Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3071

Appeal PA09-116

Ministry of the Attorney General

April 19, 2012

Summary: The appellant sought access to information pertaining to him and to other participants in the Ontario justice system including a number of identified judges and justices of the peace. The Ministry of the Attorney General (the ministry) took the position that section 65(6)3 operated to exclude a memorandum of complaint from the scope of the *Act* and relied on section 21(5) of the *Act* to refuse to confirm or deny the existence of certain records. The appellant appealed the decision and further asserted that the ministry did not conduct a reasonable search for responsive records.

By operation of section 65(6)3 the *Act* does not apply to the memorandum of complaint. The ministry is entitled to rely on section 21(5) of the *Act* to refuse to confirm or deny the existence of certain records pertaining to named members of the judiciary relating to Ontario Judicial Council or Justices of the Peace Review Council inquiries that did not result in public hearings. The ministry is ordered to conduct a further search for a letter dated August 17, 2001.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1), 21(2)(a), 21(2)(f), 21(2)(h), 21(5), 24, 65(5), 65(6)3; *Justices of the Peace Act*, R.S.O. 1990, c. J. 4, as amended, ss. 8, 10.2(4), 11; *Courts of Justice Act,* R.S.O. 1990, c. C. 43, as amended, ss. 49, 51.3(5), 51.4

Cases Considered: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

OVERVIEW

[1] The Justices of the Peace Review Council has the statutory authority to receive and, if it considers it advisable, to investigate complaints against justices of the peace in Ontario.[1] A similar process is in place regarding complaints against Judges of the Ontario Court of Justice. In that case, the complaint is made to the Ontario Judicial Council.[2]

[2] The appellant requested access to information pertaining to him and to other participants in the Ontario justice system, including a number of identified judges and justices of the peace. The request[3], made under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) was wide ranging and included access to information relating to complaints and to payment(s) made by the Ministry of the Attorney General (the ministry) for defending various proceedings that were initiated against the appellant and the identified judges and justices of the peace.

[3] At the end of mediation, only the following issues remained to be determined:

1. whether the ministry conducted a reasonable search for a specified letter relating to the appellant dated August 17, 2001;

2. whether a copy of a memorandum pertaining to a complaint made against the appellant is excluded from the scope of the *Act* under section 65(6)3;

3. the reasonableness of the ministry's search for information relating to any "decision/direction for reimbursement of legal fees" and expenses given by the Judicial Review Council or the Ontario Judicial Council pertaining to the appellant, three other justices of the peace and a judge of the Ontario Court, including[4]:

    - any order for indemnification/reimbursement of legal fees and expenses

    - the identification of whomever authorized and/or approved the payment (including any final payment), as well as the account

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[1] The Justices of the Peace Review Council is provided for under section 8 of the *Justices of the Peace Act,* R.S.O. 1990, c. J. 4, as amended.

[2] The Judicial Council is provided for under section 49 of the *Courts of Justice Act,* R.S.O. 1990, c. C. 43, as amended.

[3] Which was modified both in the course of being processed by the Ministry of the Attorney General and at the appeal mediation stage.

[4] As set out in the Mediator's Report the appellant further clarified that he seeks information regarding the "decision/direction for reimbursement of legal fees and was not referring to the merits of the complaint against the judicial official".

from which the payments were drawn as well as in whose name the payment cheque was issued.

4. whether the ministry conducted a reasonable search for responsive records that would confirm that the salaries of three justices of the peace and two judges of the Ontario Court were neither varied nor reduced when they "faced certain charges", including complaints.

5. whether the ministry can rely on section 21(5) of the *Act* in refusing to confirm or deny the existence of any records relating to compensating named members of the judiciary for the cost of judicial disciplinary investigations and processes under the Justices of the Peace Review Council, or the Ontario Judicial Council, that did not result in public hearings.

[4] I invited representations from the ministry and the appellant. I received their representations and shared them in accordance with section 7 of the IPC's Code of Procedure and Practice Direction number 7.[5]

[5] In the course of adjudication, I requested clarification from the ministry regarding point three above with respect to the sufficiency of its search for records in relation to any "decision/direction for reimbursement of legal fees" pertaining to three other justices of the peace and a judge of the Ontario Court. I sought this clarification because it appeared that the Notice of Inquiry sent to the ministry may not have specifically requested submissions on this point. I wanted to confirm that the ministry's position was, as set out in its representations provided in response to the Notice of Inquiry [6], that it was refusing to confirm or deny whether its search yielded any responsive records in relation to any "decision/direction for reimbursement of legal fees" pertaining to three other justices of the peace and a judge of the Ontario Court. The ministry confirmed the position set out in its representations.

