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

ORDER PO-1676

Appeal PA-980274-1

Ministry of the Attorney General

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BACKGROUND AND NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) from an employee for certain "page 3 forms" and notes made by evaluators in the context of participating in her performance appraisal. Before making her request, the employee was told that all original notes and "page 3 forms" had been shredded, but that one evaluator kept a photocopy of her "page 3 form", which was provided to the employee. In response to the employee's formal request under the Act, the Ministry denied access to any responsive records on the basis that they fell within the scope of section 65(6)3 and therefore outside the jurisdiction of the Act.

The employee (now the appellant) appealed this decision, and Appeal P-9700315 was opened.

After considering representations received from the parties, I issued Order P-1575, in which I found that section 65(6)3 did not apply. Although I acknowledged that notes concerning the appellant's performance, should they exist, are about an "employment-related matter", I found that the Ministry did not have a legal interest in this matter. On this point I stated:

> Even if the appellant has a right to grieve her performance appraisal, which is certainly not clear, the time period for filing a grievance has long-since expired. Therefore, I find that there is no legal forum in which the appellant can challenge the Ministry with respect to her performance appraisal under the terms of the collective agreement with OPSEU. Accordingly, I find that the performance appraisal is not an employment-related matter in which the Ministry has an interest, and the third requirement of section 65(6)3 has not been established.

With respect to the issue of reasonableness of search, I stated:

> I accept the Ministry's position that the original notes were destroyed prior to the date of the appellant's request. However, although the Act does not require an institution to create or recreate records in response to an access request, it also does not preclude an institution from doing so. Based on the representations provided by the appellant, it would appear that "page 3 forms" or similar notes may have been recreated by the evaluators between the time of the appellant's performance appraisal and the date of her request under the Act. In my view, if any such records exist, they would be responsive to the appellant's request. The Ministry's representations do not address the possible existence of these records and, as a result, I am not convinced that the Ministry's search for records was reasonable.

As a result, I ordered the Ministry to conduct a further search for records responsive to the appellant's request. If responsive records were located, I ordered the Ministry to provide an access decision to the appellant.

The Ministry made an application to the Divisional Court for a judicial review of Order P-1575, and also asked me to stay the provisions of the order pending the final disposition of the judicial review application. I

denied the stay application, and required the Ministry to comply with the provisions of the order in accordance with sections 26 and 29 of the Act.
The Ministry then complied with the provisions of Order P-1575 and issued a decision to the appellant. It stated, in part:

> A search of the Ministry's files did not locate any records which are responsive to your request. Therefore, access to the record cannot be granted as the record does not exist.

The appellant appealed this decision, and Appeal PA-980274-1 was opened.

A Notice of Inquiry for this appeal was provided to the appellant and the Ministry.

The Ministry made an application to Divisional Court to stay my inquiry, which was denied (Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), [1998] O.J. No. 5015 (Div.Ct.)).

The Ministry then submitted a request that I reconsider Order P-1575 "on the basis of new information that has come to the Ministry's attention." The Ministry stated that, after the issuance of Order P-1575, the appellant filed a grievance against the Ministry. According to the Ministry:

> . . . it is the Ministry's position that this is an employment related matter in which the Ministry has a legal interest. It is clear from the correspondence relating to the grievance that disclosure of these same records is sought for the purposes of the grievance. Accordingly, the third part of the test has now been established and brings the matter within the scope of 65(6)3 of the Act. Therefore, any responsive records are not subject to the Act.

A Notice of Reconsideration was sent to the appellant and the Ministry. Representations were received from both parties.

