

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4648

Appeal PA22-00247

Ministry of the Solicitor General

April 30, 2025

Summary: An individual made a request to the Ministry of the Solicitor General under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to an investigation into a complaint against members of the Ontario Provincial Police. The ministry issued a decision denying access to the responsive records claiming that the doctrine of issue estoppel applied to the occurrence records, while the complaint records are excluded from the *Act* under the employment or labour relations exclusion (section 65(6)3).

In this order, the adjudicator finds that the doctrine of issue estoppel applies to the occurrence records. She also upholds the ministry's claim that the labour relations exclusion applies to the complaint records. She dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(6)3.

Orders Considered: Orders PO-4312 and PO-3946.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, and *Penner v. Niagara (Regional Ministry Services Board)*, 2013 SCC 19.

OVERVIEW:

[1] The appellant made a complaint against three Ontario Provincial Police (OPP) officers to the OPP Provincial Standards Bureau (PSB) in 2020. Subsequently, he made a request to the Ministry of the Solicitor General (the ministry) under the *Freedom of*

Information and Protection of Privacy Act (the *Act*) for access to the following:

Copies of documents relating to my complaint to the OPP Commissioner and referred to [specified PSB officer investigating the appellant's complaint], OPP PSB:

1. All OPP PSB notes, emails and reports relating to my complaint and allegations,
2. All information in OPP possession from all relevant occurrences,
3. Notes and statements from all OPP officers contacted in relation to this complaint,
4. All statements from witnesses and suspects relating to my complaint,
5. Copies of phone calls between myself and [specified PSB officer investigating the appellant's complaint] (27 Oct 2021, 21 Apr 2022 & 30 Apr 2022)

Time period of the records from 2017/05/01 to 2022/05/11.

[2] The ministry issued a decision denying access to the responsive records claiming that they are excluded from the scope of the *Act* under section 65(6)3 (employment or labour relations).

[3] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] Prior to mediation, the appellant clarified part 2 of his request, stating that he sought access to OPP records related to a specified 2018 occurrence in which he was charged with mischief.

[5] As a result of this clarification, the ministry issued a supplementary decision advising that records responsive to part 2 of the appellant's request were previously provided and addressed by Appeal PA19-00433 and in Order PO-4312. Despite this, the ministry again claimed sections 49(a) (discretion to refuse access to requester's own personal information), read with section 14(1)(l) (facilitate commission of an unlawful act), and 49(b) (personal privacy) apply in this appeal to exempt these records from disclosure. The ministry stated that it continues to claim section 65(6)3 over the rest of the responsive records. The ministry clarified that certain information, such as printing information, was removed from the records because it is non-responsive to the appellant's request.

[6] After the ministry issued its supplemental access decision, this appeal was transferred to the mediation stage and a mediator was assigned to explore resolution.

[7] During mediation, the ministry confirmed that records responsive to part 2 of the appellant's request have already been adjudicated by the IPC under appeal PA19-00433 and Order PO-4312. As such, the ministry raised the doctrine of issue estoppel with respect to those records. The ministry confirmed that access to the records responsive to parts 1, 3, 4, and 5 of the appellant's request is being denied because section 65(6)3 applies to exclude them from the scope of the *Act*.

[8] The appellant advised that he continues to seek access to all records and information withheld by the ministry, including the portions withheld as non-responsive.

[9] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry in which I sought and received representations from the parties about the issues in the appeal.¹

[10] In this order, I find that the doctrine of issue estoppel applies to preclude the appeal of the records responsive to part 2 of the appellant's request. I uphold the ministry's claim that the records responsive to parts 1, 3, 4, and 5 of the appellant's request are excluded from the scope of the *Act* under section 65(6)3.

RECORDS:

[11] The records at issue in this appeal are as follows:

1. The occurrence records (responsive to part 2 of the appellant's request) are 22 pages of OPP records related to the specified 2018 occurrence. The ministry claims that the doctrine of issue estoppel applies to these records, and they should not be considered in this appeal. In the alternative, the ministry also claims that sections 49(a), read with section 14(1)(l), and 49(b) exempt these records from disclosure; and
2. The complaint records (responsive to parts 1, 3, 4, and 5 of the appellant's request) are records related to the appellant's OPP PSB complaint. The ministry claims that these records are excluded from the scope of the *Act* under section 65(6)3.

¹ I have reviewed all the appellant's representations, but I will only refer to those portions of his representations that are most relevant to the issues in this appeal. The appellant's allegations against the OPP and the related criminal occurrences are outside the scope of this appeal.