[6] In the discussion that follows I reach the following conclusions:

- the ministry did not conduct a reasonable search for a letter dated August 17, 2001
- by operation of section 65(6)3 of *FIPPA*, a memorandum of complaint is excluded from the scope of the *Act*
- the ministry is entitled to rely on section 21(5) of the *Act* to refuse to confirm or deny the existence of certain records pertaining to named members of the judiciary relating to Ontario Judicial Council or Justice of the Peace Review Council inquiries that did not result in public hearings

[5] The ministry did not provide reply representations although invited to do so.
[6] A complete copy of these representations were shared with the appellant.

ISSUES:

A. Did the ministry conduct a reasonable search for responsive records?

B. Is the memorandum of complaint excluded from the scope of the *Act*?

C. Can the ministry rely on section 21(5) of the *Act* in refusing to confirm or deny the existence of certain records?

D. Has the ministry appropriately exercised its discretion?

E. Is there a compelling public interest that outweighs the application of section 21(5)?

DISCUSSION:

A) Did the ministry conduct a reasonable search for responsive records?

[7] The appellant's position regarding the inadequacy of the ministry's search for responsive records is advanced on three grounds:

- the ministry did not conduct a reasonable search for a letter relating to him dated August 17, 2001.

- the ministry did not conduct a reasonable search for information in relation to any "decision/direction for reimbursement of legal fees" and expenses given by the Justices of the Peace Review Council or the Judicial Review Council pertaining to him, three other justices of the peace and a judge of the Ontario Court.

- the ministry did not conduct a reasonable search for records that would confirm that the salaries of three justices of the peace and two judges of the Ontario Court were neither varied nor reduced when they "faced certain charges", including complaints.

[8] Through the course of mediation, correspondence was exchanged with respect to these issues culminating in the ministry conducting a further search for responsive records and issuing a supplementary decision.

[9] With respect to the appellant's request for access to information relating to any "decision/direction for reimbursement of legal fees" and expenses given by the Justices of the Peace Review Council or the Judicial Council pertaining to him, three other justices of the peace and a judge of the Ontario Court, the ministry's supplementary decision:

- granted partial access to a record pertaining to the appellant that was located in the further search, withholding some information that it viewed as non-responsive;

- granted partial access to a record pertaining to an identified justice of the peace, also withholding some information that it viewed as non-responsive. The ministry further advised that an order relating to this justice of the peace was publicly available and provided an internet link to the order;

- granted partial access to a record pertaining to another identified justice of the peace, again withholding some information that it viewed as non-responsive. The ministry further advised that an order relating to this justice of the peace was publicly available and provided an internet link to the order; and

- advised that no responsive records could be located for an identified Judge.

[10] In the course of the exchange of representations, however, the ministry changed its position in relation to any "decision/direction for reimbursement of legal fees" for the members of the judiciary whose information was not disclosed. The ministry now stated that:

> … confirming or denying the existence of reimbursement records for confidential investigations in matters of judicial discipline would be tantamount to confirming or denying whether the inquiries had occurred at all.

[11] In keeping with this position, the ministry did not provide any representations on the reasonableness of its search for these records. Instead, it argued that section 21(5) applied to a request for information "in respect of compensating named judicial officers for the costs incurred in relation to confidential judicial disciplinary investigations and processes". This submission will be addressed in the section of this decision dealing with section 21(5), below.

[12] With respect to the search for records that would confirm that the salaries of three justices of the peace and two judges of the Ontario Court were neither varied nor reduced when they "faced certain charges", including complaints, the ministry's supplementary decision, indicated that the ministry did not have this information.

[13] Accordingly, this part of my decision will only address the reasonableness of the ministry's search for the following three items:

- a specified letter relating to the appellant dated August 17, 2001;

- information pertaining to the appellant in relation to any "decision/direction for reimbursement of legal fees" and expenses made by the Justice of the Peace Review Council;

- records that would confirm that the salaries of three justices of the peace and two judges of the Ontario Court were neither varied nor reduced when they "faced certain charges", including complaints.

The Appellant's Representations

[14] The appellant submits that the letter dated August 17, 2001 was identified "in the partial or restricted disclosure provided by [the Ministry] itself, dated March 21, 2001."[7] The appellant submits that this is therefore inconsistent with the position taken by the Ministry that it conducted a reasonable search for the letter and that the letter "could not be found or was not located".

[15] In addition, as set out in the Mediator's Report the appellant asserted that:

- the letter dated August 17, 2001 should be in the same location as the letter dated March 21, 2001 that the ministry located in appeal PA08-141[8];

- although the ministry located a record that was responsive to his request for information regarding authorization for the payment of his legal fees there should also be a related internal ministry document authorizing payment that is dated in or about 1998;

- because the salaries are paid by the ministry, there must be responsive records regarding whether the salaries of three justices of the peace and two judges of the Ontario Court were varied or reduced when they "faced certain charges", including complaints.

