

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4368

Appeal PA19-00099

Ministry of the Solicitor General

March 22, 2023

Summary: The appellants made a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* to the Ministry of the Solicitor General (ministry) for certain records created by an investigator of the Professional Standards Bureau of the Ontario Provincial Police (OPP) in the course of an investigation into allegations of officer misconduct. The ministry ultimately denied the request on the ground the records are excluded from *FIPPA* by virtue of section 65(6)3, which applies to certain records held by an institution where those records are about "labour relations or employment-related matters in which the institution has an interest." The ministry took the position that the investigation giving rise to the records concerned the conduct of OPP officers, and that the ministry (which is responsible for the OPP) thus has an interest as an employer with respect to the records. In the alternative, if the investigation concerned the conduct of municipal police officers only, the ministry sought to claim section 65(6)3 based on the interest of the municipal police service whose officers were the subjects of the investigation.

In this order, the adjudicator finds that section 65(6)3 does not apply in the circumstances. She finds that the investigation giving rise to the records at issue in this appeal concerned the conduct of municipal police officers only, and that the ministry does not have the necessary interest as an employer with respect to the records to engage the section 65(6)3 exclusion. She also finds that the ministry cannot claim section 65(6)3 for records in the ministry's custody or control based on the interest of the municipal police (as the employer of the subject officers) with respect to the records. Because the records are not excluded from *FIPPA*, the adjudicator orders the ministry to issue another access decision to the appellants in respect of all records responsive to their request, which includes certain audio or other recordings and notebook entries prepared by the investigator in the course of the misconduct investigation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 2(1) (definition of "institution"), 25(2) and (3), 65(6)3, and 67; *Police Services Act*, RSO 1990, c P.15, section 95.

Orders and Investigation Reports Considered: Orders MO-3163, PO-2615, P-1560, PO-4204, and MO-3981.

Cases Considered: *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA); *Reynolds v. Binstock*, 2006 CanLII 36624 (ON SCDC); *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC); *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

OVERVIEW:

[1] This order concerns an exclusion claim made by the Ministry of the Solicitor General (the ministry) over records created during the course of an investigation by the Professional Standards Bureau of the Ontario Provincial Police (OPP) into allegations of misconduct by officers of a municipal police service. (The ministry is responsible for the OPP.) The misconduct allegations were made by the appellants in this appeal. The ministry asserts that the misconduct investigation also encompassed the appellants' allegations against certain OPP officers, and not just the allegations against municipal police officers. As I explain below, the appellants dispute the ministry's characterization of the misconduct investigation giving rise to the records they seek.

[2] In either event, whether the records were created in the course of an investigation into the conduct of municipal police officers, or the conduct of OPP officers, or both, it is the ministry's position that the records are excluded from the *Freedom of Information and Protection of Privacy Act (FIPPA)* by virtue of section 65(6)3 of *FIPPA*. Section 65(6)3 removes from the scope of *FIPPA* certain records held by an institution where those records are about "labour relations or employment-related matters in which the institution has an interest."

[3] In this appeal, the ministry asserts that the records the appellants seek are subject to the section 65(6)3 exclusion for one or more of the following reasons:

- The records were created by the OPP's Professional Standards Bureau in the course of investigating allegations of misconduct by the OPP's own employees (i.e., OPP officers), and thus the ministry (which oversees the OPP) has an employment-related interest in the records; *or*
- The records were created by the OPP's Professional Standards Bureau in the course of investigating allegations of misconduct by OPP officers *and* officers of the municipal police, and the information about OPP officers in the records is intertwined with information about members of the municipal police so that the

ministry's interest as the employer of the OPP officers extends to all the records;
or

- Even if the records were created by the OPP's Professional Standards Bureau in the course of investigating allegations of misconduct by officers of the municipal police only, the ministry is entitled to claim the section 65(6)3 exclusion based on the interest of the municipal police as the employer of the officers who were under investigation. In support of this position, the ministry cites a 2007 order (Order PO- 2615), which I will discuss in detail further below.

[4] In this order, I find that the records at issue arose from an investigation into the conduct of municipal police officers only. I find that the section 65(6)3 exclusion does not apply to the records, because the ministry does not have the necessary interest as an employer with respect to the records. I also find that the ministry cannot claim the section 65(6)3 exclusion for records in the ministry's custody or control in respect of which the employment-related interest belongs to the municipal police, and not to the ministry. I therefore order the ministry to issue another access decision to the appellants in respect of all records responsive to their request, including any responsive audio or other recordings.

[5] Further below, I set out the reasons for my finding. Before I do, I will provide some necessary context for this appeal, which includes some significant developments at the adjudication stage.

BACKGROUND:

[6] The appellants are the parents of a child whose tragic death was the subject of investigation by the Strathroy-Caradoc Police Service (the municipal police), and, later, by the OPP. Since their child's death, the appellants have made a number of access requests to various institutions under *FIPPA* and its municipal counterpart¹ in an attempt to obtain information about the circumstances of the death, and the corresponding investigation by the municipal police and the OPP. Below, I briefly describe some of these access requests, and the resulting appeals filed by the appellants with the Information and Privacy Commissioner of Ontario (IPC).

[7] The appellants also became concerned about the conduct of some officers involved in the investigation into their child's death. In August 2017, the appellants filed a written complaint with the Office of the Independent Police Review Director (OIPRD) about several named municipal police officers.^{2,3} The OIPRD is an independent civilian

¹ The *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, which applies to access requests made to municipal institutions like the municipal police.

² As I explain further below, there is dispute between the parties about whether the appellants' allegations of misconduct by various officers of the municipal police and the OPP were filed and treated as one matter, or as separate matters. In this background section, I rely on the chronology of events set

oversight agency responsible for receiving, managing and overseeing public complaints about municipal, regional and provincial police in Ontario.⁴

[8] The OIPRD directed the OPP's Professional Standards Bureau to investigate the conduct of the municipal police officers named in the appellants' OIPRD complaint. The OPP's Professional Standards Bureau coordinates and independently investigates complaints made directly to the OIPRD;⁵ when a complaint is referred in this manner, the OIPRD continues to manage and oversee the complaint.⁶ A detective sergeant with the OPP's Professional Standards Bureau (the PSB investigator) conducted an investigation, at the conclusion of which he issued a report on February 22, 2018 (the PSB report). The PSB report identifies as the respondents of his investigation four named officers of the municipal police, and it sets out the PSB investigator's findings on the allegations made against them.

[9] The OPP's Professional Standards Bureau sent the PSB report to the chief of the municipal police. In turn, the municipal police provided the appellants with a copy of the PSB report, along with an explanation of the municipal police's decision with respect to any further action on the allegations made against their officers.

[10] The appeal before me arises from the appellants' January 2019 request under *FIPPA* to the ministry for specific records mentioned in the PSB report. Specifically, the appellants sought audio or other recordings and notebook statements obtained by the PSB investigator on particular dates, from particular witnesses, in the course of his investigation into the appellants' misconduct allegations.

[11] In its February 2019 decision on the appellants' access request, the ministry described the request as follows:

We understood your request to be for access to the following [OPP] records relating to the investigation of your son's death: ...

[PSB investigator's] notes and any statements he may have obtained with respect to his interactions with [particular named individuals, on specified dates].

[12] The ministry originally denied access to all responsive records, in full, based on

out in the February 22, 2018 Professional Standards Bureau Investigation Report (which report I discuss in greater detail further below), and the covering letter to that report.

³ In this order, for ease of reference, I will continue to refer to the appellants jointly, although I recognize that the August 2017 OIPRD complaint was filed in the name of one of the appellants only.

⁴ From "[About Us](#)" on the OIPRD's website (accessed March 2023).

