

INTERIM ORDER PO-2093-I

Appeal PA-010303-2

Ministry of the Solicitor General

NATURE OF THE APPEAL:

The Ministry of the Solicitor General (now the Ministry of Public Safety and Security) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Under s. 46 of the *Police Service Act* municipal police officers are forbidden from engaging in political activity except as permitted by the regulations.

I am interested in getting all material concerning this issue received by Ministry of the Solicitor General, produced by the Ministry of the Solicitor General, or sent by the Ministry since June of 1995.

Included in this material should be correspondence between the Ministry and the Toronto Police Services Board, and correspondence between the Ministry and the Ontario Association of Police Services Board.

My understanding as well is that the Ministry prepared a draft amendment to the political activity regulation. In this request would you please include any material prepared by the Ministry in regard to possible amendments to the political activity regulation.

The Ministry identified a number of responsive records. It provided the requester with partial access to these records, denying the remaining information on the basis of one or more of the following exemptions in the *Act*:

- section 12(1) - Cabinet records
- section 13(1) - advice or recommendations
- section 19 - solicitor-client privilege
- section 21(1) - invasion of privacy

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the following things occurred:

- The Ministry agreed to issue a revised index to the appellant, providing a description of the records and the exemptions being claimed.
- The Ministry reconsidered its decision to withhold Record 42 under sections 12(1) and 19 of the *Act*, and subsequently agreed to release pages 205-226 to the appellant. The Ministry also agreed to release a three-page letter dated August 15, 2000 (pages 280-282), since the appellant had originally supplied this letter to the Toronto Police Services Board (the Toronto Police).
- The Mediator removed the following duplicate pages from the scope of this appeal: 9-11 (duplicates of 1-3), 88-97 (duplicates of 78-87) and 297-298 (duplicates of 301).

- The Ministry advised the Mediator that pages 246-290 and 292 had already been considered in a previous appeal with this office (Appeal MA-000377-1) involving the appellant and the Toronto Police Services Board (the Toronto Police). In that appeal, it was determined during mediation that the appellant already had a copy of the document comprising pages 283-290 in the present appeal, and these pages were removed from the scope of the appeal. Pages 246-282 and 292 were disposed of by Order MO-1434, where I upheld the decision of the Toronto Police to exclude these pages from the scope of the *Municipal Freedom of Information and Protection of Privacy Act*, pursuant to section 52(3)3 of that statute. At that point in the mediation process, the Ministry advised the Mediator that it wished to transfer the request for pages 246-290 and 292 to the Toronto Police, on the basis that the Toronto Police had a greater interest in these records.
- The Ministry also issued a revised decision letter to the appellant, now taking the position that all of the records at issue in the appeal are excluded from the scope of the *Act* pursuant to sections 65(6)1 and 65(6)3. In this letter, the Ministry also advised the appellant that pursuant to section 25(2) of the *Act*, it would be transferring the request for pages 246-290 and 292 to the Toronto Police.

The appellant advised the Mediator that he wishes to appeal the Ministry's revised decision to deny access to the records pursuant to section 65(6), and confirmed that he is pursuing access to all of the responsive records. The appellant also advised that he objects to the transfer of part of the request to the Toronto Police.

After reviewing the file once it had been transferred to the adjudication stage, I decided to deal initially with the section 65(6) jurisdictional issue and the section 25(2) transfer issue only. Accordingly, I sent a Notice of Inquiry to the Ministry, outlining the facts and issues and soliciting representations. The Ministry submitted representations in response, which were then shared with the appellant along with a copy of the Notice. The appellant also provided representations.

The records that the Ministry transferred to the Toronto Police are also the subject of a separate appeal (Appeal MA-020116-1). The sole issue in that appeal appears to be whether the records are excluded from the *Municipal Freedom of Information and Protection of Privacy Act* by virtue of section 52(3)3, which is virtually identical to section 65(6)3 of the provincial *Act*.

RECORDS:

The approximately 293 pages of records remaining at issue consist of draft amendments, issue notes, orders-in-council, correspondence, decision documents, briefing material, research and discussion papers, e-mails, a draft presentation, an option paper and an approval form for regulations.

The records in Appeal MA-020116-1 consist of correspondence, extracts from minutes, legal opinions and a staff report.

DISCUSSION:

SECTION 65(6) - APPLICATION OF THE ACT

Sections 65(6) and (7) of the *Act* provide:

(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.

Although the Ministry originally relied on both sections 65(6)1 and 65(6)3 in order to deny access to all of the responsive records, its representations only deal with section 65(6)3. I assume the Ministry has withdrawn the section 65(6)1 claim.

Section 65(6)3

General

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

Sections 65(6) and (7) are record-specific and fact-specific. If section 65(6) applies to the records, 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 appellant has no right of access under the *Act* to records that are outside the ambit of the *Act* pursuant to section 65(6).