The Ministry's Representations

[16] The ministry submits that searches for responsive records were conducted both at the request stage and during the course of mediation. The ministry therefore takes the position that it conducted a reasonable search for responsive records.

[17] In support of its position, the ministry relies on an affidavit of its Acting Manager, Divisional Support & Strategic Planning Unit (the Acting Manager) setting out the steps taken when he was asked to conduct a second search for responsive records. The Acting Manager deposes that his predecessor had conducted the initial search. He states that before conducting the second search he was given his predecessor's

[7] This disclosure occurred in the course of Appeal PA08-141, which resulted in Order PO-2869.
[8] See note 7 above.

description of the records, as well as a copy of correspondence from the mediator setting out the appellant's concerns regarding the ministry's initial search. He further deposes that he instructed his assistant to retrieve any files on the appellant and the members of the judiciary named in the request. He also asked his assistant to search for "any hardcopy or electronic records relating to public inquiries into the conduct of the named individuals, including archived emails retained by the previous Senior Manager of Judicial Support Services Unit." He deposes that he reviewed all the records that his assistant located and that he "did not locate any records that were responsive to the request for the letter or the salary information of the named officials".

[18] The ministry stated in its representations, however, that it did locate the letter dated August 17, 2001 but that the letter did not refer to "internal progression of the requester". The ministry took the position that the letter was, therefore, not responsive to the request.[9]

[19] In light of what appeared to be an inconsistency in the ministry's evidence and/or submissions, and to determine whether such a letter was actually responsive to the request, I asked the ministry to provide me with a copy of the letter that it said it had located. The ministry then advised that after conducting a search, the letter could not be found. It concluded, therefore, that its representations were in error and they should actually have indicated that the letter could not be located.

[20] With respect to the documents relating to confirmation that the salaries of two judges and three justices of the peace were neither varied nor reduced when they faced certain charges the ministry submits that responsibility for payroll and benefits management resides with Ontario Shared Services, which is not a part of the ministry. It submits that the ministry supplies the global budget for judicial salaries, but the Ministry of Government Services manages payroll and benefits for individual members of the judiciary, based on instructions from the Office of the Chief Justice of the Ontario Court of Justice. The ministry submits that it does not collect or maintain the type of information that the appellant is seeking.

Analysis and Finding

[21] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[10] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

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[9] The ministry also relies on a particular excerpt from a specific case to support its position that the letter could not have been responsive to the request. In my opinion the excerpt has been mischaracterized by the ministry and adds nothing to the argument.

[10] Orders P-85, P-221 and PO-1954-I.

[22] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[11] To be responsive, a record must be "reasonably related" to the request.[12]

[23] Based on the evidence provided by the ministry, I am satisfied that the ministry conducted a reasonable search with respect to records relating to the request for information as to whether the salaries of two judges and three justices of the peace were neither varied nor reduced when they faced certain charges.

[24] I do not come to the same conclusion with respect to the letter dated August 17, 2001. In light of the inconsistent evidence and/or submissions with respect to this letter, I find that the ministry has not conducted a reasonable search with respect to this document.

[25] I will therefore order the ministry to conduct a further search for a letter dated August 17, 2001, and to provide an affidavit setting out the results of the search. The affidavit should indicate:

- the details of any search carried out including: by whom it was conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, the results of the search.

- if this subsequent search confirms that the letter no longer exists, the Ministry is to provide details of when the letter may have been destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[26] If, as a result of the further search the ministry locates the letter dated August 17, 2001, I will order the ministry to provide a decision letter to the appellant regarding access to the letter in accordance with the provisions of the *Act*, considering the date of this order as the date of the request. If the ministry locates the letter and takes the position that it is not responsive to the request it should indicate the basis for its position in its decision letter.

B. Is the memorandum of complaint excluded from the scope of the *Act*?

[27] In a revision to his original request, the appellant advised the ministry that he sought access to a "copy of a complaint" made against him by an identified individual. The ministry identified a memorandum of complaint as being the responsive record.

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[11] Orders P-624 and PO-2559.
[12] Order PO-2554.

[28] The ministry explains that the memorandum of complaint is from a manager who investigated certain matters over the course of several months. She reported her findings in the memorandum at issue to the Assistant Regional Director of Crown Attorneys for Toronto Region.

[29] The ministry states that the Criminal Law Division of the ministry prepared and used the memorandum to communicate:

> a) its concerns about the prosecutors' workplace concerns and their perception that the requester had demonstrated bias against the Crown, which in turn created labour relations stress and challenges for ministry employees and management.
>
> b) to ministry employees, that their workplace concerns were being taken seriously and that ministry management was taking all appropriate steps to address and resolve their concerns.