⁵ From "[Professional Standards](#)" and "[The Complaint Process](#)" on the OPP's website (accessed March 2023), and OIPRD website links cited at footnotes 4 and 6. The OPP's Professional Standards page also states: "Professional Standards Bureau (PSB) employees investigate internal and external complaints and criminal allegations about OPP officers or civilian employees."

⁶ From "[Referred Investigations](#)" on the OIPRD's website (accessed March 2023).

exemptions to the right of access in *FIPPA* for records concerning a matter under active investigation, and for records whose disclosure would constitute an unjustified invasion of the personal privacy of other individuals.⁷ During the course of the appeal, the ministry ceased to rely on these exemptions; however, as will be seen below, the ministry continues to deny access to the records on the ground they are excluded from the operation of *FIPPA*.

[13] The appellants appealed the ministry's denial of access to the IPC. As the parties were unable to resolve the issues through mediation, the appeal progressed to the adjudication stage of the IPC appeal process.

Adjudication of Appeal PA19-00099

[14] An IPC adjudicator initially conducted a joint inquiry into this appeal and two related appeals filed by the appellants against the ministry. The three appeals against the ministry involve records that, broadly speaking, concern allegations of misconduct in the investigation into the death of their child.⁸ A separate related appeal, filed against the municipal police, also proceeded to the adjudication stage.⁹

[15] In its initial representations during the joint inquiry in the three related appeals against the ministry, the ministry for the first time raised the application of section 65(6)3 of *FIPPA* to the records at issue in this appeal (Appeal PA19-00099). If the section 65(6)3 exclusion is applicable to the records, they are not subject to *FIPPA*, and the appellants have no right of access to them under *FIPPA*. Section 65(6)3 states:

Subject to subsection (7) [which sets out certain exceptions from the exclusion], this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to [...] [m]eetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[16] In these initial representations, the ministry described the records at issue as records prepared by an OPP investigator in the course of investigating the conduct of OPP officers, and on this basis subject to the section 65(6)3 exclusion.

[17] The joint inquiry proceeded, during which the appellants and the ministry exchanged representations on the ministry's new exclusion claim for the records at issue in this appeal.

⁷ The ministry initially cited section 49(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemptions at sections 14(1)(a), (b), (f), and (l) of *FIPPA*; and section 49(b) (personal privacy) of *FIPPA*.

⁸ Appeals PA19-00059, PA19-00060, and PA19-000099 (the current appeal), which relate to the OPP's investigation into the death of the appellants' child. Appeal PA19-00060 was resolved by Order PO-4287.

⁹ Appeal MA19-00730, filed against the municipal police, related to certain police records concerning the death investigation. Appeal MA19-00730 was resolved by Order MO-4283.

[18] This appeal, and the related appeals against the ministry and the municipal police, were then transferred to another IPC adjudicator. That adjudicator initially placed all four appeals on hold, because of potential overlap between an issue to be decided in the four appeals and matters that are currently before the Ontario Divisional Court.¹⁰

[19] Later, after further consideration of the materials before her, the adjudicator decided to remove the hold on the current appeal (Appeal PA19-00099). To continue her inquiry into this matter, the adjudicator asked the ministry to provide the IPC with a copy of the records at issue (which the ministry had not yet done).

[20] The ministry provided the IPC with copies of the PSB investigator's notes. At the adjudicator's request, the ministry also provided additional representations on its section 65(6)3 exclusion claim.

[21] This file (along with the three related appeal files) were then transferred to me. I continued the adjudication of this file independently of the related appeals against the ministry.

[22] I invited the appellants to comment on the ministry's additional representations to the previous adjudicator on its section 65(6)3 claim. The appellants provided representations in response, which included a copy of the PSB report.

[23] After considering the parties' representations up to that point, and the records supplied by the ministry (namely, copies of the PSB investigator's notes), I noted that it appeared to be the ministry's position that records responsive to the appellants' request consist solely of records created by the OPP's Professional Standards Bureau to investigate complaints made against OPP officers. I noted, however, that the appellants' access request seeks particular records, including audio or other recordings, obtained by the PSB investigator in the course of the specific investigation that is the subject of the PSB report. The PSB report documents an investigation into the conduct of four named officers of the municipal police—not the OPP.

[24] With the appellants' consent, I provided the ministry with a copy of the PSB report. I noted my observations, above, and in view of these I asked the ministry to explain, first, whether it had provided the IPC with all records responsive to the appellants' request; and, second, what impact, if any, to the ministry's exclusion claim had the fact the PSB investigation concerned the conduct of members of the municipal

¹⁰ Specifically, in IPC Order PO-3999 (issued in October 2019), the IPC disposed of five previous appeals filed by the appellants against the ministry. In IPC Orders MO-3847-I (issued in October 2019) and MO-3890-F (issued in January 2020), the IPC disposed of five previous appeals filed by the appellants against the municipal police.

Orders PO-3999, MO-3847-I, and MO-3890-F are currently the subject of judicial review applications brought by the appellants to the Divisional Court. For more detail on the nature of the overlap, see Order PO-4287 (which resolved Appeal PA19-00060) and Order MO-4283 (which resolved Appeal MA19-00730).

police, and not of the OPP.

[25] With regard to the first question, the ministry stated that the records it provided to the IPC are, in its view, sufficient to demonstrate why it had applied the exclusion. The ministry did not confirm or deny the existence of any additional records.

[26] In response to the second question, the ministry stated that at least two members of the OPP were also under investigation, and that its exclusion claim is for records “also collected in relation to that investigation.” The ministry provided documentation to show that the appellants had withdrawn complaints against these two particular OPP officers.

[27] The ministry also stated that “even if the investigation was solely against members of the [municipal police] ... our position is that section 65(6) would still apply.” The ministry cited a 2007 order of the IPC (Order PO-2615) for the proposition that an “institution,” for the purposes of the section 65(6) exclusion in *FIPPA*, includes a municipal institution such as a police service. In other words, the ministry’s alternative position is that a provincial institution like the ministry can claim the exclusion in *FIPPA* for records in the provincial institution’s custody or control that relate to employment-related matters concerning *another* institution—in this case, the municipal police, which is an institution under *MFIPPA*.

[28] I asked the ministry to comment on the IPC’s interpretation and application of the exclusions at section 65(6) of *FIPPA*, which is summarized in Order PO-4204, issued in 2021. The ministry provided representations seeking to distinguish Order PO-4204, and relying again on older IPC caselaw on the interpretation and application of the exclusions in *FIPPA* and *MFIPPA*. (I discuss these IPC orders and other caselaw in detail further below.)

[29] There were then a number of developments that are not directly related to the issues to be decided in this order.¹¹

[30] I invited the appellants to respond to the ministry’s representations on the interpretation and application of the section 65(6)3 exclusion, which they did. The appellants provided evidence (which I describe in detail further below) that there were two different misconduct investigations conducted by the Professional Standards Bureau of the OPP: one investigation into the conduct of municipal police officers, and a

¹¹ In June 2021, after the OPP announced the arrest of an individual in the death of the appellants’ child, the ministry issued a revised decision in this appeal. In its revised decision, the ministry withdrew its reliance on section 49(a), read with section 14(1), and section 49(b) of *FIPPA* to deny access to the records, and reaffirmed its reliance on the section 65(6)3 exclusion. The ministry also raised a new exclusion claim, section 65(5.2) (records relating to a prosecution), for the records. In view of this, I sought representations from the ministry on its new exclusion claim. Later during the inquiry, the ministry withdrew its section 65(5.2) claim. Because the ministry no longer relies on sections 49(a), 14(1), 49(b), and 65(5.2) in this appeal, I do not address in this order the representations I received from the parties on these issues.

separate investigation into the conduct of OPP officers. The appellants maintain that the current appeal concerns records relating to the investigation into the conduct of municipal police officers only, and not the separate investigation concerning OPP officer conduct.