After considering these representations, I issued Reconsideration Order R-980034, in which I denied the Ministry's reconsideration request. I found that I was without jurisdiction to re-open Order P-1575 for the purpose of considering the "new evidence" provided by the Ministry. However, with respect to the filing of the grievance after the issuance of Order P-1575, and its impact upon the issue raised in this appeal, I stated:

> The Ministry also submits that, in view of the filing of the grievance by the appellant, the Commissioner does not have jurisdiction over the records and issues raised in Appeal PA-980274-1. Because the existence of the grievance was not known at the time the Notice of Inquiry in [Appeal PA-980274-1] was issued, a Supplementary Notice will be sent to the parties, seeking representations on the issue of whether the requested records, should they exist, fall within the scope of section 65(6).

Accordingly, I sent a Supplementary Notice of Inquiry and received representations from both parties. The appellant also relies on her previous submissions in relation to this matter.

PRELIMINARY MATTER:

ISSUE ESTOPPEL

In her representations, the appellant states:

> It is respectfully submitted that the Commissioner should be estopped from considering once again the applicability or non-applicability thereto of section 65(6)(3) of the Act in Appeal P-980274-1 since what the Commissioner is in fact doing is reconsidering Order P-1575 of which he is functus officio and has so determined.

Some authorities assert that issue estoppel cannot apply to administrative tribunals, although this view is not universally accepted. In Administrative Law (3rd edition) by David J. Mullan (Carswell, 1996), the author states at page 274:

> The extent to which res judicata and issue estoppel pertain in the administrative process is uncertain. The bulk of authority holds either that they have no application or that they apply in a different and less decisive form than they do in the context of regular litigation.

However, Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267, 112 D.L.R. (4th) 683 (Ont. C.A.), which dealt with the question of whether a tribunal decision can be the basis of issue estoppel before a court, would appear to suggest that issue estoppel, in some form, may be available in tribunal proceedings. In obiter comments made by Madam Justice Abella at pages 280-281, she states:

> ... the Policy objectives underlying issue estoppel, such as avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings, are enhanced in appropriate circumstances by acknowledging as binding the integrity of tribunal decisions.
> ...
>
> There is no basis for restricting the application of issue estoppel to decisions made by judges in the ordinary course of litigation.

Because of my conclusions regarding whether the facts of the present appeal support the application of issue estoppel, it is not necessary for me to decide the broader issue of the availability of issue estoppel in tribunal proceedings.

The Ontario Court of Appeal recently explained the law of estoppel in the case of Minott v. O'Shanter Development Co., (1999), 42 O.R. (3d) 321. Mr. Justice Laskin begins his discussion of estoppel as follows:

> I will first discuss the general principles underlying issue estoppel and then apply them to this case. Issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding. In this sense issue estoppel forms part of the broader principle of res judicata. ... Res judicata itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding. ... Issue estoppel is narrower than cause of action estoppel. It prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ.
>
> The overall goal of the doctrine of res judicata, and therefore of both cause of action estoppel and issue estoppel, is judicial finality. "The doctrine prevents an encore, and reflects the law's refusal to tolerate needless litigation." [Holmested and Watson, Ontario Civil Procedure, v. II, s. 21 subsection 17[3]]
> ...
>
> Issue estoppel has pervasive application and extends not just to decisions made by courts but, as this court's judgment in Rasanen affirms, also to decisions made by administrative tribunals. Whether the previous proceeding was before a court or an administrative tribunal, the requirements for the application of issue estoppel are the same. In Angle [Angle v. M.N.R. (1974), 47 D.L.R. (3d) 544 p. 555 (S.C.C.)] , Dickson J. set out three requirements, relying on English authority.
>
> > Lord Guest in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 at p. 935, [H.L.] defined the requirements of issue estoppel as:
> >
> > > ... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> These three requirements have consistently been applied by Canadian courts.

The appellant provides no case law or other authority to support her position, but it would appear that she is arguing that issue estoppel applies. To determine whether it does, I will consider the three criteria from Angle, quoted with approval in the Minott case, above.

1. Is the question before me in the present appeal the same as the question that was before me in the appeal which resulted in Order P-1575?

