Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4549

Appeal PA23-00369

Ministry of Health

September 13, 2024

Summary: The appellant asked the ministry for access to specific records about the recommendation and decision to delist travel medicine services from the Ontario Health Insurance Plan in 1998.

The ministry responded by stating that it had disclosed the requested 1998 records in part in response to a prior access request that was the subject of an IPC appeal and order. The ministry maintained the position it had taken in the prior request, except that it decided to give the appellant access to some previously withheld cabinet records because they were now over 20 years old and could be disclosed under the exception in section 12(2) of the *Act*. However, the ministry denied access to one of those records claiming that the section 65(6) exclusion applies to it.

In this order, the adjudicator upholds the ministry's decision that the one record at issue is excluded from the application of the *Act* because it relates to labour relations in which the ministry has an interest. She also finds she has no jurisdiction to address the remaining records, which were addressed in a prior IPC order.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990 c F31, sections 65(6)3 and 65(7).

Orders and Investigation Reports Considered: Orders PO-2457 and PO-3619.

Cases Considered: *Ontario (Solicitor General) v Mitchinson*, 2001 CanLII 8582 (ON CA); *Ontario (Minister of Health and Long-term Care) v Mitchinson*, 2003 CanLII 16894 (ON CA); *Canadian*

Medical Protective Association v Loukidelis, 2008 CanLII 45005 (ON SCDC); *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII).

OVERVIEW:

[1] This order addresses whether a former cabinet record is now excluded from the application of the *Freedom of Information and Protection of Privacy Act* (the *Act*) under section 65(6) (labour relations or employment records).

[2] The appellant submitted a request to the Ministry of Health (the ministry) for access to specific records related to "the recommendation and decision" of the Physician Services Committee (PSC) and the ministry to delist all "travel medicine services" from the Ontario Health Insurance Plan (OHIP) effective July 1, 1998.

[3] In response to the access request, the ministry issued an access decision in which it stated that it had previously disclosed the requested 1998 records in part (in Appeal PA14-00217, addressed in Order PO-3619), withholding records that were exempt from disclosure under section 12(1) (cabinet records) of the *Act* and records that were excluded from the application of the *Act* under section 65(6) (labour relations or employment records). The ministry explained that the records it had previously withheld on the basis that they are excluded from the scope of the *Act* under section 65(6) continue to be excluded, notwithstanding the passage of more than 20 years since their creation. The ministry noted that government information excluded from the application of the *Act* cannot be obtained through freedom of information requests.

[4] Regarding the cabinet records that the ministry previously withheld under section 12, it acknowledged that they were now more than 20 years old and no longer exempt under section 12(1) of the *Act* by virtue of the exception in section 12(2) of the *Act.* On this basis, the ministry granted the appellant access to all but one of these cabinet records. The ministry explained that record 2 is a cabinet record, but it is also a record that is specific to the PSC – a joint committee of the ministry and the Ontario Medical Association (OMA) that discusses physician compensation issues. The ministry asserted that the section 65(6) exclusion applies to record 2 and the ministry denied the appellant access on that basis.

[5] The appellant was dissatisfied with the ministry's decision and appealed it to the Information and Privacy Commissioner of Ontario (IPC). The IPC attempted to mediate the appeal. During mediation, the appellant challenged the ministry's decision to withhold the remaining responsive records (1, 3, 4 and 6) under the exclusion at section 65(6) of the *Act*. The appellant also argued that the exemption at section 12(1) of the *Act* applies to record 2 and supersedes the exclusion at section 65(6) of the *Act*. The appellant asserted that the ministry is misusing section 65(6) of the *Act* to deny him access to record 2 because section 12(2)(a) of the *Act* renders section 12(1) of the *Act* no longer applicable.

[6] A mediated resolution was not achieved, and the appeal was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry. I conducted an inquiry and received representations from the ministry and the appellant.