PRELIMINARY ISSUE:

Does the doctrine of issue estoppel apply to the adjudication of the occurrence records responsive to part 2 of the appellant's request considering Order PO-4312?

[12] The appellant seeks access to OPP records related to a specified 2018 occurrence in which he was charged with mischief. In 2019, he made a request for access to these occurrence records, which was considered in Appeal PA19-00433. In that appeal, the ministry granted partial access to the records and withheld information under section 49(a), read with section 14(1)(l), and section 49(b) of the *Act*. The appeal was resolved by Order PO-4312 in which the ministry was ordered to disclose the records to the appellant in part. The ministry confirmed that it disclosed the records to the appellant as ordered and the appellant does not dispute this.

[13] The ministry takes the position that the doctrine of issue estoppel should apply in this appeal because access to the records responsive to part 2 of the appellant's request has already been adjudicated by the IPC.

[14] Issue estoppel is a common law doctrine. The leading case that considers the doctrine of issue estoppel in the context of prior tribunal decisions is the Supreme Court of Canada's (SCC) decision, *Danyluk v. Ainsworth Technologies Inc.* (Danyluk).² In that decision, the SCC stated,

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry.... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal...

[15] The SCC also confirmed that the doctrine of issue estoppel applies to administrative tribunals:

These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context

² *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

[16] The test set out in *Danyluk* for establishing the operation of issue estoppel has been adopted by the IPC. In Order PO-3946, the adjudicator stated:

Danyluk sets out a two-step analysis for the application of issue estoppel. First, the decision maker must determine whether the moving party ... has established the three conditions to the operation of issue estoppel. These conditions are:

1. that the same question has been decided,
2. that the judicial decision which is said to create the estoppel was final; and,
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[17] The adjudicator noted that, even if these three conditions are met, the IPC must still determine "whether, as a matter of discretion, issue estoppel ought to be applied."

[18] Even if issue estoppel is found to apply, the IPC may exercise its discretion to hear the appeal. In *Penner v. Niagara (Regional Ministry Services Board)*,³ the SCC stated that even if issue estoppel applies, "a court retains discretion to not apply issue estoppel when its application would work an injustice."⁴

[19] Regarding the factors to consider in the discretionary application of issue estoppel, the SCC in *Penner* stated,

Broadly speaking, the factors identified in the jurisprudence [such as *Danyluk*] illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.⁵

³ *Penner v. Niagara (Regional Ministry Services Board)*, 2013 SCC 19, (*Penner*).

⁴ *Ibid.* at para 29.

⁵ *Ibid.* at para 39.

Analysis and findings

[20] As stated above, in *Danyluk*, the SCC confirmed the importance of finality in litigation and stated, “an issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner.”⁶ In considering whether issue estoppel applies, the SCC directs a decision maker to “balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.”⁷ Based on my review of Order PO-4312, the parties’ representations, and the circumstances of this appeal, I find the doctrine of issue estoppel applies.

[21] The ministry claims that the occurrence records responsive to Part 2 of the appellant’s request are subject to the doctrine of issue estoppel. The ministry states that previous IPC orders, including Order PO-4235, have held that the IPC may invoke this doctrine to dismiss an appeal where the appeal involves the same parties, issues, and records previously considered.

[22] The appellant argues that the doctrine of issue estoppel should not apply.

[23] The first requirement for a finding of issue estoppel is that the same question has been decided. The ministry submits that Order PO-4312 determined the issue of access to the same records at issue in this appeal, so the same question has been decided. The appellant claims that his request and the exemptions the ministry claimed in Order PO-4312 are different from this current appeal.

[24] In Order PO-4312, I considered the issue of access to OPP records of a specific occurrence relating to the appellant. As a result of interactions with the OPP, the appellant filed a complaint against three OPP officers in 2020. In this current appeal, the appellant requested, “All information in OPP possession from all relevant occurrences [related to his complaint].” The appellant argues that the “documents may be the same but [the] purpose for the request and the question, that this evidence would supply, is different.”

[25] Despite the difference in wording, the records responsive to part 2 of the appellant’s current request are the same records responsive to his request in Order PO-4312. Furthermore, the ministry claimed the exemptions at section 49(a), read with section 14(1)(l), and section 49(b) over these same records in response to both the request at issue in Order PO-4312 and the request being considered in this current appeal. Based on the evidence before me, I find that the occurrence records are the same records the appellant requested in Order PO-4312, and the same question has been decided in Order PO-4312. Therefore, I find that the first condition for the doctrine of issue estoppel to apply has been met.

[26] I also find that the decision which is said to create the estoppel was final. The ministry submits that Order PO-4312 is a final decision, and the appellant does not dispute

⁶ *Danyluk*, *supra* note 2 at para 18.