The ministry submits that:

> The way in which this complaint was managed highlights the significance of the prosecutors' complaint for the ministry in its role as employer. Concerns were processed through appropriate ministry management channels. Individual prosecutors reported to their manager, who investigated over the course of several months. The manager reported her findings to the A/Regional Director of Crown Attorneys for Toronto Region. The Director forwarded those concerns to the Assistant Deputy Attorney General. The Assistant Deputy Attorney General reviewed the complaints and concluded that they merited a review by the Justices of the Peace Review Council.

[30] The ministry explains in its submissions that the Justices of the Peace Review Council has the statutory authority to receive and, if it considered it advisable, to investigate complaints against justices of the peace.

[31] At the time of the memorandum, if the Justices of the Peace Review Council investigated a complaint, it could recommend that the Attorney General of Ontario approach Cabinet to initiate an inquiry into whether there had been judicial misconduct by the justice of the peace under the *Public Inquiries Act*.[13]

[32] If misconduct were found, the provincial judge appointed to conduct the inquiry has the power to recommend to Cabinet that the justice of the peace be removed from office, or to refer the matter back to the Justices of the Peace Review Council to impose

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[13] *Justices of the Peace Act* (1994 - 2002), s. 11 and 12 (3.3).

a disposition, which could be a range of disciplinary measures, from a warning to a suspension without pay.[14]

[33] The ministry submits that "given the independence of the judiciary from the ministry, the Justices of the Peace Review Council was the only appropriate forum to address the prosecutors' workplace and employment related concerns".

Section 65(6)3

[34] The ministry takes the position that by operation of section 65(6)3 of *FIPPA*, the *Act* does not apply to the memorandum of complaint.

[35] Section 65(6)3 reads:

> 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.

[36] For section 65(6)3 to apply, the ministry must establish that:

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

[37] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[15]

[38] If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. In my view, none of the exceptions apply to the record at issue.

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[14] *Justices of the Peace Act* (1994 - 2002), s. 12(3.3).

[15] *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.

[39] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[16]

[40] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context.[17]

[41] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The Court of Appeal's judgment in *Ontario* (*Minister of Health and Long-Term Care)*[18] indicates that finding a group of professionals not to be involved in "labour relations" with the government, because they are not its employees, is reading section 65(6)3 too narrowly. The Court also indicates that "labour relations" has a meaning that goes beyond the confines of collective bargaining. The Court's comments on this point bear repeating:

> … the Assistant Information and Privacy Commissioner and the Divisional Court read the phrase "labour relations" in s. 65(6)3 of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 ("the Act"), too narrowly. The phrase is not defined in that Act, and *its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relations*; to do so would render the phrase "employment-related matters" redundant. [Emphasis added.]

[42] The phrase "labour relations or employment-related matters" has been found to apply in the context of a review of "workload and working relationships"[19].

[43] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[20]

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[16] Order PO-2157.
[17] See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.) at paragraph 31.
[18] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.
[19] Order PO-2057.
[20] *Ontario* (*Solicitor General*) v. *Ontario (Assistant Information and Privacy Commissioner*), footnote 15.

[44] The ministry submits that the communications to which the records relate were about labour relations matters, not employment-related matters. The ministry submits that because justices of the peace are not ministry employees, the labour relations interest relates to the proper maintenance of the workplace of its prosecutors.

[45] The ministry submits that:

> Previous orders have found that employers have an interest in resolving issues that interfere with working relationships and a harmonious workplace. (PO-2057) Given the delicate nature of the working relationship between prosecutors and the judicial officers before whom they appear, it is inappropriate for individual prosecutors to make complaints about this aspect of the workplace without management support.
>
> Indeed, the delicate nature of the relationship between any party, including prosecutors, appearing on a regular basis before judicial officers and complainants is the reason that the statutory scheme protects the privacy of all complainants - including ministry employees.
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> In this instance, the prosecutors reported that the [appellant] made unfounded, disparaging statements against the provincial prosecutors' office and members of its staff. Ministry management investigated the requester's statements and actions and determined them to be of significant concern. Management was aware that the requester's conduct, his ongoing contact with prosecution staff and his position of judicial independence and authority concerning the conduct of ministry prosecutions created workplace tensions and labour relations problems.
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> …
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> Given the prosecutors' workplace complaints involved the conduct of a justice of the peace, the Assistant Deputy Attorney General addressed the concerns of his employees and the ministry to the only appropriate forum available to resolve concerns about a justice of the peace, the Justices of the Peace Review Council.

