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

# ORDER PO-2531

## Appeal PA-060039-1

## Ministry of Community Safety and Correctional Services

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## NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual requesting access to records relating to a complaint that he made to the Ontario Civilian Commission of Police Services (OCCPS) concerning the Oxford Community Police Service (the Police).

The Ministry identified records responsive to the request and granted partial access to them. The Ministry relied on the exemption in section 21(1) of the *Act* (invasion of privacy) with particular reference to the factor in section 21(2)(f) and the presumption in 21(3)(b) to sever information from some pages of one of the records. The Ministry also relied on the exclusionary provision in section 65(6) (*Act* does not apply) to withhold access to all or a portion of a number of the responsive records.

The requester (now the appellant) appealed the decision.

At mediation, the appellant agreed not to pursue access to the information severed from one of the records that the Ministry claimed was subject to the section 21(1) exemption. As a result, that information and the application of the section 21(1) exemption, are no longer at issue in this appeal. The Ministry continued to rely on the application of section 65(6) of the *Act* in support of its decision to deny access to all or portions of a number of records.

Mediation did not resolve the matter and it moved to the adjudication stage.

I sent a Notice of Inquiry to the Ministry, initially, seeking representations on the issues in the appeal. The Ministry provided representations in response. In its representations, the Ministry stated that it was relying in particular on sections 65(6)1 and (3) of the *Act*, in support of its decision to deny access to all or portions of a number of the responsive records. The Ministry also advised that, after a review of the issues in this appeal, it decided to release pages 4, 6, 26 and 28 to 43 of the responsive records to the appellant. The Ministry sent the appellant a supplementary decision letter along with copies of the records it was now releasing. As a result, those records are no longer at issue in the appeal.

A Notice of Inquiry, along with the complete representations of the Ministry, was then sent to the appellant. The appellant provided representations in response.

## RECORDS

Pages 1, 2, 27, 44, 50 and 51 of the records remaining at issue are OCCPS facsimile transmission pages. Pages 3, 5, and 49 are OCCPS correspondence. The portion of page 8 that remains at issue is found in the Case Summary of the OCCPS Public Complaints Review Panel.

## BACKGROUND:

This appeal stems from a complaint made by the appellant about the conduct of the Police.

Section 59(3) of the *PSA* reads:

> The chief of police may decide not to deal with any complaint about the police force or about a police officer, other than the chief of police or deputy chief of police, that he or she considers to be frivolous or vexatious or made in bad faith.

Relying on section 59(3) of the *PSA*, the Police ruled that the appellant's complaint about a Police officer's conduct was made in bad faith.

The appellant subsequently asked OCCPS to review the decision of the Police. OCCPS confirmed the decision of the Police and advised the appellant that no further action would be taken in the matter.

**LABOUR RELATIONS AND EMPLOYMENT RECORDS**

Although the appellant made submissions on his concerns about the conduct of the Police, OCCPS and the Ministry, the issue to be decided in this appeal is whether sections 65(6)1 and 65(6)3 of the *Act* operate to remove the records from the scope of the *Act*.

Sections 65(6)1 and 3 state:

> 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.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Sections 65(6)1 and 3 are record-specific and fact-specific. If I find that either of those paragraphs applies to a record, it is excluded from the scope of the *Act*. I will first consider the application of section 65(6)3.

Section 65(7) provides exceptions to the section 65(6) exclusions, none of which apply to the records at issue here.

**Section 65(6)3**

***General***

In order for a record to fall within the scope of section 65(6)3, the Ministry must establish that:

1. the record was collected, prepared, maintained or used by an 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-2426, Adjudicator John Swaigen addressed a request for letters and fax cover sheets sent from OCCPS to the Waterloo Regional Police Service in the course of processing an application to OCCPS for a review of the disposition of a complaint.

He wrote:

> Because of OCCPS's role in reviewing the Police's decision in relation to the appellant's complaint against the police officers, it is clear that it could not itself have "an interest" in that matter. As stated by Adjudicator Donald Hale in Order P-1345 and adopted by Adjudicator Big Canoe in Order P-1560:
>
> > [A]n institution . . . acting as an impartial adjudicator would not "have an interest" in a labour relations or employment-related matter before it, in the sense intended by section 65(6)3. Such an interest would be inconsistent with impartial adjudication.
>
> The review that OCCPS carries out under section 72 of the *PSA* is analogous to the processes of the Ontario Labour Relations Board referred to in Orders P-1345 and P-1560. Both the Board and OCCPS are independent and impartial agencies that make binding decisions on disputes between parties (in OCCPS's case, the police and members of the public). As such, OCCPS's function is inconsistent with having an "interest" in the appellant's complaint in the sense intended by section 65(6)3.
>
> Accordingly, the question here is not whether the records were "collected, prepared, maintained or used by or on behalf of OCCPS in relation to "employment-related matters" in which it "has an interest", but rather, whether this could be said of the Police.

