



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

# ORDER P-1395

Appeal P-9600361

Ministry of the solicitor general and correctional services



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## **BACKGROUND:**

On February 29, 1996, there was a disturbance at the Bluewater Youth Centre (Bluewater) which occurred during a strike of prison guards. This facility is operated by the Ministry of the Solicitor General and Correctional Services (the Ministry). As a result of this occurrence, a number of young offenders were transferred to other provincial institutions, including the Elgin Middlesex Detention Centre (Elgin Middlesex).

Several of the individuals who were transferred to Elgin Middlesex subsequently claimed that they had been mistreated by staff at this facility. The Ministry requested that the Office of Child and Family Service Advocacy (the Advocacy Office) of the Ministry of Community and Social Services (MCSS) undertake an investigation of both incidents. On May 27, 1996, the Advocacy Office provided its report to the Ministry.

On June 6, 1996, the London Police (the Police) began an investigation into allegations of abuse committed upon young offenders while they were incarcerated at Elgin Middlesex. On December 10, 1996, the Police issued a news release in which they announced that 31 criminal charges had been laid against 10 individuals in connection with the above allegations.

## **NATURE OF THE APPEAL:**

The appellant, a researcher with a political party, submitted a request to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to copies of all documents and communications which were provided to the offices of the Assistant Deputy Minister - Corrections, the Deputy Minister and the Minister related to the situation at Elgin Middlesex prepared between February 29, 1996 and June 27, 1996.

In its decision letter, the Ministry denied access to the responsive records in their entirety based on the following exemptions contained in the Act:

- advice to government - section 13(1)
- law enforcement - sections 14(1)(a) and (b)
- right to a fair trial - section 14(1)(f)
- solicitor-client privilege - section 19
- invasion of privacy - section 21.

The Ministry also claimed that some of the requested records refer to labour relations or employment-related matters and fall outside the scope of the Act pursuant to sections 65(6)1 and 65(6)3.

In addition, the Ministry claimed that some of the records are outside the scope of the Act based on the provisions of the Young Offenders Act (the YOA).

The appellant appealed this decision to the Commissioner's office. In his letter of appeal, the appellant raised the possible application of section 23 of the Act, the so-called public interest override.

After receiving the appeal, this office sent a Confirmation of Appeal to the Ministry, requesting that copies of the responsive records be provided in order to facilitate processing of the appeal.

The Ministry provided the responsive records to this office, with the exception of 52 pages. According to the Ministry, the 52 pages which were not provided contain information about identifiable young offenders and may not be disclosed, even to this office, under the YOA.

Subsequently, the appellant indicated that he is not seeking access to the personal information of any young offenders which may be contained in the records, or to the 52 pages mentioned above which, according to the Ministry, contain information about identifiable young offenders. He also does not wish to pursue access to 29 pages of a report by the Advocacy Office, two copies of which are included in the responsive records identified by the Ministry. Accordingly, these items are not at issue in this appeal. In addition, it is not necessary for me to consider the possible application of the YOA.

Shortly after the appeal was filed, the Ministry revised its decision and claimed that all of the records were subject to section 65(6). The Ministry states that because the application of section 65(6) is a “fundamental preliminary issue”, it would, if necessary, issue an amended decision letter if the records are found to fall under the Act.

This office sent a Notice of Inquiry to the Ministry and the appellant. Only the Ministry submitted representations.

In its representations, the Ministry claims that pages 67-73, 95-98, 328 and 353 are “not reasonably related” to the request and, therefore, should be excluded from the scope of the appeal as non-responsive.

The Ministry also states that pages 319-325, 329-351, 451-455 and 458-465 should be considered outside the scope of the appeal as they are the subject of a request and subsequent appeal by the same appellant with MCSS. However, the Ministry states that in the event that these pages are not excluded from the appeal, it also claims section 65(6) applies to exclude them.

The Ministry also indicates in its representations that it now relies solely on paragraphs 1 and 3 of section 65(6) to exclude all of the records from the scope of the Act.

To summarize, the issues to be decided in this order are: (1) whether the records identified by the Ministry as non-responsive are, in fact, non-responsive, (2) whether the records identified by the Ministry as the subject of another request and appeal are to be considered in this appeal, and (3) whether sections 65(6)1 or 3 apply to the responsive records. In the circumstances of this case, if section 65(6)1 or 3 does not apply, a later inquiry will be required to determine whether the claimed exemptions apply.

## **DISCUSSION:**

### **RESPONSIVENESS OF RECORDS**

In its representations, the Ministry claims that pages 67-73, 95-98, 328 and 353 are not “reasonably related” to the request and, therefore, should be excluded from the scope of the appeal as non-responsive.

Both the Ministry and the appellant were invited to make further representations on this issue. The Ministry provided further representations. The appellant indicated that he was content to have this office rule on the non-responsiveness of these pages.

I have examined the pages referred to by the Ministry and I find that they are not “reasonably related” to the appellant’s request, and are therefore not responsive. I will not consider these pages further in this order.

### **RECORDS SUBJECT OF ANOTHER APPEAL**

The Ministry states that pages 319-325, 329-351, 451-455 and 458-465 should be considered outside the scope of the appeal as they are the subject of a request and subsequent appeal (Appeal P-9600360) by the same appellant with MCSS.

Appeal P-9600360 resulted in Order P-1364. I have reviewed the records which were at issue in Order P-1364 and the pages listed above and I find that these pages were not dealt with in Order P-1364. Accordingly, I find that these records are properly included in the scope of this appeal, and it is not necessary for me to decide whether their presence in another order would have the effect suggested by the Ministry.