Scope of the appeal

[7] In the Notice of Inquiry that I sent to the parties, I advised them of my preliminary assessment that I have no jurisdiction to address records 1, 3, 4 and 6 in this appeal because the IPC had already determined they are excluded from the application of the *Act*. I wrote to the parties that, having examined the records in this appeal and reviewed the relevant legislation and Order PO-3619, I confirm that records 1, 3, 4 and 6 have already been addressed by the IPC. I reiterated the IPC's finding in Order PO-3619 that records 1, 3, 4 and 6 are excluded from the scope of the *Act* pursuant to the labour relations exclusion at section 65(6)3; meaning that records 1, 3, 4 and 6 are not accessible under the *Act.* I also cited the decision of the Court of Appeal for Ontario that confirmed the application of section 65(6) is not time limited; if section 65(6) applies at the time a record is collected, prepared, maintained or used, it does not cease to apply at a later date.[1]

[8] After explaining my preliminary assessment, that I have no jurisdiction to address records 1, 3, 4 and 6 in this appeal, I asked the parties to advise me if they disagreed with my preliminary assessment and, if so, to explain the basis for their disagreement.

[9] The ministry responded that it agreed with my preliminary assessment that records 1, 3, 4 and 6 fall outside the jurisdiction of the *Act* and my authority under it. The appellant advised me that he disagreed with my preliminary assessment because it accepts the finding in Order PO-3619, which, in his opinion, was wrong. He also expressed his view that the section 65(6) exclusion is ill-advised and thwarts the access to information purpose of the *Act*. I have considered all the appellant's points of disagreement, though I need not repeat them here, and I do not find them persuasive. I confirm my assessment, from my own review of the records, the relevant legislation and Order PO-3619, that records 1, 3, 4 and 6 have been properly found by the IPC to be excluded from the application of the *Act.* I find that records 1, 3, 4 and 6 are not at issue in this appeal, and I do not address them further in this order.

RECORD:

[10] The only record at issue in this appeal is record 2, a 12-page draft cabinet submission / cabinet decision document. And the sole issue before me is whether record 2 is excluded from the application of the *Act* by section 65(6).

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[1] *Ontario* (*Solicitor General*) *v Mitchinson*, 2001 CanLII 8582 (ON CA). (*Solicitor General)*

DISCUSSION:

Section 65(6)3: labour relations in which the ministry has an interest

[11] Section 65(6) of the *Act* 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 the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.[2] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[3]

[12] The ministry argues that record 2 falls within the labour relations exclusion at section 65(6)3[4] of the *Act*, which states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest[.]

The section 65(6)3 test

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

1. the records were collected, prepared, maintained or used by the ministry or on its behalf;
2. this collection, preparation, maintenance or use 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.

The appellant's representations do not directly address the test

[14] The appellant's representations do not directly address the test for the application of section 65(6)3 or the ministry's representations on the test. Rather, they contain the appellant's views on the history and effect of the exclusion, and they urge me to reject prior IPC orders and to not follow a 2003 decision of the Court of Appeal for Ontario,

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[2] Order PO-2639.
[3] *Ontario* (*Ministry of Community and Social Services*) *v John Doe*, 2015 ONCA 107 (CanLII).
[4] The ministry also argues that the exclusion in section 65(6)2 applies to record 2. Because I am satisfied that section 65(6)3 applies and excludes record 2 from the scope of the *Act*, I need not address the possible application of section 65(6)2.

which I rely on below.

[15] The appellant argues that the ministry should not be permitted to claim that the exclusion applies to record 2 now that record 2 is no longer exempted from disclosure by the cabinet privilege exemption in section 12(1); he characterizes the ministry's claim of the exclusion as vexatious and a weaponization of the *Act.* The appellant urges me to find that record 2 should be subject to the *Act* and should be disclosed to him. In support of these and other arguments, the appellant submits that the administrative law landscape has changed since the Supreme Court of Canada issued its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[5] and that I should treat this appeal a certain way based on *Vavilov*.

[16] Despite the appellant's insistence to the contrary, the *Vavilov* decision does not support his arguments. The *Vavilov* decision addresses the standard of review for judicial reviews of administrative decisions. Judicial review is conducted by judges in courts; this appeal is not a judicial review. Moreover, my role as an adjudicator does not include applying for judicial review, as the appellant urges me to do. I reject the appellant's arguments as legally unfounded.

