



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-1440

Appeal P\_9700136

Ministry of the Solicitor General and Correctional Services



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## **NATURE OF THE APPEAL:**

A request was made to the Ministry of the Solicitor General and Correctional Services under the Freedom of Information and Protection of Privacy Act (the Act) by counsel for a Correctional Officer (the appellant). The appellant was involved in an incident that took place at a Correctional Centre. Civil proceedings were initiated between the appellant and another individual as a result of the incident. The appellant has requested access to the file pertaining to this matter, and, in particular, the complete internal security report including all findings and recommendations.

The Ministry located 134 pages of responsive records and claimed that they fell within the parameters of section 65(6) of the Act and were, therefore, outside the scope of the Act. The appellant appealed this decision.

This office sent a Notice of Inquiry to the appellant and the Ministry. Representations were received from the Ministry only.

## **DISCUSSION:**

### **JURISDICTION**

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

- (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
  1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
  2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
  3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
- (7) This Act applies to the following records:

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

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

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

The records at issue consist of memoranda, occurrence reports, witness statements, handwritten notes, external correspondence and various other administrative forms and documents. The first 110 pages of the records contain the internal security report.

I will first consider section 65(6)3. The Ministry indicates that the internal investigation report and other related records centre around two alleged workplace incidents occurring in June, 1994, both of which involved the appellant. The Ministry explains that the two incidents are inter-related.

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

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

[Order P-1242]

## **Requirements 1 and 2**

In my view, each of these records was either collected, prepared, maintained and/or used by the Ministry. It is clear that the Ministry engaged in an investigation of the incidents involving the appellant and other employees, which involved meetings, discussions and communications.

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

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

## **Requirement 3**

As noted in the preceding section, I am satisfied that the Ministry has engaged in "meetings, discussions and/or communications" as part of its investigation into the incidents at the workplace involving the appellant. The Ministry indicates that one incident pertains to allegations of assault on the appellant by another staff member. The second incident relates to inappropriate conduct in the supervision of young offenders by the appellant. I am satisfied that these meetings, discussions and/or communications were about an employment-related matter, namely, whether or not the allegations of inappropriate behaviour in the workplace could be substantiated.

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

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

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

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

The Ministry submits that its legal "interest" in the records arises from several statutes (i.e. the Young Offenders Act, the Ministry of Correctional Services Act, the Workers' Compensation Act and the Public Service Act), and from the Ontario Public Service Employees Union (OPSEU) Central Agreement.

In this regard, the Ministry refers to the findings of Inquiry Officer John Higgins in Order P-1395 regarding records similar to those in the current appeal. In that order, he stated:

If proven, the allegations against Ministry staff in this case could lead to civil liability, including possible vicarious liability for the Ministry. Clearly, therefore,

the matter of whether or not Ministry staff carried out their responsibilities in an appropriate manner is one which has the capacity to affect the Ministry's legal rights or obligations.

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

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

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

I agree that these comments apply similarly to the facts of the current appeal, in that allegations of inappropriate conduct in the supervision of young offenders has the potential to affect the Ministry's legal rights or obligations under the Ministry of Correctional Services Act.

The Ministry submits further that employee complaints in regard to employment-related issues, including discipline and harassment, may result in the filing of grievances under Article 27 of the OPSEU Central Agreement. The Ministry indicates that the appellant currently has three outstanding grievances relating to the Ministry's handling of the alleged incidents referred to above.

In addition, the Ministry indicates that the appellant has filed a Workers' Compensation claim arising from the incident and that the Ministry has an interest in this claim as a Schedule 2 employer under the Workers' Compensation Act.

Based on the above, I have concluded that the Ministry "has an interest" in the "employment-related matter" of the investigation of workplace incidents involving the appellant, within the meaning of section 65(6)3.

Therefore, I find that Requirement 3 has been met.

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

## **ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_  
August 11, 1997