[31] In response, the ministry continues to assert that the records at issue were created during an investigation into the conduct of officers from both police services. The ministry continues to claim section 65(6)3 over all responsive records, including any records relating solely to municipal police officers. As noted above, one of the ministry's arguments is that the information in the records about OPP officers is intertwined with information about municipal police officers, so that the ministry's interest as an employer (of the OPP officers) extends to all the records created during the investigation.

[32] During the inquiry, I notified the municipal police of this appeal, and invited them to make representations on the ministry's section 65(6)3 exclusion claim for the records at issue. The municipal police provided representations adopting the ministry's position in this appeal, and urging me to dismiss the appeal on other grounds that I will discuss further below.

[33] Throughout the inquiry, I shared the parties' representations with one another in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[34] In this order, I find that the records at issue in this appeal are not excluded by section 65(6)3 of *FIPPA*; as a result, the appellants have a right of access to them under *FIPPA*, subject to any applicable exemptions. I therefore order the ministry to issue another access decision to the appellants under *FIPPA* in respect of the records they seek.

RECORDS:

[35] During the inquiry, the ministry provided the IPC with a copy of the PSB investigator's notebook. In addition to responsive entries from this notebook, responsive records would appear to include the audio or other recording(s) described in the PSB report and identified in the appellants' access request, which the ministry did not provide to the IPC.

[36] The ministry described the records at issue in this appeal as records created by the PSB investigator during his investigation of employment-related complaints made against municipal police officers, as well as against two named OPP officers. In the discussion that follows, I find that responsive records were created in the course of an investigation into the conduct of municipal police officers only.

DISCUSSION:

Does the section 65(6)3 exclusion for records relating to labour relations or employment matters apply to the records at issue in this appeal?

[37] Section 65(6) of *FIPPA* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in *FIPPA*, although the institution may choose to disclose it outside of *FIPPA*'s access scheme.¹²

[38] The ministry relies on section 65(6)3 of *FIPPA*, which I reproduce again here for ease of reference (emphasis mine):

Subject to subsection (7) [which sets out certain exceptions to the application of the section 65(6) exclusion], this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to ... [m]eetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[39] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of *FIPPA*.

[40] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.¹³ The type of records excluded from *FIPPA* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.¹⁴

[41] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the subjects mentioned in section 65(6), there must be "some connection" between them.¹⁵ The "some connection" standard must involve a connection relevant to the scheme and purpose of *FIPPA*, understood in their proper context.¹⁶

[42] The term "employment-related matters" in section 65(6)3 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.¹⁷

¹² Order PO-2639.

¹³ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

¹⁴ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 2008 CanLII 2603 (ON SCDC).

¹⁵ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹⁶ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

¹⁷ Order PO-2157.

[43] The records at issue in this appeal are certain records created by the PSB investigator during his investigation into allegations of misconduct by named officers in the course of the officers' employment. Given this context, the parties do not dispute, and I find, that the records were prepared and used by the ministry (through the PSB investigator of the OPP, which is overseen by the ministry) "in relation to" meetings, consultations, discussions or communications about "employment-related" matters, within the meaning of those terms in section 65(6)3.

[44] The central dispute between the ministry and the appellants is whether the ministry can claim an "interest," within the meaning of section 65(6)3, in the employment-related matters to which the records relate. For the reasons set out further below, I find the ministry does not have the necessary interest as an employer with respect to the records to engage the section 65(6)3 exclusion. I also find that the ministry cannot claim section 65(6)3 for records in its custody or control based on the interest of the municipal police as an employer with respect to the records.

[45] Before I address these main issues, I will briefly address a preliminary issue raised by the municipal police during the inquiry.

Preliminary matter: The Police Services Act does not contain a confidentiality provision that prevails over FIPPA

[46] The municipal police submit that the records at issue are subject to provisions in the *Police Services Act*¹⁸ that are paramount and are determinative of the issues raised by this appeal. They direct me to section 95 of the *Police Services Act*, which they say operates to prohibit the release of the records, including under *FIPPA* or *MFIPPA*. Section 95 imposes secrecy obligations on persons engaged in the administration of Part V of the *Police Services Act* (which part addresses complaints and disciplinary proceedings).¹⁹

[47] The IPC addresses claims about the effect of confidentiality provisions in other statutes on the access rights in *FIPPA* and *MFIPPA* by looking to the relevant statutory provisions. In this case, I dispose of the municipal police's claim by applying section 67(1) of *FIPPA*, which states:

This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.

¹⁸ RSO 1990, c P.15. The *Police Services Act* is to be repealed on a day to be named by proclamation of the Lieutenant Governor. This proclamation has not yet been made.

¹⁹ Section 95 of the *Police Services Act* states: "Every person engaged in the administration of [Part V] shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except [...] (a) as may be required in connection with the administration of this Act and the regulations; (b) to his or her counsel; (c) as may be required for law enforcement purposes; or (d) with the consent of the person, if any, to whom the information relates."

[48] Section 67(2) of *FIPPA* lists a number of confidentiality provisions in other statutes that prevail over *FIPPA*. Section 95 of the *Police Services Act* is not listed among them. In addition, the *Police Services Act* does not “specifically provide” that section 95 of that statute prevails over *FIPPA*.

[49] I thus reject the municipal police’s claim that section 95 of the *Police Services Act* is a confidentiality provision that prevails over *FIPPA*.²⁰ I note that in Order MO-3163, the IPC previously made the same finding on an identical claim about the effect of this section of the *Police Services Act*.

Section 65(6)3 does not apply to the records issue

[50] I turn now to consider the two main grounds on which the ministry, supported by the municipal police, seeks to claim the necessary “interest,” for the purposes of section 65(6)3, in the employment-related matters to which the records relate. As will be seen below, I find no merit in the ministry’s position on either of these grounds.

The ministry’s role as the employer of OPP officers does not confer the necessary interest in the employment-related matters to which the records relate

The records do not arise from an investigation into the conduct of OPP officers

The information about OPP officers in the records is not intertwined with information about members of the municipal police in a manner that engages the ministry’s interest in all the records

[51] A central dispute between the ministry and the appellants is whether the misconduct investigation documented in the PSB report concerned the conduct of OPP officers, or the conduct of municipal police officers, or both. This distinction is relevant because the records at issue in this appeal are certain notebook statements and audio or other recordings that the PSB investigator created during the course of the investigation that gave rise to the PSB report.

[52] In particular, each of the records described by the appellants in their access request corresponds to a record described in PSB report. The following comparison between the appellants’ three-part access request and relevant extracts from the report makes this clear:

²⁰ In another part of its representations on this topic, the municipal police state that the records “very clearly relate to disciplinary proceedings under the *Police Services Act* and fall within the exemptions from disclosure as set out in *FIPPA*” and *MFIPPA*. The municipal police did not elaborate on the claim that exemptions in *FIPPA* and/or *MFIPPA* apply to the records. As noted above, during the inquiry stage of this appeal the ministry withdrew its reliance on a number of exemptions in *FIPPA* on which it had initially relied to deny access to the records. This order concerns only the ministry’s section 65(6)3 exclusion claim for records.

