



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

ORDER PO-1658

Appeal PA-980255-1

Ministry of the Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for information “relating to the take over of municipal policing duties by the Ontario Provincial Police” (the OPP). Specifically, the request was for:

- (1) What ranks have been assigned by the OPP to former Chiefs of Police of police services disbanded in favour of OPP policing, during the period 1988 to present time?
- (2) What is the highest educational level held by former Chiefs of Police at the time of joining the OPP?

The Ministry denied access to the requested information on the basis that it falls outside the scope of the Act pursuant to section 65(6). In its decision letter the Ministry provided the requester with some background information about the rank determination process, including a statement that “the Rank Determination Board has concluded that Chiefs of Police be appointed at the ranks of Constable, Sergeant, Staff Sergeant and Inspector.”

The requester, now the appellant, appealed this decision. He specified that he is not seeking information about individual former municipal Chiefs of Police. Rather, he wants to know how many former Chiefs were assigned to each rank upon joining the OPP, and the numbers who had achieved each level of formal education at that time.

A Notice of Inquiry was sent to the Ministry and the appellant, and representations were received from both parties. The issue of whether the Ministry had conducted a reasonable search for all responsive records was included in the Notice, however this issue was subsequently resolved and does not need to be addressed in this order.

DISCUSSION:

JURISDICTION

The sole issue to be determined in this appeal is whether the requested information falls within the scope of sections 65(6) and 65(7) of the Act. These provisions 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.

[IPC Order PO-1658/March 8, 1999]

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 application of the Act to the requested records.

Sections 65(6) and (7) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 65(6) falls within one of the exceptions enumerated in section 65(7), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in the Act apply.

The Ministry relies on section 65(6)3.

Section 65(6)3

In order for the records to fall within the scope of paragraph 3 of section 65(6), the Ministry must establish that:

1. they were 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]

Requirement 1

The Ministry states that the information at issue was compiled by the Human Resources Services section of the OPP Organizational Development Bureau. According to the Ministry, the information was extracted from the OPP Member Profile Data Base or identified through a manual search of records in the OPP Municipal Policing Section. The Ministry explains that this information was collected by the OPP during the municipal police service absorption process.

I accept that the records were prepared, maintained and used by the Ministry, and I find that the first requirement of section 65(6)3 has been established.

Requirement 2

The Ministry explains that the rank level determination process enables the Chief of an amalgamating municipal police service to apply for lateral entry to the OPP at a rank which is equivalent to or below their existing municipal rank. The Chief is provided with a Career Development and Planning System manual which outlines specific requirements for each rank. A Rank Level Determination Panel is convened to review the applications of former municipal Chiefs of Police, after which a rank is assigned.

The Ministry submits that the information is collected and used in relation to meetings consultations, discussions and communications about human resources management and planning purposes relating to the rank level assignment.

I concur, and find that the second requirement of section 65(6)3 has been satisfied.

Requirement 3

The Ministry states that the information at issue communicates staffing, recruitment and position classification information concerning the ranks and educational levels of former municipal Chiefs of Police who have been appointed to the OPP. The Ministry submits that this is an employment-related matter.

Clearly, an assessment of an officer's qualifications with respect to the assignment of rank and responsibilities within the OPP is an "employment-related matter" for the purposes of section 65(6)3.

The only remaining issue is whether this employment-related matter is one in which the Ministry "has an interest".

Previous orders of this office have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 65(6)3 must be a legal interest in the sense that the matter in which the Police have an interest must have the capacity to affect the legal rights or obligations of the Police (Orders P-1242 and M-1147).

Several recent and relevant orders have considered the question of whether a "legal interest" existed for the purposes of section 65(6)3 or its equivalent in the Municipal Freedom of Information and Protection of Privacy Act, section 52(3) (e.g. Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that for a "legal interest" to exist, an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records.

The Ministry disputes the interpretation in this series of orders, and argues that the provisions of the Act do not specify that an interest be current or ongoing in order for the exclusion in section 65(6)3 to apply. Although this issue is currently the subject of an application for judicial review to the Ontario Court (General Division) Divisional Court, until such time as the court renders its decision on the interpretation placed on the language in section 65(6)3, the orders listed above remain "good law", and I intend to follow this same interpretation in the present appeal.

The Ministry submits that:

... the Ministry's legal interest in the records arises from statute, including the Public Service Act and the Police Services Act, and from general common law principles regarding employer/employee relations, including the right of the employer to manage and direct its workforce.

OPP member complaints in regard to employment-related issues may result in the filing of grievances in accordance with the Ontario Provincial Police Association's Memorandum of Understanding with the Government of Ontario. In addition, employee concerns regarding unfair or discriminatory treatment in relation to employment-related matters, such as rank level assignment, may result in the filing of complaints to the Ontario Human Rights Commission.

In addition to the foregoing, any candidate from a former municipal police service who is not satisfied with the rank level assigned by the Rank Level Determination Panel may request the Commissioner of the OPP to review their individual situation.

While the appellant's representations do not address this issue, his letter of appeal includes the following statements:

My request will not be used before any court, tribunal or other entity related to labour relations, and since I am requesting a collective answer it does not refer to any individual's employment by the Ministry. Neither does it have any connection with labour relations etc. as specific in sub sec (2), neither does it apply to sub sec (3).

Having spent some 39 years of my life as a police officer I feel very much aggrieved that my former employers will not provide the information I have requested ...

I accept that the Ministry has a legal obligation to properly discharge its responsibilities under the Police Services Act. However, as I found in Order P-1586, the mere existence of legal responsibilities under a statute is insufficient to establish the third requirement of section 65(6)3. There is no evidence before me to suggest that there is any ongoing dispute or other employment-related matter involving the Ministry and the appellant, or any other person for that matter, that has the capacity to affect the Ministry's legal rights or obligations. The appellant is no longer an employee of the OPP, and I have been provided with no evidence of any unresolved grievances from his time of employment. There is also no apparent grounds for complaint under the Human Rights Code, and I have been provided with no evidence of any other statutory or common law basis for redress available to the appellant.

Accordingly, I find that, in the circumstances of this appeal, there is no employment-related matter pending or reasonably foreseeable which has the capacity to affect the legal rights or obligations of the Ministry, and I find that the Ministry has not demonstrated that it has sufficient legal interest in the records to bring them within the ambit of section 65(6)3.

Therefore, I find that the records are subject to the Act.

ORDER:

1. I order the Ministry to issue a decision letter to the appellant, in accordance with the provisions of sections 26, 28 and 29 of the Act, regarding access to the requested records, treating the date of this order as the date of the request.
2. I order the Ministry to provide me with a copy of the correspondence referred to in Provision 1 by sending a copy to me when it sends this correspondence to the appellant.

Original signed by: _____

_____ March 8, 1999

Tom Mitchinson
Assistant Commissioner