Therefore, I will consider whether these records, as well as all the others at issue, are excluded from the scope of the Act under sections 65(6)1 or 3.

### **JURISDICTION**

The jurisdictional issue in this appeal is whether the records fall within the scope of section 65(6) of the Act. If so, they would be excluded from the scope of the Act unless they are records described in section 65(7), which lists exceptions to the exclusions established in section 65(6).

These sections state:

- (6) 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.
- (7) This Act applies to the following records:
1. An agreement between an institution and a trade union.
  2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
  3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
  4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 65(6) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The records at issue include a number of letters including correspondence from legal representatives of both inmates and staff, memoranda and attachments, witness statements, various types of reports, electronic mail messages, a legal opinion, media clippings, a copy of a letter to the editor, a list of investigators, a chronology of events, a proposed Ministry action plan, documentation respecting MCSS involvement and the Ministry's response to a report of the Advocacy Office.

In its representations, the Ministry explains that the situation referred to in the request resulted in allegations that young offender clients of the Ministry had been abused by Ministry staff at Elgin Middlesex. The staff members were filling in for correctional employees who were on strike. The young offenders had been transferred from Bluewater to Elgin Middlesex following a serious incident at Bluewater.

The Ministry states that these allegations led to:

- a police investigation which has resulted in the laying of 31 criminal charges against Elgin Middlesex staff;
- an internal Ministry investigation/process review which is currently in progress;
- a civil lawsuit against the Ministry filed by a lawyer representing a number of young offender clients;
- an employment-related Divisional Court application by the former Elgin Middlesex superintendent; and
- at least one grievance under the Public Service Act filed by an employee.

I will first consider section 65(6)3. The Ministry states that this section applies because the records at issue were provided to the Minister, Deputy Minister and Assistant Deputy Minister's offices in relation to "... the allegations that young offender clients of the Ministry were assaulted by Ministry staff at a Ministry workplace."

In order for the records to qualify under section 65(6)3, the Ministry must establish that:

1. The record was collected, prepared, maintained or used by the Ministry 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 Ministry has an interest.

[Order P-1242]

### **Requirements 1 and 2**

In my view, each of these records was either collected, prepared, maintained and/or used by the Ministry. It is clear that the Ministry engaged in an investigation of the allegations against its staff members, which involved meetings, discussions and communications. Similarly, preparation for the law suit and grievance would have necessitated meetings, discussions and communications. Moreover, in many cases, the records themselves constituted communications to or from the Minister, Deputy Minister or Assistant Deputy Minister.

Having reviewed the Ministry's representations and the records, I am satisfied that the collection, preparation, maintenance or use of each of the records was "in relation to" these meetings, discussions and/or communications.

Accordingly, I find that Requirements 1 and 2 have been met.

### **Requirement 3**

As noted in the preceding section, I am satisfied that the Ministry has engaged in “meetings, discussions and/or communications” as part of its investigation of the allegations of staff wrongdoing at Elgin Middlesex, and in relation to the associated law suit and grievance. Because they pertained to allegations of staff wrongdoing, I am satisfied that these meetings, discussions and/or communications were about an employment-related matter, namely, whether or not Ministry staff carried out their responsibilities in an appropriate manner.

The remaining component which must be established is whether this matter can be characterized as one “in which the institution has an interest”.

In Order P-1242, former Assistant Commissioner Tom Mitchinson considered the meaning of this phrase in section 65(6)3. He stated:

[A]n “interest” must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry’s legal rights or obligations.

I agree with the former Assistant Commissioner’s reasoning and approach and adopt it for the purposes of this appeal.

The Ministry submits that its legal “interest” in the matter of whether or not Ministry staff carried out their responsibilities in an appropriate manner arises from several statutes (i.e. the YOA, the Ministry of Correctional Services Act and the Public Service Act) and from general common law principles regarding employer/employee relations, including the right of the employer to manage and direct its workforce.

If proven, the allegations against Ministry staff in this case could lead to civil liability, including possible vicarious liability for the Ministry. Clearly, therefore, the matter of whether or not Ministry staff carried out their responsibilities in an appropriate manner is one which has the capacity to affect the Ministry’s legal rights or obligations.

In addition, section 5 of the Ministry of Correctional Services Act provides, in part, as follows:

It is the function of the Ministry to supervise the detention and release of inmates, parolees, probationers and young persons and **to create for them a social environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford them opportunities for successful personal and social adjustment** in the community ... [emphasis added]

In my view, the description of this “function” in this statute imposes a legal obligation on the Ministry, indicating again that the matter of whether Ministry staff behaved appropriately at Elgin Middlesex is one which has the capacity to affect the Ministry’s legal rights or obligations.

Moreover, as previously noted, several internal and external proceedings, with potential legal repercussions for the Ministry, have ensued as a result of the alleged mistreatment of inmates by staff.

For these reasons, I have concluded that the Ministry “has an interest” in the “employment-related matter” of whether or not Ministry staff carried out their responsibilities in an appropriate manner, within the meaning of section 65(6)3.

Therefore, I find that Requirement 3 has been met.

In summary, I find that the records were collected, prepared, maintained and/or used by the Ministry in relation to meetings, discussions or communications about an employment-related matter in which the Ministry has an interest. None of the exceptions in section 65(7) apply in the circumstances of this appeal. I find, therefore, that the records fall within the parameters of section 65(6)3 and are, therefore, excluded from the scope of the Act.

**ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
John Higgins  
Inquiry Officer

\_\_\_\_\_ May 16, 1997