<p>Part one of the appellants' request states:</p> <p>I am requesting a copy of an audio recording provided by [named individual #1] to [the PSB investigator] given on [specified date #1] with regards to an investigation that was conducted by [the PSB investigator], OPP Case File number [specified OPP case file number].²¹</p>	<p>The relevant extract from the PSB report reads:</p> <p>On [specified date #1], [named individual #1] provided an audio recorded statement to [the PSB investigator].</p>
<p>Part two of the appellants' request states:</p> <p>We are also requesting a notebook statement and/or recording taken by [the PSB investigator] with [named individual #2]. This statement was taken on [specified date #2]. OPP Case File number [same OPP case file number specified above].</p>	<p>The relevant extract from the PSB report reads:</p> <p>On [specified date #2], the PSB investigator obtained a notebook statement from this witness.²²</p>
<p>Part three of the appellants' request states:</p> <p>Finally, we are requesting a notebook statement and/or recording provided by [named individual #3 and/or named individual #4], to [the PSB investigator, OPP badge number], taken on [specified date #3].</p>	<p>The relevant extract from the PSB report reads:</p> <p>On [specified date #3], the PSB investigator obtained a notebook statement from this witness.²³</p>

[53] One of the arguments made by the ministry at the outset of the inquiry was that the records sought by the appellants were created by the PSB investigator "solely to investigate employment related complaints against OPP officers."

[54] However, the PSB report clearly identifies as "respondent" (subject) officers in the misconduct investigation four named officers of the municipal police—not the OPP.

²¹ Further below, I find that the OPP case file number cited by the appellants throughout their access request contains an error, but that this error should not have impeded the ministry's understanding of the records sought by the appellants. See footnote 24.

²² This witness is not identified by name in the PSB report, but the report contains other descriptions of the witness (including her professional title) that correspond to the description of individual #2 provided by the appellants in their access request.

²³ This witness is not identified by name in the PSB report, but the report contains other descriptions of the witness (including his professional title) that correspond to the description of individual #3 provided by the appellants in their access request.

The copy of the PSB report I received from the appellants is accompanied by a covering letter from the bureau commander of the OPP's Professional Standards Bureau to the chief of the municipal police, confirming that the OPP had been "directed by the [OIPRD] to conduct an investigation into misconduct allegations made against [the municipal police chief's] members," and naming the four respondent municipal police officers. In this letter, the OPP bureau commander confirms that the OPP's investigation is complete, and that the report is being forwarded to the chief of the municipal police for any action the chief deems appropriate with respect to his officers.

[55] Because the appellants' evidence appeared to contradict the ministry's description of the responsive records, I sent the ministry a letter in which I noted that in their request, the appellants describe the records they seek using the specific details set out above. This was the basis for my preliminary view that the records at issue in this appeal are those described in the PSB report, being records collected during the course of the particular investigation documented in that report.²⁴ The PSB report identifies as the subjects of the misconduct investigation four municipal police officers. In view of this, I asked the ministry to explain (among other things) what impact, if any, to the ministry's exclusion claim had the fact the investigation giving rise to the records concerned the conduct of municipal police officers, not OPP officers. I also invited the municipal police to address this topic as an affected person in the appeal.

[56] In response, the ministry now states that while the PSB investigation concerned members of the municipal police,

[i]t is our position that at least two members of the OPP were also being investigated, namely [two named OPP officers]. The records we have excluded were also collected in relation to that investigation, and therefore are also subject to the exclusion.

[57] In support, the ministry provided correspondence showing that the appellants had withdrawn their complaints against these two particular OPP officers. The ministry

²⁴ At one stage of the inquiry, I asked the appellants for an explanation of what I have now concluded are typographical errors in their access request. The errors are contained in their references to a specific OPP case file number.

In brief, the PSB report cites both a "File Number" (for the PSB investigation giving rise to the report); and two "Related File Numbers," one of which is an OPP number and the other an OIPRD number. During the inquiry, the appellants explained that the two "Related File Numbers" refer to an entirely separate investigation into the conduct of OPP officers. The appellants explain that they erroneously cited one of these "Related File Numbers" (rather than the PSB investigation File Number) in their access request.

I acknowledge that this error could create the impression that the appellants are seeking records relating to an investigation into the conduct of OPP officers. However, considering all the other details in the appellants' access request about the records they seek, I am satisfied that this error should not have impeded the ministry's understanding of the appellants' request for records obtained during the course of the particular investigation documented in the PSB report.

I also note that I shared with the ministry my questions to the appellants about this discrepancy in their access request, as well as the appellants' explanation (summarized above). The ministry did not specifically address the appellants' explanation about the meaning of the different file numbers.

states that it has an employment-related interest in records created during an investigation that could have resulted in discipline against OPP officers. I understand the ministry to be claiming that the section 65(6)3 exclusion applies in this appeal because the records were created in the course of a misconduct investigation in which at least two of its employees were, at one time, also respondents.

[58] The appellants object to the ministry's characterization of the misconduct investigation giving rise to the records they seek. Instead, the appellants say, there were two different investigations conducted by the OPP's Professional Standards Bureau: one investigation, precipitated by their August 2017 complaint to the OIPRD, about officers of the municipal police; and a separate investigation into the conduct of OPP officers.

[59] The appellants explain that in the two investigations (which were both initially commenced by the OIPRD before being transferred to the Professional Standards Bureau), the OIPRD named different respondent officers and set out different misconduct allegations to be investigated. Later, the appellants say, the OPP's Professional Standards Bureau itself assigned different investigative file numbers to each matter, with each investigation file involving different respondent officers, different witnesses, and the creation of two different investigative reports. The appellants reiterate that the records they seek in this appeal were created in the course of the investigation documented in the PSB report they provided during the inquiry—which investigation concerned the conduct of municipal police officers only.

[60] In support of their position, the appellants provided an extract from their August 2017 OIPRD complaint form. This extract shows that the appellants completed the complaint form's field titled "Police Service this complaint involves" by naming the municipal police, and by identifying several municipal police officers as the subjects of their complaint. This extract of the complaint form contains no mention of the OPP or OPP officers as complaint subjects.

[61] The appellants also addressed the ministry's evidence that the appellants had withdrawn OIPRD complaints against certain OPP officers (among them the two particular OPP officers identified by the ministry). The appellants state that the ministry's evidence in fact supports their contention that there were two separate investigations into allegations of misconduct by officers of the two different police forces (the municipal police and the OPP). The appellants direct my attention to the fact the OIPRD withdrawal form (which is dated late November 2017) contains a handwritten correction of the complaint number to which the withdrawal relates. The appellants state that the corrected complaint number corresponds to the OIPRD file opened to address allegations of misconduct by OPP officers—not the separate OIPRD file (with its own complaint number) opened in August 2017 to address their allegations of misconduct by municipal police officers. The records the appellants now seek concern only the latter investigation.

[62] In response, the ministry continues to assert that the records at issue in this appeal were created during an investigation into officers of both police forces. The ministry states (emphasis ministry's):

According to the correspondence sent from the OIPRD to the OPP, there was a single complaint filed by the appellant ... The complaint did not distinguish between the two police services, and indeed members of both services were investigated.

The OIPRD requested in their correspondence that the "*matter*" be investigated by OPP. The "*matter*" led to the creation of a "*prescribed investigative report*," which was prepared by a member of the PSB. The choice of words is, in our view, important. There were not multiple matters to be investigated, but one singular matter arising out of one complaint.

[63] The ministry did not provide me with a copy of the OIPRD correspondence to which it refers.

[64] The municipal police adopt the ministry's position on the application of the section 65(6)3 exclusion to the records, as well as the ministry's characterization of the underlying investigation. The municipal police state that the investigation arose from "a single complaint ... made by the appellants regarding officers of both the OPP and [municipal police] alleging virtually identical alleged wrongdoings." The municipal police state:

To now suggest the complaints involved two separate matters is an artificial characterization and mischaracterization as the investigation completed was necessary to respond to the entirety of the complaint as a whole and the subject investigation involved both police forces.

[65] Although invited to, the municipal police did not otherwise address the appellants' evidence that two different investigations (against the two different police forces) had been assigned different file numbers, or that the investigation documented in the PSB report concerned the conduct of municipal police officers only.

