



**Information and Privacy  
Commissioner/Ontario**

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

# **FINAL ORDER P-1583**

**Appeal P-9800015**

**Ministry of the Solicitor General and Correctional Services**



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This order is my final order in respect of Interim Order P-1498 and the issues raised in this appeal.

## **BACKGROUND:**

The appellant, an officer with a Regional Police force (the Police) was the subject of allegations of misconduct. The Chief of Police asked the Ontario Provincial Police (the OPP) to investigate the matter. The OPP completed its investigation and submitted a report to the Police.

The appellant submitted a request to the Ministry of the Solicitor General and Correctional Services (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for the report as well as all information relating to the OPP's investigation. The OPP is part of the Ministry. Access was denied on the basis that they fell within sections 65(6)1 and 65(6)3 of the Act.

The appellant appealed the Ministry's decision. The Ministry subsequently issued an amended decision letter, withdrawing its section 65(6) claims, and purporting to transfer the request to the Police, in accordance with section 25(2) of the Act. The appellant appealed the Ministry's decision to transfer the request. This appeal was resolved by Interim Order P-1498, where I found that by not making a timely transfer decision, the Ministry was deemed to have waived its reliance on section 25(2) and its decision to transfer the request was void. I included a provision in Interim Order P-1498 requiring the Ministry to make a new decision.

## **NATURE OF THE APPEAL:**

The Ministry issued a new decision, again denying access on the basis of section 65(6), as well section 14(2)(a) of the Act.

The appellant appealed the Ministry's decision.

The records consist of handwritten notes, a videotaped witness statement, correspondence, and other documents relating to the OPP's investigation.

A Notice of Inquiry was sent to the Ministry, the appellant and the Police. Because the section 65(6) issue has the potential to affect the interests of other institutions, a copy of the Notice was also sent to Management Board Secretariat (MBS). Representations were received from the Ministry and the appellant, but not from the Police or MBS.

## **PRELIMINARY MATTER:**

The appellant submits that because the Ministry previously withdrew its section 65(6) claim, that it should now be estopped from relying on this exclusionary provision. In the appellant's view, it would be unfair to allow the Ministry to return to a position of claiming the exclusion, after Interim Order P-1498 voided the Ministry's attempt to transfer the request to the Police.

Section 65(6) of the Act is an exclusionary provision which goes to the Commissioner's jurisdiction. If the records are excluded under this section, and the exceptions in section 65(7)

are not present, the Commissioner is precluded from conducting an inquiry under the Act. Therefore, even if the Ministry had not raised section 65(6) as an issue in this appeal, I would have been required to determine this jurisdictional issue in any event.

## **DISCUSSION:**

Sections 65(6) and (7) 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.

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 65(7) are present,

then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The Ministry has claimed both sections 65(6)1 and 65(6)3.

### Section 65(6)3

To fall within the scope of paragraph 3 of section 65(6), an institution must establish that:

1. the record was collected, prepared, maintained or used by the institution 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 institution has an interest.

[Orders M-835, M-899, M-922 and P-1242]

The Ministry submits that the OPP collected, prepared, maintained and/or used the records in relation to meetings, consultations, discussions and communications about labour relations and employment-related matters in which **the Police** has an interest (emphasis added).

The Police is an institution under the Municipal Freedom of Information and Protection of Privacy Act (the municipal Act).

The appellant submits that section 65(6) of the Act does not apply because the Ministry is not the appellant's employer; the Police is not "an institution" under the provincial Act; and the Ministry did not collect, prepare, maintain or use the records nor were these actions undertaken on behalf of the Ministry.

The appellant also submits that the Legislature had the option of including institutions under the municipal Act within the definition of "institution" in the provincial Act, but did not do so. In the appellant's view:

It is therefore respectfully submitted that it is not the place of an adjudicator under the Act to read into the Act in a manner which was not clearly intended by the Provincial Legislature.

In Order P-1560, Adjudicator Holly Big Canoe dealt with a similar issue. In that case, a request was made to the Ontario Labour Relations Board (the OLRB) (a provincial institution) for records prepared by a municipal institution. The OLRB had discretion to transfer the request to the municipal institution but did not do so. If it had, the section 52(3) exclusion under the municipal Act (the equivalent to section 65(6) under the provincial Act) would have been available to the municipal institution. Instead, the OLRB claimed section 65(6) as the basis to deny access.

Adjudicator Big Canoe made a number of comments in Order P-1560 which are relevant to the current appeal.

In my view, the [provincial] Act and the municipal Act 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. For example, there is an exemption for “closed meetings” in the municipal Act and a “Cabinet records” exemption in the Act. As well, Part I of the Act, which sets out the administration of the office of the IPC is not repeated in the municipal Act, because they are meant to be read together.

