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

INTERIM ORDER P-1598

Appeal P_9700317

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Office of the Police Complaints Commissioner (the PCC). The request was for access to "... copies of all letters, notes, memos, evidence, documents and annotations, telephone contacts, and all other information oral or written, including the final summary of the investigation" on which the PCC based its findings, as outlined in its correspondence to the appellant dated April 22, 1997. The appellant highlighted the need to obtain "..all the material which was gathered on [a named police constable's] involvement in this matter".

The PCC identified 219 pages of responsive records, and granted access in full to 159 pages, partial access to two pages, and denied access in full to the remaining 58 pages. For those records to which access was denied, either in whole or in part, the PCC relied on the following exemption claims:

- law enforcement - section 14(2)(a)
- invasion of privacy - sections 21 and 49(b)
- discretion to refuse requester's own information - section 49(a)

The requester (now the appellant) appealed the denial of access, and also claimed that further responsive records exist.

Effective January 1, 1998, Parts V and VI of the Police Services Act (the PSA) were repealed by the Police Services Amendment Act, 1997. One consequence of these legislative amendments was the elimination of the PCC, effective March 31, 1998. The PCC had been an agency of the Ministry of the Attorney General (the Ministry).

A Notice of Inquiry was sent to the Ministry, the appellant and the Ottawa-Carleton Regional Police Services Board (the police service which employed the named police constable). The parties were also asked to consider the possible application of section 65(6) of the Act to the records. Section 65(6) has the effect of taking certain employment and labour relations records outside the scope of the Act and from the Commissioner's jurisdiction. Representations were received from the Ministry and the appellant.

The records consist of two categories of documents: (1) 13 pages of documents generated by the PCC during the processing of the appellant's complaint, including memos, notes, and correspondence; and (2) 47 pages of materials and background documentation sent to the PCC from the Ottawa-Carleton Regional Police Services Board (the Police), including statements and notes from the Police investigation of the appellant's complaint.

DISCUSSION:

JURISDICTION

Sections 65(6) and (7) read:

(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 Ministry submits that section 65(6) does not apply because there is nothing in the records concerning proceedings or anticipated proceedings before a court, tribunal or other entity which is related to labour relations or to the employment of a person by the PCC.

Because section 65(6) is an exclusionary provision which goes to the Commissioner's jurisdiction, I am required to consider the possible application of this section despite the Ministry's position.

Section 65(6)1

In Order P-1223, I found that in order for a record to fall within the scope of paragraph 1 of section 65(6), an institution must establish that:

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

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. These proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the PCC.

In the proceedings before the PCC which resulted in the creation of the category (1) records, the employer was the Police and not the PCC. The Police are an institution under the Municipal Freedom of Information and Protection of Privacy Act (the municipal Act). The only involvement of the PCC in this matter was in its role as adjudicator.

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 I believe 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 included 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. The mandate of the PCC extended to both municipal police forces and to the Ontario Provincial Police (part of a provincial institution, the Ministry of the Solicitor General and Correctional Services), which, in my view, placed the PCC in an analogous situation to the OLRB in Order P-1560.

Accordingly, I find that the Police are an "institution" for the purpose of section 65(6) of the provincial Act.

In Order P-1345, Adjudicator Donald Hale considered an appeal which also involved the OLRB, where he stated:

> Section 65(6)1 refers to the collection, preparation, maintenance or use of records by or on behalf of an institution in proceedings before a court, tribunal or other entity. In my view, this does not extend to situations where the records relate to proceedings where the institution's involvement is in the role of adjudicator. Rather, in order to qualify as a collection, preparation, maintenance or use **by or on behalf of** the [OLRB] as an institution, in relation to the proceedings, it would

> have to be an entity subject to the processes of the adjudication body (itself), such as a party to the proceedings or a witness called to produce evidence which is relevant to the proceedings. By necessary implication, the institution's role in such proceedings must be in its capacity as an employer or former employer in order to bring the records within the scope of section 65(6)1.
>
> This interpretation is supported by references throughout section 65(6) to proceedings and negotiations relating to the "employment of a person by the institution", and in section 65(6)3, to "labour relations or employment-related matters in which the institution has an interest". In my view, an institution such as the [OLRB], acting as an impartial adjudicator would not "have an interest" in a labour relations or employment-related matter before it, in the sense intended by section 65(6)3. Such an interest would be inconsistent with impartial adjudication.