[66] The parties have offered distinctly different explanations of the circumstances, and the scope, of the investigation documented in the PSB report. In the circumstances, I prefer the appellants' account, which is supported by documentary evidence that includes an extract from their initiating complaint to the OIPRD about the conduct of municipal police officers,²⁵ the existence of different file numbers for the different investigations against different respondent police forces, and the correspondence from the OPP's Professional Standards Bureau that describes the PSB report as the result of the OPP's investigation, on the direction of the OIPRD, into misconduct allegations

²⁵ The August 2017 OIPRD complaint form extract provided by the appellants.

made against four named municipal police officers.²⁶

[67] The appellants' characterization of the investigation is also consistent with the PSB investigator's report of the investigation. The PSB report clearly identifies as the subjects of the investigation four named officers of the municipal police. The PSB report also sets out a detailed chronology of the appellants' complaint giving rise to the investigation, referring specifically to the appellants' August 2017 written complaint to the OIPRD about the four municipal police officers who are the named respondents in the investigation.

[68] In this section of the PSB report, the PSB investigator notes that after filing their initial complaint, the appellants made new allegations against other officers. Nowhere in the PSB report are these other officers identified as additional respondents in the particular investigation that is documented in the PSB report. In my view, the evidence supplied by the appellants supports their assertion that allegations of misconduct by officers of the two different police forces proceeded separately.

[69] By contrast, the ministry provided little evidence in support of its assertion (echoed by the municipal police) that there was a single investigation into allegations of misconduct by both municipal police officers and officers of the OPP. For example, as noted above, although the ministry referred in its representations to correspondence from the OIPRD to the OPP that directed the OPP to investigate a "singular matter," the ministry did not provide me with a copy of this correspondence (or explain why it did not). Nor has the ministry addressed to my satisfaction why, if the misconduct investigation conducted by the PSB investigator concerned a singular matter (i.e., misconduct allegations against both police forces), the resulting PSB report addresses only the conduct of municipal police officers.

[70] On this point, I have considered whether the ministry's evidence of the appellants' withdrawal of complaints against certain OPP officers supports a claim that the investigation documented in the PSB report initially involved respondent officers from both police forces, and then later (after the withdrawal of some complaints) became an investigation solely into officers of the municipal police. I am not persuaded that the evidence before me supports such a claim.

[71] For example, this claim does not address the appellants' evidence that the various investigating bodies assigned different file numbers to the different matters involving respondent officers from different police forces. I also find this claim to be inconsistent with the PSB investigator's identification of these OPP officers as "witnesses" in the particular investigation documented in the PSB report. There is nothing in the PSB report's detailed chronology of events to suggest these OPP officers were at any time considered respondents in this investigation. Alternatively, if it is the

²⁶ The February 22, 2018 letter from the bureau commander of the OPP's Professional Standards Bureau to the chief of the municipal police, enclosing a copy of the PSB report of the same date.

ministry's position that the PSB report is not the "prescribed investigative report" of the investigation into the "singular matter" that the ministry describes, then it was incumbent on the ministry to make this argument during the inquiry, which the ministry did not do.

[72] In view of all the context and my factual findings set out above, I have considered whether the ministry has an "interest," within the meaning of section 65(6)3, in the employment-related matters to which the records at issue in this appeal relate. I conclude that the ministry does not.

[73] First, I have found, above, that the records sought by the appellants were prepared by the PSB investigator in the course of an investigation into the conduct of municipal police officers only; no OPP officers were respondents in the investigation giving rise to the records. Second, without discounting the possibility that in some circumstances, an employer could have a section 65(6)3 interest in records relating to its employees' involvement as witnesses in a given matter, I have not been provided with evidence to establish such circumstances here.

[74] When I asked the ministry to address the fact its own employees were not respondents in the investigation documented in the PSB report (which gave rise to the records at issue in this appeal), the ministry responded that the report contains a significant amount of information about members of the OPP, and it directed my attention to certain pages of the report in particular. The ministry states: "We of course do have an interest in this information [i.e., information in the report] about our members for the purpose of section 65(6), because it relates to allegations about their conduct as set out in the appellants' complaint." The ministry also asserts that information in the records about its members is "intertwined with information about members of the [municipal police], such that our interest extends to the entire investigation, regardless of whether the information is about OPP members or members of the [municipal police]."

[75] I do not accept this argument. I have examined the PSB report, including the specific pages identified by the ministry as instances in which the PSB report contains "a significant amount of information" about OPP officers. While these pages contain information about OPP officers, this information appears in the context of their roles as witnesses in the investigation of municipal police officers that is the subject of the PSB report. While the PSB report contains some references to allegations the appellants later made about various OPP officers (not only the two OPP officers identified by the ministry), these are limited and discrete references that are mainly contained in the section of the report setting out the complaint's chronology. As I noted above, there is no indication in the PSB report that these additional allegations against other officers were investigated as part of the particular investigation that is documented in the PSB report. Thus I do not agree with the ministry's broad claim that the information about OPP officers in the PSB report relates to allegations about OPP officer conduct. More importantly, I do not agree with the claim that the PSB report was intended to address

any such allegations.

[76] Furthermore, even if I were persuaded that the ministry has an interest, as an employer, in the information about OPP officers in the PSB report, the focus of my analysis is each of the records at issue, taken as a whole.²⁷ I have examined the records provided by the ministry, and I disagree with the ministry's claim that the information about OPP officers in the records themselves is "intertwined with" information about municipal police officers in a manner that would engage the ministry's section 65(6)3 interest as an employer in all the records.

[77] In making this finding, I have taken into account the nature of the investigation giving rise to the records (i.e., an investigation into the conduct of municipal police officers), as well as the contents of the particular records the appellants seek. To reiterate, the records at issue in this appeal are the PSB investigator's notebook entries (and audio or other recordings, which the ministry did not provide to the IPC) of his interviews with three civilian (i.e., non-OPP) witnesses during an investigation into the conduct of municipal police officers. The appellants do not seek records of the PSB investigator's interviews with the two particular OPP officers in relation to whom the ministry focused many of its arguments about its section 65(6)3 interest as an employer of OPP officers. I note again that these OPP officers were witnesses in the investigation giving rise to the records at issue; as I also noted above, the ministry declined to provide any other responsive records (or to confirm or deny their existence), and did not provide any other documentation to support its claim that the OPP officers were also subjects of this investigation.

[78] The IPC has consistently taken the position that the application of the exclusions at section 65(6) of *FIPPA* (and the equivalent section in *MFIPPA*) are record-specific and fact-specific.²⁸ The ministry has simply not explained to my satisfaction how its interest as an employer of OPP officers is engaged by records created during an investigation into the conduct of municipal police officers, nor specifically how the particular records at issue in this appeal engage those interests.

[79] In conclusion, neither the ministry's representations nor my own examination of the records I have been provided with persuades me that the records at issue in this appeal were collected, prepared, maintained, or used by the ministry in connection with labour relations or employment-related matters about OPP officers (or other ministry

²⁷ The IPC applies a "whole-record" method of analysis in considering the exclusions at section 65(6) of *FIPPA* and section 52(3) of *MFIPPA*: see Orders M-797, P-1575, PO-2531, PO-2632, MO-1218, PO-3456-I, PO-3642, and many others. This whole-record method of analysis has also been described as the "record-by-record" approach. Under this method, the unit of analysis is the whole record, rather than individual paragraphs, sentences or words contained in a record. In addition, where the information at issue is the withheld portion of a record that has been partially released, the whole of the record (including released portions) is analyzed in determining a requester's right to access the withheld information: Order PO-3642.

²⁸ See Orders M-797, P-1575, PO-2531, PO-2632, MO-1218, PO-3456-I, and PO-3642, among many others.

employees) so as to engage the ministry's interest as an employer. As a result, the ministry cannot claim section 65(6)3 for the records on this basis.