The ministry's representations establish that the section 65(6)3 test has been *met*

[17] Regarding parts 1 and 2 of the test, the ministry explains that it prepared record 2, summarizing recommendations of the PSC, to facilitate amendments to the OHIP Schedule of Benefits for Physician Services. It explains that the PSC recommended to the ministry that travel medicine services be removed from the Schedule of Benefits, and the ministry used record 2 for meetings, consultations and discussions about amendments to the Schedule of Benefits. The appellant does not dispute the ministry's submissions on parts 1 or 2. I am satisfied that record 2 was prepared and used by the ministry for meetings, consultations and discussions about amendments to the Schedule of Benefits in satisfaction of parts 1 and 2 of the test for the application of section 65(6)3.

[18] Regarding part 3 of the test, the ministry asserts that the nature of its relationship with physicians in Ontario and the way it negotiates with them are determinative of the application of the exclusion to the records. It explains that, although practising physicians are not employed by the ministry, the ministry makes payments to physicians in Ontario under OHIP based on the fees established in the Schedule of Benefits. It further submits that recommendations regarding the Schedule of Benefits directly impact the amounts of and the conditions that apply to the payments the ministry makes to physicians in Ontario. As a result, the ministry submits that record 2, relating to these recommendations, is about labour relations within the meaning of section 65(6)3 in which it has a direct and substantial financial interest.

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[5] 2019 SCC 65 (CanLII).

[19] The ministry states that record 2 is similar to the types of records that were found to be excluded in Order PO-2497 and the Court of Appeal's 2003 decision in *Ontario (Minister of Health and Long-term Care) v Mitchinson*, which states:[6]

> The relationship between the government and physicians, and the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, fall within the phrase "labour relations", and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in s. 65(6)3. The result is that the Act does not apply to the records the production of which was ordered by the respondent.

[20] The ministry further submits that it has the interest in record 2 required by the last part of the test due to: its statutory mandate under the *Health Insurance Act* and the *Commitment to the Future of Medicare Act, 2004*, its responsibility for managing and controlling OHIP and health care costs in general, its direct involvement in the creation of record 2, and the financial implications for the ministry of the negotiated issues reflected in record 2. The ministry stresses that the section 65(6)3 exclusion is not time limited, which the Court of Appeal confirmed in 2001 in *Solicitor General*.[7] The ministry concludes by noting that, given it is the primary source of physicians' income, its interest in any record that relates to physician remuneration and work-related matters is obvious.

[21] Although the appellant does not directly address the last part of the test, he argues that the 2003 Court of Appeal decision is wrong and that I should not follow it.

[22] I agree with the ministry. And I follow the Court of Appeal's 2003 decision – as I am bound to do – that the nature of the relationship between the government and physicians in the context of physician remuneration falls within the meaning of "labour relations." I am satisfied that the meetings, consultations, discussions or communications for which the ministry prepared and used record 2 were about labour relations in which the ministry has an interest, namely the negotiation of physician remuneration as reflected in the Schedule of Benefits. I find that the last part of the test for the application of section 65(6)3 is met.

The section 65(7) exceptions to section 65(6) do not apply

[23] The appellant relies on section 65(7) of the *Act*, which lists exceptions to section 65(6). Section 65(7) states that despite section 65(6), the *Act* applies to the following records:

1. An agreement between an institution and a trade union.

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[6] 2003 CanLII 16894 (ON CA), at paragraph 2.
[7] Cited at footnote 1.

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.

[24] The ministry submits that record 2 does not fall within any of the exceptions listed in section 65(7) as the record is neither an agreement nor an expense account.

[25] The appellant argues that the OMA is a trade union and, therefore, the exceptions found in section 65(7) apply to record 2, bringing the record within the application of the *Act*. In support of his position, the appellant cites Order PO-2497 and notes that the Divisional Court upheld Order PO-2497 in its decision in *Canadian Medical Protective Association v Loukidelis*.[8]

[26] The records that were before the adjudicator in Order PO-2497 were agreements between the ministry, the OMA and the Canadian Medical Protective Association. While agreements fall within the exceptions at section 65(7) to the exclusion in section 65(6), record 2 in this appeal is not an agreement. Record 2 is not an expense account either. Record 2 is a draft cabinet submission / cabinet decision document and none of the exceptions in section 65(7) applies to it. I find that record 2 is excluded from the application of the *Act* under section 65(6)3.

ORDER:

I uphold the ministry's decision that record 2 is excluded under section 65(6)3 of the *Act* and I dismiss the appeal.

Original Signed by: September 13, 2024
Stella Ball
Adjudicator

[8] 2008 CanLII 45005 (ON SCDC).