I agree with this reasoning, and find that the category (1) records in this appeal were not collected, prepared, maintained or used by or on behalf of the PCC in relation to the proceedings before it in the sense intended by section 65(6)1. I also find that the requirements of section 65(6)2 and 3 are not applicable to these records, in the circumstances of this appeal.

However, Adjudicator Hale went on to find that records submitted to the OLRB by the employer, or sent by the OLRB to the employer, were excluded from the scope of the Act under section 65(6)1. Similarly, I am satisfied that any records contained in the PCC's files which originated with or were sent by the PCC to the Police were collected, prepared, maintained or used by the Police in relation to proceedings before the PCC, and that these proceedings relate directly to the employment of a person or persons by the Police, thereby satisfying the three requirements of section 65(6)1.

As a result, the 47 pages of category (2) records which were submitted by the Police to the PCC or sent by the PCC to the Police are excluded from the scope of the Act. The remaining 13 pages of category (1) records, however, do not qualify for exclusion under section 65(6), and I have jurisdiction to consider the PCC's decision respecting the appellant's access to them under the Act. These records are Pages 1, 9, 17-24, 212, 213 and 215. Page 9 contains information related to a number of different matters, and only the portion relating to the appellant or her complaint are responsive to the request and will be considered in this appeal.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Pages 1 (Page 215 is a duplicate of Page 1), 9, 212 and 213 contain the personal information of the appellant only. Pages 17-24 consist of a handwritten outline of various steps taken by the PCC during the course of its investigation, including reference to statements made by other individuals. I find that these pages contain the personal information of both the appellant and other identifiable individuals.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, an institution has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions, including section 14 of the Act, would otherwise apply to that information.

Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information. (emphasis added)

All of the remaining records at issue in this appeal contain the appellant's own personal information. Therefore, I will consider whether any of these records qualify for exemption under section 14(2)(a) as a preliminary step in determining whether section 49(a) applies.

LAW ENFORCEMENT

Section 14(2)(a) of the Act states:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

Previous orders of this office have determined that investigations by the PCC qualify as law enforcement activities (Order P-659).

In Order 200, former Commissioner Tom Wright determined that in order to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information and that, generally speaking, results would not include mere observations or recordings of fact. I agree with this view.

The records consist of internal memoranda, an e-mail message, and the handwritten notes of the investigator. Pages 1, 9, 212, 213 and 215 clearly do not provide a statement or account of the results of the collation and consideration of information, and in no way resemble what would normally be considered a "report". I find that these records do not qualify for exemption under section 14(2)(a), and therefore, section 49(a) does not apply to them. Because no other discretionary exemptions have been claimed for these pages of records, and they contain the personal information of the appellant only, I will order that they be disclosed to the appellant.

As far as the handwritten notes are concerned (Pages 17-24), in my view, they consist primarily of observations made by the PCC investigator during her investigation, together with her review of the statements and supporting documentation provided by other individuals. Although the investigator draws conclusions, they are factual in nature, and appear to be for her own use and not for the purpose of reporting to others. Accordingly, I find that these notes do not set out "a formal statement or account of the results of the collation and consideration of information" and therefore do not qualify as a "report" within the meaning of section 14(2)(a). Therefore, I find that Pages 17-24 are also not exempt under section 49(a).

INVASION OF PRIVACY

Because Pages 17-24 contain the personal information of the appellant and other identifiable individuals, I must also consider the possible application of section 49(b) of the Act.

Where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, section 49(b) provides the Ministry with the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, **the only way** such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.
The Ministry submits that the information contained in Pages 17-24 was compiled as part of an investigation into a possible violation of law, specifically the PSA.