OCCPS submits that:

> The records remaining at issue were either sent to OCCPS by the [Police] or were sent from OCCPS to the [Police]. The [Police are] an institution subject to the *Municipal Freedom of Information and Protection of Privacy Act* [the municipal *Act*] . . . [T]he records remaining at issue would fall within the scope of section 52(3)1, the [municipal *Act*] equivalent of section 65(6)1 of [the *Act*], should the appellant's request have been directed to the [Police].

In my view, it is not possible simply to apply the provisions of the municipal *Act* to a request made to OCCPS, which is an institution under the *Act* rather than the municipal *Act*. Rather, the question is whether the word, "institution" in section 65(6) can encompass an institution under the municipal *Act*.

In Order P-1560, Adjudicator Holly Big Canoe faced the same question. She found that the meaning of the word "institution" in section 65(6) of the *Act* should be extended to include a municipal institution under the municipal *Act*. She considered it necessary to go beyond the plain words of the *Act* which do not include municipal institutions in order to avoid an "absurd result". In reaching this conclusion, Adjudicator Big Canoe stated in part:

> In the present case, if the [Ontario Labour Relations Board (OLRB)] had exercised its discretion to transfer the request to the [Hamilton-Wentworth District School Board (HWDSB)], it is clear that the section 52(3) exclusion in the municipal *Act* would be available, as found by Inquiry Officer Higgins in Order M-962. The only difference between the facts in Order M-962 and the present case is that the institution receiving the request exercised its discretion not to transfer the request.
>
> These different outcomes may be regarded as an "absurd" result, as that term is understood in law. Driedger in *Driedger on the Construction of Statutes* (3rd edition, 1994 (Butterworths) at page 79) says "consequences judged to be unjust or unreasonable are regarded as absurd." There are different categories of absurdity, including:
>
> > **Irrational distinctions.** A proposed interpretation is likely to be labelled absurd [if it] would result in persons or things receiving a different treatment for inadequate reasons, or for no reason at all. This is

> one of the most frequently recognized forms of absurdity.

In my view, the *Act* and the municipal *Act* are intended to function as a single, coherent, logical legislative scheme, with certain express distinctions based on variations in how local and provincial government operate. For example, there is an exemption for "closed meetings" in the municipal *Act* and a "Cabinet records" exemption in the *Act*. As well, Part I of the *Act*, which sets out the administration of the office of the IPC is not repeated in the municipal *Act*, because they are meant to be read together.

If the *Act* and the municipal *Act* are to be read together as a coherent scheme, would the Legislature intend that the section 65(6) exclusion would be available to the OLRB when the employer is a provincial institution, but not available when the employer is a municipal institution? In my view, the question arises whether a municipal institution can be considered as an institution for the purposes of section 65(6) of this *Act*.

The word "institution" is defined in section 2(1) of the *Act* as follows:

> "institution" means,
>
> (a) a ministry of the Government of Ontario, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

According to Pierre-André Coté, in *The Interpretation of Legislation in Canada*, definitions can be inclusive or exhaustive:

> A first reading is usually sufficient to indicate whether a definition is exhaustive or not: if it is introduced by the word "means" it is deemed to be exhaustive. But a definition introduced by the word "includes" serves only to extend the ordinary meaning or to illustrate certain applications.

Accordingly, it appears that the definition of the word "institution" in the *Act* was intended to be exhaustive. Additionally, when the municipal *Act* became law, the Legislature amended sections 25, 39, 41, 50 and 58 specifically to refer to the municipal *Act*. There is no indication that the Legislature intended that municipal institutions be included in the *Act* except to the extent that the municipal *Act* is specifically referenced in the *Act*. However, at the time the municipal *Act* became law, section 65(6) was not included in the *Act*. In my view, it is arguable that had section 65(6) been in the *Act* at the time the municipal *Act* became law, additional amendments may have been made.

