



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

# **ORDER PO-1748**

Appeal PA-990183-1

Ministry of the Solicitor General and Correctional Services



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Solicitor General (the Ministry). The request was for access to a copy of a named Ontario Provincial Police (OPP) officer's vacation schedule for the months of April and May 1997.

The Ministry denied access to the information requested on the basis of sections 14(1)(e) (endanger life or safety) and 21 (invasion of privacy) of the Act. The appellant appealed this denial of access.

During mediation, section 65 (6) was identified as having potential application in the circumstances of this appeal.

I sent a Notice of Inquiry to the Ministry, the named officer and the appellant. Representations were received from both parties. The Ministry did not make submissions in support of its application of section 14(1)(e), and this exemption will not be considered in this order.

## **RECORDS:**

The record identified by the Ministry as responsive to the request is an attendance record. The information at issue is the part of the record which covers the time period specified by the appellant.

## **DISCUSSION:**

### **JURISDICTION:**

In this appeal, the first issue to be decided is the interpretation of sections 65(6) and (7) of the Act. These sections of the Act may apply to the records requested by the appellant.

If section 65(6) applies, and none of the exceptions found in section 65(7) apply, section 65(6) has the effect of excluding records from the scope of the Act.

The Ministry claims that the records are excluded from the scope of the Act under section 65(6)3.

### **Section 65(6)3**

In order to fall within the scope of paragraph 3 of section 65(6), the 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.

### ***Requirement 1***

The Ministry submits that the record at issue represents the attendance record of the officer. On its face, it is apparent that this record was prepared, maintained or used by the Ministry or on its behalf, and the first part of the test has been met.

### ***Requirement 2***

The Ministry submits that vacation leave is a condition of the terms and agreements of employment as per the Memorandum of Understanding between the Ontario Provincial Police Association and the Employer and, therefore, is directly related to the employment of the officer.

If the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be “in relation to” that activity (Order P-1223).

The activities referred to in section 65(6)3 are meetings, consultations, discussions or communications. The Ministry has not indicated that the officer’s attendance record was prepared, maintained or used for the purpose of, as a result of or substantially connected to any meetings, consultations, discussions or communications. Accordingly, the second requirement has not been met.

### ***Requirement 3***

The Ministry submits that failure to properly record and determine that all absences are within the Memorandum of Understanding or Police Orders could adversely affect the application of benefits or the pension of the officer. It submits that the record clearly documents a condition of employment between the officer and the Employer, and that failure to abide by the employment conditions could result in disciplinary action being sought by the Employer against the officer. As well, the Ministry argues that failure by the Employer to abide by the conditions of employment could result in a grievance, human rights complaint or other remedies being sought by the employee. The Ministry states that this is an ongoing responsibility affecting the officer until his departure or retirement.

The Ministry also submits that it must have sufficient officers in attendance in order to perform its statutory obligations under the Police Services Act with officer safety in mind.

In Order P-1575, Assistant Commissioner Tom Mitchinson found that an institution’s interest in or an obligation to administer its performance appraisal process and policies fairly is not sufficient to bring the

employment-related matter within the scope of section 65(6)3. To meet the requirements of this section, the institution must establish an interest that has the capacity to affect its legal rights or obligations.

In Order P-1586, Assistant Commissioner Mitchinson also found that the routine discharge of responsibilities imposed by statute is not, in and of itself, sufficient to constitute an ongoing legal intent. The statutory responsibility must be considered in context.

In Order M-1128, which addressed a request for the appellant's application for employment and related documentation, Adjudicator Laurel Cropley concluded that in considering whether an institution has a "legal interest", there must be a reasonable prospect that this interest will be engaged. She states:

The records at issue in this discussion were collected and used by the Police over ten years ago. There is no indication from either the appellant or the Police that the hiring process has been challenged or is at issue in any way. The fact that no action has been taken in this regard since the appellant was hired leads me to conclude that there is no reasonable prospect that the institution's legal interest in the circumstances of this hiring would be engaged in the future.