[46] The appellant submits that section 65(6)3 only deals with labour relations or employment-related matters and not to complaints to the Justices of Peace Review Council. He submits:

> To include "complaints" violates the well-known rule of "expressio unis est exclusio alterius" or "inclusion unis est exclusio alterius". Seeking to draw difference between employment and labor-related matters, while

> contending Justices of the Peace are not employees does not stand the test of legal scrutiny or interpretation. These two words, having regard to its nuances, grammatical variations and cognate expressions do not manifest a great significance or shade of difference, except they would show similarity, if not, consistency. Hence the interpretation is flawed and untenable.

[47] The appellant further asserts that the memorandum of complaint should not be withheld because it relates to his "personal record".

Part 1: collected, prepared, maintained or used

[48] The ministry submits that the record was prepared by management in the ministry's Criminal Law Division in reference to labour relations matters. I have reviewed the record at issue and find that it was prepared, maintained or used by the ministry.

Part 2: meetings, consultations, discussions or communications

[49] For the preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3, it must be reasonable to conclude that there is "some connection" between them.[21]

[50] I am satisfied that the memorandum was prepared, maintained or used by the ministry in relation to meetings, consultations, discussions and communications to address complaints about the conditions of work of ministry employees in the workplace which have led to workplace tensions and labour relations problems. Accordingly, I find that the second part of the test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[51] There are a line of orders of this office holding that a wide variety of labour relations or employment-related matters involving public servants, including complaints, can result in the application of the exclusionary provision at section 65(6)3 of *FIPPA*. Records relating to Police Officers[22], the Physician's Services Committee[23], the Ontario Deputy Judges Association[24] and an Order-in-Council appointment[25] have all been held to be subject to section 65(6)3.

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[21] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[22] Order PO-2106.
[23] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).
[24] Order PO-2501.

[52] The ministry submits that because justices of the peace are not ministry employees, the communications to which the records relate were about labour relations matters, not employment-related matters. The ministry takes the position that the labour relations interest relates to the proper maintenance of the workplace of its prosecutors.

[53] As discussed above, a complaint about the conduct of a justice of the peace is made to the Justices of the Peace Review Council. This is a body that is not a listed institution under the *Act* and is separate from the ministry. However, what the appellant seeks in this appeal is not a complaint that may have been in the hands of the Justices of the Peace Review Council, but rather a memorandum that originated with the ministry. The document sought is a memorandum that compiled the concerns that crown attorney's raised regarding the conduct of the appellant in his capacity as a justice of the peace, and the impact that this conduct had upon them in performing their prosecutorial duties. It must be kept in mind that the relationship between the crown attorneys and a justice of the peace is a sensitive one requiring delicate balance, recognizing the important roles that each play in the justice system. The courtroom is where crown attorneys ply their trade. Conflicts between a crown attorney and a justice of peace in that arena can have practical ramifications that impact upon both of them.

[54] Whether or not a justice of the peace is in an employment-like role, which is not necessary for me to decide in this appeal, the ministry still has an interest in maintaining and ensuring an appropriate workplace for its crown attorneys.

[55] In my view, this interest extends to addressing complaints from its crown attorneys about the conditions of work in their workplace which have led to tensions and labour relations problems. I have found that the memorandum was prepared, maintained or used by the ministry in relation to meetings, consultations, discussions and communications to address the complaints of crown attorneys about their conditions of work which have led to workplace tensions and labour relations problems. In this situation, I am satisfied that the ministry was acting as the employer of the crown attorneys and the memorandum relates to "labour relations", problems occurring in a ministry workplace, an Ontario courtroom.

[56] Accordingly, I conclude that the issue addressed in the memorandum are about "labour relations" in which the institution has an interest within the meaning of section 65(6)3 and part three of the section 65(6)3 test has been met.

Conclusion

[57] I find that ministry has established all of the requirements of section 65(6)3. In addition, I find that none of the exceptions in section 65(7) applies. I conclude that the

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[25] Order PO-2952.

memorandum at issue is excluded from the scope of the *Act* by operation of section 65(6)3.

C. Can the ministry rely on section 21(5) of the *Act* in refusing to confirm or deny the existence of certain records?

[58] The ministry relies on section 21(5) of the *Act* in refusing to confirm or deny the existence of any records pertaining to the named members of the judiciary relating to Ontario Judicial Council or Justice of the Peace Review Council inquiries that did not result in public hearings. The ministry submits that it applied section 21(5) with respect to records pertaining to "compensating named judicial officers for the costs incurred in relation to confidential judicial disciplinary investigations and processes".

[59] Section 21(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[60] Section 21(5) gives the ministry discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[61] A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 21(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [26].

[62] Before an institution may exercise its discretion to invoke section 21(5), it must provide sufficient evidence to establish both of the following requirements:

> 1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
>
> 2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[26] Order P-339.

[63] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[27]

[64] The appellant submits that the ministry has incorrectly interpreted and applied section 21(5), and that the Government of Ontario has released "this kind of information, including finances" to the public.

