



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-1869**

**Appeal PA-000219-1**

**Ministry of Correctional Services**



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## **NATURE OF THE APPEAL:**

The Ministry of Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all file information regarding an “internal investigation [re] allegations now the subject of criminal charges against” the appellant, who was incarcerated at a detention centre operated by the Ministry at the time the incident giving rise to allegations occurred. The Ministry located 30 pages of records responsive to the request and denied access to them, in their entirety, claiming the application of the following exemptions contained in the *Act*:

- sections 14(1)(a) and (b) - law enforcement;
- section 14(1)(f) - right to a fair trial;
- section 14(2)(d) - correctional record;
- section 19 - solicitor-client privilege;
- section 49(a) - discretion to refuse requester’s own information;
- section 49(b) - invasion of privacy, with reference to the factor in section 21(2)(f) (the information is highly sensitive) and the presumption in section 21(3)(b) (the information was compiled as part of an investigation into a possible violation of law).

The Ministry also indicated that it denied access to the requested records on the basis that “the records concern a matter that is currently under investigation and/or before the courts”.

The appellant appealed the Ministry’s decision to deny access to the records.

During the mediation stage of the appeal, the appellant requested that the Ministry conduct a further search for records relating to an internal investigation undertaken by the Ministry into certain allegations made by the appellant against several corrections officers. The Ministry conducted a further search and located a 41-page investigation report dated November 4, 1999 which was created by its Independent Investigations Unit (the IIU records) in the course of its investigation into certain allegations brought by the appellant against a correctional officer. It denied access to all of these documents on the basis that they fell outside the scope of the *Act*, because of the operation of section 65(6)1 and 3.

The appellant appealed the Ministry’s decision to deny access to the IIU records, as well as the records initially identified as responsive.

I sought and received the representations of the Ministry, initially. In its submissions, the Ministry indicated that it is no longer relying on the exemptions in sections 14, 19 and 49(a) which it claimed apply to the 30 pages of Offender Incident Reports, Occurrence Reports, Misconduct Reports and Accident/Injury Reports compiled between October 6, 1999 to October 29, 1999. Instead, it agreed to disclose the majority of this information to the appellant. It continued to claim the application of section 49(b) to the names and personal identifiers of the correctional officers who are named in these records, however. The Ministry also maintained its position that the IIU report dated November 4, 1999 falls outside the scope of the *Act* under section 65(6).

I decided to share the non-confidential portions of the Ministry's submissions with the appellant, along with a modified copy of the Notice which was sent to the Ministry. The appellant made representations in response to the Notice and indicated that he is only interested in obtaining access to the IIU report at issue in this appeal, which the Ministry submits falls outside the scope of the *Act* because of the operation of section 65(6). Accordingly, I will address the application of section 65(6) to the IIU report in this decision.

## **DISCUSSION:**

### **JURISDICTION**

The Ministry claims that because the IIU records fall within the scope of sections 65(6)1 and 3, they are, therefore, outside the jurisdiction of the *Act*. As noted above, this record consists of the investigation report prepared by an IIU investigator following allegations made by the appellant of sexual impropriety on the part of a correctional officer

Sections 65(6)1 and 3 and 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. I will first address the possible application of section 65(6)3 to the record.

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

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

1. the record was 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 One and Two**

I find that the record was prepared by an IIU investigator in the course of her inquiries into the allegations made by the appellant against a correctional officer and were maintained and used by the Ministry as part of that investigation. Therefore, I find that the first requirement of section 65(6)3 has been established.

As far as the second requirement of section 65(6)3 is concerned, I also find that the preparation, maintenance and use of the record by the Ministry was in relation to communications between the IIU and the administration of the detention centre in which the appellant was incarcerated, as well as the Deputy Minister of Correctional Services. As such, I find that the second requirement of section 65(6)3 has also been satisfied.

### **Requirement Three**

Section 65(6)3 requires that the activities listed in the section must be “about labour relations or employment-related matters”. The Ministry submits that its staff “collected, prepared, maintained or used the records at issue in relation to meetings, consultations, discussions and communications about labour relations and employment-related matters in which the Ministry has an interest.”