Mr. Justice Laskin summarizes the first question in Minott as follows (at page 331):

> Issue estoppel first requires that the issue in the subsequent litigation be the same as the issue decided in the previous litigation and that "its determination must have been necessary to the result in the litigation" ... In other words, issue estoppel covers fundamental issues determined in the first proceeding, issues that were essential to the decision. Issue estoppel applies to issues of fact or of law or of mixed fact and law.

I would characterize my decision that section 65(6)3 did not apply in Order P-1575 as a mixed finding of fact and law, and one which was necessary to the result. However, it was also a decision, as I made clear in Reconsideration Order R-980034, that **as of the date Order P-1575** section 65(6)3 did not apply. Order P-1575 dealt with the application of the Act in the context of the Ministry's **first** search and its **first** response to the appellant. Appeal PA-980274-1 arises from the Ministry's **second** search and **second** response to the appellant. In my view, despite their similarity, the question to be decided in the present appeal is different from the one I decided in Order P-1575.

Therefore, I find that the answer to Question 1 is "no".

2. Was this a final judicial decision?

Commentary from Minott is also helpful in addressing this question (at page 335):

> The Board of Referees under the Employment Insurance Act, as under the previous Act, does not have the power to revise or rescind its decision. ... The Board's decision, therefore, was final.
>
> In my opinion, the Board's decision was also a judicial decision. The decision of an administrative tribunal may be a judicial decision for the purpose of issue estoppel though the tribunal's procedures do not conform to the procedures in a civil trial. Provided the tribunal's procedures meet fairness requirements and provided the tribunal is carrying out a judicial function, its decision will be a judicial decision. The words of L'Heureux-Dubé J. in Knight v. Indian Head School Division No. 19 [(1990), 69 D.L.R. (4th) 489 at 512 (S.C.C.)] bear stating:
>
> > It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible,

> adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action, 4th ed., (1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case a bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the board, the requirements of procedural fairness will be satisfied even if there was no structured "hearing" in the judicial meaning of the word.

I am satisfied that the procedures followed in arriving at Order P-1575, described at the beginning of this order, meet fairness requirements. I am also satisfied that I was carrying out a "judicial function", within the meaning given to that term by Mr. Justice Laskin, in adjudicating that appeal. In my view, a decision on an appeal of a government decision under the Act is certainly no less "judicial" than the decision of a Board of Referees under the Employment Insurance Act, as was the case in Minott.

In addition, as I made clear in Reconsideration Order R-980034, Order P-1575 was a final decision regarding the particular facts and issues it determined, notwithstanding that the closing paragraph of Reconsideration Order R-980034 contemplates a subsequent consideration of the jurisdictional question in the context of this second appeal.

Further support for the finality of the my decision in Order P-1575 arises from the provisions of the Act. Section 54(1) states that "[a]fter all the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues in the appeal." As previously noted, I have already declined a request to reconsider Order P-1575, finding that I was functus officio.

I am satisfied that Order P-1575 represents a final decision and, therefore, I find the answer to the second question is "yes".

3. Were the parties in the appeal which led to Order P-1575 the same as the parties in the present appeal?

The Ministry and the appellant participated fully in the first proceeding, and are the same parties in the present appeal. Therefore, I find that the answer to the third question is "yes".

Generally speaking, in order for issue estoppel to apply, the answer to all three questions must be "yes". I have found that the answer to question 1 is "no", therefore issue estoppel does not apply in these circumstances.

In Minott, the Court found that the answer to the first and third questions was "no", and that, accordingly, issue estoppel did not apply. However, Mr. Justice Laskin went on to discuss other aspects of issue estoppel which I find are also relevant to this appeal. He states at pages 340-341:

Even had the three requirements been met, however, in my view the court has always retained discretion to refuse to apply issue estoppel when to do so would cause unfairness or work an injustice. As Lord Upjohn observed in Carl Zeiss Stiftung v. Rayner Keeler Ltd. [[1967] 1 A.C. 853 at 947] [a]ll estoppels are not odious but must be applied so as to work justice and not injustice, and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or, at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

That the courts have always exercised this discretion is apparent from the authorities. For example, courts have refused to apply issue estoppel in "special circumstances", which include a change in the law or the availability of further relevant material. If the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings. It would be unfair to do otherwise. In Arnold v. National Westminster Bank plc, [[1991] 3 All E.R. 41 (H.L.) at page 50] Lord Keith wrote:

> ... there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognize that in special circumstances inflexible application of it may have the opposite result ...

