



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1797

Appeal PA-000070-1

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

The Ministry of the Solicitor General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of documentation regarding an internal review of an Ontario Provincial Police (OPP) investigation into the death of the requester's son.

The Ministry identified 92 pages of responsive records, consisting of letters, memoranda, a synopsis, handwritten notes, witness statements, a general occurrence report, supplementary report, review report and various other administrative documents. The Ministry denied access to the records in their entirety, claiming they fall outside the scope of the Act pursuant to section 65(6).

The requester, now the appellant, appealed the Ministry's decision.

I sent a Notice of Inquiry to the Ministry and received representations in response. In its representations, the Ministry identified 30 additional pages of responsive letters and handwritten notes, and claimed that they too fall within the scope of section 65(6). At the same time, the Ministry issued a supplementary decision to the appellant, disclosing two pages of records (pages 86 and 109) on the basis that they fall within the exceptions listed in section 65(7) of the Act.

Having reviewed the Ministry's representations, I have decided that it is unnecessary for me to obtain representations from the appellant.

DISCUSSION:

JURISDICTION

The Ministry claims that the records fall within the scope of sections 65(6)1 and 3, and therefore are outside the jurisdiction of the Act.

The records relate to the appellant's two complaints about the OPP investigation into his son's death. The records document the OPP's review of the complaints and attempts to resolve them.

Sections 65(6)1 and 3 and section 65(7) 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.

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) is present, then the section 10(1) right of access does not apply to the record.

In order for records to fall within the scope of paragraph 1 of section 65(6) of the Act, the Ministry must establish that:

1. the records 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 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 Ministry.

To qualify under section 65(6)3, the Ministry must establish that:

1. The records 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 one - sections 65(6)1 and 3

The records were collected, prepared, maintained and used by the OPP in discharging its responsibility to investigate two complaints made by the appellant under the Police Services Act (the PSA). Accordingly, I find that the first requirement of sections 65(5)1 and 3 has been established.

Requirement two - section 65(6)1

As far as the second requirement of section 65(6)1 is concerned, the Ministry provides a detailed chronology of steps taken in the context of the appellant's complaint.

The appellant made his initial complaint about the lead OPP Investigator to the Professional Standards Bureau on May 5, 1998, pursuant to section 56(1) of the PSA. Before completing the investigation, the Professional Standards Bureau determined that the appellant and the lead OPP Investigator were interested in informally resolving the complaint, pursuant to section 58(1) of the PSA. The terms of the informal resolution were set out in an ADR Agreement dated August 5, 1998 [Pages 86 and 109 which have now been disclosed to the appellant]. This Agreement was signed by the appellant, his wife, the lead OPP Investigator, the OPP Professional Standards Bureau and the OPP Detective Inspector who conducted the review.

Before the parties had finished implementing the terms of the Agreement, the appellant contacted the Ontario Civilian Commission on Police Services (OCCPS) expressing dissatisfaction with the informal resolution of his complaint through the ADR process. The OPP was then contacted by the OCCPS on December 7, 1998 and asked to complete its review of the appellant's complaint.

On January 5, 1999, the Professional Standards Bureau advised the appellant, pursuant to section 64(6) of the PSA, that his complaint was unsubstantiated and that no further action would be taken.

The appellant then asked OCCPS to review the OPP's decision, pursuant to section 72(5) of the PSA. OCCPS completed its review and upheld the OPP's decision on March 12, 1999, and advised the appellant accordingly.

On March 25, 1999, the appellant submitted a second complaint to the Professional Standards Bureau, this time regarding the conduct of the Detective Inspector who conducted the review of the original OPP investigation into the circumstances of the appellant's son's death. On April 1, 1999, the Professional Standards Bureau advised the appellant, pursuant to section 64(6) of the PSA, that this second complaint was also not substantiated and that there had been no misconduct on the part of the Detective Inspector.

The appellant asked OCCPS to review this decision. OCCPS upheld the OPP's decision regarding the Detective Inspector, and advised the appellant accordingly on May 7, 1999.

On the basis of this chronology of events, the Ministry concluded that the preparation, collection, maintenance and use of the records was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity as set out in section 65(6)1 of the Act.

The Ministry also points out:

It should also be noted that the appellant continues to raise issues regarding his dissatisfaction with the services provided by OPP staff. The appellant has written to his Member of Provincial Parliament in regard to this matter. The appellant is not precluded from filing a further public complaint against OPP officers in the event he wishes to have his concerns reconsidered or has new evidence in support of his concerns.