The Ministry refers to the findings of former Adjudicator John Higgins in Order P-1395 in which he addressed similar records to that which is the subject of the present appeal. In that case, the records at issue related to a Ministry investigation into certain allegations of wrong-doing by Ministry staff at a correctional facility for young offenders. Adjudicator Higgins found that:

As noted in the preceding section, I am satisfied that the Ministry has engaged in “meetings, discussions and/or communications” as part of its investigation of the allegations of staff wrong-doing at Elgin Middlesex, and in relation to the associated law suit and grievance. Because they pertained to allegations of staff wrong-doing, I am satisfied that these meetings, discussions and/or communications were about an employment-related matter, namely, whether or not Ministry staff carried out their responsibilities in an appropriate manner.

The remaining component which must be established is whether this matter can be characterized as one “in which the institution has an interest”.

In Order P-1242, former Assistant Commissioner Tom Mitchinson considered the meaning of this phrase in section 65(6)3. He stated:

[A]n “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.

I agree with the former Assistant Commissioner’s reasoning and approach and adopt it for the purposes of this appeal.

The Ministry submits that its legal “interest” in the matter of whether or not Ministry staff carried out their responsibilities in an appropriate manner arises from several statutes (i.e. the *YOA*, the *Ministry of Correctional Services Act* and the *Public Service Act*) and from general common law principles regarding employer/employee relations, including the right of the employer to manage and direct its workforce.

If proven, the allegations against Ministry staff in this case could lead to civil liability, including possible vicarious liability for the Ministry. Clearly, therefore, the matter of whether or not Ministry staff carried out their responsibilities in an appropriate manner is one which has the capacity to affect the Ministry’s legal rights or obligations.

In addition, section 5 of the *Ministry of Correctional Services Act* provides, in part, as follows:

It is the function of the Ministry to supervise the detention and release of inmates, parolees, probationers and young persons and **to create for them a social environment in which they may achieve changes in attitude by providing training, treatment and services designed to**

**afford them opportunities for successful personal and social adjustment** in the community ... [emphasis added]

In my view, the description of this “function” in this statute imposes a legal obligation on the Ministry, indicating again that the matter of whether Ministry staff behaved appropriately at Elgin Middlesex is one which has the capacity to affect the Ministry’s legal rights or obligations.

Moreover, as previously noted, several internal and external proceedings, with potential legal repercussions for the Ministry, have ensued as a result of the alleged mistreatment of inmates by staff.

For these reasons, I have concluded that the Ministry “has an interest” in the “employment-related matter” of whether or not Ministry staff carried out their responsibilities in an appropriate manner, within the meaning of section 65(6)3.

Therefore, I find that Requirement 3 has been met.

I adopt the approach outlined by Adjudicator Higgins in Order P-1395 for the purposes of the present appeal. In my view, because the record at issue relates directly to allegations of wrong-doing by a Ministry staff member, I am satisfied that the communication reflected in it relates to an employment-related matter as contemplated by section 65(6)3.

With respect to the question of whether the Ministry “has an interest” in the employment-related matter which is reflected in the record, I again adopt the findings in Order P-1395. Specifically, I find that the Ministry has certain statutory and common-law legal obligations to those incarcerated in its correctional facilities that may give rise to proceedings which trigger legal repercussions for the Ministry, particularly if the allegations made are found to be substantiated. For this reason, I find that the Ministry has an interest in the subject matter of the records for the purposes of section 65(6)3, regardless of the outcome of the IIU investigation.

I find, therefore, that the third requirement of section 65(6)3 has been met. In summary, I find that the record was prepared, maintained and used by the Ministry in relation to communications about an employment-related matter in which the Ministry has an interest. None of the exceptions in section 65(7) apply in the circumstances of this appeal. I find, therefore, that the records fall within the parameters of section 65(6)3 and are, therefore, excluded from the scope of the *Act*.

## **ORDER:**

I uphold the decision of the Ministry.

Original Signed By: \_\_\_\_\_ February 20, 2001  
Donald Hale  
Adjudicator