If the [provincial] Act and the municipal Act 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 this Act.

Adjudicator Big Canoe went on to find that, although there is no indication that the Legislature intended that municipal institutions be included in the provincial Act except to the extent that the municipal Act is specifically referenced in the provincial Act, at the time the municipal Act became law, section 65(6) did not exist. I agree with Adjudicator Big Canoe that it is arguable that had section 65(6) been in the provincial Act at the time the municipal Act became law, the situation might have been different.

Order P-1560 goes on to state:

If the meaning of “institution” in section 65(6) was extended to include institutions as defined in the municipal Act, 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. Accordingly, I find that, in the circumstances of this appeal, the meaning of the word “institution” in section 65(6) should be extended to include ... an institution under the municipal Act.

I agree with this reasoning, and find that it is equally applicable in the present appeal. I find that the Police is an “institution” for the purpose of section 65(6) of the provincial Act.

Although it is not necessary for me to determine this in order to make my findings, I note that the Ministry submits that the OPP was acting as an agent or delegate of the Chief of Police with respect to the investigation under the Police Services Act (the PSA). I agree that the indicia of an agency or a delegated arrangement were present in the circumstances.

## Requirements 1 and 2

I find that the records were collected, prepared, maintained and/or used by OPP investigators, on behalf of the Police, in relation to meetings, consultations, discussions or communications about their investigation of the appellant's alleged misconduct. Therefore, Requirements 1 and 2 have been met.

## Requirement 3

The Ministry submits that the OPP, while not an employer of the appellant, acted as the agent of the Police with respect to the investigation, and that the Police has a legal interest in the records arising from the PSA. The Ministry states that the records document an investigation into whether or not the appellant was guilty of unlawful conduct in accordance with section 56 of Part V of the PSA.

The appellant submits that the records do not relate to labour relations or employment-related matters in which the Ministry has a legal interest. The appellant states:

The Ministry has no interest in the records, as the records did not have the capacity to affect the Ministries (sic) legal rights or obligations. Furthermore, the Ministry was not a participant in any meetings, consultations, discussions or communications about any labour relations or employment-related matters.

My finding that the Police is an "institution" for the purpose of section 65(6) means that it is the Police, and not the Ministry, that must have a legal interest in the labour relations or employment-related matter.

The appellant submits that:

The information was ostensibly collected, etc. for the sole purpose of [the Chief] determining whether there was any basis upon which [the appellant] could be charged with any disciplinary offence, as defined in the Police Services Act, and was not collected, prepared, maintained, or used in relations to any meetings, consultations, discussions or communications about any labour relations or employment-related matters.

I agree with the Ministry that the records are about or relate to an investigation under Part V of the PSA by the OPP on behalf of the Police.

In Order M-922, former Inquiry Officer Anita Fineberg dealt with an appeal relating to an investigation under Part V of the PSA by the Professional Standards Section of a police services board. Referring to sections 52(3)1 and 3 of the municipal Act (the equivalent provision to section 65(6)1 and (3) of the provincial Act), she states at page 5:

The language of sections 52(3)1 and 3 on this point is slightly different. Section 52(3)1 refers to **the employment of a person by an institution** while section

52(3)3 includes the phrase **employment related matters**. However, in my view, the findings in Orders M-835 and M-840 confirmed in Order M-899, also supports the view that records prepared, maintained etc. in relation to meetings, discussions or communications concerning PSA charges are about employment-related matters. [emphasis in original]

I agree with this view, and find similarly that records prepared, maintained and/or used in relation to meetings, discussions or communications documenting an investigation under the PSA that may result in charges are about an employment-related matter.

I must now determine if the Police has an interest in this employment-related matter.

In Order P-1242, I stated the following regarding the meaning of the term “has an interest”:

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.

In Order M-922, former Inquiry Officer Fineberg considered the submissions of the police with respect to the requirements of Part V of the PSA, and held that the police had an interest in the record in that it “deals with matters having the capacity to affect the legal rights or obligations of the Police, pursuant to the PSA ...”.

In the present appeal, the Police, as represented by the OPP, had a statutory obligation under Part V of the PSA to investigate an allegation of misconduct on the part of the appellant. In my view, the Police has a legal interest in the investigation, and I find that Requirement 3 has been established.

Therefore, I find that section 65(6)3 applies to the records at issue in this appeal. Section 65(7) is not applicable, and I find that the records are excluded from the scope of the Act.

**ORDER:**

I uphold the Ministry’s decision.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ June 12, 1998