I agree with the Ministry that proceedings stemming from complaints made under the PSA are properly considered proceedings for the purposes of section 65(6)1 of the Act (Order M-835). However, the availability of these proceedings is not sufficient to satisfy the second requirement of section 65(6)1.

In Order P-1618 I found that:

When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

My findings in Order P-1618 were upheld on judicial review in Ontario (Solicitor General and Correctional Services) v. Ontario (Information and Privacy Commissioner) (March 21, 2000), Toronto Docs. 681/98, 698/98, 209/99 (Ont. Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (Ont. C.A.).

In the circumstances of this appeal, both the OPP and OCCPS reviews were completed by May 7, 1999, more than a year ago. Both bodies determined that there had been no misconduct on the part of OPP officials in relation to the investigation of the appellant's son's death or the handling of the appellant's complaints. All proceedings flowing from the appellant's complaints were completed 14 months ago and the appellant has taken no further action involving the OPP since that time. To that point, the appellant had established a pattern of prompt action when dissatisfied with any decision made by the OPP. For these reasons, I find that disclosure of records associated with the OPP and/or OCCPS proceedings could not have an impact on any labour relations issues directly related to these records. Therefore, I find that the

second requirement of section 65(6)1 has not been established. The fact that the appellant continues to complain to other sources (i.e. his MPP) is not sufficient to bring these records within the scope of section 65(6)1.

Requirement two - Section 65(6)3

The Ministry submits that the records were collected, prepared, maintained and used by the Ministry in the course of responding to the appellant's complaints. I agree. The records were collected, prepared, used and maintained in relation to meetings, consultations and/or discussions that occurred regarding the OPP and OCCPS reviews regarding the appellant's complaints, thereby satisfying requirement two of section 65(6)3.

Requirement three - Section 65(6)3

Section 65(6)3, requires that the activities listed in this section must be "about labour relations or employment-related matters". It has been established in several previous orders that investigations conducted under the PSA in relation to complaints made against police officers are "employment-related" matters and, therefore, this part of the third requirement has been established (see Orders M-899, M-931, MO-1186 and P-1618).

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

In this regard, the Ministry submits:

With specific reference to the third requirement, the Ministry submits that the Ministry's ongoing interest in the records at issue arises from statute, including the PSA, and from general common law principles regarding employer/employee relations. While the appellant currently has no outstanding complaints pursuant to the PSA, as noted earlier he is not precluded from filing a further related public complaint in the event that he wishes to have his concerns reconsidered or has new evidence in support of his concerns. In this regard, section 59(4), which is discretionary, states:

59(4) The chief of police may decide not to deal with any complaint made by a member of the public if the complaint is made more than six months after the facts on which it is based occurred.

The Ministry submits that the appellant's six [access] requests, two public complaints, two [Commission] reviews and correspondence to his Member of Provincial Parliament are all in the reasonably proximate past and are evidence of the fact that the Ministry has a continuing and current interest in the records at issue.

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 (see Orders M-1147 and P-1242).

Several orders of this Office have considered the application of section 65(6)3 in circumstances where there is no reasonable prospect of the institution’s “legal interest” in the matter being engaged (see, for example, Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion in this line of orders has essentially been that 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. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner) (March 21, 2000), supra.

For the same reasons outlined with respect to the second requirement of section 65(6)1, I find that the third requirement of section 65(6)3 has not been established. The OPP and OCCPS reviews were concluded by May 7, 1999. The fact that the appellant has made a number of requests for access to records under the Act and complained to his MPP may suggest that he continues to be dissatisfied with the results of the investigation of his complaints. However, the Ministry has provided no evidence to suggest that the appellant has taken any specific action with respect to the findings under the PSA or to avail himself of any other legal recourse that may be available to him. Even if further action is taken by the appellant, it appears unlikely, given the findings of the Professional Standards Bureau and OCCPS, that the Ministry would take any subsequent employment-related action against any of its employees involved in any event. As far as section 59(4) of the PSA is concerned, it has no potential application in the present circumstances since it is clear that actions have already been taken by the OPP in response to the appellant’s complaints involving the investigation of his son’s death.

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 Ministry’s legal rights or obligations, 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 of the Act.

Therefore, requirement three of section 65(6)3 has not been established, and I find that the records are subject to the provisions of the Act.

ORDER:

1. I order the Ministry to issue an access decision to the appellant concerning the records, in accordance with the provisions of sections 26, 28 and 29 of the Act, 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 decision letter referred to in Provision 1 by sending it to my attention c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____ July 5, 2000
Tom Mitchinson
Assistant Commissioner