[65] The ministry submits that confirming or denying the existence of reimbursement records for confidential investigations in matters of judicial discipline would be tantamount to confirming or denying whether the inquiries occurred at all.

[66] The ministry submits that:

> Both councils receive complaints against judicial officers and have the power to impose penalties, the most severe being a recommendation to the Attorney General to remove a judicial officer from office.
>
> Both councils currently have legislative schemes that require investigations to be conducted in private unless a public hearing is ordered.
>
> …
>
> The privacy requirements recognize the great damage that can be done to the effective administration of justice and to the ability of a judicial officer to carry out his or her duties of office when information about complaints is made known.
>
> Pursuant to subsection 8(18) of the *Justices of the Peace Act*, subject to any order made by a complaints committee or a hearing panel, any information or documents relating to a meeting, investigation of hearing that was not held in public are confidential and shall not be disclosed or made public. [*Justices of the Peace Act*] subsection 8(19) states that this order applies whether the information or documents are in the possession of the Review Council or the attorney general or any other person.

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[27] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

[67] The ministry further submits that:

- Section 65(5)3 of *FIPPA* operates to exclude any record that was prepared in connection with a meeting or hearing of the Ontario Judicial Council that was not open to the public[28]
- Both councils have the authority to confirm or deny whether any complaint was made to it, at any person's request[29]

- Hearings themselves are presumptively public[30]

[68] The ministry submits that these provisions create a statutory scheme that is designed to protect the privacy of members of the judiciary unless a public hearing occurs.

Part one: disclosure of the record (if it exists)

Definition of personal information

[69] Under part one of the section 21(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of privacy can only result from the disclosure of personal information. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

[70] The ministry submits that:

> Records relating to confidential Justices of the Peace Review Council or Ontario Judicial Council recommendations about compensation or the details of compensation of judicial officers would, if they exist, reveal that the named individuals had been the subject of a complaint. This would undermine the legislative scheme set out in the *Courts of Justice Act* and

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[28] Section 65(5) of the *Act* provides that *FIPPA* does not apply to a record of the Ontario Judicial Council, whether in the possession of the Judicial Council or of the Attorney General, if any of the following conditions apply:

> 1. The Judicial Council or its subcommittee has ordered that the record or information in the record not be disclosed or made public.
> 2. The Judicial Council has otherwise determined that the record is confidential.
> 3. The record was prepared in connection with a meeting or hearing of the Judicial Council that was not open to the public.

[29] *Justices of the Peace Act*, section 10.2(4); *Courts of Justice Act*, section 51.3(5).

[30] *Justices of the Peace Act*, section 11; *Courts of Justice Act*, section 51.4.

the *Justices of the Peace Act* and the underlying policy objectives of those Acts.

[71] The ministry submits that although the complaints about judicial misconduct relates to individuals in their professional capacities they reveal something of a personal nature about them and thereby qualifies as their personal information.

[72] In my view, because the subject individuals have been named in the appellant's request any record responsive to this part of the appellant's request would, by definition, contain information about the named individual in the context of any complaint made against them. Although the information in such a record, if it exists, relates to an examination into the conduct of the identified individual in that individual's professional role, I find that because the individual might have been the focus of an investigation into whether their conduct was appropriate, it has taken on a different, more personal quality. In that regard, I am following a long line of orders of this office that have held that information in records containing a complaint about the conduct of an individual and an examination of that conduct contains that individual's personal information under the definition at section 2(1) of the *Act*.[31]

Unjustified invasion of personal privacy and section 21(5)

[73] Section 21 reads, in part:

> (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.
>
> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> …
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[31] See, in this regard Orders P-165, P-448, P-1117, P-1180 and PO-2525.

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;
(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[74] Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) provides some criteria for the ministry to consider in making this determination;[32] section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[75] The ministry submits that none of the presumptions at section 21(3) or section 21(4) applies, and I agree.

[76] The ministry submits that none of the factors favouring disclosure are applicable, and provides detailed submissions in support of the non-applicability of the factor favouring disclosure at section 21(2)(a).

[77] The ministry also provides submissions on the applicability of the factors favouring non-disclosure at sections 21(2)(e), 21(2)(f), 21(2)(g), 21(2)(h) and 21(2)(i).

[78] With respect to the application of the factor favouring disclosure at section 21(2)(a), the ministry submits that:

> The judicial councils are not agencies of the Government of Ontario. Given the nature of their responsibilities in addressing matters of judicial discipline in conformity with the protections of judicial independence afforded to justices of the peace, the councils are independent bodies with at least half of their respective memberships constituted of judicial officers.