If the institution receiving the request uses section 25 to transfer the request to another institution with a greater interest in the records, the "different treatment for inadequate reasons" can be avoided. In my view, the situation reviewed by Inquiry Officer Higgins in Orders P-1422 and M-962 is a clear example of how the *Act* and the municipal *Act* work in harmony. However, the use of section 25 is discretionary. In my view, the Legislature could not have intended that a question of jurisdiction would be determined by the whim of the institution receiving the request, and I disagree with Inquiry Officer Higgins' finding in Order P-1422 that, where the employer is an institution under the municipal *Act*, but not an institution for the purposes of section 65(6) of the *Act*, the fact that the employer may have received (and hence "collected", "used", etc.) some of the records is irrelevant for the purpose of deciding whether section 65(6) applies.

If the meaning of "institution" in section 65(6) was extended to include institutions as defined in the municipal *Act*, both provincial and municipal government employers providing records to the OLRB would enjoy the "protection" of that provision. Inconsistent treatment between them is avoided. In my view, this interpretation is more consistent with the Legislature's approach to exclusions in the rest of section 65, which are not location specific but record specific. Accordingly, I find that, in the circumstances of this appeal, the meaning of the word "institution" in section 65(6) should be extended to include the HWDSB, an institution under the municipal *Act*. As a result, the OLRB records which were sent by or to the HWDSB are excluded from the scope of the *Act*. The remaining records, however, do not qualify for exclusion under section 65(6), and the OLRB must make a decision respecting the appellant's access to them under the *Act*.

> Applying Adjudicator Big Canoe's analysis to this case results in the conclusion that the Police are an institution for the purposes of section 65(6) of the *Act*.

I agree and find that the Police qualify as an "institution" under section 65(6) of the *Act*.

***Requirement 1: collected, prepared, maintained or used***

With reference to section 65(6)3, the Ministry submits that:

> … OCCPS staff collected, prepared, maintained and/or used the information in the records at issue in relation to meetings, consultations, discussions or communications in respect to the complaint under the *PSA* [*Police Services Act*] filed by the appellant.

As noted above pages 1, 2, 27, 44, 50 and 51 are OCCPS facsimile transmission pages and pages 3, 5, and 49 are OCCPS correspondence. The portion of page 8 that remains at issue is found in the Case Summary of the OCCPS Public Complaints Review Panel. The Ministry submits that this information was "derived" from the Police *PSA* complaint file. I find that all of the records were sent by OCCPS to the Police. On this basis, I am satisfied that the records at issue were collected by the Police. I therefore find that Requirement 1 has been satisfied.

***Requirement 2 - meetings, consultations, discussions or communications***

Based on my review of the records, the *PSA*, the submissions of the Ministry, the statutory scheme governing OCCPS proceedings and the fact that the records were sent to the Police and, in the case of the portion of page 8, contain information provided by the Police to OCCPS, I am satisfied that the collection and/or preparation, maintenance and use of the records by the Police was in relation to communications between OCCPS and the Police.

Accordingly, I find that requirement 2 has been met.

***Requirement 3 - labour relations or employment-related matters in which the institution has an interest***

In its representations, OCCPS states:

> . . . [I]nformation supplied by or sent to the [Police] in its capacity as employer of the involved police officer is excluded.

The question of whether police officers are engaged in "employment" within the meaning of this section was canvassed in considerable detail by Adjudicator Laurel Cropley in Order M-899. Based on a number of provisions of the *Police Services Act*, she concluded that, whether or not

police officers are "employees" at common law, they are clearly engaged in "employment" in the eyes of the Ontario legislature.

I agree, and accordingly, I have concluded that disciplinary matters involving police officers are "employment-related" matters for the purposes of section 65(6)3 of the *Act*. Therefore, I find that the communications referred to under requirement 2 were "about" employment-related matters.

Therefore, what remains to be determined is whether they have the requisite "interest".

It is clear from the factual context of this appeal that the officer in question was an officer with the Police. As noted in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 509, an interest "must relate to more than a mere curiosity or concern", and restricts the application of section 65(6)3 to records relating to an institution's "own workforce". I am satisfied that these requirements are met in this case, and I find that the Police have the requisite "interest". Requirement 3 is therefore met.

As all three requirements are met, I find that the records are excluded from the scope of the *Act* under section 65(6)3.

Accordingly, it is not necessary to consider whether section 65(6)1 applies.

## ORDER:

I uphold the decision of the Ministry that the *Act* does not apply to the records at issue and I dismiss the appeal.

Original Signed By: December 14, 2006
Steven Faughnan
Adjudicator