⁷ *Ibid.* at para 33.

this fact. Order PO-4312 is a final decision on the issue of access to the occurrence records, and the appellant received partial disclosure in accordance with the terms of that order. The decision was neither subject to a reconsideration request nor a judicial review application. Therefore, I find that Order PO-4312 is a final decision and the second condition for issue estoppel to apply is satisfied.

[27] Finally, I find the third requirement for issue estoppel to apply is satisfied. The parties to Order PO-4312 are the same as those before me in this appeal. The appellant argues that the parties are not exactly the same as before because this appeal includes the “questionable actions of another OPP officer.” While the reasons for the appellant’s access request may have changed, the parties to this appeal remain the same: the appellant and the ministry. The OPP officers are not parties to this appeal and their alleged misconduct is outside the scope of this appeal.

[28] For the reasons above, I find that the doctrine of issue estoppel applies to this appeal.

[29] Even though the conditions of the doctrine of issue estoppel are met, I must determine that, as a matter of discretion, the doctrine ought to be applied to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.

[30] The ministry argues that the IPC should exercise its discretion to apply the doctrine of issue estoppel in this appeal because it would be a waste of resources and serve no public policy interest to re-adjudicate the same request for the same records by the same appellant. The ministry submits that the appellant had the opportunity to provide representations that were considered in rendering Order PO-4312 and there is nothing to suggest that the order was otherwise unfairly decided that would justify re-adjudication.

[31] The appellant argues that the IPC should exercise its discretion to not apply the doctrine of issue estoppel in this appeal. He alleges that the ministry is denying access to the records at issue because the ministry is trying to protect the OPP officers and hide evidence of their wrongdoing.

[32] The IPC has previously considered the application of the doctrine of issue estoppel to its decisions.⁸ In Order MO-1907, former Assistant Commissioner Sherry Liang held that judicial finality would be undermined if the issue of access to the same records were considered in two separate appeals. I agree with this approach, and I adopt it in this appeal.

[33] I find that the appellant’s reasons are not sufficient for me to proceed with the appeal of the occurrence records because the issue of access to the same occurrence records was determined in Order PO-4312. I am also not satisfied the appellant has demonstrated an injustice may arise from using the results from Order PO-4312 to

⁸ See Orders PO-1676, P-1392, and MO-1907.

preclude the appeal of part 2 of his request.

[34] Therefore, I find that all three conditions for the application of the doctrine of issue estoppel have been met, and issue estoppel applies to the occurrence records at issue in this appeal. I do not exercise my discretion to adjudicate part 2 of the appellant's request and I dismiss that part of the appellant's appeal.

DISCUSSION

Does the section 65(6)3 exclusion for records relating to labour relations or employment matters apply to the complaint records?

[35] Since I have found that the doctrine of issue estoppel applies to the appellant's right of access to the occurrence reports responsive to part 2 of the appellant's request, the only issue remaining in this appeal is whether the exclusion for records relating to labour relations or employment matters in section 65(6)3 applies to exclude the complaint records from the scope of the *Act*.

[36] 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.⁹

[37] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.¹⁰

[38] Section 65(6)3 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....

[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 the *Act*.

[40] If section 65(6) applied at the time the record was collected, prepared, maintained

⁹ Order PO-2639.

¹⁰ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

or used, it does not stop applying at a later date.¹¹

[41] The type of records excluded from the *Act* 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.¹²

Analysis and findings

[42] Based on the parties' representations, I find that section 65(6)3 applies to exclude the complaint records from the scope of the *Act*.

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

1. the complaint records were collected, prepared, maintained or used by the ministry or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the ministry has an interest.

[44] In order for section 65(6)3 to apply, all three parts of the test set out above must be met.

Part 1 and 2: collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

[45] After reviewing the representations of the parties and the circumstances of this appeal, I am satisfied that the complaint records were collected, prepared, maintained or used by the PSB on the ministry's behalf.

[46] The ministry submits, and I accept, that the PSB is responsible for conducting investigations and making recommendations to OPP management in cases where external concerns pertaining to an officer's conduct or service are made, such as in this appeal. The ministry submits that the PSB is part of the ministry and the PSB created the complaint records at issue pursuant to its mandate to investigate the appellant's complaint. I accept that the complaint records at issue would include allegations about the OPP officers, as well as the PSB's investigation into those allegations. I accept that these types of records would be collected, prepared, maintained or used by the PSB on the ministry's behalf as part of its investigation into the officers' conduct. Accordingly, I

¹¹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.

¹² *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

find that part 1 of the test under section 65(6)3 has been met.

