



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-1969-F**

**Appeal PA-000409-1 and PA-010013-1**

**Ministry of Citizenship, Culture and Recreation**



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## **NATURE OF THE APPEALS:**

The appellant submitted a seven-part request to the Ministry of Citizenship, Culture and Recreation (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The Ministry separated the requests and gave each one a request number. Of the seven requests, only Request Numbers 00-024 and 00-026 are at issue in these appeals.

### **Request Number 00-024**

The appellant asked for a copy of an independent audit done by a named consultant with respect to "Operations and Policy of the Archaeology Unit, Heritage & Libraries Branch" of the Ministry.

### **Request Number 00-026**

This request was for the written response of Ministry staff to the documentation submitted by the appellant entitled *Report to the Red Tape Commission Respecting the Policies and Conduct of the Ontario Ministry of Citizenship, Culture & Recreation, Heritage and Libraries Branch, Heritage Operations*.

The Ministry located records responsive to both requests and denied access to them claiming that they fell outside the scope of the *Act* pursuant to paragraphs 1 and 3 of section 65(6).

The appellant appealed the Ministry's decision on the basis that the requested records were completed by or for the Ministry in direct response to its complaint and that they were, therefore, not prepared for the purpose of labour relations. The appellant also notes that since submitting its complaint to the Ministry, it has received no response to any of the allegations or concerns expressed in the complaint.

This office opened Appeal Number PA-000409-1 to address the issues with respect to Request Number 00-024 and Appeal Number PA-010013-1 to deal with Request Number 00-026. Because the parties are the same and the issues in both appeals are similar, I decided to join them together for the purpose of this inquiry.

I sought representations from the Ministry, initially and sent it a Notice of Inquiry setting out the facts and issues in the appeal. The Ministry submitted representations in response. I subsequently decided to seek representations from an employee of the Ministry (the affected person). The affected person also submitted representations. I provided the Ministry with a copy of the affected person's representations and an opportunity to respond to them. The Ministry submitted supplementary representations in response to the affected person's submissions.

After reviewing all of these representations, I decided to seek submissions from the appellant. I attached the non-confidential portions of the Ministry's representations to the Notice that I sent to it. I also summarized the affected person's representations and portions of the Ministry's representations, which had been withheld due to confidentiality concerns.

The appellant did not submit representations.

## **RECORDS:**

Record 1 is a 218-page document entitled *[Named company] Report on Heritage Operations Unit of the Ministry of Citizenship, Culture and Recreation* (this record is responsive to Request Number 00-024).

There are three records responsive to Request Number 00-026:

Record 2 is a three-page staff response to the appellant's allegations containing *General Recommendations*;

Record 3 is a seven-page staff response to the appellant's *Red Tape Commission/ADM Complaint Submission*; and

Record 4 is a 34-page staff response to the appellant's *Submission to [the Ministry] & The Red Tape Commission*.

## **DISCUSSION:**

### **APPLICATION OF THE ACT**

#### **Introduction**

Section 65(6) is record-specific and fact-specific. If section 65(6) applies to the record, and none of the exceptions found in section 65(7) applies, then the record is outside the scope of the *Act*.

As I indicated above, the Ministry claims that paragraphs 1 and 3 of section 65(6) apply to the records.

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

Sections 65(6)3 and 65(7) read:

(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:

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.

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

1. the records were 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.

The Ministry submits that the records were all prepared, maintained and used by it or on its behalf in relation to meetings, consultations, discussions and communications for the purpose of investigating, reviewing and responding to allegations made against named Ministry staff with respect to the carrying out of their duties and responsibilities, and to determine if disciplinary action was required in the circumstances. In particular, the Ministry states:

[T]he appellant made a submission to the Red Tape Commission and to the Ministry of a document setting out serious allegations against the Ministry, the most serious of which were allegations of inappropriate staff behaviour ...

The Ministry retained [the named chartered accountants] for the express purpose of conducting a special audit investigation into allegations of staff misconduct. This investigation was performed under the direction of the Ministry's Internal Audit Services.

The Ministry notes that Record 1 is the final report of the chartered accountants relating to their investigation into the allegations. The Ministry indicates that Records 2, 3 and 4 were prepared by Ministry staff at the request of management following the receipt by the Ministry of the appellant's complaint. The Ministry states that these records were used for the dual purpose of

informing senior Ministry management about the content of the appellant's complaint, and in preparing the Ministry's response to it.

The Ministry submits that the matter to which the records relate is employment-related since it relates directly to the alleged misconduct of several Ministry staff, and in particular, the affected person. The Ministry refers to a number of previous orders of this office that support this conclusion (Orders M-997, P-1575 and PO-1696).

The Ministry provides representations relating to its interest in the employment-related matter. Because it is likely that detailing this part of the Ministry's submission would constitute an invasion of the affected person's privacy, I am not able to discuss the factual basis for its position. In essence, the Ministry notes that the appellant's complaint was made against the affected person. The Ministry's representations refer to the circumstances leading to the creation of the records and the affected person's interests in them, which, it submits, are sufficient to engage its interest in the employment-related matter. The Ministry has provided documentation in support of its position.

The affected person states in his representations that he has "no interest in any of [the records]" at issue in Appeal PA-010013-1, and believes that they should be made public to the appellant. The affected person indicates that, although he does have a personal "interest" in the record at issue in Appeal PA-000409-1, he is ambivalent about its disclosure to the public. The affected person expresses some concern about "misuse" of this document in the absence of other pertinent information also being made available. The affected person states that in his view, section 65(6) is not applicable in the circumstances of this appeal.

Following receipt of the affected person's representations, the Ministry reiterates its position that section 65(6) applies to the records at issue and submits that the affected person's representations themselves support such a conclusion.

Based on the Ministry's and affected person's representations, supporting documentation, and the records themselves, I am satisfied that the records were all prepared, maintained and used by the Ministry or on its behalf. Record 1 was prepared by an outside firm at the request and under the direction of the Ministry. The remaining records were prepared by Ministry staff. Accordingly, I find that the first requirement has been met.

In Order P-1223, Assistant Commissioner Tom Mitchinson held that 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 found to be "in relation to" that activity. I agree with this approach.

The evidence provided by the Ministry in support of its position, including the records themselves, establishes that the preparation, maintenance and usage were in relation to meetings, consultations, discussions and communications amongst staff and management in reviewing and investigating the complaint against the affected person and in responding to the appellant, thereby satisfying the second requirement.

Consistent with previous orders of this office, I find that records made concerning an employee's performance generally, and in particular, in response to allegations of inappropriate behaviour or misconduct, are about an employment-related matter. In the circumstances of these appeals, although the affected person indicates that he does not believe that section 65(6)3 is applicable as a basis for denying access to the records, the nature of the information contained in them and the supporting documentation submitted by the Ministry suggest otherwise. On the basis of the evidence before me, I find that the Ministry has established that it has an interest in this employment-related matter thus satisfying the third requirement.

Since all three requirements have been satisfied, I find that section 65(6)3 applies to the records at issue in this appeal. I find further that none of the exceptions in section 65(7) applies. Accordingly, the records fall outside the scope of the *Act*.

Because of these findings, it is not necessary for me to consider the application of section 65(6)1.

**ORDER:**

I uphold the Ministry's decision that the *Act* does not apply to the records.

Original signed by:  
Laurel Cropley  
Adjudicator

November 19, 2001