Finally, in Order PO-1718, I stated:

The Ministry refers to the possibility of some legal action being taken as a result of the audit or disclosure of the audit, and relies on the due performance of its ongoing responsibilities to establish that its legal interests are engaged. In my view, the mere possibility of future legal action, which may be said to arise out of many kinds of audit or regulatory activities of government, is insufficient to engage a reasonable anticipation of such action actually occurring or, therefore, to engage an active legal interest. Further, the due performance of supervisory activities in setting clear standards and procedures, even with a view to avoiding exposure in possible future legal proceedings, is also insufficient to engage an active legal interest. In my view, unless there is something that arises to give reality to the prospect or anticipation of such action, government's "interest" in the record relates to the normal course of its affairs, and the requisite legal interest is not established.

The only relevant evidence before me in this appeal establishes that there is no reasonable prospect that the Ministry's legal interest will be engaged. Accordingly, I find that there is no ongoing dispute or other employment-related matter involving the Ministry that has the capacity to affect the Ministry's legal rights or obligations, and the Ministry has failed to establish a "legal interest" in the employment-related matters reflected in the records.

Therefore, the second and third requirements for section 65(6)3 have not been established, and I find that the record falls within the jurisdiction of the Act.

## **INVASION OF PRIVACY**

[IPC Order PO-1748/January 27, 2000]

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The appellant acknowledges that the information would be personal if it related to where the officer went for his vacation or with whom he spent his vacation. Since it does not, he submits that it is not personal information.

I have reviewed the record, and in my view, a record of vacation days actually taken by the officer is information which satisfies the definition of personal information under section 2(1) of the Act, and relates solely to the officer (Orders M-141 and P-863).

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) of the Act reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The appellant submits that disclosure would not be an unjustified invasion of privacy because officer, in the discharge of his duty, told the appellant that he was going on vacation. He submits that the officer entered his place of business and disrupted a business meeting to issue notification of a search warrant. The appellant indicates that when he questioned the officer's conduct, the officer explained that part of the reason he was issuing notification at the appellant's place of business was because he was going on vacation.

The appellant also indicates that a similar request to the Ministry of the Attorney General for the vacation schedule of a Crown Attorney was granted in full.

Although the officer was notified of this request, he did not respond. Accordingly, I find that he has not consented to the disclosure of the record to the appellant, despite what he may have previously disclosed verbally to the appellant. The representations of the Ministry suggest that, because of the conduct of the appellant, the officer likely would not consent to disclosure at this time.

With respect to disclosure by the Ministry of the Attorney General, that decision was not appealed, is not before me, and could have been the result of consent provided by the Crown Attorney.

Accordingly, in my view, the appellant's submissions in favour of disclosure carry little weight in the circumstances of this appeal.

The Ministry submits that sections 21(2)(e), (f) and 21(3)(d) apply. Sections 21(2)(e) and (f) read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;

The Ministry indicates that there is a history between the appellant and the officer, and has attached copies of a series of requests the appellant has made for the officer's personal information. The Ministry submits that the disclosure of this information in these particular circumstances would cause distress to the individual and/or his family.

I am not convinced that disclosure of this record would unfairly expose the officer to pecuniary or other harm, or that the information is by its nature highly sensitive. However, I am satisfied that disclosure to the appellant in these particular circumstances would cause distress to the officer and/or his family, a consideration in favour of privacy protection.

Section 21(1)(f) applies only if disclosure would **not** constitute an unjustified invasion of privacy. In my view, the factors raised by the appellant in favour of disclosure are outweighed by the factors favouring privacy protection. Accordingly, I find that the exception contained in section 21(1)(f) does not apply, and the personal information of the officer is exempt from disclosure under section 21(1) of the Act.

## **ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_

\_\_\_\_\_ January 27, 2000

Holly Big Canoe  
Adjudicator