Parts one and two

The Ministry addresses the requirements of parts one and two of section 65(6)3 in its representations as follows:

The Ministry submits that the records at issue, as outlined in the indices, were collected, prepared, maintained or used by the Ministry for matters related directly to the *Police Services Act (PSA)* and the regulations. The records directly relate to police officers engaging in political activity and the subsequent misconduct provisions of the *PSA* should this activity not follow statutory requirements. The Ministry submits that the legislative provisions within the *PSA* and other legislation such as the *Public Service Act*, which impacts the OPP, also speaks to this specific issue. ...

The two categories of records, as evidenced by the indices, clearly indicate that the records were clearly “collected” and “used” by the Ministry and are directly related to this employment related matter related to the *PSA*.

The appellant’s representations do not deal directly with the first two requirements of section 65(6)3.

All of the records at issue in this appeal, including the ones purportedly transferred to the Toronto Police, relate to Ontario Regulations 554/91 (as amended by O. Reg. 89/98) and 123/98 made under the *PSA* that deal with political activity of police officers. These regulations were

under consideration by the Ministry during the time frame identified in the appellant's request. Ministry employees or legal counsel from the Ministry of the Attorney General who participated in discussions on this issue prepared most of the records. The records transferred to the Toronto Police were authored by representatives of that institution and provided to the Ministry in the context of discussions regarding the regulation. On my review of the records, I am satisfied that all of them, including the ones transferred to the Toronto Police, were, "collected, prepared, maintained or used" by the Ministry in relation to "meetings, consultations, discussions or communications" about the regulation governing political activity by police officers under the *PSA*. Therefore, I find that the first two requirements of section 65(6)3 have been satisfied.

Part three

The Ministry takes the position that all of the records relate to labour relations or employment-related matters in which the Ministry has an interest. The Ministry submits that:

... the records clearly relate to the legislation [the *PSA*] in which the issue of the employment and management of police officers refer. All officers including OPP are bound by statute relating to political activity and the *PSA* provides a section relating to misconduct should the requirement not be met.

In Order M-840 [the Commissioner] took a broader approach to excluded records and commented that although the records at issue in the appeal were not created in the context of a disciplinary hearing, the records dealt with the issues of the propriety of police conduct and possible misconduct of police officers under Part V of the *PSA* and as such they relate to the employment of a person by the institution. Matters involving police services are not restricted to those activities dealt with in Part VIII of the *PSA*, but is broader and extends to other activities which take place in the operation of police forces. The Ministry submits that the records at issue in this appeal provide the legislative framework, which set out the employment requirements. In this case the records do not speak to the administrative component of the *PSA* but rather speak to a requirement that must be adhered to or a pecuniary initiative could be undertaken.

It is incumbent upon the institution's management to ensure that all members adhere to the rules, regulations, and procedures of the OPP, which includes the *PSA*, other legislation as well as the *Criminal Code* of Canada. When an officer is deemed not to have fulfilled his employment duties/responsibilities by failing to comply with the above-noted regulations or other legislative directives, it therefore follows that any ensuing public complaints or internal investigations clearly relate to the employment by the institution of the police officer that is the subject of the investigation. The records at issue speak directly to the political activities that bind all police and if not properly followed could result in a disciplinary matter as outlined in the *PSA*.

In support of its position, the Ministry relies on Order M-835, where I found that disciplinary proceedings under the *PSA* are properly characterized as “employment-related matters” for the purpose of the provision equivalent to section 65(6) contained in the municipal *Act* (section 52(3)); and Order MO-1347, where I determined that amendments made to the *PSA* since the issuance of Order M-835 had no bearing on my section 52(3) finding.

The appellant argues that whatever was done by the Ministry “in regard to political activities of police officers has nothing to do with labour relations”. He submits:

The Ministry of the Solicitor General does not employ police officers. It is responsible for preparing regulations under the *Police Services Act* and in general is responsible for policing in Ontario.

In Order M-899, Adjudicator Laurel Cropley reconsidered my Order M-835, in particular the issue of whether police officers are properly characterized as employees. She reviewed various court decisions as well as provisions of the *PSA* that refer to the “employment” of the individual police officer, including sections 40(1), 44, 61(7) and 49(1)(d), and concluded:

While it appears that the Courts are clear that, generally speaking, police officers are not “employees”, in the context of the *PSA*, the legislature has made it abundantly clear that what police officers do for Police Services Boards constitutes “employment”. In my view, the statutory context of the *PSA* is the governing factor, and I find that proceedings under Part V of the *PSA* relate to “employment”.

I also addressed this issue in Order M-835 in the context of determining whether disciplinary proceedings under the *PSA* related to the “employment of a person by the institution” for the purposes of section 52(3)1 of the municipal *Act*, and found:

In the circumstances of this appeal, the disciplinary hearing was initiated as a result of an internal complaint under Part V of the *PSA*, not under the public complaints part of the statute (Part VI). Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V proceedings do in fact “relate to the employment of a person by the institution”. The penalties outlined in section 61(1), which may be imposed after a finding of misconduct, involve dismissal, demotion, suspension, and the forfeiting of pay and time. In my view, these can only reasonably be characterized as employment-related actions, despite the fact that they are contained in a statute and applied to police officers.

