



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

ORDER P-1326

Appeal P_9600119
[Reconsideration]

Ministry of the Solicitor General and Correctional Services



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BACKGROUND:

On September 24, 1996, former Assistant Commissioner Tom Mitchinson issued Order P-1264. That order addressed a decision made by the Ministry of the Solicitor General and Correctional Services (the Ministry) in response to a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to minutes of the Southern Region Area Managers' meetings for the period of January 1, 1992, to the date of the request.

The Ministry claimed that parts of some of these records fell within the parameters of section 65(6)3 of the Act, and were therefore outside the scope of the Act. The former Assistant Commissioner made the following findings with respect to this information:

- (1) Pages 2 and 3, item m) on page 4, items 1, 2 and 3 on page 10, item 11 on page 13, item 17 on page 15, and item 7 on page FI00176 properly fell within the parameters of section 65(6)3 and were, therefore, outside the scope of the Act; and
- (2) Item 5 on page 4, item 4 and the remaining parts of item 5 on page 11, item 16 on page 15, item 8 on page FI00176, and all of pages FI0096-99 did not fall within the parameters of section 65(6)3 because they did not deal with matters which had the capacity to affect the Ministry's legal rights and obligations. Therefore, these matters fell under the scope of the Act and the Ministry was ordered to make an access decision with respect to this information.

The Ministry asked this office to reconsider the finding set out in point (2) on the basis that it "had an interest" in **all** of the records for which it had claimed the application of section 65(6)(3) of the Act. Thus the Ministry claimed that the order contained a jurisdictional error because all the records should be seen to fall within the exclusion from the Act set out in that section.

The IPC's Reconsideration Policy Statement describes the threshold for proceeding with a reconsideration, as follows:

When an application for reconsideration of an order is received, the order should be reconsidered only where:

1. there is a fundamental defect in the adjudication process (for example, lack of procedural fairness) or some other jurisdictional defect in the order; or
2. there is a typographical or other clerical error in the order which has a bearing on the decision or where the order does not express the manifest intention of the decision maker.

An order should not be reconsidered simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the inquiry.

In the Ministry's request for reconsideration as set out above, the substantive issue raised is the interpretation of section 65(6)3 of the Act. If it applies, section 65(6)3 has the effect of excluding records from the scope of the Act, which removes such records from the IPC's jurisdiction. Therefore, this "substantive" issue is also a threshold issue in this reconsideration.

For this reason, I sent a letter inviting representations on both the threshold and substantive issues relating to the request for reconsideration. By letters dated November 12, 1996 (the Reconsideration Notices), I invited the Ministry and the appellant to make submissions as to whether or not I should reconsider the order, and, if so, whether Order P-1264 should be amended in any way. The Reconsideration Notices set out the Ministry's objections to the findings noted above in some detail.

In response to the Reconsideration Notices, the Ministry advised that its initial request for reconsideration set out the matters it wished to address. The appellant submitted representations in response to the Reconsideration Notice.

DISCUSSION:

SHOULD ORDER P-1264 BE RECONSIDERED?

As noted above, an order will be reconsidered if it contains a jurisdictional error. Since section 65(6)3 excludes records from the scope of the Act, and since the jurisdiction of this Office depends, in part, on the records at issue being subject to the Act, an incorrect finding in Order P_1264 to the effect that records are **not** excluded from the scope of the Act by section 65(6)3 would constitute a jurisdictional error.

This reconsideration is somewhat unusual because the major substantive issue - the question of jurisdictional error and section 65(6)3 - is also a threshold issue which must be resolved in deciding to proceed with the reconsideration.

For the sake of simplicity in explaining my decision on the question of whether to reconsider Order P-1264, I will indicate that, in the substantive discussion below, my conclusion is that section 65(6)3 applies to **all** of the records for which it was claimed, and that these records are all, therefore, excluded from the scope of the Act. By contrast, in Order P-1264, former Assistant Commissioner Mitchinson found that the records described in point (2) above **were** subject to the Act. Therefore, as regards these records, Order P-1264 did contain a jurisdictional error. Accordingly, I have concluded that Order P-1264 must be reconsidered.