[80] I will next consider the alternative argument made by the ministry for claiming section 65(6)3 based on the interest of the municipal police as the employer. As will be seen below, I also reject this alternative argument.

The ministry cannot claim section 65(6)3 for the records based on the interest of the municipal police as employer

[81] In an alternative argument, the ministry proposes that even if the misconduct investigation solely concerned allegations against members of the municipal police (and not the OPP), the section 65(6)3 exclusion would still apply. The ministry cites Order PO- 2615 for the proposition that an "institution," for the purposes of section 65(6), includes a municipal institution such as a police service.

[82] The municipal police adopt the ministry's argument in this regard. They also propose that had the misconduct investigation been conducted by the municipal police (rather than by the OPP's Professional Standards Bureau), the records would be excluded under the equivalent exclusion in *MFIPPA* for records about labour relations or employment-related matters.²⁹ In these circumstances, the municipal police say, disallowing the ministry's section 65(6)3 exclusion claim in this appeal would amount to making a finding "simply based upon who conducted the investigation rather than a consideration of the nature of the information itself."

[83] Order PO-2615, relied upon by the ministry, is a 2007 decision of the IPC that considered the application of the section 65(6)3 exclusion to records of correspondence between a municipal police service (the Brantford Police Service) and a provincial civilian oversight body then known as the Ontario Civilian Commission on Police Services (OCCPS).³⁰ The respondent institution in Order PO-2615 (being the institution to which the access request was made) was then known as the Ministry of Community Safety and Correctional Services (MCSCS),³¹ and was the provincial ministry responsible for the OCCPS. One of the central issues in Order PO-2615 was whether MCSCS could claim the section 65(6)3 exclusion for records that the Brantford Police Service had sent to or received from the OCCPS in the *Brantford Police Service's* capacity as the employer of the officers whose conduct was under review by the OCCPS. In formulating the issue this way, the adjudicator recognized that the OCCPS, in its role as an independent and impartial adjudicator of the complaint, could not itself have a labour relations or employment-related "interest," within the meaning of section 65(6)3, in the

²⁹ Section 52(3)3 of *MFIPPA*.

³⁰ The OCCPS is now known as the Ontario Civilian Police Commission.

³¹ Now the Ministry of the Solicitor General (which is also the respondent institution in the current appeal).

matter before it.³²

[84] The adjudicator in Order PO-2615 ultimately concluded that section 65(6)3 applied to the records at issue in that appeal. This conclusion flowed from the adjudicator's acceptance of the central premise that the exclusion in the provincial statute (*FIPPA*) could apply in relation to a municipal institution's interest in the labour relations or employment-related matters to which records at issue relate. Thus, after accepting that the Brantford Police Service (a municipal institution under *MFIPPA*) qualified as an "institution" for the purposes of the section 65(6)3 exclusion in *FIPPA*, the adjudicator in Order PO-2615 concluded that the records at issue in that appeal had been collected, prepared, maintained, or used by the police service in relation to meetings, consultations, discussions, or communications about labour relations or employment-related matters in which the police service (as the employer of the officers under review) had an interest. On this basis, the adjudicator allowed the respondent provincial institution (MCSCS) to claim the section 65(6)3 exclusion in *FIPPA* in relation to these records.

[85] Order PO-2615 cited and relied on the reasoning set out in a line of older IPC orders. These include Order P-1560, a 1998 order of the IPC that is cited in several of these older orders for the proposition that section 65(6) in *FIPPA* can apply to records in respect of which the "institution," for the purposes of the exclusion, is a municipal institution under *MFIPPA*.

[86] Order P-1560 concerned a request made under *FIPPA* to the Ontario Labour Relations Board (OLRB), a provincial institution under *FIPPA*, for records in the custody of the OLRB in respect of which (the adjudicator found) a local school board had an interest as an employer. The adjudicator agreed that in the circumstances before her, the OLRB could itself not claim an interest as an employer in the records. However, the adjudicator ventured to say that had the access request been before the local school board (a municipal institution under *MFIPPA*), and not the OLRB, the same records would have been excluded under the equivalent exclusion in *MFIPPA*, based on the school board's interest as an employer in relation to those records.

[87] The adjudicator in Order P-1560 deemed these different outcomes an absurd result in law that should be avoided. To avoid this absurdity, the adjudicator read the definition of "institution" in *FIPPA* broadly, to include municipal institutions under *MFIPPA*. The adjudicator decided that this expansive interpretation of "institution" in *FIPPA* better supported the Legislature's intention with respect to the section 65(6) exclusions, and yielded the appropriate result: the exclusion from *FIPPA* of records in the custody of the OLRB relating to the school board's interest as an employer.

³² The adjudicator in Order PO-2615 adopted the reasoning of earlier IPC caselaw considering whether independent and impartial bodies like the OCCPS and agencies with analogous functions could claim a section 65(6)3 "interest" in the matters before them. The adjudicator cited Order PO-2426, which itself adopted the reasoning from Orders P-1345 and P-1560 (considered in detail further below).

[88] In my view, the reasoning on this issue in Order P-1560 (and applied in Order PO- 2615, cited by the ministry in this appeal) has been superseded by the reasoning applied in more recent decisions of the IPC and the courts, and is no longer good law on this point.

[89] The IPC's approach to the section 65(6) exclusions has been refined significantly in the time since the release of Orders P-1560 (in 1998) and PO-2615 (in 2007). As noted in Order PO-4204 (released in 2021), Order P-1560 was issued before the release of several significant and binding court decisions addressing the interpretation of section 65(6). In *Ontario (Solicitor General) v. Mitchinson*, the Court of Appeal concluded that both a plain reading and a purposive interpretation of the phrase "in which the institution has an interest" in section 65(6) of *FIPPA* supports limiting the exclusion to records relating to an institution's own workforce.³³ The Court of Appeal's reasoning was adopted in subsequent decisions of the Divisional Court, which applied the same narrow interpretation to the analogous exclusion in *MFIPPA*,³⁴ and reiterated the importance of a fact-specific and record-specific approach to the application of the exclusions.³⁵ In orders post-dating Order PO-2615, the IPC has adopted these principles, interpreting and applying a narrow construction of the exclusions in order not to extend their reach beyond what is necessary to accomplish the Legislature's aim of protecting certain information relating to an institution's relations with its own workforce.³⁶

[90] In the more recent Order PO-4204 (the 2021 order noted above), the IPC considered certain section 65(6) exclusion claims made by the OIPRD, the respondent institution in that appeal, in response to a request for complaint investigation records held by the OIPRD in its capacity as an independent oversight body for complaints about the police. It was not in dispute that the OIPRD was not the employer of the municipal police officer who was the subject of the complaint investigation records at issue in that appeal. The adjudicator in Order PO-4204 ultimately found that the records in that appeal were not excluded under section 65(6). Among other reasons, she found that because the OIPRD lacked the necessary interest in the employment-related matters to which the records related, the OIPRD could not answer the access request made to it by claiming the section 65(6)3 exclusion for the records.

[91] The ministry sought to distinguish Order PO-4204 on the basis the appeal before me involves records created by the OPP itself, which has an interest as an employer in records relating to an investigation into OPP officer conduct. As I found above, however, the investigation giving rise to the records at issue in this appeal did not concern OPP officer conduct, and thus this argument made by the ministry does not

³³ *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA), at para 35.

³⁴ *Reynolds v. Binstock*, 2006 CanLII 36624 (ON SCDC), at paras 60 and 64.

³⁵ *Ontario (Correctional Services) v. Goodis*, cited above, at para 29.