[32] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

> It is a legislative requirement and a matter of public record that the judicial councils may recommend that judicial officers be compensated for costs incurred during the complaints process. This results in information about complaints and council recommendations being disclosed to the ministry for the limited purpose of facilitating compensation.
>
> Ministry release of these records would have the effect of overriding this statutory scheme, which is structured to safeguard the requirements of judicial independence and judicial accountability together with public confidence in the administration of justice.
>
> Individuals named in the request would be subjected to public scrutiny, at the expense of their personal privacy and at the risk of doing harm to the administration of justice.

[79] The objective of section 21(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. In the appeal before me, I have been presented with no evidence to suggest that the appellant's motives in seeking access to the records are anything other than private in nature. Additionally, in my view, the subject matter of the records sought does not suggest a public scrutiny interest.[33] This is because while disclosing the information regarding complaints against named members of the judiciary, if it exists, might result in greater scrutiny of the named members of the judiciary or of the judicial councils, it would not, in the circumstances, result in greater scrutiny of the ministry. Accordingly, in the circumstances I find that the factor at section 21(2)(a) is not a relevant consideration.

[80] I now turn to the analysis of the factors favouring non-disclosure.

[81] In my view, if the requested records exist, they could be considered highly sensitive (21(2)(f))[34] because disclosing the existence of responsive records to this request would itself reveal personal information about a named individual, specifically whether or not a complaint has been made against them. In my view, disclosure of this information, if it exists, could reasonably be expected to cause the identified judge or justice of the peace significant personal distress. In my view, this is an extremely relevant factor weighing heavily in favour of non-disclosure.

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[33] See Order PO-2905 where Assistant Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question as a condition precedent for the factor in section 21(2)(a) of *FIPPA* to apply, but rather that this fact would be one of several considerations leading to its application.

[34] For information to be considered highly sensitive under section 21(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

[82] With regard to the factor at section 21(2)(h) the ministry submits:

> At the times of these complaints, as now, the governing statutes permitted the councils to recommend that the ministry compensate judicial officers for their legal costs in connection with a confidential investigation by a review council. (*Courts of Justice Act*, s. 51.7; *Justices of the Peace Act*, s. 11(16)).
> It follows from the fact that an investigation is confidential that an expectation of confidence will be attached to records submitted to secure compensation for that investigation.
>
> The intent is to collect payment, not to compromise the confidentiality of the investigation and the complaints process.

[83] I accept that the context and the surrounding circumstances of a complaint about a named member of the judiciary that does not result in a public hearing are such that a reasonable person would expect that the information supplied in this context would be subject to a degree of confidentiality. Accordingly, I find that the factor favouring privacy protection in section 21(2)(h) is relevant and carries some weight in favour of privacy protection with respect to some of the personal information in the records.

[84] I am satisfied that there are no factors favouring disclosure and at least two factors favouring non-disclosure[35], I accordingly find that disclosure of the responsive records pertaining to the named members of the judiciary, if they exist, would constitute an unjustified invasion of personal privacy when considering the factors and circumstances in section 21(2).

[85] In the result, I find that the ministry has satisfied part one of the section 21(5) test.

Part two: disclosure of the fact that the record exists (or does not exist)

[86] Under part two of the section 21(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[87] The ministry submits that confirming or denying the mere existence of the requested record would convey information to the appellant by confirming for the

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[35] As I have found that at least two factors favouring non-disclosure apply, it is not necessary for me to consider whether the factors favouring non-disclosure at sections 21(2)(e), 21(2)(g) and 21(2)(i) are also applicable.

appellant that a complaint of judicial misconduct was made against the named member of the judiciary.

[88] The ministry submits that:

> The risk of indirectly disclosing information is particularly pronounced when a requester names several individuals as the requester has done. Were the ministry to deny the existence of records for one subset of judicial officers but refuse to confirm or deny whether records exist in relation to another subset, the refusal to confirm or deny would have the effect of confirming; there would be a clear inference that the ministry refused to confirm or deny only when a record actually existed. This would undermine the purpose of the exemption.

[89] The ministry submits that such a disclosure would be an unjustified invasion of privacy. The ministry submits that the statutory scheme justifies invading the privacy of a member of the judiciary who is subject to a complaint only where a public hearing has been ordered.

[90] I find that disclosing the existence or non-existence of records responsive to this part of the request would itself reveal personal information about the member of the judiciary, specifically whether or not a complaint has been made against them. In my view, the analysis with respect to the factors in sections 21(2)(f) and 21(2)(h) relating to the disclosure of responsive records, if they exist, is equally applicable here. I find that disclosing the existence or non-existence of responsive records would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy based on the considerations favouring privacy protection in sections 21(2)(f) and 21(2)(h), against the absence of any factors favouring disclosure.[36]

[91] Accordingly, I conclude that the ministry has established both requirements for section 21(5), subject to any findings I may make below under "exercise of discretion" and the "public interest override".