[47] I am also satisfied that the evidence submitted by the ministry establishes that the complaint records were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications by the PSB in connection with its investigation into the allegations made in the appellant's complaint against the OPP officers. Therefore, I find that part 2 of the test has been met.

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

[48] The records are excluded only if the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest. The phrase "in which the institution has an interest" means more than a "mere curiosity or concern" and refers to matters involving the institution's own workforce.¹³

[49] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.¹⁴

[50] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.¹⁵

[51] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.¹⁶

[52] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.¹⁷

¹³ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹⁴ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹⁵ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

¹⁶ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

¹⁷ Order PO-2157.

[53] Examples of when the IPC has found the phrase “labour relations or employment-related matters” applicable include a job competition,¹⁸ an employee’s dismissal,¹⁹ and disciplinary proceedings under the *Police Services Act*.²⁰

[54] In addition, previous IPC orders have found that an employment-related nexus is not established simply because an institution is called upon to address a complaint about one of its employees, simply on the basis that a complaint *might* result in a disciplinary matter.²¹

[55] Based on the parties’ representations and the nature of the records, I find that the complaint records were collected, prepared, maintained or used by the ministry in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the ministry has an interest.

[56] The ministry submits that it has an employment-related interest in the complaint records at issue, and that allegations made by a member of the public of misconduct by an OPP officer must be dealt with in accordance with the process described in the *Police Services Act (PSA)*. The ministry submits that previous IPC orders²² have found that disciplinary matters involving police officers are “employment-related matters” for the purposes of section 65(5)(3), while the appellant argues that those orders are not applicable or analogous to the current appeal.

[57] The appellant specifically seeks access to records created during the PSB investigation into the complaint he made against three OPP officers. The appellant argues that these circumstances do not meet the definition of “employment-related” matters under the *Act* because of “some possible future [PSA] action.” He submits that his complaint relates to a criminal allegation against the officers and not misconduct under the *PSA*. The appellant alleges that the PSB never investigated his complaint²³ and he made this access request to prove this. He also alleges that the ministry is denying access to the complaint records because it is trying to protect the OPP officers and hide evidence of their wrongdoing. The appellant argues that matters related to the actions of employees, for which an institution may be responsible, are not employment-related matters for the purpose of section 65(6)3.

[58] The appellant is partially correct. Matters related to the actions of employees, for which an institution may be responsible, are not employment-related matters for the purpose of section 65(6)3, *unless* the meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the

¹⁸ Orders M-830 and PO-2123.

¹⁹ Order MO-1654-I.

²⁰ Order MO-1433-F.

²¹ Orders PO-4223 and PO-3861.

²² Orders M-931, PO-2426, PO-2499, PO-2658, and PO-2982.

²³ He outlined several reasons for this belief, but I will not reiterate them because they are not directly relevant to the issues in this appeal.

institution has an interest. Whether a record is excluded from the *Act* under section 65(6)3 is record-specific and fact-specific.

[59] In this case, the appellant specifically requested the records related to the investigation into his complaint against three OPP officers, including the recordings of phone calls between the appellant and the specified PSB officer investigating his complaint. These records were created and maintained as part of the PSB's duty to investigate the appellant's complaint. The investigation was conducted to assess the three OPP officers' professional conduct in their capacity as OPP officers. I accept that discussions and communications about the professional conduct and potential discipline of OPP officers are matters in which the ministry has an employment-related interest.

[60] I am satisfied that the complaint records meet the requirement that they be about employment-related matters, because they relate to the officers' employment with the OPP and consist of records that relate to the PSB's investigation into the professional conduct of the OPP officers. This is not simply a matter of a complaint from a member of the public that may or may not have led to discipline: the evidence before me satisfies me that the ministry has an employment-related interest in the complaint records at issue.

[61] I am satisfied in this case that the ministry's interest in the communications in the complaint records is employment related. Accordingly, I find that part 3 of the test under section 65(6)3 is met.

[62] Neither party has argued that any of the exceptions in section 65(7) apply to the complaint records, and I find that none of them apply in the circumstances of this appeal.

[63] Since all three parts of the section 65(6)3 test have been met and none of the exceptions in section 65(7) apply, I find that the complaint records are excluded from the scope of the *Act*. Therefore, the appellant has no right of access to them under the *Act*.

ORDER:

1. I find that doctrine of issue estoppel applies to the occurrence records responsive to part 2 of the appellant's request.
2. I uphold the ministry's claim that the complaint records are excluded from the scope of the *Act* under section 65(6)3.

Original Signed by: _____
Anna Truong
Adjudicator

April 30, 2025