These remarks are relevant in the context of the present appeal. In my view, to preclude the Ministry from "relitigating" the issue of jurisdiction under section 65(6)3 would be to work an injustice, given the particular circumstances. The appellant's grievance did not exist when I issued Order P-1575, and the absence of a relevant grievance was an important element underpinning my decision regarding the application of section 65(6)3. Applying the reasoning articulated by Mr. Justice Laskin in Minott, and in particular his reference to the interpretation given to issue estoppel in the Arnold decision, I find that the existence of new evidence going to a jurisdictional issue that did not even exist on the date of my initial order would qualify as a "special circumstance". Therefore, even if I had answered all three questions in the affirmative, I would not apply issue estoppel in this case.

In reaching this conclusion I am mindful that the existence of the grievance was known to me when I issued Reconsideration Order R-980034. However, Reconsideration Order R-980034 was a reconsideration of the fact situation that had crystallized at the time Order P-1575 was issued. A reconsideration of Order P-1575 was not the appropriate forum for considering this new information because, as I found in Reconsideration Order R-980034, there had been no fundamental defect in the adjudication process, no other jurisdictional defect in my decision, nor any clerical error, accidental error or omission, or similar error in the decision. However, the fact that I was functus with respect to my decision in Order P-1575, does not preclude me from finding that failing to consider this new information in the present appeal would work an injustice, and that the new relevant evidence concerning the appellant's grievance must be considered in the appropriate forum, the present appeal.

Therefore, I dismiss the appellant's estoppel argument.

DISCUSSION:

JURISDICTION

The issue to be decided is whether sections 65(6) and (7) of the Act apply to the records, if they exist. These two sections 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 section 65(7) are present, then the record is excluded from the scope of the Act and outside the Commissioner's jurisdiction.

Section 65(6)3

In order for the records, if they exist, 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]

Requirements 1 and 2

In Order P-1575, I found that the first 2 requirements of section 65(6)3 had been established, and this was not disputed by the appellant. There has been no change in circumstances as it relates to these two requirements, and I find that they are both also established in this appeal.

Requirement 3

Similarly, I found in Order P-1575 that notes about an employee's performance are about an "employment-related matter" for the purpose of section 65(6)3. There has been no change in circumstances as it relates to this part of the third requirement, and I make the same finding in this appeal.

The Ministry has provided evidence to suggest that a change in circumstances may have an impact on the interpretation of whether this is an employment-related matter in which the Ministry "has an interest" for the purpose of section 65(6)3. This is the only remaining issue for me to consider in the present appeal.

Order P-1242, which has been applied in many subsequent decisions, interprets the term "has an interest" as follows:

> Taken together, these [previously discussed] authorities support the position than 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.

At the time I issued Order P-1575, no grievances had been filed by the appellant, and I based my finding that the appellant's performance appraisal was not an employment-related matter in which the Ministry had a legal interest on the absence of any legal forum in which the appellant could challenge the Ministry with respect to her performance appraisal.

The appellant acknowledges that she filed her grievance after the issuance of Order P-1575, but submits that it does not relate to the subject matter of any responsive records in this appeal. According to the appellant, her grievance does not relate to her performance appraisal, and she is not seeking records under the Act for the purpose of any grievance. The appellant submits:

> [The appellant's] grievance was dated September 30, 1998 and arose out of a meeting that she had with her immediate supervisors on September 1, 1998 concerning a memorandum that one of them wrote dated August 7, 1998 which concerned, inter alia a particular file on which [the appellant] had worked.
>
> Unfortunately the Ministry now is trying to intermingle the issues relating to [the appellant's] performance evaluation of August 12, 1997 and the destruction of the notes with [the appellant's] ongoing grievance.