D. Has the ministry appropriately exercised its discretion?

[92] I must now determine whether the ministry exercised its discretion in a proper manner in applying section 21(5) of the *Act*.

[93] The exemption at section 21(5) is discretionary and permits an institution to disclose information despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the

[36] See footnote 35 above.

institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

[94] In any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] However, pursuant to section 54(2) of the *Act*, this office may not substitute its own discretion for that of the institution.

[95] In its representations on the exercise of discretion, the ministry sets out the factors and circumstances it considered in its exercise of discretion. In particular, the ministry submits that its decision was based on the following considerations:

- the privacy protection and access principles of *FIPPA*;

- the statutory scheme in the *Justices of the Peace Act* and the *Courts of Justice Act*, both of which aim to strike a balance between openness and confidentiality. The ministry submits that the review councils, "which are not institutions under the *Act* and are independent from the ministry (PO-2869), have statutory discretion to maintain confidentiality in certain circumstances. Making confidential documents accessible from the ministry under *FIPPA* would frustrate the intent of the legislative scheme";

- principles of judicial independence, judicial accountability and the maintenance of public confidence in the administration of justice;

- the requester is not seeking his own personal information but rather information about others' compensation.

[96] I am satisfied that the ministry has not erred in exercising its discretion to rely on section 21(5) of the *Act*. The ministry has not done so in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. Accordingly, I find that the ministry properly exercised its discretion to apply section 21(5) in the circumstances of this appeal.

[37] Order MO-1573

E. Is there a compelling public interest that outweighs the application of section 21(5)?

[97] The appellant submits that it is in the public interest to release the requested information and accordingly, section 21(5) should not apply. He submits that relying on the exemption is against "public policy and practice" and that the public interest outweighs privacy.

[98] The ministry submits that in the circumstances of this appeal the appellant is advancing a private, as opposed to a public interest in disclosure. The ministry further submits that:

> Previous orders also state that for this exemption to apply, the record must in some way add to information the public has. These records provide no additional information about the broad activities of the ministry or of the judicial councils – they simply are particular examples of the system in action. The rules governing the system are transparent and clear in the legislation and on the publicly accessible Ontario Courts website.

[99] The ministry submits that the purpose of the exemption is to protect the privacy of individuals and that in all the circumstances the "refusal to confirm or deny records is the best way to serve that purpose". The ministry further submits that no public interest has been identified that outweighs this purpose.

[100] The public interest override found at section 23 of the *Act* reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[101] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[102] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [38]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public

[38] Orders P-984 and PO-2607.

opinion or to make political choices.[39] A public interest does not exist where the interests being advanced are essentially private in nature.[40] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[41]

[103] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[42]

[104] Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.[43]

[105] In my view, the appellant has not established the existence of a compelling public interest that is sufficient to override the application of section 21(5) in the circumstances of this appeal.

[106] In my view, the interests being advanced by the appellant are essentially private in nature. The request is not for global amounts paid for compensation, but rather for information potentially relating to specifically named members of the judiciary.

[107] Furthermore, the judicial councils, which make the determinations regarding compensation, are not institutions under the *Act* and are independent from the ministry[44]. Therefore, while disclosing whether compensation is awarded might serve the purpose of somehow allowing the appellant, and perhaps others, to better scrutinize the activities of the named members of the judiciary or of the judicial councils with respect to certain named members of the judiciary, in my view, disclosing the requested information, would not "serve the purpose of informing the citizenry about the activities of government".

[108] Furthermore, in light of the nature of the information requested and that the members of the judiciary were named, even if I had found there to be a compelling public interest, I would have not found that this public interest is sufficiently compelling to override the application of section 21(5) in the circumstances of this appeal.

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[39] Orders P-984 and PO-2556.
[40] Orders P-12, P-347 and P-1439.
[41] Order MO-1564.
[42] Order P-984.
[43] Order P-1398.
[44] See in this regard Order PO-2869.

[109] Accordingly, in all the circumstances, I am not persuaded by the evidence that there exists a public interest in the requested information sufficient to override the section 21(5) exemption.

ORDER:

1. I order the ministry to conduct a further search for a letter dated August 17, 2001, and to provide an affidavit to the appellant setting out the results of the search. The affidavit should indicate:

   > the details of any search carried out including: by whom it was conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, the results of the search.
   >
   > if this subsequent search confirms that the letter no longer exists the Ministry is to provide details of when the letter may have been destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
   >
   > If, as a result of the further search the ministry locates the letter dated August 17, 2001, I order the ministry to provide a decision letter to the appellant regarding access to the letter in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

2. In all other respects I uphold the decision of the ministry.

Original Signed By: April 19, 2012
Steven Faughnan
Adjudicator