in numerous records. The appellant submits that the mere fact that this information may have been used by the Ministry in a meeting dealing with employment related matters cannot mean that all other records that contain the information are exempt from release pursuant to section 65(6)3. The specific record used at the meeting, and not the information contained in the record is so excluded. Otherwise, a vast number of records would likely be excluded from the *Act* pursuant to section 65(6)3 merely because they have been "tainted" by information contained in a record that may meet the requirements of the section.

The appellant also made submissions on the relationship between the Ministry's position under section 65(6) in this appeal and its position in another appeal, which I will discuss in greater detail below.

In reply, the Ministry states that the record is a summary of information extracted from Overtime Report/Bank Register Forms, the Workforce Information Network (WIN) and the OPP Paylist (payroll records). The information was collected, prepared, maintained and used by Ministry staff, including the Manager of the OPP Security Section and the Manager of OPP Human Resources. The single-page document was created for administrative convenience in order to isolate the specific information requested by the appellant under the *Act*, as the source documents contain additional information that is not reasonably responsive to the appellant's specific request.

The Ministry submits that the exclusion under section 65(6)3 extends to information derived from the source records. In support of this position, the Ministry refers to the appeals under consideration in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.). The responsive information in one of the

requests at issue was extracted from other records. The Court of Appeal ultimately concluded that the requested information was excluded under section 65(6)3. The Ministry also referred to Order P-1271, which considered the exclusion contained in section 65(2)(a) for clinical records and applied it to information derived from clinical records. In conclusion, the Ministry submits that information derived from records respecting staff scheduling and compensation issues relating to the OPP security staff is excluded in accordance with section 65(6).

**Analysis**

The representations of the appellant raise the issue of whether a record created for the purposes of responding to a request ought to be treated as an independent "record" for the purposes of applying section 65(6), separate from a consideration of the information in the record. The effect of the appellant's position is that such a record would not be covered by section 65(6) even if all of the information it compiles would otherwise be excluded under section 65(6).

I cannot accept the appellant's submissions.

To begin with, I am satisfied that the Ministry has established that the information in the record was collected, prepared, maintained or used by the Ministry in relation to discussions and communications with respect to employment-related matters in which the Ministry, as the employer of OPP officers, has an interest. The recording of information about overtime worked for scheduling and payment purposes is so clearly a part of standard personnel management practices that it hardly requires any more specific an explanation of why such information was so collected, prepared, maintained or used. Even the appellant agrees that it is "obvious" that such information would be routinely communicated to scheduling and payroll staff of the Ministry. Accordingly, I am satisfied that the information in the record is covered by the provisions of section 65(6)3.

Further, it is significant that the Ministry created the record solely for the purpose of responding to the request under the *Act*, as a convenient means of isolating the specific information sought by the appellant. The record was not created for any other purpose, nor has it been used for any other purpose. The information taken from the source records has not been incorporated with other types of information, nor been made part of a larger document used for non-labour relations or employment purposes. In a sense, the record before me is merely a vehicle for the presentation of the information which the appellant seeks. In such circumstances, I find that there is no purpose under the *Act* to be served by making a distinction between the *record* and the *information* contained in it. On the facts before me, the record has no independent purpose or status apart from the presentation of responsive information.

I acknowledge the appellant's submission that section 65(6) refers to "records" rather than "information". However, I do not agree with the appellant that this wording prevents the application of section 65(6) to a record existing solely for the purpose of responding to a request under the *Act*.

The facts of this appeal do not engage the concerns raised by the appellant about vast numbers of records being "tainted" by the inclusion of labour relations or employment information. Further, prior orders have made it clear that a "substantial connection" to a labour relations or employment related matter is required in order for section 65(6) or its municipal equivalent to apply, and that the inclusion of some labour relations or employment information in a record is not in itself conclusive. In Order PO-2231, for instance, a record containing labour relations or employment-related information was not excluded from the *Act* as the record had a broader purpose unrelated to labour relations or employment. In Orders P-1369 and MO-1654-I records containing information that may have an impact on future labour relations negotiations or containing suggestions about the creation or elimination of certain positions in an organization were found to be related more to a "general organization review" than to labour or employment matters. In the above-described situations, section 65(6) (or its municipal equivalent) did not apply to exclude the records from the *Act*, despite the fact that they contained information arguably related to labour or employment matters. The facts of these appeals are distinguishable from those in the one before me, and the approach taken in these orders addresses some of the issues raised by the appellant.

I agree with the Ministry that Order P-1271, discussing the exclusion of clinical records in relation to patients of psychiatric facilities, supports my above conclusions, although I would exercise some caution in applying an order under a different provision of the *Act* to decisions under section 65(6), particularly given the number of orders issued under 65(6) since the time of that particular order.

Finally, the appellant has pointed out that certain Overtime Report/Bank Register Forms are the subject of another appeal (No. PA-010085-3), in which the Ministry has not taken the position that section 65(6) applies to exclude these records from the *Act*. Rather, the Ministry relied on the exemptions in sections 14 and 21 to withhold access to them. The appellant submits that the Ministry has provided no basis as to why the record in this appeal should not be similarly treated.

In Order PO-2175-R, Assistant Commissioner Tom Mitchinson found the Forms at issue in Appeal No. PA-010085-3 exempt from disclosure under section 14(1)(e). After consideration, I see no reason to inquire into the positions taken by the Ministry in the other appeal nor reconcile them with the position taken in the one before me in order to decide the issues under section 65(6). There is no inconsistency in the legal determinations made in that appeal and those I have made here. As no issue as to the application of section 65(6) was raised in Appeal No. PA-010085-3, the Assistant Commissioner made no finding under section 65(6).

In conclusion, I am satisfied that the Ministry has established the requirements for the application of section 65(6)3 to the record at issue in this appeal. The record is accordingly excluded from the *Act*.

## ORDER:

I uphold the Ministry's decision.

Original signed by: March 4, 2004
Sherry Liang
Adjudicator