The appellant refers to the "stage two" meeting held by the Deputy Minister's delegate in consideration of her grievance, and submits:

> At this meeting on February 23, 1999 [the appellant] expected that there would be discussion about her grievance and yet all management wanted to talk about was the performance evaluation

> of August 12, 1997 and the destruction of the records. [The appellant] said nothing during the meeting. [The appellant] has never asserted that the destruction of the records or her performance evaluation of August 12, 1997 is part of any on-going grievance and continues to so represent to the Commissioner.

The Ministry states that on September 30, 1998, the appellant filed two grievances alleging that the employer breached the collective Agreement, violated the Ontario Human Rights Code and the government Workplace Discrimination and Harassment Policy, and created a poisoned work environment. The Ministry acknowledges that the grievances do not, on their face, clearly establish the relevance of the appellant's performance appraisal records. However, the Ministry refers to a November 18, 1998 letter received from the appellant's union representative in the context of these grievances as the basis for establishing the connection between the grievances and the performance appraisal.

This November 18, 1998 letter consists of four paragraphs, and deals with the disclosure of documents relevant to the appellant's grievances. The only substantive statements included in the letter are the following two paragraphs:

> I [the union representative] will take this opportunity to remind you that the grievor is involved in litigation involving the issue of disclosure of information. You continue to fail to provide this vital information to the grievor. This has led to legal action regarding the disclosure of this information.
>
> We will gladly give you full disclosure of the allegations made in this grievance, at the same time you give us full disclosure regarding the Crown Attorney documents under our Freedom of Information Act request. We also wish full disclosure for this grievance under Article 22.14.4 and 22.14.5 of the Collective Agreement.

In her previous representations, the appellant provided me with her view of the relevance of this letter. She states:

> [The appellant's] agent does remind the Ministry of its failure to provide the records under the Freedom of Information request to [the appellant] and indicates "we will gladly give you full disclosure of the allegations made in this grievance, at the same time you give us full disclosure regarding the Crown Attorney documents under our Freedom of Information Act request." Nowhere in the correspondence is it indicated what use will be made of the records or for what purpose the records are sought. Again [the appellant] will represent to the [Information and] Privacy Commissioner that she is not seeking her personal records for the purpose of the grievances that she has filed.

I do not accept the appellant's position. Although the appellant may not be grieving her performance appraisal per se, the union representative's letter leaves little doubt that the appellant's grievances and her ongoing request under the Act for access to responsive records relating to her performance appraisal are

related. It is also relevant to note that the "stage two" decision letter issued by the Deputy Minister's delegate deals exclusively with issues relating to the appellant's performance appraisal.

Previous Orders have found that the existence of a relevant ongoing grievance involving an appellant and an institution is sufficient to establish a "legal interest" on the part of the institution in the employment-related matter which led to the grievance (eg. Orders PO-1649 and MO-1167). Similarly, I find that the appellant's performance appraisal is relevant to her ongoing grievances with the Ministry, and that the performance appraisal is therefore an employment-related matter in which the Ministry has an interest.

Therefore, the third requirement of section 65(6)3 has been established.

As stated earlier, section 65(6) is record-specific and fact-specific. I find that the specific records requested by the appellant in the circumstances of this particular appeal fall within the scope of section 65(6)3. I also find that none of the exceptions in section 65(7) are present. Therefore, any records responsive to the appellant's request, should they exist, are excluded from the scope of the Act and outside the Commissioner's jurisdiction.

ORDER:

I uphold the Ministry's decision.

Original signed by: May 28, 1999
Tom Mitchinson
Assistant Commissioner