³⁶ In addition to Order PO-4204, see as examples Order PO-4149; Order MO-3664, upheld in *Brockville (City) v. Information and Privacy Commissioner, Ontario*, cited above; and Order PO-2917, upheld in *Ontario (Community and Social Services) v. John Doe*, cited above.

reflect the circumstances before me. In fact, the circumstances in this appeal and in Order PO-4204 are similar in this respect: In both cases, the respondent institutions with custody or control of records requested under *FIPPA* are not the institutions that employ the individuals whose conduct is addressed in the records.

[92] The municipal police sought to distinguish the current appeal on the basis that Order PO-4204 concerned complaint investigation records that were being sought by the very subject of the complaint, whereas the appellants in this appeal are not the subjects of the complaint to which the records relate, and the records contain information of individuals other than the appellants. I do not see the relevance of this argument. The application of the section 65(6)3 exclusion does not turn on whether the records at issue contain the personal information of the individual requesting access to them.

[93] Thus neither the ministry nor the municipal police made persuasive arguments for departing from the IPC's current interpretation of the section 65(6)3 exclusion, as summarized in Order PO-4204 and described above. I apply the IPC's current approach here in considering the ministry's argument that the section 65(6)3 exclusion in *FIPPA* should apply to records in respect of which another institution (like the municipal police) has an interest as an employer. In doing so, I specifically decline to follow the adjudicator's reasoning on this issue in Order P-1560. I find the adjudicator's approach on this issue, and the result, to be inconsistent with a purposive interpretation of the exclusion.

[94] First, I find unpersuasive the reasons given in Order P-1560 for departing from a plain reading of the definition of "institution" in *FIPPA*. The adjudicator in Order P-1560 began by acknowledging that a plain reading of the definition indicates that it is meant to be exhaustive (i.e., complete).³⁷ She also recognized that although the Legislature had amended several sections of *FIPPA* after the enactment of *MFIPPA*, to include references to *MFIPPA*, the Legislature had not amended the definition of institution in *FIPPA*. Despite this, the adjudicator proposed that it was "arguable that had section 65(6) been in [*FIPPA*] at the time [*MFIPPA*] became law, additional amendments may have been made." She went on to read into the definition of institution in *FIPPA* an additional category of bodies—municipal institutions under *MFIPPA*—that were not explicitly listed there.

[95] I see no principled basis for this departure from a plain reading of the definition of institution in section 2(1) of *FIPPA*. At the time of Order P-1560, the Legislature could have amended, but chose not to amend, the definition of institution in *FIPPA* to include municipal institutions under *MFIPPA*. Moreover, in the time since Order P-1560, the Legislature has amended the definition to bring several additional categories of bodies

³⁷ The adjudicator in Order P-1560 cited the principle that a definition introduced by the word "means" is deemed to be an exhaustive definition [quoting from Pierre-André Côté, The Interpretation of Legislation in Canada, 2nd ed. (Quebec: Les Éditions Yvon Blais, Inc., 1991)].

into the scope of *FIPPA*. "Institution" is currently defined in section 2(1) of *FIPPA* as follows:

In [*FIPPA*],

"institution" means,

(0.a) the Assembly,

(a) a ministry of the Government of Ontario,

(a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*, (a.2)

(a.2) a hospital, and

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations[.]

[96] To date, the Legislature has not amended the definition of institution in *FIPPA* to include municipal institutions under *MFIPPA*. I also observe that the enumerated list in the definition at section 2(1) is introduced by the word "means" (as it was at the time the adjudicator in Order P-1560 considered the definition in 1998). As noted in that order, it is a principle of statutory interpretation that a definition introduced by the word "means" is deemed to be an exhaustive definition.³⁸ Thus, in my view, the adjudicator's comments in Order P-1560 about the Legislature's intention with respect to the definition of institution in *FIPPA* is not supported by a plain reading of the definition, nor borne out by the events since the time of her order.

[97] In Order P-1560, the adjudicator found it necessary to take an expansive approach to the definition in order to avoid what she characterized as an absurd result on the facts before her. As noted above, Order P-1560 concerned a request made under *FIPPA* to the OLRB, a provincial institution under *FIPPA*, for records in the custody of the OLRB in respect of which the OLRB did not itself have an interest as an employer.

[98] Although the question was directly not before her, the adjudicator decided that the same records would be excluded under the equivalent exclusion in *MFIPPA*, based on their connection to the employment-related interest of a municipal institution under *MFIPPA*. To achieve the same result for records in the hands of the provincial institution (the OLRB) to which the access request had been made, the adjudicator decided it was necessary to expand the definition of institution in *FIPPA* to include municipal

³⁸ Quoting from Pierre-André Côté's text on statutory interpretation: see footnote above. This contrasts with a definition introduced by a word such as "includes," which indicates that the definition is intended to be non-exhaustive.

institutions under *MFIPPA*. The following extracts from that decision set out the adjudicator's rationale:

In the present case, if the OLRB had exercised its discretion to transfer the request to the [local school board], it is clear that the section 52(3) exclusion in [*MFIPPA*] 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.³⁹ ...

In my view, [*FIPPA*] and [*MFIPPA*] 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. ...

If [*FIPPA*] and [*FIPPA*] 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 [*FIPPA*]. ...

If the meaning of "institution" in section 65(6) was extended to include institutions as defined in [*MFIPPA*], 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.

[99] In the appeal before me, I understand the municipal police to be making a similar argument when they propose that disallowing the ministry's section 65(6)3 exclusion claim in this case would be to "allow indirectly what cannot be accomplished directly." For example, the municipal police propose that had they conducted the misconduct investigation themselves, the records at issue would be excluded under *MFIPPA*. I understand the municipal police to be objecting to the possibility that the appellants could request under *FIPPA* records that would be excluded under *MFIPPA* in the hands of the municipal police.

³⁹ Here the adjudicator in Order P-1560 referred to the legal category of absurdity in law known as "irrational distinctions," and she provided the following definition from *Driedger on the Construction of Statutes* (3rd edition, 1994 (Butterworths) at page 79: "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."

[100] I find this line of reasoning an unpersuasive basis for such an expansive reading of the institutional interest required by section 65(6)3. First, I do not agree that different outcomes to access requests made to different bodies is, by itself, indicative of an “absurd result” in law that requires remedy. For example, the IPC has recognized that police investigative records may be exempt on the basis of solicitor-client privilege in the context of a Crown brief, but that the same records may not be exempt on this basis outside the Crown brief, such as in the hands of the police that originally prepared the records.⁴⁰ Different outcomes may be the result of applying different statutes, in different factual contexts, to the same records at issue.

[101] In the case before me, I make no finding on whether the records sought by the appellants are, first, in the custody or control of the municipal police; and, second, whether those records would be excluded in the hands of the municipal police under the equivalent exclusion in *MFIPPA* for labour relations or employment-related matters. These questions are not before me in this appeal, which arises in the context of a request made to the ministry under *FIPPA*, not a request made to the municipal police under *MFIPPA*.

[102] The IPC’s approach to the application of the exclusions is record-specific and fact-specific, and thus requires consideration of the particular records at issue within the factual context of the appeal. A key part of the relevant factual context in an appeal is the identity of the institution⁴¹ to which the access request is made. Among other things, the identity of the institution will determine the applicable statute, and issues around custody or control, all of which are relevant to determining the very scope of the records responsive to the request.

[103] In this regard, I do not agree with the adjudicator’s formulation in Order P-1560 that the identity of the institution that responds to an access request is simply a matter of a record’s “location.” Different institutions may not have custody or control of the same records, or they may hold copies of the same records for different purposes. In those different contexts, different institutions may make different decisions on access to records in their custody or control. I also note that in some circumstances, it may be open to an institution that receives a request for records in its custody or control to consider the relevance of the transfer provisions in *FIPPA*.⁴² An institution’s decision to

⁴⁰ Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

⁴¹ Or, where an institution acts in multiple capacities, the capacity in which the institution has custody or control of requested records: see Order MO-3981 and the discussion at para 105.