As the Ministry points out, and the appellant acknowledges, the regulatory scheme under the *PSA* deals with, among other things, political activities of police officers throughout the province. The *PSA* prohibits political activity by police officers, except as permitted by regulation. Ontario Regulation 554/91 made under the *PSA*, as amended, sets out these permitted political activities for municipal police officers, for example, when a police officer

may be a candidate in a federal, provincial or municipal election, or express views in the course of certain political activities. Ontario Regulation 123/98 binds OPP officers to the political activity provisions of the *Public Service Act*. Non-compliance with the terms of the regulations can result in disciplinary action initiated by a police service or the OPP under the *PSA* in its role as an employer.

In order to meet requirement 3, however, the consultations, discussions and communications that took place in the context of the Ministry's review of Regulations 554/91 and 123/98 would have to be "about labour relations or employment-related matters in which the Ministry has an interest." The Ontario Court of Appeal considered and rejected my interpretation of this phrase in a number of previous orders in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355). The Court stated (at 368 – 369):

In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6) 3 must be referring to "a legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant Privacy Commissioner.

As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Sub clause 1 deals with records relating to "proceedings or anticipated proceedings relating to labour relations or to the employment of a person **by the institution**" [emphasis in original]. Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**" [emphasis in original]. Sub clause 3 deals with records relating to a miscellaneous category of events "about labour-relations or employment related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, **the words "in which the institution has an interest" in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce** where the focus has shifted from "employment of a person" to "employment-related matters" [my emphasis]. To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.

Applying the Court's direction to the facts and circumstances of this appeal, in order to find that the meetings, consultations, discussions or communications reflected in the records are "about employment-related matters in which the Ministry has an interest", I would have to be satisfied that the "matter" and the records themselves involve and relate to the Ministry's own workforce and that the Ministry's "interest" is that of an employer. In my view, this is not established here. Instead, the records were collected or prepared in relation to the Ministry's regulatory and policy-making responsibilities in the area of policing, as confirmed in section 3(1) of the *PSA*, which indicates that the *PSA* "shall be administered by the Solicitor General". This view is further supported by the fact that police officers are not employed by the Ministry; rather, they are employees of one of the various municipal police services boards or the OPP. Although the OPP is, for certain purposes, considered to be part of the Ministry, the policy development function relating to the *PSA* and its regulations is separate and distinct from the operation of the provincial police force. In my view, the inclusion of the OPP within the organizational structure of the Ministry does not affect my finding. (See also Orders P-1563 and P-1564, and *Minister of Health and Long Term Care v. Mitchinson*, (December 5, 2002) Toronto. Doc. 784/99, a recent decision of the Divisional Court upholding my Order P-1721.)

Therefore, as far as the third requirement of section 65(6)3 is concerned, I find that the review of the regulations governing political activity by police officers under the *PSA* is not an employment-related matter in which the Ministry has an interest. Accordingly, section 65(6)3 does not apply in the circumstances of this appeal.

Earlier in this order, I noted that the Ministry appears to have withdrawn its reliance on section 65(6)1. Because this section is jurisdictional in nature, I deal with it briefly here. Section 65(6)1 refers to "proceedings or anticipated proceedings" in relation to "the employment of a person by the institution". The Ministry has not provided evidence to demonstrate that the records were collected, prepared, maintained or used in relation to actual or anticipated proceedings, and I find that the application of this section is not established.

As far as the records purportedly transferred to the Toronto Police are concerned, all of them were responsive records in a previous appeal involving the same appellant and the Toronto Police. I determined in Order MO-1434 that pages 246-282 and 292 were excluded from the access regime pursuant to section 52(3)3 of the municipal *Act*. As noted in that order, the appellant already has a copy of the legal opinion comprising pages 283-290 in the present appeal. I see no useful purpose in proceeding further with any of these records here. The appellant already has pages 283-290, and if I were to allow the Ministry to transfer pages 246-282 and 292 they would clearly be excluded documents in the hands of the Toronto Police. In my view, it would defeat the purpose of the parallel exclusionary provisions in the provincial and municipal statutes if I were to make a different finding on these same records in the hands of the Ministry. Therefore, I find that pages 246-290 and 292 are excluded from the Act pursuant to section 65(6)3.

I will now issue a Supplementary Notice of Inquiry to the Ministry, seeking representations on the various exemptions claimed for all responsive records, with the exception of pages 246-290 and 292.

Because this order disposes of the records purportedly transferred to the Toronto Police, Appeal MA-020116-I can now be closed.

INTERIM ORDER:

1. Pages 246-290 and 292 are excluded from the *Act* pursuant to section 65(6)3.
2. All other remaining records fall within the scope of the *Act*.
3. I remain seized of this appeal in order to deal with any remaining issues.

Original Signed By: _____
Tom Mitchinson
Assistant Commissioner

_____ December 27, 2002