JURISDICTION

In its initial representations and in its request for reconsideration of Order P-1264, the Ministry claimed that all of the records at issue fall within section 65(6)3 of the Act. To substantiate this claim, the Ministry must establish that:

1. The record was collected, prepared, maintained or used by the Ministry or on its behalf; **and**

2. This collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. These meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Ministry has an interest.

In Order P-1264, the former Assistant Commissioner found that **all** of the records were clearly prepared, maintained and/or used by employees of the Ministry in relation to meetings, discussions, or communications about labour relations and/or employment-related matters. This finding is not in dispute.

He then went on to consider whether these matters are ones in which the Ministry “has an interest”.

In Order P-1242, he had reviewed a number of legal sources regarding the meaning of the term “has an interest”, as well as several court decisions which considered its application in the context of civil proceedings. He concluded as follows:

Taken together, these [previously discussed] authorities support the position that an “interest” is more than mere curiosity or concern. An “interest” must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry’s legal rights or obligations.

He applied this interpretation to his analysis of the records before him in Order P-1264.

The Ministry’s representations in the appeal did not specifically address this issue. The former Assistant Commissioner reviewed the records himself and found that item 5 on page 4, item 4 and the remaining parts of item 5 on page 11, item 16 on page 15, item 8 on page FI00176, and all of pages FI0096-99 did not fall within the parameters of section 65(6)3 because they dealt with matters which were characterized as “concerns” rather than matters which had the capacity to affect the Ministry’s legal rights and obligations.

In this reconsideration, the Ministry disputes this finding on the basis that it is inconsistent with previous orders as well as with the finding that the other records at issue **did** fall within the parameters of section 65(6)3 of the Act. The Ministry also maintains that it has more than a “concern” in the records described above and that it has the requisite “legal interest” to support a finding that these records as well meet all the requirements for the application of section 65(6)3.

In this request for reconsideration of Order P-1264, the Ministry has now provided detailed submissions on the basis of its legal interest in the records at issue in the reconsideration.

The Ministry states that its legal interest in the labour relations and employment-related matters contained in these records arises from statute, including the Public Service Act, from collective bargaining agreements, including the Central Collective Agreement between the Ontario Public Service Employees Union and the Government of Ontario (the Central Agreement) and from

general common principles regarding employer/employee relations, including the right of the employer to manage and direct its workforce.

The Ministry has also provided a number of examples of the specific provisions of the Central Agreement and the regulations under the Public Service Act which affect the Ministry's legal rights or obligations with respect to the matters set out in the records at issue. The Ministry notes that employee complaints in regard to the employment-related issues dealt with in these records could result in the filing of a grievance under Article 27 of the Central Agreement. Furthermore, claims of unfair treatment by the Ministry in regard to these matters could result in allegations of violations of the Ontario Human Rights Code.

Having reviewed the records that are subject to this reconsideration and the Ministry's submissions on this application, I am satisfied that the Ministry "has an interest" for the purpose of section 65(6)3 in item 5 on page 4, item 4 and the remaining parts of item 5 on page 11, item 16 on page 15, item 8 on page FI00176 and all of pages FI0096-99. These parts of the records deal with staffing matters, monitoring of employee attendance, strike-related issues and training and development matters. These are matters having the capacity to affect the Ministry's legal rights or obligations, pursuant to the Central Agreement and/or the Public Service Act.

Given this finding and the undisputed previous findings in Order P-1264 that these parts of the records were prepared, maintained and/or used by employees of the Ministry in relation to meetings, discussions or communications about labour relations and/or employment-related matters, all of the requirements of section 65(6)3 have been established by the Ministry for these parts of the records. None of the exceptions contained in section 65(7) apply. Therefore, these parts of the records are excluded from the scope of the Act.

ORDER:

I rescind Order Provision 3 of Order P-1264 and uphold the Ministry's decision that section 65(6)3 applies to the information in item 5 on page 4, item 4 and the remaining parts of item 5 on page 11, item 16 on page 15, item 8 on page FI00176 and all of pages FI0096-99.

Original signed by: _____
Anita Fineberg
Inquiry Officer

January 7, 1997