⁴² Section 25(2) of *FIPPA* states: “Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.”

The criteria for the determination of which institution has the “greater interest” in the requested records are set out at section 25(3) of *FIPPA*, which states: “For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if, (a) the

transfer a request under *FIPPA* may be appealed to the IPC.

[104] In this appeal, the identity of the respondent institution is key to determining whether the records sought by the appellants are excluded from *FIPPA* because of their connection to labour relations or employment-related matters in which the “institution” referred to in section 65(6)3 has an interest. If I were to accept the ministry’s argument in this appeal, the ministry would be entitled to claim the section 65(6)3 exclusion based on the employment-related interest of the municipal police force whose officers the ministry (through the OPP’s Professional Standards Bureau) was charged with investigating.⁴³ This claim by the ministry is simply inconsistent with the independent role played by the ministry (through the PSB investigator) with respect to the records. I note that for the same reasons, the adjudicator in Order PO-4204 rejected the respondent institution OIPRD’s claim of a section 65(6)3 interest in records based on the employment-related interest of the police force in respect of which the OIPRD exercised an oversight role.⁴⁴

[105] This reasoning is illustrated even more starkly in Order MO-3981, issued in 2020. In Order MO-3981, the adjudicator rejected the equivalent exclusion claim made by the Peel Regional Police Services Board (the Peel Police) for records held by a distinct body *within the same institution* whose role was to act as an impartial adjudicator of police misconduct allegations. The adjudicator considered whether the underlying purpose of the equivalent exclusion in *MFIPPA*—namely, to preserve the confidentiality of certain employment-related information held by the Peel Police in its capacity as the employer of police officers—would be served by excluding from the scope of *MFIPPA* certain records, relating to police disciplinary proceedings, held by the Peel Police in the context of its separate and distinct role as an independent tribunal of discipline matters. He concluded that the exclusion in *MFIPPA* did not apply to such records, noting among other things that the wording of the exclusion was inconsistent with the Peel Police’s quasi-judicial role in that context as a disinterested and impartial adjudicator with respect to those records. I pause to note here that such a finding does not prevent an institution from seeking to protect legitimate confidentiality interests through the application of relevant exemptions from the right of access. However, as Order MO-3981 illustrates, an institution cannot rely on these exclusions for records in respect of which the institution’s role is inconsistent with the claim of an interest as an employer.

[106] For this same reason, I find inapposite another line of reasoning followed by the adjudicator in Order P-1560 to support her finding in that order. The adjudicator noted that in a previous order,⁴⁵ the IPC had upheld the OLRB’s section 65(6) exclusion claim

record was originally produced in or for the other institution; or (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.”

⁴³ As noted above, the OPP’s Professional Standards Bureau coordinates and independently investigates complaints made directly to the OIPRD: see footnotes 4, 5 and 6, above.

⁴⁴ Order PO-4204, paras 70-71.

⁴⁵ Order P-1345, from 1997.

based on another provincial institution's (i.e., not the OLRB's) interest as an employer with respect to records requested from the OLRB. The adjudicator in Order P-1560 concluded that because the OLRB would be entitled to claim the section 65(6)3 exclusion for records relating to provincial institution employers, the same treatment should be afforded to records relating to municipal institution employers. She reasoned that by expanding the institutional interest in section 65(6)3 to apply to municipal institutions, "both provincial and municipal government employers providing records to the OLRB would enjoy the 'protection' of that provision."

[107] The adjudicator's statement reflects the IPC's interpretation of the section 65(6) exclusions at the time of her order in 1998. The IPC's approach has evolved since that time, and, in my view, the adjudicator's statement is no longer good law. Instead, I believe that the same principles outlined above would apply: A respondent institution under *FIPPA* would not be entitled to claim a section 65(6)3 interest in respect of records in its custody or control in the context of its independent oversight role in matters concerning another institution as employer, regardless of whether that other institution is a provincial institution under *FIPPA* or a municipal institution under *MFIPPA*. In either case, the respondent institution's role with respect to the records would be inconsistent with any claim of a section 65(6)3 interest on behalf of a party in the matter before it.

[108] In my view, this interpretation is consistent with the IPC's well-established approach, which considers the specific records at issue, in their specific factual context, having regard to the purpose of the section 65(6) exclusions. This factual context includes, notably, the circumstances under which a respondent institution has custody or control of records that are the subject of an access request.

[109] I recognize here (as did the adjudicator in Order PO-4204) that the Court of Appeal and Divisional Court did not explicitly examine the question of whether the exclusions in section 65(6) apply only to records concerning the respondent institution's own workforce or employees—these decisions did not, for example, specifically involve the interpretation of the word "institution" for the purposes of the exclusion. However, I agree with and adopt the adjudicator's conclusion that these decisions call for a narrow interpretation of the section 65(6) exclusions, based on a purposive reading of these sections, and that they support, by implication, the conclusion that the "institution" for the purposes of section 65(6) must be the employer.⁴⁶

[110] In my view, these principles also support a reading of the section 65(6)3 exclusion that limits its application to records in which the institutional interest described in section 65(6)3 is the interest of the respondent institution under *FIPPA* that has custody or control of the records sought under *FIPPA*. In this appeal, the ministry urges a broader interpretation that would enable the ministry to claim this exclusion in *FIPPA* based on the municipal police's interest (and not the ministry's own

⁴⁶ Order PO-4204, para 46.

interest) as an employer with respect to the records sought under *FIPPA*. But allowing a respondent institution under *FIPPA* to claim section 65(6)3 for records in its custody or control, based solely on a municipal institution's interest in the records, would have the effect of excluding from *FIPPA*'s rights and protections entire categories of records in which the respondent institution has no labour relations or employment-related interests to protect. This same reasoning would also apply to cases where the employer is a provincial institution under *FIPPA*, but is a separate institution from the respondent institution that receives the access request.

[111] In my view, allowing a respondent institution to claim another institution's labour relations or employment-related interest as its own, in respect of records in the respondent institution's custody or control, is inconsistent with a fact-specific analysis, and unduly broadens the scope of the exclusion. *FIPPA* explicitly provides that "necessary exemptions from the right of access should be limited and specific."⁴⁷ The narrow construction of the section 65(5) exclusion is justified in order to support *FIPPA*'s statutory purpose.⁴⁸

[112] For the above reasons, I find that the ministry cannot claim the section 65(6)3 exclusion in this appeal based on the interest of the municipal police in respect of the records. To the extent my finding departs from older IPC caselaw on this issue, I prefer my interpretation, which is consistent with the reasoning in more recent decisions of the IPC and the courts on the interpretation of the section 65(6) exclusions.⁴⁹

[113] For all the foregoing reasons, I find that the ministry's section 65(6)3 claim fails. Because responsive records in the custody or control of ministry are not excluded from *FIPPA*, I will order the ministry to issue another decision on access to these records. As noted above, these records include responsive notebook entries made by the PSB investigator. They also include any responsive audio or other recordings, which the ministry did not identify or provide to the IPC during the inquiry.

ORDER:

1. I do not uphold the ministry's decision to refuse the appellants' access request on the basis of section 65(6)3 of *FIPPA*.
2. I order the ministry to issue another access decision to the appellants in respect of all records responsive to their January 2019 request, treating the date of this order as the date of the request for the purposes of the procedural requirements in *FIPPA*.

⁴⁷ *FIPPA*, section 1(a)(ii).

⁴⁸ *Brockville (City) v. Information and Privacy Commissioner, Ontario*, cited above, at para 38.

⁴⁹ The principle of binding precedent, or *stare decisis*, does not apply to require administrative tribunals to follow their own previous decisions: *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929, at para 14.

Original signed by: _____

Jenny Ryu
Adjudicator

_____ March 22, 2023