Section 21(3)(b) of the Act, states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Previous orders have held that a public complaint investigation is a law enforcement investigation since such an investigation can lead to charges against the subject officer, and a hearing before a board of inquiry under the PSA (Orders P-1250, P-932 and M-757). I agree, and find that Pages 17-24 were compiled and are identifiable as part of an investigation into a possible violation of law, specifically an alleged breach of the PSA. Accordingly, I find that the

personal information in these pages is subject to the presumption in section 21(3)(b). This information does not fall under any of the provisions of section 21(4), and section 23 has not been raised by the appellant. Therefore, I find that Pages 17-24 are exempt under section 49(b) of the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the institution indicates that such records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The Act does not require the institution to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant's request is quite detailed, and outlines the specific type of information she is seeking. This was reflected in the Notice of Inquiry as follows:

> The appellant believes that additional records in response to her request exist. For example, please note that on page 22 of the records (investigator's undisclosed notes) there are references to notes of conversation(s) with [a named constable]. The "File Monitoring Log" entry for April 23, 1997 (Page 6 of the records) refers to the investigator's computer notes of discussions with [the named constable] and other officers. These computer notes do not appear to have been identified by the PCC. In addition, Page 1 of the records states that this file went before "review committee", and there appear to be no notes or comments relating to that process. The appellant maintains that she was seeking **all** documents relating to her complaint to the PCC, and believes that additional records exist.

The Ministry explains the process that the PCC followed in responding to access requests prior to its dissolution. The Ministry assumes that this process was followed in responding to the appellant's request, and relies on this assumption as the basis for concluding that all responsive records were located. The Ministry does not address the appellant's specific concerns regarding Pages 6 and 22. Rather, the Ministry states that because the office of the PCC has been closed and all staff, including the investigator, have been disbanded, "there is no quick and practical way to re-check with staff to determine whether there may be any additional records which may have formed a part of this file which may have been over looked."

As far as reference to the "review committee" on Page 1 is concerned, the Ministry submits that notes may never have been taken, or if taken may not have been retained by the investigator. The Ministry explains that the purpose of the review committee was to provide timely advice and guidance to investigators on a variety of issues regarding their files.

Finally, with respect to whether responsive records may have been destroyed, the Ministry again points out the difficulties in verifying this due to the fact that the office of the PCC has been closed.

While I can appreciate the potential difficulties encountered by the Ministry in searching for responsive records in the files of an agency that has been dissolved, I nonetheless find that Pages 1, 6 and 22 contain information, as described above, which clearly supports the appellant's belief that further responsive records may exist, and that this has not been adequately addressed by the Ministry in its representations. I am confident that a file transfer and storage plan must have been put in place as part of the winding down of the PCC, and I have difficulty in accepting the Ministry's position that further searches are not practical. Based on the representations provided by the Ministry, I find that the search by the Ministry for all records responsive to the appellant's request was not reasonable, and I will order the Ministry to conduct further searches in order to discharge its statutory responsibilities.

ORDER:

1. I find that the category (2) records which were sent by or to the Ottawa-Carleton Regional Police Service Board are excluded from the scope of the Act under section 65(6), and I dismiss this part of the appeal.

2. I uphold the Ministry's decision to deny access to Pages 17-24 in their entirety.
3. I order the Ministry to disclose Records 1, 212, 213 and 215 in their entirety, and the responsive parts of Page 9, by sending a copy of these records to the appellant by **August 5, 1998**.

4. I order the Ministry to conduct a further search for additional records responsive to the appellant's request, including, but not limited to, the possible additional records identified on Pages 1, 6 and 22.

5. I order the Ministry to communicate the results of this search to the appellant by sending her a letter summarizing the search results on or before **August 5, 1998**. If additional responsive records are located, I order the Ministry to issue an access decision concerning those records in accordance with sections 26, 28 and 29 of the Act, treating the date of this order as the date of the request. I further order the Ministry to provide me with copies of any correspondence sent to the appellant.

6. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

7. Until such time as the issues surrounding the Ministry's search for responsive records has been resolved to my satisfaction in this interim order, I remain seized of this matter.

Original signed by: July 21, 1998
Tom Mitchinson
Assistant Commissioner